IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. UA-2023-001292-V
[2024] UKUT 224 (AAC)

Between:

NK

Appellant

-v-

Disclosure and Barring Service

Respondent

Before Upper Tribunal Judge Church, Tribunal Member Derrick and Tribunal Member Hutchinson

Decided following a remote oral hearing on 01 July 2024

Representation: The Appellant was unrepresented
Mr Tinkler of counsel, instructed by DLA Piper LLP, represented the Respondent

DECISION OF THE UPPER TRIBUNAL

On appeal from the Disclosure and Barring Service (**"DBS"**)
DBS Reference: 00982299914
Final Decision Letter: 16 June 2023

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (**"SVGA"**)

The appeal is allowed.

The decision of the DBS made on 16 June 2023 to place the Appellant's name on the Adults' Barred List and the Children's Barred List was based on a material mistake of fact.

Pursuant to section 4(6)(a) of SVGA the Upper Tribunal directs that the Appellant's name is removed from both the Adults' Barred List and the Children's Barred List.

REASONS FOR DECISION

Background

1. At the relevant time the Appellant was working as a nursing auxiliary on a hospital ward.

2. It was alleged that, while working as an auxiliary nurse, the Appellant inserted two of his fingers into the vagina or a vulnerable adult patient in his care and applied pressure to the patient's vaginal wall to cause her to pass a stool, a procedure which was not authorised by his employer.

3. The Appellant denied the allegations, but his employer, and subsequently the DBS, found on the balance of probabilities that he had done what was alleged.

4. The DBS decided that the Appellant's conduct was 'relevant conduct' in relation to vulnerable adults (being conduct which endangered a vulnerable adult or was likely to endanger a vulnerable adult), and also 'relevant conduct' in relation to children (being conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him or her). The DBS decided that it was both appropriate and proportionate to place the Appellant's name on both the Adults' Barred List and the Children's Barred List.

What this case is about

5. The Appellant agrees that it would be wrong for a nursing auxiliary to insert their fingers into a patient's vagina with a view to relieving constipation, and he doesn't dispute that doing that would amount to 'relevant conduct' in relation to vulnerable adults or indeed to children.

6. However, the Appellant says he did no such thing, and the DBS was mistaken when it found that he had. He says his name should be removed from both the Adults' Barred List and the Children's Barred List so that he can continue his career as an auxiliary nurse.

DBS's findings and the Barring Decision

7. By a 'Final Decision Letter' dated 16 June 2023 the DBS informed the Appellant of its decision to place his name on both the Adults' and Children's Barred Lists (the **"Barring Decision"**). In that letter it said:

> "How we reached this decision
> We are satisfied that you meet the criteria for regulated activity. This is because of your previous role of Health Care Assistant with Hull University Hospital NHS Trust.
> We have considered all the information we hold and are satisfied of the following:
> - That on 12th December 2021, you assisted a constipated patient to pass stools by inserting two fingers into her vagina and applying pressure.
>
> Having considered this, DBS is satisfied you engaged in relevant conduct in relation to vulnerable adults. This is because you have engaged in conduct which endangered a vulnerable adult or was likely to endanger a vulnerable adult.
> It is also considered that you have engaged in relevant conduct in relation to children, specifically conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him or her.

We are satisfied a barring decision is appropriate. We have concerns about the risk you may pose to vulnerable adults and children in the future. Specifically, as you completed a medical procedure that you were not qualified to do, in a role as an auxiliary nurse, and the procedure was not a permitted procedure within Hull NHS Trust. After admitting your behaviour to colleagues, you have then attempted to deny that you had inserted your fingers inside the patient's vagina, despite three people being present and either heard or witnessed your description of how you did this procedure including using your two fingers and showing a digging motion. You have failed to take responsibility for your actions, attempting to downplay and deny your disclosure when you realised the reaction of your colleagues to what you had admitted to having done.

It is acknowledged that your actions could have been driven by your desire to assist the patient who was suffering with constipation, however, as a nursing auxiliary this would not have been a procedure you were qualified or permitted to be undertaking within Hull NHS. It seems that you chose to complete the procedure without any consultation with your senior colleagues, who would have informed you of the appropriate way to support a constipated patient. You have lacked empathy for this patient, given the impact such a personal intervention would have had on them both emotionally and physically. Whether or not your actions were to support this patient, you acted outside of your permitted role and placed the patient at significant risk. It is accepted that the decision to include you in the barred lists is based on information that was from witnesses who had not actually witnessed your behaviour. However, all three witnesses heard your disclosure and two witnessed [sic] saw you using your two fingers to show how you completed this procedure. You were asked to repeat your disclosure by the witnesses and you repeated what you had done in the same manner. It was only when you realised the concern shown by your colleagues that you changed your description of your actions. When challenged by a senior colleague you then became aggressive and abusive towards her.

The fact you were happy to discuss your actions initially with your colleagues suggests an acceptance that what you did was acceptable and therefore you have lacked insight into your role and the medical procedures you were permitted to perform. It is also noted that you became very angry when challenged about your behaviour by one nurse present, which caused herm and other witnesses some emotional upset The Staff Nurse described you as showing your teeth with anger when challenged, and this anger rases further concerns about your ability to take feedback and/or instruction from others including senior professionals.

Consideration has been given to your disclosure that you were being bullied by the nursing staff, offering this as an explanation for them to make a false disclosure about you. However this was considered in your disciplinary hearing and it was noted you had not raised any concerns about discrimination or bullying to senior colleagues prior to this incident. One witness described having a good relationship with you and enjoyed working with you therefore there is no obvious reason as to why she would have made a false allegation against you and her disclosure was exactly the same as the two nursing staff.

Consideration has been given to your questioning of the timescale between the statements being taken following the incident. However, there is no evidence to suggest these witnesses had colluded to make false allegations against you. It is acknowledged that English is not your first language and that you could have been misinterpreted, however given the witnesses report not only hearing your

> words but also witnessed you using your fingers in a gesture consistent with inserting them inside the patient to remove the stools.
> Your actions had the potential to cause significant harm to vulnerable adults and your actions could be seen as an assault on the patient. You have not provided ay representations to lower the risk the DBS considers you would present if you chose to do an unauthorised procedure when working as a healthcare assistant in the future or any other role that involved personal care within regulated activity roles in the future.
> As the DBS cannot be assured that you would not perform medical procedures you are not qualified to do or that you would not touch patient [sic] inappropriately, this could put future vulnerable adults at significant risk of emotional and/or physical harm and it is appropriate to include your name in the Adults' Barred List.
> Although your actions were not committed against children, the DBS considers that any role that involved personal care of children within regulated activity could result in your performing medical procedures you are not qualified to do and which has the potential to put children at risk of emotional and/or physical harm and it is also appropriate to include you in the Children's Barred List."

The appeal to the Upper Tribunal

8. The Appellant applied to the Upper Tribunal for permission to appeal the Barring Decision. He maintained that he had been falsely accused, pointing out that no witness claimed to have seen him carry out the alleged unauthorised procedure, even though there was a colleague with him at the time he was alleged to have carried it out.

9. I ordered a remote oral hearing of the permission application, following which I granted permission to appeal on the basis that I was satisfied that the Appellant's grounds were arguable. I ordered a remote oral hearing of the substantive appeal, which took place on 1 July 2024 on the CVP platform before a three-member panel with expert members. The hearing was assisted by Ms Neeta Jain, a Hindi interpreter.

10. The Appellant was unrepresented at the hearing, although supported by his wife. I don't think he was hampered by having no legal representation because his case was a very simple one: he didn't dispute that, had he done what was alleged, that would have been harmful to the patient, but he insisted that he did not do what was alleged.

11. Translating his argument into the language of the SVGA, his case was that the Barring Decision was based on a material mistake of fact. He gave oral evidence both about what happened on 12 December 2021 when he was said to have carried out the unauthorised procedure, and on the 15/16 December 2021 night shift, when he was said to have told his colleagues about what he had done on 12 December.

12. The DBS was represented by Mr Tinkler of counsel (instructed by DLA Piper LLP). Mr Tinkler cross-examined the Appellant and made submissions resisting the appeal. He maintained that the DBS was entitled to assess the evidence as it did and to make the findings that it did. Appropriateness was a matter for the DBS and the Upper Tribunal should not trespass on that, and the Barring Decision was proportionate given the seriousness of the conduct that the DBS had found proved. He maintained that the Barring Decision involved no mistake or fact or law and the appeal should be dismissed.

The statutory framework

13. The DBS was established by the Protection of Freedoms Act 2012, taking on the functions of the Criminal Records Bureau and the Independent Safeguarding Authority. One of its main functions is the maintenance of the children's barred list and the adults' barred list (the **"Barred Lists"**, and each a **"Barred List"**). Its power and duty to do so arises under the SVGA.

Duty to maintain the Barred Lists

14. Section 2(1)(a) SVGA places a duty on the DBS to maintain the Barred Lists. Under Section 3(2)(a) SVGA a person is barred from "regulated activity" relating to children if they are included in the children's barred list.

Criteria for inclusion in the Barred Lists

15. Schedule 3 to the SVGA applies for the purposes of DBS determining whether an individual is included in either or both Barred Lists.

16. Under Section 3(2)(a) SVGA a person is barred from "regulated activity" relating to children if they are included in the Children's Barred List, and under Section 3(3)(a) Under Section 3(3)(a) a person is barred from "regulated activity" relating to vulnerable adults if they are included in the Adults' Barred List.

17. The Appellant has been included by the DBS on the Children's Barred List pursuant to Schedule 3, Part 1, paragraph 3 SVGA (which relates to children and is headed "Behaviour") and in the adults' barred list pursuant to Schedule 3, Part 2, paragraph 9 SVGA (the equivalent provision relating to vulnerable adults, which is also headed "Behaviour").

18. Paragraph 3 of Part 1 of Schedule 3 to the SVGA provides:

> "3. (1) This paragraph applies to a person if –
>
> (a) it appears to DBS that the person—
>
> (i) has (at any time) engaged in relevant conduct, and
>
> (ii) is or has been, or might in future be, engaged in regulated activity relating to children, and
>
> (b) DBS proposes to include him in the children's barred list.
>
> (2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.
>
> (3) DBS must include the person in the children's barred list if —
>
> (a) it is satisfied that the person has engaged in relevant conduct,
>
> (aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
>
> (b) it is satisfied that it is appropriate to include the person in the list. ..."

19. By section 5(1) of the 2006 Act, a reference to regulated activity relating to children must be construed in accordance with Part 1 of Schedule 4. By section 59 SVGA "child" means a person who has not attained the age of 18. Regulated activity relating to children includes any form of care or supervision of children (paragraph 2(1)(b) of Schedule 4), and any form of advice or guidance provided wholly or mainly for children

(paragraph 2(1)(c) of Schedule 4) carried out frequently by the same person (paragraph 1(1)(b) of Schedule 4).

20. "Relevant conduct" in relation to children is explained in paragraph 4 of Part 1 of Schedule 3 to the SVGA as follows:

> "4. (1) For the purses of paragraph 3 relevant conduct is –
>
> (a) conduct which endangers a child or is likely to endanger a child;
>
> (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
>
> (c) conduct involving sexual material relating to children (including possession of such material);
>
> (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
>
> (e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate.
>
> (2) A person's conduct endangers a child if he –
>
> (a) harms a child,
>
> (b) causes a child to be harmed,
>
> (c) puts a child at risk of harm,
>
> (d) attempts to harm a child, or
>
> (e) incites another to harm a child. …"

21. Paragraph 9 of Part 2 of Schedule 3 to the SVGA provides:

> "9. (1) This paragraph applies to a person if-
>
> (a) it appears to DBS that the person—
>
> (i) has (at any time) engaged in relevant conduct, and
>
> (j) is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
>
> (b) DBS proposes to include him in the adults' barred list.
>
> (2) DBS must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.
>
> (3) DBS must include the person in the adults' barred list if-
>
> (a) it is satisfied that the person has engaged in relevant conduct,
>
> (aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
>
> (b) it is satisfied that it is appropriate to include the person in the list."

22. By section 5(2) SVGA, a reference to regulated activity relating to vulnerable adults must be construed in accordance with Part 2 of Schedule 4. By section 60 SVGA, a vulnerable adult means any adult to whom an activity which is a regulated activity

relating to vulnerable adults by virtue of any paragraph of paragraph 7(1) of Schedule 4 is provided.

23. "Relevant conduct" in relation to vulnerable adults is explained in paragraph 10 of Part 2 of Schedule 3 to the SVGA as follows:

> "10.(1) For the purses of paragraph 9 relevant conduct is –
>
> (a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;
>
> (b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;
>
> (c) conduct involving sexual material relating to children (including possession of such material);
>
> (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
>
> (e) conduct of a sexual nature involving a vulnerable adult, if it appears to DBS that the conduct is inappropriate.
>
> (2) A person's conduct endangers a vulnerable adult if he –
>
> (a) harms a vulnerable adult,
>
> (b) causes a vulnerable adult to be harmed,
>
> (c) puts a vulnerable adult at risk of harm,
>
> (d) attempts to harm a vulnerable adult, or
>
> (e) incites another to harm a vulnerable adult.
>
> …"

24. The Appellant does not dispute that he has in the past been engaged in regulated activity relating to vulnerable adults or that he might seek to be engaged in regulated activity with vulnerable adults or with children in the future. Indeed, the reason he has pursued his appeal is that he wants very much to return to a role helping patients.

25. The Appellant also accepts that the conduct which the DBS has found him to have engaged in would amount to 'relevant conduct'. His case is simply that he has not engaged in that conduct.

Appeals of decisions to include, or not to remove, persons in the Barred Lists

26. Section 4 SVGA sets out the Upper Tribunal's jurisdiction and powers in respect of appeals against decisions of the DBS. It provides (so far as relevant):

> "**4. Appeals**
>
> (1) An individual who is included in a barred list may appeal to the Upper Tribunal against-
>
> …
>
> (b) a decision under paragraph 2,3,5,8,9 or 11 of Schedule 3 to include him in the list;

(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake-

(a) on any point of law;

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

(5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.

(6) If the Upper Tribunal finds that DBS has made such a mistake it must-

(a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)-

(a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise."

The recent authorities on the Upper Tribunal's 'mistake of fact' jurisdiction

27. The nature and extent of the Upper Tribunal's "mistake of fact" jurisdiction has been the subject of several recent decisions of the Upper Tribunal and the Court of Appeal.

28. What constitutes a mistake in the findings of fact made by the DBS on which the decision was based (for the purposes of section 4(2)(b)) was considered recently by the Upper Tribunal in *PF v DBS* [2020] UKUT 256 (AAC). At paragraph [39] the panel stated:

> "There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when, where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs."

29. In *AB v DBS*, in the context of discussing the Upper Tribunal's power to make findings of fact under section 4(7) of the 2006 Act, Lewis LJ noted (at [55]) in relation to the Upper Tribunal's jurisdiction to make findings of fact that it would:

> "need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to marriage being a "strong" marriage or a "mutually supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact."

30. It was noted in *PF v DBS* that:

> "41. The mistake may be in a primary fact or in an inference... A primary fact is one found from direct evidence. An inference is a fact found by a process of rational reasoning from the primary facts likely to accompany those facts.
>
> 42. One way, but not the only way, to show a mistake is to call further evidence to show that a different finding should have been made. The mistake does not have to have been one on the evidence before the DBS. It is sufficient if the mistake only appears in the light of further evidence or consideration."

31. In *DBS v JHB* [2023] EWCA Civ 982 the Court of Appeal returned to the issue of the extent of the Upper Tribunal's jurisdiction under the SVGA on issues of mistake of fact. Laing LJ said that a finding may be "wrong" even if there was some evidence to support it, or it was not irrational, and it may also be "wrong" if it is a finding about which the Upper Tribunal has heard evidence which was not before the DBS, and that new evidence shows that a finding by the DBS was wrong (see paragraph [95]).

32. However, the Court of Appeal decided that, while the Upper Tribunal had identified what it said were mistakes of fact, it did not explain why the relevant DBS findings were "wrong" or outside "the generous ambit within which reasonable disagreement is possible". Rather, it had looked at very substantially the same materials as the DBS and made its own findings on those materials, which differed from those of the DBS. This, the Court of Appeal said, was impermissible, because it was only entitled to carry out its own evaluation of the evidence that was before the DBS if it had first identified that the DBS had made a finding which was not available to it on the evidence on the balance of probabilities.

33. The scope of the mistake of fact jurisdiction was further considered by the Court of Appeal in the recent cases of *Kihembo v DBS* [2023] EWCA Civ 1547 and in *DBS v RI* [2024] EWCA Civ 95. The decision in *Kihembo* confirmed that *PF v DBS* remains good law. In *RI v DBS* Males LJ explained that the restrictive approach adopted by the Court of Appeal in *JHB* should be confined to those cases where the barred person does not give oral evidence at all, or gives no evidence relevant to the question of whether the barred person committed the relevant act relied upon. Where the barred person does give oral evidence before the Upper Tribunal:

> "the evidence before the Upper Tribunal is necessarily different from that which was before the DBS for a paper-based decision. Even if the appellant can do no more than repeat the account which they have already given in written representations, the fact that they submit to cross-examination, which may go well or badly, necessarily means that the Upper Tribunal has to assess the quality of that evidence in a way which did not arise before the DBS" (per Males LJ at [55])

34. Males LJ interpreted the scope of the Upper Tribunal's jurisdiction under section 4(2)(b) of the 2006 Act as follows:

> "In conferring a right of appeal in the terms of section 4(2)(b), Parliament must therefore have intended that it would be open to a person included on a barred list to contend before the Upper Tribunal that the DBS was mistaken to find that they committed the relevant act – or in other words, to contend that they did not commit the relevant act and that the decision of the DBS that they did was therefore mistaken. On its plain words, the section does not require any more granular mistake to be identified than that" (*RI v DBS,* per Males LJ at [49]).

35. Bean LJ rejected the DBS's argument that the Upper Tribunal was in effect bound to ignore an appellant's oral evidence unless it contains something entirely new. He said in *RI v DBS* at [37] that:

> "where Parliament has created a tribunal with the power to hear oral evidence it entrusts the tribunal with the task of deciding, by reference to all the oral and written evidence in the case, whether a witness is telling the truth."

Discussion

36. We were faced with a stark conflict of evidence between what the Appellant told us and his employer's case investigator on the one hand (that he cleaned the patient thoroughly from front to back using a wipe in his open hand, successfully collecting some hard and soft faeces in the wipe), and what three of his colleagues say he told them during a conversation in the nurses' station on a night shift on 15/16 December 2021 on the other.

37. Three of the Appellant's colleagues report that they were discussing problems with constipated patients on the ward when the Appellant volunteered that he had assisted his patient to pass a stool by digitally penetrating her vagina to relieve her constipation, demonstrating a "digging motion" with his fingers. Their accounts of this conversation are consistent with each other and inconsistent with the account of the Appellant.

38. We had to decide what to make of the evidence of the Appellant's three colleagues, and how to resolve the conflict between what they said and what the Appellant said.

39. At first glance the fact that three colleagues have given consistent accounts of the conversation on the night shift of 15/16 December 2021 seems very compelling. However, we assessed the evidence critically to decide how much weight we could place on these accounts.

40. First of all, it must be noted that these accounts were accounts not of witnessing the Appellant carrying out the alleged procedure, but rather of what the Appellant told them about what he had done, and how he had demonstrated this to them using hand gestures. There was no direct evidence of the incident itself other than the account of the colleague who was present in the room with the Appellant while he attended to the patient on 12 December. That colleague said she didn't notice anything untoward (see paragraphs [52]-[53] below).

41. We considered whether the three witnesses to the conversation in the nurses' office might have misheard what the Appellant said, whether they might have misremembered what they heard him say and what they saw him demonstrate, and whether they might have misinterpreted what he said and how he gestured with his hands.

42. We took into account that the Appellant speaks with an accent. We found it plausible that the witnesses misheard the words spoken. Indeed, the DBS itself acknowledged such a possibility in the Final Decision Letter:

> "It is acknowledged that English is not your first language and that you could have been misinterpreted").

43. The DBS considered that while it was possible that his words could have been misinterpreted, the accompanying hand gestures make it unlikely that they misunderstood him.

44. Unlike the DBS we had the benefit of hearing live evidence from the Appellant, including seeing him try to explain things using his hands during the hearing. With the benefit of this evidence we found it plausible that the witnesses misinterpreted the Appellant's demonstration of the motion he said he used. During the hearing it was difficult to tell the difference between the gesture he used when explaining what he said he did (wiping the patient front to back with a wipe in his open hand) and when demonstrating what he would have to have done had he performed the procedure he is alleged to have performed (inserting his fingers into the patient's vagina and using his fingers to scoop faeces out by applying pressure through the vaginal wall).

45. We also took into account that only one of the "statements" given by the Appellant's colleagues detailing their recollection of the conversation of 15/16 December 2021 was dated, and it isn't at all clear how long after the conversation the other statements were produced. Neither was any of them signed or accompanied by a statement of truth. We were therefore cautious about placing significant reliance on them and we decided that it was certainly possible that all three of them had misremembered the exact words they heard (or thought they heard) and the gestures they saw (or thought they saw).

46. While the DBS said in its Final Decision Letter that there was "no evidence to suggest that these witnesses had colluded to make false allegations against [the Appellant]", the consistency of their accounts can be explained by the fact that they worked together and would have had every opportunity to discuss the allegations, which they wouldn't necessarily have considered to amount to "collusion". Because none of them was called as a witness at the hearing, we were denied the opportunity to explore this.

47. We weigh against this evidence the Appellant's firm statement about what happened, and about what he said and demonstrated. We take into account that the Appellant has been entirely consistent in denying carrying out the alleged procedure. The suggestion that it was accepted practice in India came not from the Appellant but rather from his employer and from DBS. While the Appellant said that in India such a procedure could be performed by a doctor, he said it could not be performed by a nurse, he hadn't been trained to do it, and he had never even seen a doctor perform it. He was adamant that it would have been wrong for him to carry out such a procedure, whether in the UK or in India.

48. We also take into account that the Appellant gave oral evidence at the hearing of this appeal and made himself available for questioning by Mr Tinkley and by the panel. He stood up well to cross-examination and we found him to be forthcoming in his evidence, and a credible witness.

49. He was asked why, if he were simply wiping the patient's bottom with a wipe in his open hand, as he now says, he felt the need to share this with his colleagues, or indeed to illustrate it with a manual demonstration. However, it must be remembered that the context of his contribution was a conversation among professionals about issues that patients on the ward were having with their bowel movements. There is nothing strange about the Appellant seeking to contribute to that discussion by sharing his own experience with colleagues. We are not persuaded that he would only contribute to the discussion if he had something particularly new or striking to share.

50. Considering the evidence about the conversation of 15/16 December 2021 in the round, we decided that despite the evidence of the three colleagues being consistent, it

should be given only limited weight because of the possibility discussed above of mishearing, misinterpretation and misremembering, and because there had been no opportunity to investigate this because none of the witnesses gave evidence at the hearing.

51. We considered the practicalities of carrying out the alleged procedure, relying on the expertise and experience of the Tribunal Members: had the Appellant digitally penetrated the patient's vagina and carried out the "digging motion" that the witnesses allege he demonstrated to them, this would have prompted an immediate physical response in the patient, resulting in her defecating on the Appellant's arm before he would have had the chance to get it out of the way.

52. However, the only eye witness to the incident on 12 December 2021 noticed nothing of this nature when she assisted the Appellant with the patient, and her account of what she observed was consistent with the Appellant's account (see page [66] of the appeal bundle):

> "[The Appellant] proceeded to wipe/clean the patient. He appeared to wipe firmly from front to back and a large amount of firm balls of stool appeared on the wipes. He repeated this action with the same result; a large amount of firm balls of stool on wipes. The patient leaned further into my chest. [The Appellant] carried out the action a third time and a large smooth looking stool appeared on the wipes. During this procedure the patient let out noises of ? objection, this was normal for the patient when being cleaned or rolled for pressure relief."

53. Her account in her interview with the employer's case investigator was consistent with this (see page [64] of the appeal bundle):

> "It was in the right back area, there was a person in Bed 12 on the floor. Could see a large bowel movement. She was female. I could see that there were hard stools under the bed. We got the lady onto the commode and waited behind the curtain Checked she had finished and we went in, [the Appellant] to the left of the commode and I to the right. I explained what we were going to do, [The Appellant] began cleaning. There were 3 lots of stools 2 hard 1 other. For the last time of cleaning the patient made a noise. I didn't think anything of it at the time. [The Appellant] was at the side of me, I can't say which hand he used. He wiped 3 times and there was a large softer movement."

54. Had the Appellant performed the procedure alleged it is difficult to see how he could have done so without his colleague becoming aware that he had done something unusual. Were such an invasive action taken the patient can be expected to have responded either by making noises of significant distress or by pulling away, while the only response reported by the colleague was "noises of ? objection" which she described as "normal" for the patient when being cleaned or rolled.

55. Digitally penetrating the patient's vagina and "digging" by applying pressure to the vaginal wall to remove stools would also be very difficult in the position the Appellant and his colleague described. If the Appellant had intended to carry out such a procedure it is much more likely that he would have done so when the patient was lying on the bed, rather than standing/crouching.

56. It is also difficult to see how the Appellant could carry out the procedure alleged if he had a wipe in his hand (as both the Appellant and his colleague consistently described). Had he digitally penetrated the patient's vagina while holding a wipe in his hand, he would have inserted the wipe into the patient's vagina. It is then difficult to see

how he would be able to collect the faeces in the wipe as his colleague who was the only eyewitness described him doing.

57. Having considered the evidence in the round, we concluded that the DBS was wrong to find that the Appellant had inserted his fingers into the patient's vagina and pressed against her vaginal wall. We find instead that he wiped the patient's vagina and perineum firmly three times with a wipe in his open hand, and in doing so stimulated a bowel movements, which he collected with the wipe in his cupped hand.

Disposal

58. We are satisfied that the Barring Decision involved a material mistake of fact.

59. The Barring Decision was based firmly on the primary finding of fact that the Appellant engaged in the conduct which we have now found he did not engage in. Its secondary findings as to the Appellant's lack of empathy, the Appellant's lack of insight and the risk that the Appellant might repeat the conduct were predicated on that mistaken finding and are not sustainable.

60. The DBS has not argued that it would have placed the Appellant's name on any Barred List solely on the basis of his alleged confrontational behaviour with colleagues when they alleged that he had assaulted the patient in the way suggested. In any event, we consider that a decision to do so would have been disproportionate.

61. The appropriate disposal, therefore, is to direct the DBS to remove the Appellant's name from the Barred Lists.

Authorised for issue on
29 July 2024

Thomas Church
Judge of the Upper Tribunal
John Hutchinson
Member of the Upper Tribunal
Sally Derrick
Member of the Upper Tribunal