Neutral Citation Number: [2025] EWCA Civ 191

Case No: CA-2024-001214

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Church, Tribunal Members Hutchinson and Stuart-Cole
[2024] UKUT 85 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/2/2025

Before :

LADY JUSTICE ANDREWS
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE JEREMY BAKER,
(Vice-President, King's Bench Division)

- -

Between :

XYZ	**Appellant**
- and -	
DISCLOSURE AND BARRING SERVICE	**Respondent**

- -
- -

Gavin Dingley and Freyja McLoughlin (instructed on **Direct Access**) for the **Appellant**
Samantha Broadfoot KC and Barney McCay (instructed by **Disclosure and Barring Service**) for the **Respondent**

Hearing date: 12 February 2025.
Further written submissions received on 17 February 2025.

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Approved Judgment

This judgment was handed down remotely at 10.am on 28th February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

INTRODUCTION

1. This is an appeal brought by a teacher against a decision of the Upper Tribunal (Administrative Appeals Chamber) ("the UT") dismissing his appeal against a decision of the Disclosure and Barring Service ("DBS") made on 15 September 2020 to include his name in the children's barred list ("the Barring Decision"). It raises a number of important issues which this Court has not previously considered, including whether the DBS (or the UT on an appeal from a decision of the DBS) is bound by findings of fact made in disciplinary proceedings before "a competent body" as defined in paragraph 16 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"), and if it is not so bound, whether there are any legal constraints on the extent to which it is free to depart from those findings in the absence of fresh/different evidence. In the present case the body concerned is the Teachers' Regulation Authority ("TRA"), which exercises the functions of the Secretary of State for Education under section 141B of the Education Act 2002 ("the 2002 Act").

2. An anonymity order was made by the UT, and a fresh anonymity order was made on an application by the DBS by Elisabeth Laing LJ when granting permission to appeal, for the reasons she explained in her order of 9 September 2024. We shall therefore refer to the appellant as "XYZ".

3. In August 2019, an allegation was made that XYZ had formed an inappropriate relationship with a 16-year-old girl, Pupil A, who left the school at which he taught ("the School") after sitting her GCSE exams at the end of the 2019 academic year. The allegation was made by Pupil A's father who, after becoming concerned by his daughter's behaviour, decided to monitor her movements surreptitiously. He said that on 13 August 2019 he had witnessed her getting into a car being driven by XYZ. He had followed the car to a town some distance away, before losing contact with it at some traffic lights. Although when first confronted, his daughter had denied to her parents (and then to the police) that there was any relationship between herself and XYZ, she had subsequently admitted that there was. She told him that the couple had been communicating on Snapchat since her 16th birthday in December 2018, and that this had progressed to XYZ giving her several lifts in his car since March 2019. She also said that they had kissed four times. Pupil A said that she and XYZ had agreed that if their relationship were discovered they would deny it, as she initially had.

4. The police investigated these allegations, but XYZ (who gave a "no comment" police interview on legal advice) was not arrested nor charged with any criminal offence. He voluntarily handed over his mobile phone, and supplied the police with the means of access to all his social media accounts. Pupil A's mobile phone was also interrogated. It appears that nothing incriminating was found, although that was not conclusive, because Snapchat has a function which deletes messages after they have been read. Pupil A declined to make a formal statement or undergo an Achieving Best Evidence interview, and the police decided not to take the matter any further. However, following its own internal investigation after the allegations were made known to it by the local authority, the School dismissed XYZ in September 2019, and the head teacher referred the matter to the DBS and to the TRA.

5. The DBS was the first body to make a decision. On 27 April 2020 it issued XYZ with a "minded to bar" letter and invited him to make representations, which he did through his counsel, Mr Dingley. Notwithstanding those representations, on 15 September 2020 the DBS decided that XYZ's name should be placed on the children's barred list. The Barring Decision was based on the DBS caseworker being satisfied on the information before them, on the balance of probabilities, that XYZ had formed a relationship with Pupil A, that he had given her lifts in his car and that he had kissed her on four occasions. Permission to appeal was granted by the UT on 26 April 2021.

6. Two weeks after the Barring Decision, on 29 September 2020, the TRA notified XYZ that it had decided to refer to a professional conduct panel allegations that he was guilty of unacceptable professional conduct and/or conduct that may bring the (teaching) profession into disrepute, namely, engaging in and/or developing an inappropriate relationship with Pupil A by:

> " a) Meeting up with and/or taking Pupil A on one or more occasions
>
> i) in your car
>
> ii) in/to [the town identified by Pupil A's father] on or around 13 August 2019
>
> iii) outside of the School.
>
> b) Instructing and/or inviting Pupil A to communicate with you via Snapchat, which did not retain copies of your messages.
>
> c) Communicating with Pupil A on one or more occasions between December 2018 and September 2019 using Snapchat.
>
> d) Kissing Pupil A on one or more occasions.
>
> e) Cuddling Pupil A on one or more occasions."

There was a separate allegation that such of XYZ's alleged behaviour as may be found proven was conduct of a sexual nature and/or was sexually motivated.

7. The TRA convened a professional conduct panel (comprising a teacher and two lay members) to consider XYZ's case on 18 May and 6 August 2021. The TRA appointed an independent firm of solicitors to present the case to the panel on its behalf. The TRA and XYZ were represented by counsel at the hearing, which took place remotely. XYZ gave oral evidence and was cross-examined. So too did Pupil A's father and the School's head teacher who had carried out the internal investigation. Pupil A, who by then was 18 years old, did not give oral evidence, but she provided a signed witness statement for use in the proceedings. The TRA panel found that no satisfactory explanation was given for her absence. They placed minimal weight on her witness statement because it differed from her earlier accounts of events and was disputed hearsay.

8. In his witness statement in the disciplinary proceedings, XYZ admitted that he had twice given Pupil A a lift in his car. He said that both occasions were after she had left

the School. The first was in early August 2019, when he had bumped into her by chance in the local city centre, and had given her a lift home at her request. The second occasion, the incident witnessed by Pupil A's father on 13 August 2019, was also a chance encounter. XYZ was driving back from a golf club where he had been playing, and saw Pupil A standing at a bus stop. He pulled over to speak to her, and she told him that she was going to meet her cousin. As her stated destination was in the direction that he was going, he offered to drop her off. He explained that he took an indirect route because she said she would be really early to meet her cousin. That was how he came to drive her via the town identified by pupil A's father. He denied that there was any sexual motivation for his actions. In hindsight he accepted that it was inappropriate behaviour, though he said that at the time he thought that because she was no longer a pupil at the School, there was nothing wrong with giving her a lift in his car.

9. In a formal statement of agreed and disputed facts, signed and dated by him on 14 February 2021, XYZ admitted that there was no reason relating to his employment with the School for the second journey to have occurred, and that by his behaviour on that occasion he developed and engaged in an inappropriate relationship with Pupil A.

10. In the light of those admissions, in its determination promulgated on 8 August 2021, the TRA panel found the particulars of allegation (a) proved. However they found that none of the other allegations had been proved to the civil standard and that the proven conduct was not sexually motivated. They held that whilst XYZ's behaviour in respect of allegation (a) had breached the Teacher's Standards and demonstrated "exceedingly poor judgement," it was not so serious as to constitute professional misconduct. They further held that the two incidents that were proved "occurred out of random coincidence," and amounted to XYZ giving a pupil a lift. That conduct would not have a negative impact on XYZ's status as a teacher or damage the public's perception. He was therefore not guilty of conduct that may bring the profession into disrepute.

11. The UT admitted the TRA's decision and all the material that was produced for the hearing before the TRA in evidence on the appeal against the Barring Decision, which was heard in person on 22 November 2023. The DBS and XYZ were both represented by counsel. XYZ gave evidence before the UT and was cross-examined. He was also asked questions by the Tribunal members. It was submitted to the UT on XYZ's behalf that the findings of the TRA Panel, which followed a contested hearing before an expert panel at which live evidence was given and at which the parties were legally represented, established that the Barring Decision was based on mistakes of fact and should be set aside.

12. At paragraph 27 of its decision, the UT identified the legal issues it had to address as including the following (which are the only issues relevant to this appeal):

    i) What is the significance of the TRA Decision? In particular, are the findings of fact made by the TRA Panel binding on the DBS, or indeed on the Upper Tribunal?

    ii) Was the Barring Decision based upon a mistake of fact? In particular …

> Was the DBS mistaken in its findings that XYZ holds an exploitative attitude, formed a personal relationship with Pupil A for his own gratification, and holds a significant sexual interest in teenage girls, having engaged in sexual activity with a 16 year old pupil by kissing her on 4 occasions?

13. The UT was not persuaded that any type of estoppel applied in this context, pointing out that the DBS was not a party to the disciplinary proceedings before the TRA. It found, further, that it was not necessarily an abuse of process to invite a Court or tribunal to make a finding inconsistent with one made in earlier proceedings. The UT held at [67] that it must give the findings of the TRA Panel appropriate weight, just as it must give appropriate weight to the Barring Decision and all the other evidence before it, and make its own assessment of all the evidence to decide whether the Barring Decision was based on a mistake of fact. It concluded that it was not.

14. XYZ appealed against the UT's decision on four grounds, namely:

> Ground 1:
>
> The UT reached a conclusion which was plainly wrong or alternatively failed to take into account material considerations such as the significant weight to be applied to the TRA decision which disproved the conclusions reached [by the DBS];
>
> Ground 2
>
> The UT made a material misdirection of law on a material matter when it held that it was open to it to find that facts, particularly those at [142] to [143] of its decision, occurred after considering almost identical evidence to the same standard of proof when an earlier Tribunal considered that these facts did not occur.
>
> Ground 3
>
> The UT made a material misdirection of law by exceeding its jurisdiction and re-opening various findings of fact in the TRA decision.
>
> Ground 4
>
> The UT erred in law by misunderstanding the application of the *res judicata* principle and permitting the relitigating of a cause of action which had already concluded.

15. It is easy to understand why XYZ should feel aggrieved that the UT found that he had done the things of which he had been expressly exonerated by the TRA panel, when both tribunals were considering essentially the same evidence, and applying the same standard of proof. The sense of grievance would be heightened by the fact that, despite being cleared of professional misconduct by his professional regulatory body, he can no longer teach.

16. Nevertheless, if it is accepted that as a matter of law the UT (and the DBS) were not bound by the fact-findings of the TRA Panel, the weight to be afforded to those findings and whether they demonstrated that the Barring Decision was based on

factual errors were quintessentially matters for the UT, subject only to a rationality challenge (which, quite understandably, has not been made). Ultimately, for reasons I shall go on to explain, I have concluded that that is the correct analysis, and that in consequence this appeal must be dismissed.

THE LEGAL FRAMEWORK

17. Before considering the Grounds of Appeal in more detail it is necessary to set out a brief overview of the two statutory regimes with which the case is concerned.

The safeguarding regime

18. The DBS is a body corporate (section 87 of the Protection of Freedoms Act 2012 ("POFA")). It is not a servant or agent of the Crown (POFA, Schedule 8, paragraph 15(1)(a)). Barring decisions are part of the core functions of the DBS, and the Secretary of State is precluded from giving directions to the DBS in respect of any such core function (POFA, Schedule 8, paragraphs 8 and 14).

19. The arrangements governing the DBS's functions of protecting children (and vulnerable adults) are contained in the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"). Schedule 3 to the 2006 Act provides, at paragraph 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."

20. "Relevant conduct" is defined in paragraph 4 of Schedule 3 as including conduct of a sexual nature involving a child, "if it appears to DBS that the conduct is inappropriate." It also includes conduct which puts a child at risk of harm.

21. Teaching children is a regulated activity under section 5 and Part 1 of Schedule 4 to the 2006 Act. A person included in the children's barred list is prohibited from engaging in regulated activity relating to children (section 3 of the 2006 Act).

22. The requirement that, before making a barring decision, the DBS must afford the individual concerned the opportunity to make representations as to why they should not be included in the children's barred list, is addressed in more detail in paragraph 16 of Schedule 3. This provides, relevantly, in sub-paragraph (3) that:

> "The opportunity to make representations does not include the opportunity to make representations that findings of fact made by a competent body were wrongly made".

Sub-paragraph (4) states that findings of fact made by a competent body are findings of fact made in proceedings before the Secretary of State in the exercise of the Secretary of State's functions under section 141B of the 2002 Act (i.e. proceedings before the TRA) or in proceedings before certain other specified professional regulators, including, for example, the General Medical Council, the General Optical Council and the Nursing and Midwifery Council.

23. The ambit of the role and functions of the DBS was explained by the Divisional Court in *R(SXM) v DBS* [2020] EWHC 624 (Admin), [2020] 1 WLR 3259 in these terms at [38]:

> "… it is clear that the function of the DBS is a protective forward-looking function, intended to prevent the risk of harm to children by excluding persons from involvement in regulated activities. The DBS is not performing a prosecutorial or adjudicatory role and it is not engaged in considering complaints from individuals and imposing punishments. It may, as part of its task, have to form a view as to whether a person has engaged in conduct likely to endanger a child or sexually inappropriate conduct, or the case may involve conduct posing a risk of harm. It will need also to consider questions as to whether it is appropriate to include the person on the children's barred list. However it is not there to receive and adjudicate upon complaints from individuals."

That explains why information about whether a person's name is on the children's barred list is not publicly available. It is restricted to those who intend to employ or engage someone who would be involved in regulated activity with children. In *SXM* it was decided that even someone who alleged that they had been abused as a child by a person referred by a local authority to the DBS for determination as to whether they should be included in the children's barred list, had no status to seek information from the DBS as to the outcome of that referral.

24. Section 4 of the 2006 Act provides for a right of appeal against a barring decision to the UT, with the permission of the UT, on the grounds that the DBS has made a mistake on any point of law or in any finding of fact which it has made and on which the barring decision was based. If the UT finds that the DBS made such a mistake, it must either direct the DBS to remove the appellant from the barred list or remit the matter to the DBS for a fresh decision. If it takes the latter course, the UT may set out any findings of fact which it has made on which the DBS must base its new decision.

25. In determining such an appeal, the UT is not restricted to consideration of the information which was before the DBS decision maker. It has the power to hear oral

evidence, and to make its own findings of fact and draw its own inferences from all the evidence before it. It will not defer to the DBS in factual matters but will afford appropriate weight to fact-findings by the DBS in matters that engage its expertise, such as the assessment of risk to the public: see *PF v DBS* [2020] UKUT 256 (AAC) at [51], approved by this Court in *Kihembo v DBS* [2023] EWCA Civ 1547 at [26].

26. In the present case, the UT accurately summarised the case law on the nature and extent of its "mistake of fact" jurisdiction under section 4(2)(b) of the 2006 Act at [39] to [47] of its determination. It referred, among other matters, to the decision in *DBS v JHB* [2023] EWCA Civ 982 in which it was confirmed by the Court of Appeal that a finding of fact may be "wrong" even if there was some evidence to support it or it was not irrational, if it is a finding about which the UT has heard evidence which was not before the DBS and the new evidence shows that the finding made by the DBS was wrong. In that case, the Court of Appeal held that the UT had erred by substituting its own evaluation of the evidence for that of the DBS decision-maker in circumstances where (i) the evidence was identical, and (ii) the UT had not held that the DBS had made findings which were not open to a reasonable decision-maker (i.e. irrational).

27. The UT also referred to the more recent case of *DBS v RI* [2024] EWCA Civ 95, in which a different constitution of the Court of Appeal found it difficult to discern the ratio of *JHB* save possibly that "it may be authority for the proposition that if the UT has exactly the same material before it as was before the DBS, then the tribunal should not overturn the findings of the DBS unless they were irrational or there was simply no evidence to justify the decision": see the judgment of Bean LJ, with which Males LJ and Lewis LJ agreed, at [33]. Males LJ, in his concurring judgment, with which Lewis LJ also agreed, indicated that the restrictive approach adopted in *JHB* should be confined to those cases where the appellant does not give oral evidence before the appellate tribunal, or gives no evidence relevant to the question whether they committed the relevant act relied upon. The UT quoted from his judgment where he said (at [49]):

> "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."

28. The UT directed itself in accordance with that approach. It first satisfied itself that whilst the DBS decision could have been better explained, and different findings could have been made, the findings made by the DBS were open to the decision maker on the evidence before them. It then considered further evidence, including the TRA decision, to ascertain whether any of those findings were mistaken ([88] and [89]).

29. For completeness, Paragraph 18 of Schedule 3 to the 2006 Act provides for the right of a person who is included in a barred list to apply to the DBS for a review of their inclusion (though the permission of the DBS is required to make such an application).

However, sub-paragraph (3) provides that such an application can only be made after the end of the minimum barred period (which is prescribed by regulations, currently SI 2008/474) which in XYZ's case is 10 years.

30. Ms Broadfoot KC, on behalf of the DBS, drew the Court's attention to the DBS's power under paragraph 18A of Schedule 3 to review a person's inclusion in the list at any time and to remove them if it is satisfied that, in the light of information which it did not have at the time of their inclusion, any change of circumstances relating to the person, or any error by the DBS, it was no longer appropriate to include them in the list. Ms Broadfoot informed the Court on instructions that, although XYZ could not have made a formal application for a review under paragraph 18, he could have made an informal request to the DBS to consider exercising its power under paragraph 18A in the light of the TRA's decision, as an alternative to pursuing his appeal. That may be so, but since XYZ did not pursue that course (understandably, in the light of the fact that the appeal process was already well advanced when the TRA panel made its decision) we need not concern ourselves with it further.

The TRA disciplinary system

31. The TRA is an executive agency of the Department for Education, which was established in 2018 to carry out the functions of the Secretary of State under sections 141A-E of the 2002 Act. By section 141B, the Secretary of State may investigate a case when he receives an allegation that a relevant person may be guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute (or has been convicted of a relevant offence). If he finds there is a case to answer, he must decide whether to make a prohibition order. By section 141C, the Secretary of State must keep a list containing, among other matters, the names of persons subject to a prohibition order. By contrast with the children's barred list, that list is required to be available for inspection by the public.

32. Pursuant to Schedule 11A of the 2002 Act, the Secretary of State has promulgated regulations (currently the Teachers' Disciplinary (England) Regulations 2012, SI/2012/560) which, among other matters, provide that the decision of the Secretary of State following the determination of a professional conduct panel must be published (regulation 8(5)), and require the publication of any prohibition order and certain other information, including the name, date of birth, and teacher reference number of the teacher concerned (regulation 15). Regulation 17 confers an unfettered right of appeal to the High Court upon a person in relation to whom a prohibition order is made.

33. The TRA has issued guidance in relation to TRA disciplinary procedures (the current version was issued in May 2020). In February 2022 it also issued guidance concerning factors that could lead to the making of prohibition orders. That guidance considers the relationship between the TRA disciplinary process and the safeguarding system operated by the DBS. Paragraph 5 states that:

> "The DBS will consider cases that concern safeguarding matters (i.e. harm or the risk of harm to a child), barring individuals from working in regulated activity with children where appropriate. When considering whether to bar a teacher, the criteria used by the DBS differ from those used by the TRA when it considers whether to

> prohibit a teacher. The TRA and the DBS may consider cases in parallel and where the DBS has decided a case does not meet its criteria for barring, the TRA can still decide to progress the case to a panel for its consideration."

THE GROUNDS OF APPEAL

Ground 1

34. Ground 1 (at least in its original form at the time when permission to appeal to this Court was granted) contended that the UT made an error of law at [64] of its determination by "misunderstanding the scope of its jurisdiction under paragraph 16(3) of Schedule 3 of the 2006 Act."

35. The relevant passage in that paragraph of the determination reads as follows:

> "There is nothing in the 2006 Act (or elsewhere in statute) that requires the DBS to accept the factual findings of any other decision-making body, including a regulator such as the TRA (exercising the powers of the Secretary of State for Education). The status of findings of fact made by a "competent body" (defined in paragraph 16 to Schedule 3 to the 2006 Act) is dealt with in Schedule 3 to the 2006 Act. However, it provides only that, where the DBS must give a person an opportunity to make representations, that does not include the opportunity to make representations that findings of fact made by a competent body were wrongly made. In other words, the findings of fact in such proceedings before competent bodies are binding on the referred person who was party to those proceedings. It says nothing about them being binding on the DBS."

36. The argument that was originally advanced on behalf of XYZ in the Grounds of Appeal and the Appellant's skeleton argument was that the effect of paragraph 16 of Schedule 3 is that "findings of fact reached by the TRA cannot be challenged in appeals under the 2006 Act" [including, by necessary implication, by the DBS]. The DBS was going behind paragraph 16 in challenging the findings of the TRA before the UT, and the UT erred in law (and, indeed, exceeded its jurisdiction) by hearing, accepting and affording significant weight to the DBS's representations.

37. In answer to that argument, Ms Broadfoot submitted that paragraph 16 of Schedule 3 addresses the situation in which, unlike the present case, the decision of the competent body is made *before* the DBS considers whether to include the person concerned on the children's barred list. If the regulator has made adverse fact-findings, then the proper route of challenge to those findings is by way of appeal, (in the case of a teacher, to the High Court) and not by making the type of representations to the DBS which should be raised in an appeal. Paragraph 16 only deals with the situation where the professional is dissatisfied with the findings of the body concerned, for the obvious reason that if the fact-findings were favourable, they would wish to rely on them in their representations to the DBS, and there is no reason to preclude them from doing so.

38. Ms Broadfoot submitted that Paragraph 16 is solely concerned with matters of a procedural nature which arise prior to the barring decision. It does not concern proceedings before the UT on appeal, and says nothing about the UT's jurisdiction when determining such an appeal. If a teacher appealed to the High Court against an adverse decision by the TRA panel which the DBS had relied upon in making a barring decision, and the High Court reversed the fact-findings of the panel or found that the panel was not entitled to make those findings on the evidence before it, it would obviously be open to the appellant to make representations to the UT, based on the High Court judgment, that the findings of fact made by the TRA panel were wrongly made, and therefore that the DBS's barring decision was based on one or more mistakes of fact. Paragraph 16 is no bar to that.

39. Ms Broadfoot also drew our attention to paragraph 6 of Schedule 3 to the 2006 Act, which precludes the DBS from including a person in the children's barred list if a relevant Scottish authority has already considered whether they should be included in a corresponding list on the same ground and if, in accordance with criteria specified by order of the Secretary of State, it is more appropriate for the person's case to be considered by the relevant Scottish authority. That is so regardless of whether the Scottish decision is to include them on the corresponding list or not to include them. She submitted that this demonstrates that Parliament has expressly turned its mind to the position where there is the potential for conflict between decisions made by two bodies (in this instance, bodies carrying out the same safeguarding functions in parallel jurisdictions) and has mandated how that conflict is to be resolved. This lent support to her submission that if Parliament had intended that findings by a competent body should be binding on the DBS either at the time of its barring decision, or on an appeal to the UT by a person included on the barred list, it would have said so in terms.

40. Ms Broadfoot's analysis appears to me to be sound. In my judgment, the statement of the legal position in [64] of the UT's determination which I have quoted above is unimpeachable. That would have been the complete answer to Ground 1 had matters rested there. However, in his oral submissions, Mr Dingley changed tack somewhat. He said that, in contrast to the other Grounds of Appeal, Ground 1 was advanced on the premise that the fact-findings of the TRA are <u>not</u> binding on the DBS (or on the UT). He submitted, rather, that the inability of the teacher to challenge the TRA's fact-findings in representations to the DBS in consequence of paragraph 16(3) was an indication of the importance ascribed by Parliament to the expertise of the competent body, and thus of the weight to be afforded to its fact-findings. This meant that by necessary implication the UT must pay "high regard" to such findings or afford them "great weight" when considering whether contrary findings by the original decision-taker were mistaken. In the present case, the UT failed to take into account a material consideration, namely the significant weight to be applied to the TRA decision which "disproved" the conclusions reached by the DBS in the Barring Decision.

41. I am unable to accept those submissions. The TRA and the DBS have different aims and considerations, although they may overlap to some extent. The UT is looking at the matter through its own lens in the context of the statutory appeal scheme. Its focus must be, as it was in this case, on the question whether, in the light of all the evidence before it, the Barring Decision was based on a mistake of fact. The weight to be afforded to the TRA decision was a matter for the UT. As the UT said at [67], the

TRA decision was evidence of what was said at the hearing, what the TRA panel decided and why it decided as it did. The UT had to afford it "appropriate weight" just as it had to give "appropriate weight" to the Barring Decision and any other evidence before it (such as XYZ's oral evidence in the UT). Parliament has not dictated that "significant" weight should be ascribed to such a decision, let alone that it should be afforded greater weight than the decision under appeal.

42. It is clear from [54] and [90] of the determination that the UT was alive to the fact that whilst the DBS decision was taken on the papers, the TRA panel had the advantage of an adversarial hearing at which witnesses were cross-examined, and that with that advantage, it made findings on virtually identical allegations which differed in important respects from those made by the DBS. However, the UT was not constrained by these or any other considerations to afford the TRA decision "great weight" and there is nothing in the 2006 Act that mandates such an approach.

43. Indeed that does not appear to have been Mr Dingley's submission before the UT. He put XYZ's case much higher than that. At [65] the UT recorded Mr Dingley's submission to it as being that it would be "improper" to make any findings that contradicted the findings of fact comprised in the TRA decision, and that it could only uphold the Barring Decision if that decision was still open to the DBS if any findings of fact that conflicted with the TRA Panel's findings were ignored. The UT described that proposition as "striking", pointing out that Parliament had given the UT the statutory jurisdiction to decide appeals in respect of barring decisions based on mistake of fact (or law), and that there was no basis in statute, in the authorities or in principle for circumscribing that jurisdiction in the manner suggested.

44. I consider that the UT was right to reject that proposition for the reasons that it gave. I would add that even if it had agreed with it, that was unlikely to have availed XYZ because Mr Dingley accepted, when it was put to him in the course of oral argument, that it would have been open to the DBS to make the Barring Decision based upon XYZ's admissions about the two lifts that he gave Pupil A his car, including the one on 13 August with the lengthy detour, that led to the limited findings against him by the TRA panel. As Mr Dingley pointed out, that was not the reasoning of the Upper Tribunal, which was based on findings that were contrary to those made by the TRA panel (including rejecting XYZ's explanation given to them for the detour), but that does not detract from the force of the point. In any event, however it is finessed, Ground 1 fails.

Grounds 2 and 3

45. Mr Dingley made oral submissions on Grounds 2 and 3 together, since they overlap to some extent. At [142] and [143] the UT found that:

i) it was more likely than not that XYZ was in an inappropriate relationship with Pupil A and that he kissed her on four occasions,

ii) it was neither irrational nor unreasonable for the DBS to infer that he had a sexual interest in Pupil A and thus that he had a significant sexual interest in teenage girls;

iii) XYZ's willingness to cross professional and moral boundaries to exploit the imbalance of power between himself and Pupil A to satisfy his own ends was an adequate basis for the DBS's finding that XYZ had "an exploitative attitude."

Mr Dingley submitted that those findings amounted to a collateral attack on the final decision made by the TRA panel which, although not a court, was a competent quasi-judicial body which had considered and pronounced upon exactly the same issues and reached diametrically opposing conclusions on them. He relied upon the principle in *Hunter v Chief Constable of the West Midlands* [1982] AC 529.

46. In that case, Lord Diplock stated at page 536 that there is an

> "inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people."

The abuse of process identified in that case was the launch of proceedings by the plaintiff for the purpose of mounting a collateral attack on a final decision by a court of competent jurisdiction in previous proceedings which the plaintiff had had a full opportunity to contest in that other court.

47. In *Mueen-Uddin v Secretary of State for the Home Department* [2024] UKSC 21, [2024] 3 WLR 244, at [39] Lord Reed PSC (with whom the other members of the constitution agreed) noted two aspects of Lord Diplock's statement: first, that the power is a power to prevent misuse of the court's procedure, and cannot be used if someone is making proper use of the civil jurisdiction of the court to protect his rights; second, that the purpose of the doctrine is to preserve public confidence in the administration of justice.

48. In *Greene v Davies* [2022] EWCA Civ 414 Newey LJ undertook a comprehensive review of a long line of authorities in which the *Hunter* principle was considered, pointing out that several of them illustrate that it is not necessarily an abuse of process to invite a Court or tribunal to make a finding inconsistent with one made in earlier proceedings. He confirmed that a determination by a civil Court cannot necessarily preclude disciplinary proceedings based on allegations which the civil Court has rejected. In that case, a finding made by a District Judge that a solicitor had told him the truth in civil proceedings brought by his firm against a client for unpaid fees did not prevent the client from pursuing disciplinary proceedings against the solicitor (with the support of the Solicitors' Regulatory Authority) on the basis that he had lied to the District Judge.

49. The principle in *Hunter* is of no assistance to the appellant in this case. Given that the Barring Decision was first in time, and the DBS was merely defending XYZ's appeal to the UT, as it was entitled to do, there can be no question of DBS misusing the tribunal's procedure by seeking to persuade the UT to make different fact-findings from the TRA panel.

50. As to preserving public confidence in the administration of justice, section 4 of the 2006 Act delineates the scope of the UT's appellate jurisdiction. Section 4 requires the UT to determine for itself whether the Barring Decision was based on a mistake of fact or a mistake of law. As the UT observed at [60], that exercise cannot properly be characterised as an attempt by the DBS (or indeed the UT) to "relitigate" the TRA decision. The same analysis demonstrates that there is no justification for the criticism advanced under Ground 3 that the UT was acting as a proxy appeal court from the TRA panel.

51. It would undermine public confidence in the administration of justice if the UT were to abrogate its role by deferring completely to fact-findings made by the TRA (or even by the High Court on an appeal from the TRA), though of course it was obliged to consider and evaluate those findings. Indeed, it would be surprising if matters were otherwise. If one were to compare the two statutory schemes, the DBS decision and the TRA decision are taken at the same level within their respective schemes, and the UT is at a higher level. It also has the status of a court, which the TRA panel does not. The equivalent body in the TRA scheme would be the High Court hearing an appeal from the TRA panel.

52. Once it is accepted that paragraph 16 of Schedule 3 does not implicitly bind the DBS to accept the fact-findings of the TRA panel even if the TRA decision is first in time, it necessarily follows that Parliament has deliberately left it open to the two bodies to reach different conclusions even if the evidence and the factual issues are the same. The fact they have reached different conclusions may call into question the soundness of one or other of those decisions, but that may not necessarily be the case, especially where value judgments had to be exercised about what weight to place on the absence of a key witness, or about the plausibility or veracity of excuses or explanations given under cross-examination by the professional concerned. The impression a witness made on one tribunal or panel could well be different from the impression they made on the other on another occasion. It seems that the UT was less impressed by XYZ's performance in the witness box than the TRA panel, though even the latter found that "the answers he gave, on occasion, were minimal when he could have provided further information on matters."

53. Mr Dingley placed particular reliance on the decision of Mostyn J in *R (Mandic-Bozic) v British Association for Counselling and Psychotherapy* [2016] EWHC 3134 (Admin). That case concerned two professional bodies, UKCP and BACP, to which the claimant, M, a psychotherapist, belonged. Whereas most professions have a single regulator, the judge found that these bodies performed "precisely the same functions over the same professions in accordance with common ethical standards." A complaint was made about M to UKCP. An adjudication panel of UKCP found that most allegations had not been proved, but that on M's own account of events, some misconduct had been established. However, for reasons it explained, it imposed no sanction on her. M appealed against the finding of misconduct. Whilst the appeal was in train, BACP was progressing disciplinary proceedings against M arising out of a complaint made to it about M by the same complainant arising from the same matter. M sought judicial review of BACP's refusal to stay those proceedings, alleging that they amounted to a collateral attack on the initial decision by UKCP.

54. One of the key features of that case is recorded at [32] of the judgment, namely, that BACP had entered into a consent order which prevented it from taking any steps in

the complaint before it before a certain date. That order recorded that BACP would "recognise" any decision made in the proceedings before UKCP, in accordance with a specified professional standard. The judge interpreted this as a promise to be bound by the findings of the UKCP. Although his decision rested primarily on a questionable finding of cause of action estoppel, he held in the alternative that in those circumstances it would be manifestly unfair to M to allow BACP to continue with its own process, even in respect of aspects of the complaint that the panel had not dealt with at a hearing because the UKCP had sifted them out at a preliminary determination. He found as a fact that all of the allegations raised by the complainant had been adjudicated upon by a full quasi-judicial determination in the UKCP [40].

55. This Court is not bound by that decision, which turned on its own peculiar facts, and is readily distinguishable. This is not a case concerning two professional bodies performing identical regulatory functions, applying the same standards, but of two separate statutory schemes. The TRA and the DBS serve different public interests and perform different functions, even though they may be called upon to decide similar or even identical issues in the course of performing them. One is concerned with a person's professional conduct and fitness to be a teacher; the other is concerned with an evaluation of whether they pose a present and future risk to children. Parliament has chosen not to make the fact-findings of one body binding upon the other.

56. The other case on which Mr Dingley specifically relied, *Secretary of State for Business, Innovation and Skills v Potiwal* [2012] EWHC 3723 (Ch), also concerned a very different scenario. Mr Potiwal was the sole witness in proceedings before a VAT Tribunal against the company of which he was sole director, in which it was found (after hearing him give evidence) that he knew that the company was involved in a VAT fraud. Briggs J held that although the principle of issue estoppel/*res judicata* was inapplicable to directors' disqualification proceedings subsequently brought by the Secretary of State against Mr Potiwal, it would be manifestly unfair and would bring the administration of justice into disrepute in those circumstances to allow Mr Potiwal to impose on the Secretary of State the cost of relitigating the issue of his knowledge of the fraud. All that case demonstrates is that the question whether the *Hunter* principle applies is quintessentially fact-specific.

57. In the course of his submissions on Ground 3, Mr Dingley contended that the UT was wrong to criticise the TRA decision for appearing to apply a "much higher standard than the civil standard" [130] when dismissing the allegations about the Snapchat communications. He submitted that it was not for the UT to "second guess" whether a competent body has applied the correct standard of proof.

58. It does seem to me that the concerns expressed by the UT in that regard may have been based on a misreading of the relevant passage in the TRA decision. In context, the TRA panel appears to have been simply lamenting the absence of any documentary evidence which might have proved conclusively whether messages had been exchanged between Pupil A and XYZ, which left them predominantly reliant on the oral evidence of XYZ, the hearsay evidence of Pupil A's father and the head teacher, and Pupil A's witness statement. I do not read the TRA Panel as suggesting there was a requirement to prove the allegations to any higher standard than the balance of probabilities. However, even if the UT's concerns were misplaced, they were peripheral to the UT's ultimate decision, and I disagree with Mr Dingley's proposition that the UT had no business expressing them. On the contrary, it was a

legitimate part of the UT's function to form a view about the reliability of the TRA Panel's evaluation of the evidence before it, and whether it found the Panel's reasoning persuasive. The UT also heard XYZ give evidence and his answers to cross-examination, and formed its own assessment of his reliability and truthfulness. It gave cogent and persuasive reasons for its conclusions that the Barring Decision was not based on mistakes of fact.

59. Finally on Ground 3, at least in the written submissions, some reliance was sought to be placed on the decision in *DBS v RI* (above) which was said to be authority for the proposition that where the UT has exactly the same material before it as was before another Tribunal, it should not overturn the other Tribunal's findings of fact unless they were irrational or there was no evidence to justify the decision. The short answer to that point is that the observations in that case, which tried to identify and articulate the ratio in *JHB,* were concerned with the question whether the UT, exercising its appellate function, could overturn a barring decision by the DBS on the grounds that it was "mistaken" simply because it disagreed with the latter's evaluation of the same evidence. They have nothing to do with earlier decisions by a Tribunal of a competent body. In any event, the UT in the present case, like the UT in the *RI* case, was considering evidence which the DBS decision maker did not have, including oral evidence from XYZ which it was able to evaluate for itself.

60. For those reasons I would dismiss the appeal on Grounds 2 and 3.

Ground 4

61. The contention in Ground 4 is that the UT erred in misunderstanding the application of the principle of *res judicata*. Ms McLoughlin, who presented the oral argument on this Ground on behalf of XYZ, contended that there was a cause of action estoppel binding the DBS, which was "privy" to the TRA disciplinary process even though it was not a party to it.

62. That submission was fundamentally misconceived. Cause of action estoppel arises where both the parties and the subject-matter of the litigation are the same in both the first and second actions. Here, both are different. The principle extends to someone who is a "privy" to one of the parties, (such as a beneficiary under a trust where the party was the trustee; or a successor in title), but in order to be a "privy" that person must have the same interest as that of the original party.

63. In *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 it was recognised by the House of Lords that the doctrine of *res judicata* (which embraces both cause of action estoppel and issue estoppel) is not confined to adjudications in the area of private law, and that in principle it may also be applied in public law proceedings. Specifically, if Parliament has enacted a statutory scheme which is designed to establish the existence of a legal right, then the principle of *res judicata* would operate to give finality to that determination (as between parties and their privies) unless an intention to exclude that principle could be inferred from construction of the relevant statutory provisions. Thus it was held that once a statutory appeal tribunal had decided on the legitimacy of a planning enforcement notice, that decision could be relied on in answer to a second enforcement notice in the same terms directed by the same planning authority against the same development on the same land (a cause of action estoppel). Likewise any findings made in the first

proceedings that were necessary to the determination of the validity of the enforcement notice could give rise to an issue estoppel.

64. The application of the principle of *res judicata* in public law proceedings is subject to the important caveat that a statutory body cannot fetter its own freedom to perform its statutory duties or exercise its statutory powers: see *Hillside Parks Ltd v Snowdonia National Park Authority* [2020] EWCA Civ 1440 at [43]. (The issue of *res judicata* was not considered when that decision was appealed to the Supreme Court).

65. Whilst the principle of *res judicata* can be applied in the public law context, the circumstances in which it has been applied in practice are relatively uncommon. They appear to be confined to cases in which the attempt to re-open the issue previously determined can readily be characterised as an abuse of process. There is still a degree of uncertainty about the boundaries of its application in the context of proceedings for judicial review.

66. One of the problems in seeking to apply the *Thrasyvoulou* approach in the context of these particular public law proceedings is that at least one and probably both of the two separate statutory schemes with which we are concerned are not designed to finally establish the existence of a legal right. One might fairly describe the 2006 Act as conferring a statutory right on the DBS to make a barring order against certain individuals, and the 2002 Act and the regulations made under it as conferring a statutory right on the Secretary of State (and the TRA acting on his or her behalf) to make prohibition orders against teachers. But the DBS does not need to resort to any form of litigation to exercise its right, and the disciplinary process that the TRA initiates when an allegation of professional misconduct is made is of a very different character from bringing a claim in a court or tribunal against someone based on facts constituting an alleged legal wrong (or conferring an alleged legal right on the claimant).

67. Neither scheme is designed to establish the *existence* of a legal right, and the criteria which have to be satisfied before the different statutory rights conferred on the two bodies can be exercised are not identical. Establishing the facts is only the first stage of the process; each body then has to form a value judgment, in the case of the TRA as to whether those facts constitute professional misconduct or bring the profession into disrepute, in the case of the DBS as to whether those facts satisfy it that the individual poses a relevant risk to children.

68. The second problem lies in identifying what the cause of action is said to be, which gives rise to a final determination that cannot be re-litigated. A common definition of a cause of action is a set of facts which *entitle a person to bring an action* against another person. It most often consists of facts constituting a legal wrong (e.g. nuisance, breach of contract, actionable misrepresentation) which gives rise to a right to seek a remedy from a court or tribunal. Sometimes it will consist of facts which establish a legal right, or status, or entitlement to something, such as entitlement to exercise a right of way over land, or an entitlement to develop the land or, conversely, to prevent someone from developing it. In the planning context, the facts may give rise to a right on the part of the planning authority to bring legal proceedings against landowners or developers. The same set of facts can establish more than one cause of action, for example, breach of contract and negligence. But the fact that the same factual allegations against XYZ may have given rise to the complaints considered by

both the DBS and the TRA does not mean that there was a cause of action arising out of them (let alone identical causes of action).

69. When Miss McLoughlin was asked to identify the cause of action in the present case which was said to give rise to the alleged estoppel, or to identify the person who was advancing the cause of action, she was unable to do so. That is not surprising. The factual allegations made against XYZ, if established, conferred no right of action in a court or tribunal on the DBS. They created a basis for the DBS to exercise its statutory functions without the need to resort to court. The 2002 Act, and the regulations made pursuant to it, confer certain rights and obligations on the TRA as regulator, including the investigation of allegations of behaviour which in due course may culminate in disciplinary proceedings before a TRA panel, but I have some difficulty in characterising those proceedings as the pursuit of a cause of action by the TRA against XYZ. I acknowledge, however, that the constituent elements of cause of action estoppel can be present in disciplinary proceedings before an independent adjudicative body. For example, in *R(Coke-Wallis) v Institute of Chartered Accountants* [2011] UKSC 1, one of the authorities referred to by Lavender J in *Barnes v Chief Constable of Thames Valley Police* [2023] EWHC 2737 (Admin) ("*Barnes")*, discussed below, cause of action estoppel was applied in a situation where successive complaints were made by the Institute of Chartered Accountants against the same individual, so as to oblige the second independent disciplinary committee to dismiss the second complaint (see the discussion in *Barnes* at [74] and following). *Mandic-Bozic* (above) extended the approach in *Coke-Wallis* by analogy to a situation where the sequential disciplinary proceedings were before two separate professional bodies serving the same function.

70. Even if it were possible for the disciplinary proceedings to be characterised in this way, the subject-matter of the two statutory procedures with which this case is concerned is different, as I have already pointed out. Moreover the DBS is not in any sense a privy of the TRA. They are not "both government departments charged with the protection and furtherance of the public interest" as was alleged in the Appellant's skeleton argument. The TRA exercises certain statutory functions of the Secretary of State, but the DBS is an independent corporate body whose barring function cannot be interfered with by the Secretary of State. The public interests the two bodies serve to protect are similar but not identical. The TRA is concerned with upholding professional standards; the DBS with minimising risks to children. The fact that the two bodies co-operate and on occasion share information with each other takes XYZ's case no further.

71. The final problem is that the TRA proceedings, which in this case were second in time, could never be determinative of whether the statutory right to make a barring decision existed, or even of the question whether the DBS was entitled to exercise its right to do so on the facts, because that was simply not a matter which the TRA panel had to (or could) decide. The TRA panel only determined whether it was established that XYZ had behaved in a way which amounted to professional misconduct or brought the profession into disrepute. Unlike the situation in *Mandic-Bozic* the second public body, in this case the DBS, was not serving the same regulatory function and deciding the same matters as the first. In theory, a teacher could be found guilty of professional misconduct but pose no risk to children, and vice versa. Defending an appeal to the UT against the Barring Decision on the basis that the decision was

justified on the DBS's view of the evidence cannot by any stretch of the imagination be characterised as relitigating "the same cause of action" as was determined by the TRA panel. For all those reasons, Ground 4 is hopeless.

72. We gave the parties an opportunity to put in written submissions relating to the application of the doctrine of *res judicata* in the public law context within 7 days after the hearing. Both parties availed themselves of that opportunity, and each produced a very helpful note which drew our attention to *Thrasyvoulou*, to Lord Carnwath's obiter dicta in *DN (Rwanda) v Secretary of State for the Home Department* [2020] UKSC 7 at [44] to [65], and to a number of more recent authorities including *Barnes*. I am very grateful to them for their industry. However, none of the further authorities to which we were taken assisted XYZ.

73. The decision of Lavender J in *Barnes* is positively unhelpful to him; in that case a disciplinary panel found a probationary constable guilty of misconduct, but not gross misconduct, for telling a racist joke, and imposed a sanction falling short of dismissal. Despite this, the Chief Constable, in exercise of his powers under Regulation 13 of the Police Regulations, discharged him from his duties. In rejecting the arguments in that case based on *res judicata* and collateral attack of the type described in *Hunter*, Lavender J rightly pointed out that the exercise by an employer of a disciplinary power is not a form of adjudication, nor does it determine a dispute. He relied on the analysis of Elias LJ in *Christou v Haringey LBC* [2014] QB 131 especially at [40] to [41] and [47] to [52]. That applies with equal force to the DBS. The DBS is not an organ of the State, nor does it serve a prosecutorial or adjudicatory function, as this Court expressly confirmed in *SXM* (above). As in *Secretary of State for Trade and Industry v Baker* (No.4), *Re Barings Plc* [1999] BCC 639, the two sets of proceedings in this case have different purposes and objectives.

CONCLUSION

74. The UT was right to conclude that it was not bound by the fact-findings of the TRA Panel, whether in consequence of the operation of the principle of *res judicata*, the *Hunter* principle, or as a matter of construction of paragraph 16 of Schedule 3 to the 2006 Act. Nor was it bound to afford any greater weight to those findings than it did when deciding if the Barring Decision was based on mistakes of fact. There was no failure to take into account any material considerations. The UT considered and properly applied the relevant legal principles, examined the evidence with conspicuous care and reached a decision that it was entitled to reach for the reasons that it gave.

75. I would therefore dismiss this appeal.

Lady Justice Elisabeth Laing:

76. I agree.

Lord Justice Jeremy Baker:

77. I also agree.