



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-000972-V
[2024] UKUT 354 (AAC)**

On appeal from the Disclosure and Barring Service

Between:

A.M.

Appellant

- v -

The Disclosure and Barring Service

Respondent

**Before: Upper Tribunal Judge Nicholas Wikeley
Upper Tribunal Member Sally Derrick
Upper Tribunal Member Matthew Turner**

Hearing date: 21 October 2024

Decision date: 8 November 2024

Representation:

Appellant: Mr Duncan Craig of Counsel, instructed by direct access

Respondent: Mr Ashley Serr of Counsel, instructed by DLA Piper UK LLP

DECISION

- 1. The decision of the Upper Tribunal is to dismiss the Appellant's appeal.**
- 2. The Respondent's decision taken on 15 June 2023 to include the Appellant's name on the Children's Barred List did not involve any mistake of fact or error of law. The Respondent's decision is accordingly confirmed.**

This Decision and the Orders that follow are given under section 4(5) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

ORDERS

Pursuant to rule 14(1)(a), the Upper Tribunal orders that no documents or information should be disclosed in relation to these proceedings that would tend to identify any person who has been involved in the circumstances giving rise to this appeal.

Pursuant to rule 14(1)(b), the Upper Tribunal orders that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify either the Appellant or any family members.

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case to anyone who has been the complainant of a sexual offence. No matter relating to the complainants shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of a sexual offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

REASONS FOR DECISION

The outcome of this appeal to the Upper Tribunal in a sentence

1. We dismiss the Appellant's appeal to the Upper Tribunal.

A summary of the Upper Tribunal's decision

2. We conclude that the Disclosure and Barring Service's decision does not involve any mistake of fact or error of law. Those are the only bases on which we can interfere with that decision. Accordingly, we confirm the Respondent's decision to include the Appellant on the Children's Barred List.

Introductory matters

3. This is the Appellant's appeal against the Disclosure and Barring Service's final decision, dated 15 June 2023, to include him on the Children's Barred List under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act').
4. We held an oral hearing of the full appeal at the Birmingham Civil and Family Justice Centre on 21 October 2024. This was a hybrid hearing as the Upper Tribunal's two specialist members participated in the hearing by way of a CVP video-link. The Appellant attended in person, represented by Mr Duncan Craig of Counsel, and gave extensive sworn evidence (for the most part at least) through an interpreter in Sylheti Bengali. He was accompanied by family members including by his daughter TM, who also gave extensive sworn evidence on his behalf. Mr Ashley Serr of Counsel appeared on behalf of the Respondent (the Disclosure and Barring Service or 'the DBS'). We are grateful to both counsel for their assistance.

The rule 14 Orders on this appeal

5. We refer to the Appellant either in that capacity or simply as Mr M in order to preserve his privacy and anonymity. We refer to other individuals by their initials (see below). For that same reason, we make the rule 14 Orders included at the head of this decision. We are satisfied that the Appellant and his previous and present family should not be identified in this decision, whether directly by name or indirectly. We are also satisfied that any publication or disclosure that would tend to identify any person who has been involved in the circumstances giving rise to this appeal would be likely to cause serious harm to those persons. Having regard to the interests of justice, we were accordingly satisfied that it is proportionate to make the rule 14 Orders. To avoid the possibility of 'jigsaw identification' (by which we mean pieces of evidence might be put together to identify those concerned), we omit certain other details (e.g. we refer to the local authority which at first refused, but later granted, Mr M a private hire driver's licence as simply 'the City Council').
6. The initials we use in this decision are as follows (there is no material evidence relating to the eldest son, so his initials are not included):
 - IM – the Appellant's middle son
 - NM – the Appellant's younger daughter
 - RM – the Appellant's youngest son
 - SB – the Appellant's ex-wife
 - TM – the Appellant's elder daughter

A brief summary of the background to this appeal

7. This appeal concerns serious allegations of historic sexual abuse carried out in a domestic context.
8. Mr M is originally from Bangladesh. His ex-wife, SB, was born in the UK. They contracted an arranged marriage in Bangladesh in 1995 and went on to have five children. On 14 February 2014 SB sought police assistance, stating that she had suffered (unspecified) domestic abuse and wished to leave the family home. The police escorted her and her children to the train station, from where they travelled to London. Initially they stayed with SB's brother before moving to a safe house at an undisclosed location. In April 2014 the local police were contacted by the Metropolitan Police as SB had stated that the children had made disclosures about Mr M acting in an overtly sexual manner with them.
9. The Metropolitan Police conducted a series of interviews with SB and also with the two daughters TM and NM. SB alleged that she had been subject to rapes and sexual assaults as well as controlling and coercive behaviour by Mr M. TM and NM gave accounts of their father getting into bed with them as young children. IM and RM were not interviewed as their mother considered them too young. Mr M had gone back to Bangladesh but was arrested and interviewed on his return to the UK in 2015. He denied all the allegations.
10. After lengthy delays, for reasons that need not concern us, Mr M was eventually charged in January 2018 with multiple counts of rape of SB, sexual assault on a child under 13 and multiple counts of causing or inciting a female child under 13 to engage in sexual activity. There were two Crown Court trials, both of which resulted in hung juries – one in January 2019 and the other six months later in July/August 2019. Although there is some uncertainty about the matter, we find that he elder daughter TM gave evidence at the first trial but not at the second trial. Following the second trial, the prosecution offered no evidence and the criminal proceedings effectively ended. IM made additional disclosures after the second trial.
11. In 2020 Mr M applied to the City Council for a private hire driver's licence. This was initially refused in 2022 on the basis that he was not a fit and proper person. The City Council also referred the matter to the DBS. In connection with a projected appeal to the magistrates' court, Mr M provided an affidavit from TM, who now asserted that the allegations against her father had been fabricated by SB. The City Council then reversed its decision (it appears without any appeal hearing) and granted the Appellant's application for a private hire driver's licence in January 2023.
12. However, the DBS's final decision letter (in June 2023) found the allegations in respect of abuse of SB, NM, IM and RM to be made out. The allegations in respect of Mr M's conduct towards TM were found not proven. The DBS concluded it was appropriate to include Mr M on the children's barred list.
13. Before considering the evidence in more detail, we remind ourselves of the statutory framework governing safeguarding appeals and the associated guidance from the case law.

The statutory framework

14. An individual's appeal rights against a DBS barring decision are governed by section 4 of the 2006 Act:
- 4.(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
 - (a) ...
 - (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 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.
15. We highlight sub-section (3), namely that “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”. This means, in effect, that the issue of appropriateness is non-appealable. Instead, an appellant must show a material mistake of fact and/or an error of law on the part of the DBS (see sub-section (2)).

The guidance in the case law

16. The scope of the Upper Tribunal's fact-finding jurisdiction was analysed in the decision of the three-judge panel in *PF v DBS* [2020] UKUT 256 (AAC). That judgment shows that 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. A mistake may be in a primary fact, or in an inference, but some mistake by the

DBS must still be identified in order for an appeal to succeed. It is not enough that the Upper Tribunal would have made a different finding of fact. Furthermore, the Upper Tribunal, in deciding an appeal, is not limited to considering the appellant's criticism of the DBS's decision nor the evidence before the respondent, but it should assess the evidence as a whole, including the evidence that may be relevant to the reliability of the appellant's evidence. Finally, as already noted, the decision that it is appropriate to bar is not for the Upper Tribunal at all but is a matter for the DBS. The Upper Tribunal may consider the barring decision only in the context of whether it is proportionate. The test is a high one; only if the decision is irrational will it be met. The Court of Appeal has also provided further guidance in a series of cases on the role of the Upper Tribunal in fact-finding, including notably in *DBS v JHB* [2023] EWCA Civ 982 and *DBS v RI* [2024] EWCA Civ 95, which we also took into account.

17. We now turn to the details of this appeal. We start with an outline of the sequence of the DBS investigation in this case.

The DBS investigation and the decision to bar the Appellant under SVGA 2006

18. For present purposes we need only summarise the main features of the DBS process as follows.
19. On 18 October 2022 the DBS sent Mr M an 'early warning' letter to the effect that they had received information that the City Council had refused him a private hire driver's licence on the basis that he was not a fit and proper person to hold such a licence.
20. On 28 March 2023 the DBS sent Mr M a 'minded to bar' letter, together with disclosure of associated documentation relied upon by the Respondent in reaching its decision. This letter set out the DBS's preliminary findings on the balance of probabilities.
21. On 5 April 2023 Mr M responded to the DBS minded to bar letter, explaining why he rejected the DBS allegations and pointing out that the City Council had changed its decision and granted him a licence on 19 January 2023. Mr M also made a series of further representations to the DBS.
22. However, on 15 June 2023 the DBS issued its final decision letter, notifying Mr M that the DBS had decided it was appropriate and proportionate to include him on the Children's Barred List. The central findings were put in these terms:

We have considered all the information we hold, including your representations and are now satisfied of the following on the balance of probability:

- *On unknown dates between September 1997 and 13 February 2014, you repeatedly had penetrative sex with SB (your ex-wife) without her consent, you were violent towards her causing significant physical and emotional harm and to fear for the safety of herself and your children.*

Having considered this, DBS is satisfied you engaged in relevant conduct in relation to children and vulnerable adults. This is because you have engaged in conduct which, if repeated against or in relation to a child would endanger that child or would be likely to endanger him or her.

- *Your sexual, violent and emotional abuse towards SB was witnessed by your children on occasion, causing them emotional harm and distress.*

Having considered this, DBS is satisfied you engaged in relevant conduct in relation to children. This is because you have engaged in conduct which endangered a child or was likely to endanger a child.

- *On unknown dates prior to 14 February 2014, you exposed your daughter N (then aged under 13) to inappropriate and sexualised behaviour for your own enjoyment by frequently getting her to rub/massage your legs and upper thigh areas with creams and exposing your genitals to her on such occasions.*
- *On unknown dates prior to 14 February 2014 you repeatedly and inappropriately rubbed and touched your two young sons' (IM and R) penises under and over their clothing unnecessarily and for your own amusement.*

Having considered this, DBS is satisfied you engaged in relevant conduct in relation to children. This is because you have engaged in inappropriate conduct of a sexual nature involving a child.

23. A fuller justification for the DBS's decision to bar the Appellant was contained in the Respondent's Barring Decision Process document.

A summary of the grounds of appeal to the Upper Tribunal

24. The Appellant's grounds of appeal are as set out on UT Form UT10 and the further grounds of appeal document dated 10 November 2023. These comprise a list of a total of some 21 separate propositions. There is no point in itemising each and every one of these propositions here. In essence, however, the Appellant's primary submission is that the DBS findings all involve mistakes of fact and go against the weight of the evidence. In particular, it is said that the DBS have failed to give sufficient weight to TM's new affidavit evidence. Thus, it is argued that TM's evidence is more recent, sworn and more reliable, whereas there is no currently contemporaneous evidence from SB, NM, IM or RM. Additionally, it is submitted that TM's affidavit evidence does not just refute the allegations made in relation to herself but also goes to undermine the evidence of her mother and siblings as it demonstrates that all the allegations against Mr M were fabricated by SB.
25. On 14 November 2023 Upper Tribunal Judge Wikeley gave Mr M permission to appeal, observing as follows:

I have the benefit of detailed grounds of appeal drafted by the Applicant's legal representative. The grounds may face some difficulty insofar as they may in part be seen as an invitation to the Upper Tribunal to engage with the assessment of appropriateness, which of course lies outside the Tribunal's remit. However, I consider in all the circumstances that the grounds of appeal are at least arguable and so I should give permission to appeal.

26. Next, we outline the DBS response to the appeal.

The DBS response to the appeal

27. A good place to start is the Respondent's final decision letter. The DBS dealt with TM's new evidence in the following way:

We have considered the information you have provided in your representations. You challenged and contested some of our original findings on the basis that your eldest daughter T has provided an affidavit/new statement (dated October 2022), which retracts and denies the original evidence she gave about your serious and repeated sexual, physical and emotional abuse against her mother SB and your sexually abusive behaviours towards 4 of your children. T now states that the allegations against you were fabricated maliciously by SB and that she told her children 'what to say' about you and 'how to say it' to the authorities (school staff, social workers, Police) in order to make you appear guilty.

Your legal representative argues that if the DBS accept T's new evidence, which contradicts the evidence DBS previously relied on then the only conclusion in your case would be that your version of events, is more convincing than that of your wife and other two children (N and IM). The DBS deem T's current statement to completely contradict her earlier extremely detailed version of events and would highlight that T's original evidence is still supported by the corroborative accounts of SB, N and IM who have not changed their version of events and have remained consistent, detailed and credible.

The DBS still find that the consistent, detailed, balanced and corroborative evidence of SB, N and IM is more convincing than your version of events in relation to the other allegations.

28. In summary, the DBS argue that its findings of historic sexual abuse within the family were based, among other matters, on the documentary evidence that supported the criminal prosecution; on the fact that Mr M was prosecuted and that prosecution was maintained through two trials; on the evidence of complainants who (TM aside) have never retracted their evidence; on the cross-corroboration of the complainants' accounts; on the oral evidence given at trial (notably the second trial, for which the judge's summing up is available); and on the absence of any acquittal on the merits even applying the criminal standard of proof.
29. We next proceed to consider the evidence of TM and her father, the Appellant. They gave oral evidence at the hearing in that order, so we deal with their evidence in the same way.

TM's evidence

Introduction

30. We had three types of evidence from TM before us: (1) the records of her interviews with the police; (2) her more recent affidavit evidence; and (3) her oral evidence at the Upper Tribunal hearing.
31. We therefore had the benefit of oral evidence from TM which was not available to the DBS.

TM's evidence from the police interviews

32. There were three police interviews with TM. The first, a record of a taped interview, took place on 3 July 2014 (pp.119-121), when she was aged 13. The second, also a record of a taped interview, was nearly a year later on 25 April 2015 (pp.122-125). The third (a handwritten record) was on 2 November 2015 (pp.126-132).
33. The first police interview explored several incidents in the family's life. For present purposes we only need to refer to two such incidents, the first involving a pornographic DVD. T's account at that time of this incident was as follows:

Pornographic DVD

[TM] describes one day coming home from school and going to her parent's room to watch telly. She found a white dvd connected to the dvd player and out of curiosity played it and found pornography so she switched it off and left the disk there. Her Mum found the disk and told her off for watching it. [TM] explained, Mum has then understood the reason for her finding the dvd and hugged her and said she was sorry. [TM] has later heard her Mum shouting at her Dad saying "why was this in the house in front of the kids your own daughter had been watching it her, it was right in the room, that the tv was meant to be used for the family". Says he denied it and talked in a low voice.

This happened at [redacted] She believes she was maybe ten years old, three years ago.

There is a telly upstairs in the parents room as well as the tv downstairs as there were arguments about access to it, Mum normally supervises what is viewed but that day she just went straight in.

She describes the cd as a white cd, little pink sticker label on it, already in the DVD player.

She describes the images she saw as a grown up naked female and a grown up naked male and that they were having sex. She has played it to watch the introduction which wasn't very clear so she went ahead with watching it, then one minute later she has decided to switch it off and left it still in the slot as she thought best to leave it in its place so they didn't know it was her watching it.

34. The second incident to which we refer was reported by TM as follows:

One night came and slept in her bed with her

One Saturday around 8 am he came to her bedroom. Her bed is a single bed against the wall. She was wearing her dressing gown with nothing underneath not under the covers. She has woken up feeling uncomfortable as he was squashing her in bed and against the wall with his arm over her. He was under the covers. She has pushed arm away, got up and gone downstairs. He's not said anything. She has told her Mum and the same happened with her sister, the next day. She found it strange as her brother's bed is a double bed and he could have slept there with eldest brother and [IM] but he chose to sleep with her. Mum and dad argued again and mum said not to sleep in daughters room.

When dad in bed he is wearing a traditional Bangladesh skirt, rolled up to see his legs. He wore a plain white vest.

Sister [NM] came and told her he'd done the same to her the following day. Normally he would sleep in parents' bedroom. Told her Mum who asked if he'd done anything, she said no. Mum hugged her and said I'm going to sort this out.

35. The second police interview involved further disclosures by TM. In particular, she gave the following account at the second interview:

Got into bed with [TM]

Eleven years old. Really late at night the door creaked so woke up, barely opened her eyes, glimpsed Dad and went back to sleep. Didn't realise he had gone to bed with her until the next morning at nine o'clock, early on a Saturday morning and woke up. She remembered properly what happened afterwards when she rethought about it because she was sleeping. Remembered that he was rubbing himself against her lower back area and bottom. He was undressed, wearing his skirt which in bed was rolled up. She could feel something on her lower back and he was trying to rub her. He had his thigh over her and put his arm around her. He tried to make her feel warm but she didn't realise all that as was sleeping. Realised she had a sensation between her legs that she didn't know what it was. She researched it and found out it was known as an orgasm which happens when there is constant rubbing to that area. It was a really nice sensation and she wanted it to carry on. She didn't know what it was at the time as so young. Remember him being in the bed, a single bed.

Q - What was it that was hard on your back?

I felt his penis, it was towards more my bottom. He put his legs over me and it was constantly rubbing in that area. With the sensation I had it felt good but I didn't understand at the time what it was or if it was good or bad.

How often?

This was only once but numerous times he would come into the room late at night but nothing happened. He would ask if she was doing ok or any questions that came to his mind and then he would go. He wouldn't get into bed. No one else saw this, no-one else shared room with her.

Witness anything happen to [NM]?

Used to see Dad come into [NM]'s bed but she didn't think anything happened to her as she wasn't upset the next day when [TM] asked her why did he sneak into your bed. She said he just did. Didn't tell [NM] what had happened to her at the time.

36. The third interview was not directly about the Appellant and his conduct at all. It was solely about threatening telephone calls from wider family members which SB and TM had allegedly received. For example, TM reported that one caller had said "I'm gonna kill you + your mum, she's a slag, she goes out with men, she's defaming the family" (p.130). TM told the interviewing officer "Whatever mum does she's not allowed to live her life. I don't think it's right" (p.131).

TM's affidavit evidence

37. TM swore two more recent affidavits. The first, affirmed on 18 October 2022 (pp.260-265), was made in connection with her father's licensing application. In summary, she stated that the allegation of sexual assault by her father on her and her sister NM was fabricated by her mother. The second, affirmed on 10 November 2023 (pp.361-365), was made for the purpose of the instant proceedings and reiterated the retraction of her earlier evidence to the police. We record here TM's affidavit evidence about her role at her father's trial. We do so as it is relevant to our later findings about her credibility.
38. In her first affidavit, TM gave the following account:
22. In the summer of 2019, my mother contacted me suddenly saying she was in UK for the trial against my father in relation to the sexual abuse allegations. She said to meet her in [*location retracted*] and to stay in a hotel under a protection order.
23. The 2 days I spent with my mother, she told my sister and I what to say, she said to use more emotions when speaking in court. She kept feeding us lies.
24. I was older by that time and I knew this was wrong. The day before the hearing, I told her I will deny everything, I will not let an innocent person go behind bars.
25. She got angry, she got a hairbrush and was about to hit me. My mother and sister ran towards me, they attacked me and tried to hurt me.
26. I ran away from them and managed to pick my phone and wallet from the table before leaving the room.
27. I went back to my in-laws in London, police officers called me and issued an arrest warrant. I told them I would attend court if I do not see my mother and my sister.
28. I went to court and an officer took me straight to the hearing, to the witness box. I said all the allegations against my dad were untrue. I had enough of my mother and I have not seen her or my sister since.
39. If the reference to the summer of 2019 in paragraph 22 of the affidavit was correct, then the events described related to the second trial (which was in July/August 2019). It is always possible that she made an error about the season, in which case the account might have referred to the first trial in January 2019.
40. TM gave the following account in her second affidavit:
3. I firstly want to address why I withdrew my original statement at the second trial. Before the second trial in August 2019, I had an argument with my mother and sister about how I was feeling about giving evidence at the trial because I felt it was wrong to give evidence against my father because I knew that what my dad was accused of was not true and it was all just for compensation. I told them both that I would not be giving evidence.
4. This led to a heated argument in the hotel room in [*location redacted*], which resulted in me leaving the hotel room in my pyjamas. I had to leave

because of how heated it was getting. I was trying to discuss why they had accused my father of such terrible things. I tried to ask them if they were the victims of such domestic abuse, why has it become about what compensation can they get, and not about getting justice, surely if they were victims of domestic violence, they would want closure, not money.

5. I battled with my feelings as a daughter, the need to protect my mother, and knowing that it was not morally right for my father to potentially end up incarcerated for something he did not do. I knew how terrible I felt when I gave evidence in first trial earlier that year where I did give evidence and I didn't want to be in that position again. I felt under so much pressure to lie that I could not answer the questions asked and I kept shrugging my shoulders and just saying "I don't know".

41. We simply observe at this stage that this account explicitly places the retraction at the second trial – not least by its express comparison with how she felt about giving evidence at the first trial.

TM's oral evidence to the Upper Tribunal

42. TM gave oral evidence under affirmation for nearly two hours. She was born in the UK and has spent most of her life here and certainly did not need an interpreter. She is now aged 25.
43. In examination in chief TM adopted the evidence set out in her two affidavits, retracting her original evidence to the police. She clarified in response to a specific question from Mr Craig that she had attended her father's first trial in 2019 and given evidence on that occasion but had not attended the second trial.
44. Under cross-examination by Mr Serr about her police interviews, TM said that at the time she knew the difference between truth and lies but had been acting under coercion from her mother. For example, she denied ever having found and watched part of a pornographic DVD. She said that she had been given a story (or a series of stories) by her mother to tell the police. It was, she said, all a lie designed to do her father down. When pressed by Mr Serr about the level of detail (for example) in the account given about the DVD, TM repeated that the story had been made up by her mother. She said she would not have needed to watch the TV in her parents' room as they had a TV downstairs. She said that her mother had made her repeat the story to her.
45. She did not now believe that there had been any need for her mother to leave the family home and her job or to call the police. She said that her mother had told her she was doing it for compensation and so had to appear to be the victim. She agreed that her sister had massaged her father's lower legs because of his (undisputed) dry skin condition but some of the details of her sister's account had been fabricated. When Mr Serr took TM through the various matters mentioned in the first two police interviews, she repeatedly stated that her mother had given her false stories to relay to the police and others (e.g. social services and the school) and that she had to follow what her mother said as she had been scared of her. Likewise, as regards the third interview, TM said that nothing she had said at the time was the truth. It had all

been said to make her father look bad and so as her mother appeared to be the innocent victim.

46. TM told us that her mother had taken her and her siblings to Bangladesh in early 2015. She had not wanted to miss her GCSEs and the visit was initially for 3 months. However, they had stayed until 2018 before returning to the UK. Whilst they were in Bangladesh her mother had made an arranged (or rather forced) marriage for her in 2016 (which was subsequently annulled in about 2022). She described in her own words her relationship with her mother by this stage as being “toxic”. Her mother had contacted her shortly before the first trial. TM said that her mother had gone through the evidence she should give at the trial and coached her in what she should say. TM said that she could not go through with it (giving evidence), whereupon she was threatened by her mother and sister. She told us that she had said to the police that she wished to retract her evidence, and that nothing she had previously said was true, but the officer had said she would have to go in the witness box nevertheless. TM gave a somewhat confused account of what followed. At one stage she admitted to the tribunal about having lied under oath in court, but she also said that she had kept saying in court “not true, not true”, when her previous evidence was put to her.

Our assessment of TM’s evidence

47. Both counsel were agreed that TM’s evidence was central to this appeal. The key question for us was whether the DBS had made a mistake of fact in finding that Mr M had sexually abused his wife and children notwithstanding TM’s retraction affidavit and her associated evidence. We therefore start by summarising their closing submissions on how we should approach her evidence.
48. Mr Craig submitted that TM gave clear, cogent and direct evidence in a calm and considered manner. He argued that there could only be three possible explanations for her attendance, namely she had come: (1) to correct falsehoods; (2) to lie on behalf of her father because the events she had described involving her had happened; or (3) to lie on behalf of her father because they had not happened to her but the allegations of abuse of her mother and siblings had happened. Mr Craig put it to us that explanations (2) and (3) were not plausible. TM was now an adult aged 25 and was not acting under coercion. The DBS was seeking to act on stale hearsay evidence that was a decade old. Mr Craig submitted that TM should not be judged too harshly for having lied in the original police interviews, as people tell lies for all sorts of reasons, selfish and unselfish.
49. Mr Serr, on the other hand, submitted that the DBS was entitled to rely on TM’s original evidence and to discount her more recent retractions. The evidence that TM had given in 2014 and 2015 to the police was detailed and cross-corroborated by evidence from SB and her siblings, especially her sister. The suggestion that the allegations were all based on lies fabricated by SB to be relayed wholesale to the police, the school and social services did not stand up to realistic scrutiny. Moreover, if they were all lies, they would have to be maintained right up to and including the first and second trials, at least five years after the events in question. Mr Serr argued that TM’s live evidence before us that she retracted her accounts in the witness box was improbable. If

that were the case, it would have been more likely that the Appellant would have been acquitted. It was also more likely that she would have been asked to be a defence witness at the second trial. However unpalatable it might be, Mr Serr invited us to conclude there was no mistake of fact in the Respondent's barring decision.

50. We acknowledge that realistically there are only two very contrasting ways of viewing TM's evidence. On one view, as a young teenager she lied to the police at the instigation of her mother and over a long period of time but she has latterly retracted her evidence and is now telling the truth that there is no substance to the allegations. On the other view she was telling the truth to the police and is now as an adult lying on oath when she says those allegations were all fabricated by her mother. There is, it seems to us, no half-way house. These sharply differing accounts necessarily mean that we need to take care in assessing her credibility.
51. We accept that TM came over when giving oral evidence as an intelligent and articulate young woman. We recognise that for the most part she gave clear answers and without hesitation to the questions put to her. That said, her answers were mostly uniform – that her previous evidence had been fabricated by her mother, who had rehearsed what she should say to the authorities, and that she had followed her mother's instructions because she had been scared of her, and so she denied that any of the inappropriate incidents described in the police interviews had taken place. However, and as we have already noted, and as we discuss further below, her account of her role at trial was somewhat confused. We also noted her description of her relationship with her mother as being "toxic" by the time of the first trial in 2019, by which date her mother had already forced her into a so-called arranged marriage in Bangladesh.
52. We therefore compared TM's (now) flat denials of any inappropriate conduct by Mr M with her (broadly) contemporaneous detailed accounts in her first and second police interviews. Our unanimous conclusion is that those original disclosures have the 'ring of truth' about them. We say that for several reasons. First, there is simply too much detail for these descriptions to have been generated from a fabricated story or stories. Second, there is a wealth of trivial information – such as the pink sticker on the DVD – which is inconsistent with a false narrative. Third, as set out in detail in the DBS Barring Decision Process document, there is cross-corroboration between TM's original evidence and that of SB and NM. Fourth, and finally, the gradually unfolding disclosure of the more serious allegations is entirely consistent with how victims of domestic abuse typically present.
53. As for the third police interview, we bear in mind the cultural issues involved and the most likely intensely-held perception among some relatives that, by leaving the matrimonial home and taking the children to London, SB had brought shame upon the family within the wider community. But, having read the transcript of that interview, we are left in no doubt whatsoever that TM was giving at the time an accurate, detailed, honest and essentially matter of fact account of the threatening telephone calls that had been received by her mother and herself. We simply did not believe her evidence now that her original account of those calls was all pure fabrication engineered by her mother to further discredit the Appellant.

54. As noted above, there was some confusion about TM's role at trial, which her oral evidence did little to clarify. TM's first affidavit evidence was that she had attended the second trial as a result of a police warrant and effectively under duress from her mother but had given evidence in court that the allegations against her father were untrue. TM's second affidavit evidence was that she had refused to give evidence at the second trial. She then said "I knew how terrible I felt when I gave evidence in first trial earlier that year where I did give evidence and I didn't want to be in that position again. I felt under so much pressure to lie that I could not answer the questions asked and I kept shrugging my shoulders and just saying "I don't know"." It is unclear whether that last sentence is referring to the first or second trial.
55. We have tried to identify whether there is any independent evidence to confirm beyond any doubt what took place but there is none. The Respondent (in its reply to the appeal at para 20) states that the CPS has confirmed that TM gave live evidence although the Crown Court said that the log showed she did not. We consider the best evidence is the Judge's summing up at the second trial which makes no reference whatsoever to TM as having given oral (or indeed any) evidence. We find it very unlikely that a trial judge would have accidentally omitted such material. We therefore find as a fact that TM did not give evidence at the second trial, but we are satisfied that she gave evidence at the first trial. However, we are simply unable to say with any certainty what the tenor of that evidence was. Her first affidavit stated that she had (under oath) denied the allegations made against her father and had retracted the statements in her police interviews. Her second affidavit appears to suggest that she simply declined to answer questions. As indicated above, her oral evidence to us was confused, not least at one stage she admitted to lying under oath in court (yet on her account if she was truthful in denying the allegations in court she would not have been lying under oath). What is clear is that she had definitely 'changed sides' by the time of the second trial. The motivation for this change of position was unclear. We were not satisfied this was driven by a decision to 'tell the truth', given the toxic relationship with her mother. The belated retraction of her original evidence undermines her credibility.
56. For all those reasons, on the critical issues we did not believe TM's live evidence. We can entirely understand why the DBS concluded that her retractions made it difficult to sustain the allegations made in respect of her. However, TM's evidence does not persuade us that SB is a liar and does not undermine either her mother's evidence or that of her siblings.

The Appellant's evidence

57. We also had four types of evidence from Mr M: (1) the records of his police interviews under caution; (2) extracts from his evidence at the second trial, as contained in the judge's summing up; (3) his more recent affidavit evidence; and (4) his oral evidence at the Upper Tribunal hearing.
58. We therefore had the benefit of hearing oral evidence from Mr M which was not available to the DBS.

Mr M's evidence from the police interviews

59. There were two fairly lengthy police interviews with Mr M under caution – the first on 21 April 2015 (pp.142-180) and the second on 5 June 2015 (pp.181-

198). The appeal bundle contains verbatim records of both interviews. He denied all the allegations and indeed claimed that SB had beaten him (p.149). We note that at an early stage in the first interview, in response to the allegation of rape of SB being put to him, Mr M replied that “I can’t rape her, because she’s my wife and I can’t rape her” (p.143).

Mr M’s evidence at the second trial

60. The judge at the second trial quoted extensively from Mr M’s evidence (pp.76-84), in which he maintained his denial of all the allegations.

Mr M’s affidavit evidence

61. Mr M made a short witness statement (dated 29 September 2024) for the purposes of this appeal. He sought to clarify one matter but essentially maintained his previous denial in earlier representations of all the allegations that had been made against him.

Mr M’s oral evidence to the Upper Tribunal

62. Mr M gave sworn oral evidence to the Upper Tribunal for just over an hour (not including a break for lunch). For the most part he gave evidence through an interpreter.

63. In giving evidence in chief, Mr M maintained his position of denying all the allegations that had been made against him. He reiterated his claim that the allegations had been fabricated by his ex-wife who was intent on ruining his character (p.203).

64. Under cross-examination by Mr Serr, Mr M confirmed the details of his marriage to SB. He told us that the family home had been jointly owned. He said that SB had started work part-time as a dinner lady and had later got a qualification as a family support worker. He gave his account of how SB had left with the children on 14 February 2014 while he was out at work. He said he was shocked by the way she had left and could see no reason for her doing so. He stated that he thought the allegations were a cover story to hide the fact that she had started a relationship with another man. He had not gone to the Family Court but had tried to get his family back using social contacts. He had then left the UK because he was depressed; he denied Mr Serr’s suggestion that he had left because the allegations were true. He and SB had then got divorced and he had remarried in Bangladesh in February 2015. He reiterated his argument that his ex-wife was determined to destroy him. Mr M also explained that he had a dry skin condition and his daughter NM had applied oil to his legs but only below his knee. He said there was just one occasion when he was cold and he had got on the covers of NM’s bed, but she had asked him to leave.

65. In answer to questions from the Upper Tribunal, Mr M said it had generally been a happy marriage. He said that no aspects of SB’s allegations were true and that she was jealous. She had made up her mind that she did not wish to continue with their life together. He stated that she only thought about herself.

Our assessment of Mr M's evidence

66. We recognise at the outset that Mr M has been consistent from the outset in his denial of the allegations against him. We also recognise the difficulty we have of evaluating the credibility of oral evidence that was (largely) given through an interpreter. In such circumstances there is always the risk that some nuances of meaning may become clouded. That said, we note that the police interviews under caution were conducted without an interpreter and without any apparent major misunderstandings. Mr M also had a legal representative present during those police interviews. We are confident he would have raised any concerns about lack of understanding on the part of the Appellant.
67. We consider it significant that Mr M baldly asserted during the first interview under caution that "I can't rape her, because she's my wife and I can't rape her" (p.143). Even allowing for the fact that Mr M was answering in his second language, his reply gives an indication as to his way of thinking, namely an entitlement as husband to have sex with his wife. At his second trial, when the point was put to him, he partly qualified the assertion: "I have a right but I do not have a right without her consent" (p.78). In evidence to us he said that "In our culture we should respect our wife, and love them, so we can't rape our wife." We consider his first response when the point was first put to him as more indicative of his attitude to sex within marriage.
68. We have already recognised that the outcome of this appeal essentially turns on what we make of the evidence of TM. We have explained above why we prefer her original evidence to her more recent retraction evidence. We further explain below why we found the evidence of SB and NM to be credible, notwithstanding the Appellant's denials. That being so, it necessarily follows that we were not persuaded by Mr M's evidence that there was no substance to the allegations.
69. We now turn to consider the evidence of SB and NM. We have borne in mind that the Respondent has not adduced any live evidence and so the Appellant has not had the opportunity of testing the evidence of SB and NM by way of cross-examination.

The evidence of SB

70. As noted above, we did not hear directly from SB. However, she had made four witness statements to the police, being those dated 21 April 2014 (pp.105-106), 12 June 2014 (pp.107-114), 2 November 2015 (p.115) and 14 June 2017 (pp.116-118). In particular, the second and fourth witness statements give detailed and graphic accounts of alleged rape and sexual abuse by the Appellant. While we have no documentation from the first trial, we know from the judge's summing up at the second trial that she also gave detailed live evidence against her ex-husband at the Crown Court on that further occasion (pp.62-72).
71. We find SB's evidence as contained in the appeal bundle to be consistent and credible. It is cross corroborated by TM's original evidence and by NM's evidence. Again, there is a level of detail that has the 'ring of truth' and is not consistent with a fabricated account. Cases of domestic sexual abuse can be notoriously difficult to prove, and yet the Appellant was not acquitted by a jury on the merits – both criminal trials resulted in hung juries, suggesting that at

least several members of the two juries must have been satisfied of guilt applying the higher criminal standard of proof. Furthermore, we agree with Mr Serr that the events of 14 February 2014 are telling in themselves. Notably, SB (i) resigned from her job, having worked hard to progress in her career, (ii) took her five children out of school and away from their friends, (iii) left the matrimonial home in which she had a half-share, and (iv) fled with her children to another city to stay in (at least to start with) insecure accommodation. We find that conduct is entirely consistent with the actions of a desperate victim of domestic abuse. We consider it is wholly improbable that SB's flight from her home was part of a carefully fabricated plot to create the illusion of victimhood.

The evidence of NM

72. NM, TM's younger sister, was interviewed by the police on two occasions. The first time was on 3 July 2014 (when she was aged about 10 or 11) and the second occasion almost a year later on 25 April 2015. The notes of the first interview include the following entry:

N Leg Massage

Dad used to tell her to massage his legs from feet to top of the thigh, nearly every day, with Vaseline due to dry skin for 20-30 minutes at a time. He would wear no underwear and a Bengali skirt lifted up high so she could see his private parts. Made feel quite uncomfortable and he would be relaxed. Started off as bottom part of legs then went higher. Happened since she was nine or ten so for a year. Would happen when she was alone with Dad, Mum not there. If Mum came he would tell her to stop and to do her homework or go to bed or something. Mum would tell him off and say it was not alright. 20-30 mins at a time.

73. NM also gave the following account:

Twice got in bed with me and my sister

N normally wakes late and Dad early. This was in the [redacted] house, she has her own room with a single bed. One or two years ago when she was 9/10 years old she has woken up but still sleepy as her Dad has come into her room and got into bed next to her. The first time he just hugged her in bed and the second time he put his legs over her and squeezed her really hard. This made her feel quite weird and nervous. She was wearing long trousers, long sleeved pyjama top. Dad was wearing skirt and vest. They were both under the blanket, covering both of us. There was probably a month between the first and second time. She didn't tell her mum as she would tell him off and start a really big fight, so she has told her sister and she said he'd done it to her and they both said it felt weird.

74. At the second interview NM gave essentially the same account of both matters, subject to some minor discrepancies. As the Barring Decision Process document observed, NM's evidence in these respects is corroborated by SB's evidence and TM's original evidence. We do not consider it plausible that SB concocted a false narrative and then persuaded NM to repeat that fabricated

account to the police. There is simply too much detail, including extraneous detail, in both her interviews to suggest that NM was not telling the truth.

Conclusion

75. It follows, as we reject the evidence of both Mr M and TM, that we conclude that none of the grounds of appeal is made out and so we must dismiss the appeal.

Disposal

76. Having decided that the DBS decision does not involve any mistake of fact or error of law, there can only be one outcome to this appeal. This is because section 4(5) of the 2006 Act states as follows:

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

77. That being so, we must by law confirm the DBS's decision.

**Nicholas Wikeley
Judge of the Upper Tribunal**

**Ms Sally Derrick
Specialist Member of the Upper Tribunal**

**Mr Matthew Turner
Specialist Member of the Upper Tribunal**

Approved for issue on 8 November 2024