IN THE UPPER TRIBUNAL ***Appeal No. UA-2023-001559-V***
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 161 (AAC)**

On appeal from the Disclosure and Barring Service

Between:

P.Q.

Appellant

- v -

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Nicholas Wikeley
Upper Tribunal Member John Hutchinson
Upper Tribunal Member Suzanna Jacoby

Hearing date: 30 May 2024
Decision date: 5 June 2024

Representation:
Appellant: In person
Respondent: Mr D. Tinkler of Counsel, instructed by DBS Legal Services

DECISION

1. The decision of the Upper Tribunal is to dismiss the Appellant's appeal.

2. The Respondent's decision taken on 24 July 2023 to include the Appellant's name on the Children's Barred List did not involve any material 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 UNDER RULE 14

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 the young persons or the professionals involved in this matter.

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 (i.e. the Respondent's) decision does not involve any material mistake of fact or error of law, which are the only bases on which we can interfere with that decision. Accordingly, we have no option but to confirm the Respondent's decision to include the Appellant on the Children's Barred List.

3. We appreciate this decision will be a considerable disappointment to the Appellant. We wish to record at the outset that we were impressed by the way the Appellant has conducted his appeal. However, the right of appeal in safeguarding cases is not a 'full merits review' type of appeal. Instead it is limited in the way summarised in the previous paragraph. In particular, the decision as to whether it is "appropriate" to bar a person carries no right of appeal to the Upper Tribunal.

Introductory matters

4. This is the Appellant's appeal against the Disclosure and Barring Service's final decision, dated 24 July 2023, to include him on the Children's Barred List under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act').

5. We held an oral hearing of the full appeal at Field House in London on 30 May 2024. The Appellant attended in person, representing himself, and supported by a McKenzie friend. Mr David Tinkler of counsel appeared on behalf of the Respondent Disclosure and Barring Service (or 'the DBS').

The rule 14 Orders on this appeal

6. We refer to the Appellant as 'PQ' (not his real initials) in order to preserve his privacy and anonymity. For that same reason, we make the rule 14 Orders included at the head of this decision. We are satisfied that neither the Appellant nor the children nor any of the teaching professionals involved should be identified in this decision, whether directly by name or indirectly. We are also satisfied more generally 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. Furthermore, to avoid the possibility of 'jigsaw identification' (by which we mean pieces of evidence might be put together to identify those concerned), we refer to the schools in which PQ variously worked as 'School A', 'School B' and 'School C' respectively and to the supply teaching agency that placed him in those schools as 'the Agency'. We refer to the Council involved as 'the Local Authority'.

A very brief summary of the background to this appeal

7. This appeal concerns events that all took place in 2022. PQ worked as a teaching assistant at School A from April 2021 through to March 2022. He was then a teaching assistant at School B from March 2022 through to June 2022. This was

followed by work in a similar role at School C from June 2022 through to July 2022.

8. In January 2022 PQ became aware of rumours circulating in School A that he had engaged in sexual activity with a female student. He undertook enquiries on his own initiative with several students to try and discover the source of the rumour. In February 2022 School A suspended PQ while the Agency carried out its own investigation. In March 2022 the Agency concluded the allegation of sexual harm was unfounded and provided PQ with bespoke 1-2-1 safeguarding training. PQ did not return to work at School A but went to work at School B. In June 2022 a student at School B disclosed that PQ had been going to her lessons and seeking her out. School B then terminated the contract. Further safeguarding concerns were raised at School C and PQ's appointment there was ended in July 2022.

9. The concerns were reported to the Local Authority's LADO and also to the police. The police took the view that the threshold for criminality had not been reached. The LADO convened a series of three Allegations against Staff and Volunteers (ASV) meetings with professionals who were concerned with the matter. These meetings took place on 22 July, 26 September and 11 October 2022. Following the first of the ASV meetings School A referred PQ to the DBS. At the third ASV meeting all those present agreed that PQ represented a risk of harm or was unsuitable to work with children. Later in October 2022 PQ attended a disciplinary hearing with the Agency, following which he was dismissed for gross misconduct and again referred to the DBS.

The evidence and the late evidence

10. The bulk of the documentary evidence was in the Upper Tribunal bundle (pp.1-236), which we refer to as the main bundle. We also received late evidence from both parties which we now summarise.

11. On 27 May 2024, and so three days before the hearing, PQ sent the Upper Tribunal a letter together with summary grounds of appeal, an affidavit of truth and further detailed comments on the DBS allegations. Unfortunately, and for reasons that are not clear, a copy did not find its way to Mr Tinkler. This was, however, through no fault of the Appellant's. We allowed Mr Tinkler a short adjournment of 10 minutes at the start of the oral hearing to read and digest the relevant material. This also allowed the Appellant's McKenzie friend, who was running late, to arrive.

12. On 28 May 2024, and so two days before the oral hearing, the DBS sent through by e-mail a further bundle of some 104 pages, which it described as a 'Further Information Gathering Bundle' (which we refer to as the extra bundle). We understood from PQ that it had been sent to him at around the same time. This further bundle comprised e-mails and other documents from School A. The extra bundle did not find its way to the panel members until the afternoon of 29 May 2024. It was not accompanied by any explanation as to its very late arrival nor was there any formal application for it to be admitted. The Appellant did not have a copy with him at the hearing and told us he had only had time to 'skim read' the extra bundle. We were not happy with the apparent assumption by the Respondent that we would simply admit such a volume of (mostly) new material at such a late stage in the proceedings. More importantly, we were concerned that PQ might be put at some disadvantage by its late admission. Mr Tinkler

indicated it was principally background material from School A and undertook to read out any relevant passages from the extra bundle. We took the view that was a fair and just way of proceeding. In the event it mattered not, as our decision to dismiss the Appellant's appeal is not based on any material from the extra bundle.

The statutory framework

Introduction

13. There are several ways under Schedule 3 to the 2006 Act in which a person may be included on one or other of the two barred lists. This appeal is concerned with what might be described as discretionary barring. This may be on the basis of either an individual's "relevant conduct" – in effect their past behaviour – paragraphs 3 & 4) or the risk of harm they pose now and for the future (paragraph 5). This appeal concerns the former of those two discretionary routes to barring, which we now consider in more detail.

The basis for a "relevant conduct" barring decision

14. Paragraphs 3 and 4 of Schedule 3 to the 2006 Act deal with behaviour or "relevant conduct" in relation to children, and are in issue in the present case. So far as is relevant, they provide as follows:

> **9.**(1) This paragraph applies to a person if—
>
> (a) it appears to DBS that the person —
>
> (i) has (at any time) engaged in relevant conduct, and
>
> (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.
>
> **10.**(1) For the purposes of paragraph 9 relevant conduct is—
>
> (a) conduct which endangers a child or is likely to endanger a child;
>
> (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
>
> ...

(2) A person's conduct endangers a child if he—

(a) harms a child,

(b) causes a child to be harmed,

(c) puts a child at risk of harm,

(d) attempts to harm a child, or

(e) incites another to harm a child.

…

15. However, the issue in this case was not so much the meaning of "relevant conduct" but rather whether the DBS had established the allegations it had made against PQ and whether its findings involved any mistake(s) of fact or legal error.

Rights of appeal

16. 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.

17. 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" and so, in effect, is non-appealable. We now turn to the details of this appeal.

The ASV meetings and the Agency's decision to dismiss the Appellant

18. As noted above, the LADO convened a series of three ASV meetings with professionals who were concerned with the matter. These meetings took place on 22 July, 26 September and 11 October 2022. The summary and outcome of the third and final ASV meeting was expressed as follows:

> LADO summarised that there have been 8 allegations against this agency employed learning support assistant / teaching assistant. At a time when he was aware that he was in the process of investigation regarding his behaviour with students by [the Agency], he took employment at [a 6th Form college], against their advice. All of the allegations although they differ in severity, involve him attempting to build relationships with young female students, particularly those most vulnerable. In every educational setting he has worked in this authority his approach to young females has raised concern. The LADO said that he met threshold for each of the following categories:
>
> • Behaved in a way that has harmed a child or may have harmed a child.
>
> • Behaved towards a child or children in a way that indicates they may pose a risk of harm to children.
>
> • Behaved or may have behaved in a way that indicates they may not be suitable to work with children.
>
> While he is clearly unsuitable to work with children and while it has not been evidenced that he had caused actual harm, his behaviour is such that it can be established that he may have harmed the children we have considered today and may pose a risk of harm to harm to children in the future.

19. The Agency's dismissal letter dated 28 October 2022, following the disciplinary hearing, described the gross misconduct in essentially the same terms (main bundle p.233).

20. We now turn to consider the DBS process itself.

The DBS referrals, the investigation and the decision to bar

21. For present purposes we need only summarise the main features of the DBS process as follows. It will be recalled that there were two referrals to the DBS. The first was by School A after the first ASV meeting (main bundle p.32). School A reported that:

> This staff member is currently under investigation for repeated concerns related to vulnerable students. We are currently working through the ASV process which is under review, but the LADO and representatives at the meeting feel that this is already at the situation that the outcome is likely to

> be substantiated concerns about this individual being a risk to children and therefore not suitable to be working with children. The final ASV meeting is very likely to conclude substantiated and the police are also involved.

22. On 20 October 2022 the DBS duly sent PQ an "early warning" letter to the effect that they had received information from School A "about allegations of a safeguarding nature relating to four students, and it appears that the agency ended your contract" (main bundle, p.21). No further details were provided by the DBS at that stage.

23. The second referral to the DBS was made by the Agency after the third ASV meeting and following the Appellant's dismissal by the Agency for gross misconduct. It summarised the allegations in the following terms (main bundle p.189):

> In total, there were allegations from 7 different students at [School A and School C] of inappropriate professional boundaries, contacting students on social media (Tik Tok, Twitter, Snapchat), liking student's photos and videos, unnecessary frequent contact with student on her way to school, and the student mentioned she didn't used to see [PQ] normally, inappropriate comments made to students (telling one student she was pretty), inappropriate and unnecessary physical contact with students (student disclosed they used to link arms), further attempt to develop relationships with female students – inappropriate boundaries around children and young people, after attending one to one session with [the Agency's] Learning and Development Manager on 11th March 2022, gifting item to student (jacket) – although the student's mum was aware and accepted the gift, allowing female student to wear his hat and watch. Not allowing a male student to wear his hat and watch; working through other Agencies, whilst being under the investigation. Failure to inform [the Agency that PQ] was working with children and vulnerable adults whilst the investigation was ongoing.

24. On 11 May 2023 the DBS sent PQ a "minded to bar" letter (main bundle, p.25), together with disclosure of associated documentation relied upon by the Respondent in reaching its decision (main bundle, pp.31-84). This letter set out the DBS's preliminary (and global) finding, on the balance of probabilities, that:

> On 19 October 2022, the LADO of [the Council] found six allegations against you substantiated and made a finding that you were unfit to work with children. These allegations related to unprofessional conduct and suspected grooming type behaviour by you towards female students in [School C, School B and School A] between around February 2022 and September 2022.

25. Shortly afterwards PQ responded in detail to the DBS minded to bar letter, explaining why he rejected the DBS allegations and including various supporting evidence (main bundle, pp.85-106).

26. On 24 July 2023 the DBS issued its final decision letter, notifying PQ that the DBS had decided it was appropriate and proportionate to include him on the Children's Barred List (main bundle, p.107). The final decision letter confirmed the global finding that had been provisionally made in the minded to bar letter. The essential

core of the DBS's reasoning was contained in the following passage from the final decision letter:

> 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. You have also 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.
>
> We are satisfied a barring decision is appropriate. This is because we are satisfied that over a period of more than 6 months, in three different employments, you engaged in unprofessional and harmful behaviour towards multiple female children under your care.
>
> You repeated this behaviour despite previous interventions by employers, and in spite of having lost previous employment due to this behaviour. A LADO investigation into your conduct involved staff from three schools over a period of several months, and significant weight has been given to the various safeguarding professionals findings that you are unsuitable to work with children and that six of the allegations made against you were substantiated.
>
> You did not moderate or limit your behaviour, in spite of safeguarding training and increasing experience in your role. DBS is satisfied with its finding that you have repeatedly engaged in unprofessional physical contact with female children, and to have repeatedly breached professional boundaries whilst employed as a Teaching Assistant. We are also satisfied that you repeatedly and deliberately initiated or attempted to initiate contact with current and former pupils via social media, in spite of ongoing investigations into your conduct towards female pupils.

27. A fuller justification for the DBS's decision to bar the Appellant was contained in the Respondent's Barring Decision Summary document (main bundle, p.114).

The overarching grounds of appeal to the Upper Tribunal

28. PQ had three overarching grounds of appeal, which he neatly summed up in his closing submissions under three headings as being (1) the evidence requirement, (2) fair process and (3) proportionality.

(1) <u>The evidence requirement</u>

29. By the evidence requirement, the Appellant means that the DBS should have reliable and substantial evidence before barring anybody from e.g. working with children.

30. The Appellant's argument, in essence, is that the DBS is acting in his case on mere rumour and unsubstantiated claims without any supporting evidence. In that context he drew to our attention the recent decision of the Court of Appeal in *DBS v RI* [2024] EWCA Civ 95, which we have duly taken into account.

31. We accept that if the DBS had relied for the basis of its barring decision solely on the fact that there were rumours circulating in January 2022 that PQ had been involved in a sexual relationship with an ex-student (and under-age girl), and without having made any other findings, then this ground of appeal would undoubtedly have considerable merit. However, that was not the position. That

rumour had been investigated by the Agency and the outcome of its inquiry was that the allegation was unfounded. The DBS accepted that finding – it was no part of its case for barring that there was any substance to the original rumour in question. This ground of appeal can only properly be addressed by considering the findings that the DBS did rely upon, which we consider in turn further below after having reviewed the fair process and proportionality grounds.

32. Before doing so, however, there is one more general point that we need to make. On several occasions at the oral hearing the Appellant argued that the DBS findings (and, by the same token, the ASV findings) were unreliable because they were not supported by any written evidence (let alone e.g. sworn witness statements). However, this argument is to misunderstand the nature of the DBS process. It is not part of the criminal justice system with all the restrictive conditions that apply to the admissibility of evidence. Thus, the DBS can rely on pure hearsay evidence. The question therefore is not whether hearsay evidence is admissible but rather what weight should be attached to it.

33. Thus, the safeguarding jurisdiction is not about punishing people. It is about protecting children (and vulnerable adults, where relevant) from the risk of harm (which may or may not happen). As the Divisional Court has observed, "the function of DBS is a protective forward-looking function, intended to prevent the risk of harm to children by excluding persons from involvement in regulated activities. DBS is not performing a prosecutorial or adjudicatory role" (*R (on the application of SXM) v The Disclosure and Barring Service* [2020] EWHC 624 (Admin) at paragraph [38]; see also paragraph [61] of the same decision).

(2) Fair process

34. By fair process, the Appellant argues that the DBS must conduct a fair and thorough investigation before making any barring decision and must allow the person concerned to respond to the claims made against them.

35. The fairness of both the LADO/ ASV meetings and the Agency's disciplinary process are not matters for us. So far as the DBS process is concerned, in the Appellant's case the DBS followed its standard operating procedure, as laid down within the framework of the 2006 Act. In particular, PQ was sent a copy of the evidence on which the DBS proposed to rely, as an annex to the minded to bar letter, and invited to make written representations. He duly availed himself of that opportunity, making detailed comments, and it is clear from the Barring Decision Summary that those representations were considered by the DBS decision-maker. There is no legislative requirement for the DBS itself to hold a hearing of any sort. We are satisfied that PQ was subject to a fair process in terms of the DBS involvement.

(3) Proportionality

36. By proportionality, the Appellant contends that a barring decision should only be made where there is clear evidence of a real risk. Accordingly, he argues, the decision to bar someone must be proportionate to the risk involved.

37. Determining proportionality primarily involves determining whether the Appellant posed a continued risk of harm to children at the time of his inclusion on the barred list. However, it also involves taking into account the impact on the Appellant of the barring decision and answering the four questions set out in the case of *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1

AC 621. Those four questions are (1) is the legislative objective sufficiently important to justify limiting a fundamental right?; (2) are the measures which have been designed to meet it rationally connected to it?; (3) are those measures no more than are necessary to accomplish it?; and (4) do they strike a fair balance? We must also bear in mind that where it is argued that a decision to include a person on a barred list is disproportionate to the relevant conduct or the risk of harm relied on, case law requires that we must afford appropriate weight to the judgement of the DBS as a body empowered by statute (in the form of the 2006 Act) to decide appropriateness (see e.g. *ISA v SB and RCN* [2012] EWCA Civ 977 at paragraphs 17-22). Taking all those matters into account, we cannot say that the decision to bar was disproportionate. The DBS decision to include the Appellant on the children's barred list might be viewed by some as unduly cautious, given the likely level of risk, but we cannot say it was disproportionate.

The Appellant's oral evidence

38. We had the advantage over the DBS in that we heard at first hand from PQ when he gave oral evidence before the Upper Tribunal. In particular, he spent most of the morning session of the oral hearing (some two hours) answering questions from Mr Tinkler (appearing for the DBS).

39. As Bean LJ observed in *DBS v RI*, "where relevant oral evidence is adduced before the UT in an appeal under s 4(2)(b) of the 2006 Act the Tribunal may view the oral and written evidence as a whole and make its own findings of primary fact" (at [31]). As Bean LJ added later, "where Parliament has created a tribunal with the power to hear oral evidence it entrusts the tribunal with the task of deciding, by reference to all the oral and written evidence in the case, whether a witness is telling the truth" (at [37]). In the same Court of Appeal judgment, Males LJ ruled (at [55]) that where an appellant gives oral testimony:

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

40. At the outset of his closing submissions, Mr Tinkler made five short points which he submitted cast some doubt on the Appellant's credibility.

41. First, he pointed out that PQ in his oral evidence had denied ever having used the expression "mini-investigation" (in relation to Allegation 1), whereas in fact PQ had used this very term in his response to the minded to bar letter. We do not read too much into that contradiction – the Appellant's lengthy response to the minded to bar letter had been written a year or so ago and we are inclined to regard his denial as an instinctive and defensive response. The important point is rather that PQ does not deny making enquiries among students of his own initiative.

42. Second, PQ asserted in oral evidence that he had done what he was told to do in that respect (i.e. let the rumour fizzle out) whereas in fact he had done the opposite (making enquiries, and so stoking the rumour). There is some force in this submission.

43. Third, in relation to gifting the jacket, PQ had not explained why he had decided not to gift it until he'd left the school. Mr Tinkler suggested the only likely explanation was a realisation on PQ's part that gifting the jacket was a problematic act. Again, there is some force in this argument.

44. Fourth, Mr Tinkler referred to what he described as a lack of candour on PQ's part in not taking the Agency's advice not to work with children while its investigation was ongoing. We have some doubts about this argument, not least as PQ was not at that time under any legal duty to refrain from such work.

45. Fifth, and finally, Mr Tinkler noted that in his oral evidence PQ had said there was nothing unusual in teaching assistants giving presents to their students although he later accepted that there was the potential by doing so to put the child or young person in an embarrassing situation and potential position of harm. We are not sure this really goes to credibility, but rather is a reflection of the Appellant's still somewhat limited awareness of safeguarding issues.

46. It follows that we do not accept all of Mr Tinkler's submissions on PQ's credibility. Equally we do not necessarily accept everything that the Appellant told us at face value. Ultimately it is a question of assessing all the evidence and deciding which, on the balance of probabilities, is the more likely account in any given situation. We now turn to the details of the specific allegations, bearing in mind the Appellant's argument about the evidence requirement and our response as summarised above.

The ASV allegations accepted by the DBS as having been made out

47. The final ASV meeting found six allegations against PQ to have been substantiated. These allegations were then adopted by the DBS and framed in the following terms (as now both anonymised and italicised) in the Barring Decision Summary.

48. *Allegation 1: While the initial concerns from School A in March 2022 that PQ was having a relationship with a child were considered to be unfounded, it was noted that there were five or six students involved in these rumours. It is stated that PQ was speaking to them on a one to one basis about these rumours, pulling some of them out of lessons, writing messages for them on classroom whiteboard asking who told them, when did they hear the rumour, etc.*

49. There is no real dispute over the essence of this allegation. The DBS accepts that the concerns that the Appellant had had a relationship with a student at School A were unfounded and false. On the other hand, PQ admits he did speak to students to try and identify the source of the rumours and now acknowledges that acting as he did was wrong.

50. The DBS case, in summary, was that the way PQ conducted his investigation into the rumour was likely to cause emotional harm to the children involved. For example, PQ stated (in his response to the 'minded to bar' letter) that he "confronted" a student about the rumour but that the student "pointed fingers" elsewhere (main bundle, p.87). Furthermore, five or six students reported that PQ spoke to them on a one-to-one basis about the rumour and some of them were taken out of lessons to do so (main bundle, p.55). PQ wrote messages about when students first heard the rumour and from whom, using a mini-whiteboard to communicate with students directly about the allegation. In short, PQ's approach was unprofessional and likely to place the students under pressure and cause

conflict between students. At the very least, his conduct was likely to cause the students to feel shame and embarrassment. Moreover, it was more likely to stoke (rather than to quash) the rumour that PQ had engaged in sexual activity with a student.

51. The Appellant explained that at the time in question he had not received any training in how to deal with rumours of this nature. His response was, he said, a natural human reaction to try and get to the bottom of the source of the rumour so as to dispel it. He now accepted with the benefit of hindsight that it "may not have been the best approach". He also accepted that it had been wrong to conduct his own investigation.

52. As already noted, there is no material dispute over the substance of this allegation. Despite his protestations that he had acted in accordance with the instructions of his line manager, we are satisfied that he disregarded the advice not to do anything about the rumour and, in contradiction to this advice, initiated his own inquiries which only served to fan the flames of the rumour and to put the students concerned at risk of emotional harm.

53. The DBS made no material mistake of fact when concluding that Allegation 1 was made out. What the Respondent then made of that finding was then relevant to the question of appropriateness, which as noted above is exclusively a matter for the DBS.

54. *Allegation 2: While at the same school, following this investigation, PQ met a different vulnerable female student outside of school in the presence of another staff member. Information provided indicates that as part of the conversation, PQ mentioned to the child that 'if she altered a particular part of her computer' then 'her parents would not be able to access that information'. The full context of this conversation is not available, however it is considered concerning that someone in a position of trust would provide a child advice on how to conceal things from her parents. It appears reasonable to consider that PQ would have been more aware of the inappropriateness of his actions. No information is available as to who the other staff member was or the nature of the meeting, although it is noted that the 2nd staff member was also no longer employed by the school and that a safeguarding concern had been raised regarding them.*

55. The DBS based this finding on the minutes of the first ASV meeting, based on the LADO's summary of the incident (main bundle, p.54)

> I received a number of emails from School A in relation to a Learning Support Assistant … The concern was that an LSA arranged for a student R to meet up with PQ, outside of the classroom, outside the jurisdiction of School A. It was noted by staff and parts of the conversation between the child and PQ were noted - particularly in relation to PQ mentioning to R that if she altered a particular part of her computer that in fact her parents would not be able to access that information.

56. The Appellant's response is a flat denial. He states that he was chatting with a colleague in the staff car park when the student R approached them. They had a discussion about preparations for forthcoming examinations. There was no discussion about changing passwords or disabling parental access to a computer or mobile phone.

57. We do not consider on the balance of probabilities that, taken as a whole, the evidence supports Allegation 2. The allegation relies on second or third hand hearsay evidence involving snippets of a conversation, recognising that the full context of the conversation is not available. Weighed against this there is now a short written statement by the Appellant's colleague, supporting PQ's account. We have considered the late evidence in the extra bundle provided by the Respondent in the form of contemporaneous e-mails but they are not conclusive. Indeed, the student R is recorded as stating that "she didn't discuss disabling it and he didn't suggest it" (extra bundle, p.45). Furthermore, the allegation as framed imputes a degree of devious grooming behaviour on the part of PQ. We find that is inconsistent with the Appellant's open and somewhat naïve character. The allegation is also inconsistent with the undoubted fact that PQ sought parental consent before gifting the jacket, which is the subject matter of allegation 3, to a student.

58. We therefore conclude that Allegation 2 involves a material mistake of fact by the DBS. It follows that Allegation 2 is not made out.

59. *Allegation 3: PQ then attempted to meet another female student immediately following his dismissal from School A. This involved waiting outside the school and looking for the child, before trying to arrange a meeting with her via another child. He appears to have subsequently gifted the child he was attempting to meet a jacket. While the child's mother was aware of the gift, she was not aware of the allegations against PQ or the concerns regarding his behaviour. This behaviour speaks to PQ's persistence in contacting children even following dismissal and an awareness that he was acting inappropriately.*

60. There is no dispute over the core fact that the Appellant gave a female student a jacket. The DBS formed the view that PQ's actions were unprofessional and breached professional boundaries. The DBS further submits it was entitled to conclude that the act of giving a valuable and/ or desirable jacket to a former student was conduct which endangered or was likely to endanger a child as it amounted to "grooming type behaviour" (main bundle, p.8). The DBS also took the view that PQ's decision to wait until he had left School A before giving the student the jacket demonstrated at least some awareness on his part that the gift was, or may be, inappropriate. The DBS noted that PQ was reported to have told other students who had asked him for items of his clothing that "it would not be right" (main bundle, p.79). The DBS argument is that there was a real likelihood that the gift would cause the student to feel uncomfortable, particularly given the original rumour that had circulated about PQ at School A. There was also a risk that the gift would cause the student to contact PQ (he had been unable to give the jacket to the student personally, as he had planned, and instead gave it to her friends to pass it to her on his behalf: main bundle, pp.56-57). Therefore there was, according to the DBS, a real likelihood that the gift would give rise to rumours regarding the relationship between PQ and the student.

61. The Appellant told us that the student, who was a key student of his (and so not "any random student"), liked his jacket because it had her nickname on the back. He told the student that he would give the jacket to her as a gift when he left the school, stating that he gave the jacket to the student "with no strings attached" and with "no ill intent" (main bundle, pp.158-159). He denied that his decision to delay giving her the jacket until he had left School A reflected an awareness on his part that the gift was inappropriate – he had simply decided not to hand it over

until he had left. He told us that it was not uncommon for teaching assistants to give students gifts. He also pointed out that he had contacted the student's mother by e-mail to check that he had her permission to give the student the jacket. He accepted that he had met the student later by chance and she had thanked him for the jacket. He could not say whether or not the student's friends would ask her how it was that she had come to have PQ's jacket.

62. We do not consider on the balance of probabilities that PQ was in fact actively involved in grooming the student in question, but we can see how the DBS came to take that view. On the contrary, we consider that his actions reflect a combination of a desire to be liked and his lack of understanding of the importance of professional boundaries. Be that as it may, the bottom line is that there is no factual dispute over the core allegation – that he gave the student a jacket which had the effect of exposing her to the risk of emotional harm. The DBS's reliance on this conduct in support of the barring decision is then ultimately of relevance to the question of whether it was appropriate to bar (and so exclusively a matter for the Respondent).

63. Accordingly, we find no material mistake of fact by the DBS in relation to Allegation 3.

64. *Allegation 4: Whilst employed at School B, a student stated that PQ had been 'seeking her out' in lessons and attempted to get her to join a group on Instagram. The child reported this behaviour, and PQ claimed that the social media group he had invited the child to was in relation to his work as a youth pastor. The LADO checked with the church PQ claimed to be a youth pastor at, and was told he did not hold this post and had not previously.*

65. This DBS finding was based on the following account provided at the final ASV meeting by the Assistant Head Teacher at School B (AHT(B)), who noted that PQ:

> was employed between March and June '22 when a concern was brought to their attention. The student disclosed that [PQ] had been going to her lessons and seeking her out. He asked her to join lnstagram group. She alerted the safeguarding team and school staff terminated his contract and informed the agency of his termination. He mentioned that he was a youth pastor, and that the lnstagram group was for that purpose.

66. The Appellant denied this allegation, saying that there was no witness evidence to support it. In particular he denied seeking a student out or inviting her to join an Instagram group. He argued that while he did not hold any formal position in his Church, his unofficial ministry was a matter of common knowledge with students and e.g. clips on TikTok would pop up on students' social media feeds without any intervention on his part.

67. On the face of it this is an example of a "she said, he said" type of allegation. Although the evidence may not be compelling, we cannot say that the DBS decision to find this allegation proven involves a mistake of fact. We take into account (i) there is no apparent reason why the student concerned should raise a false safeguarding concern; (ii) management at School B plainly decided the matter was sufficiently serious to terminate PQ's placement with them; and (iii) the professionals at the ASV meetings found the allegation made out.

68. The challenge to Allegation 4 on the basis of a mistake of fact is accordingly not made out.

69. *Allegation 5: While working within [School C], PQ was seen putting his arm around a girl and resting his head on her shoulder, and as such concerns were identified regarding his conduct around female students. Concerns were also raised that PQ had allowed female students to wear his watch and hat, and had been seen wearing the hat of a female student.*

70. This DBS finding was based on the account provided at the first ASV meeting by the Deputy Head Teacher at School C (DHT(C)), and strictly involves two discrete sub-allegations. First, DHT(C) reported that a male student had said he had asked to wear PQ's hat and watch, but had been told that he could not. The male student subsequently saw a female student wearing PQ's hat and watch. Secondly, DHT(C) further reported that PQ had demonstrated overfamiliarity with a student by allowing her to put her head on his shoulder, and then putting his own head on her shoulder. DHT(C) also reported that students had seen PQ putting his arm around the female student [main bundle, p.58].

71. The Appellant denied both sub-allegations. As to the former, he argued that students had at times taken his hat or watch to wear when he had left them unattended, but this was without his permission and he had always asked for them to be returned. As to the latter, he denied that any inappropriate physical contact had taken place. He noted that the female student in question had also denied that any such contact had taken place, when interviewed by DHT(C), citing her faith as a reason why any such contact with an unrelated adult male would have been forbidden.

72. We do not consider there is sufficient evidence to support the first sub-allegation that PQ actively allowed female students to wear his hat or watch. The inference that he did so while refusing such consent to a male student is simply too tenuous.

73. However, we do find on the balance of probabilities that the second sub-allegation is made out. We take into account the female student's denial that any such incident took place but that cannot be determinative, not least as she may have felt ashamed about such conduct. We bear in mind that according to DHT(C) School C "had spoken to [PQ] several times about his over familiarity and casual behaviour" (main bundle, p.58) – the absence of any formal record of such advice does not mean that it was not given informally. We also note that DHT(C) reported that the incident had been corroborated by other students – and there is no reason to think that such other students had any reason to concoct a false allegation.

74. It follows that we uphold the more serious of the two aspects of Allegation 5. The DBS reliance on the first sub-allegation, which we find not to be made out, is not a material mistake of fact in all the circumstances.

75. *Allegation 6: A student revealed that she was 'accidentally' meeting PQ regularly away from school, and that she had been in contact with him via social media. The child stated that she would repeatedly see PQ on her way to school. She reported that in her contact with him he would hug her, and that he had followed her on social media. This included his repeatedly liking her photos and videos, even ones he had previously liked. The student stated that he had messaged her online saying it had been good to see her, and that she had subsequently blocked*

him. This appear to have occurred several months after he had been dismissed from his role at the school where the child attended. Again, it is considered that this persistence in attempting to make contact with a child, even post dismissal, is significantly concerning.

76. This final DBS finding is based on disclosures that were made by a student ('A') at School A in September 2022 (so some time after PQ had left that employment). A teacher at School A reported two conversations with student A, as recorded in the minutes of the second ASV meeting (main bundle, pp.65-66, and now as suitably anonymised):

> **So, what happened on Friday 17/09/22**
>
> I had a free period … A comes to me and asks me about PQ she said "do you know what school PQ teaches at." I ask "isn't he at School C?" to which she replied "no he has left School C for the same reason he left School B. I said "and what was that for?" and she said "nothing". Later on during the lesson A came to me again and asked me how old PQ was. I answered and said "he is either 24-26 years old I think" and while I was answering her, her friend who was behind me whispered "tell him" (him being me). I turned and asked "what did you say" to which she replied "nothing". After the lesson I asked [a colleague] if A had asked her anything, to which she said "she was asking about PQ's age". I left the lesson feeling suspicious and thought about it all weekend and came in to school looking for A as I had never taught her before. I didn't want to raise any alarm bells just yet until I had spoken with her because she must have come to me because in some way she trusted me. I wasn't able to find her until today Thursday 22/09/22.
>
> **Today's conversation 22/09/22**
>
> A came into my classroom and I sat her down and asked her why she asked me those questions. She became very defensive, so I knew something was up so I started by saying: "You will not be in trouble if you happen to be in contact, sending messages, photos or anything to an adult. It becomes a serious issue when an adult responds or initiates anything." I assured her she would be fine, then she opened up. She said she first met PQ at a school club and he called her out by her name. A said she was shocked he knew her name and asked how he knew it. She said he said "I see you walking around the school and people have said your name" then later on during the club he commented on how beautiful she was and that she looks like a model.
>
> Skip a few months and PQ had left School A. A was walking down the road and bumped into him, they spoke for a bit and then they went on their way. However, she noticed after that day he started following her on Tik-Tok and didn't know how, but she stated she does have a popular Tik-Tok and its easy to find because its public and all you have to do is search her name. PQ was initially liking a number of her photos/videos and she mentioned he would circle back around and like the same said images/videos again which she thought was weird. Then another day she saw him again and they spoke but in the evening he messaged her on Tik-Tok, she said the message said something like "it was nice bumping in to you stay blessed". A didn't reply but she showed her friends and unfollowed him and blocked him. She mentioned when she did this he also unfollowed her.

> To this day she says she sees him frequently on her way to school and she mentioned she didn't use to normally. She says around 8:14am nearly every morning he is in the same spot. She didn't think it was that serious when she was telling me and she has been speaking to him every time she sees him. After our talk today she knows now it is a serious matter but she is worried about seeing him now. She also said she has heard rumours that he tried to add a couple girls snapchats.

77. Student A gave an essentially similar account in a subsequent interview with the police, which was summarised in the minutes of the third ASV meeting (main bundle p.79). The police officer noted that "She is defensive in regards to getting PQ into trouble. She realises that boundaries have been crossed but does not want to appear rude by ignoring PQ if she runs into him. A was open but sways between being defensive and understanding the concerns that have been raised… She views him as being cool and that he made her feel special. She denies meeting him on her own". The police's overall conclusion was that "His actions have not met threshold for criminal investigation. We will be contacting him about the issues have been brought to the attention of the police. Police are worried about his behaviour but it is not criminal. For some reason he is unable to adhere to professional boundaries and there seems to be a lack of understanding considering he has been terminated from several posts in relation to the same" (main bundle, p.80).

78. The Appellant denied setting out to meet Student A privately. He pointed out that he lived locally and so it was inevitable that he would encounter former students in the area. He acknowledged that he had met Student A and a friend by chance at a shopping centre in August 2022. He also accepted that he had given her a side hug on farewell – "not a hug of endearment but rather a cultural norm" – with no sinister intention. He now appreciated that having physical contact with a student is wrong (main bundle, p.163). He denied repeatedly liking her social media photos and videos or making any personal comments as alleged.

79. There is no factual dispute in respect of the specific allegation that the Appellant hugged the former student in question on taking leave of her at the shopping centre. We do not find that PQ had any ulterior motive in doing so, and accept that it reflected a cultural norm on his part. However, the fact remains that the Appellant now belatedly recognises any such physical contact with a student (or ex-student) as wrong. However, we also find the other aspects of this allegation to be made out. Student A's account to both the teacher at School A and the police was both detailed and internally consistent. There is no suggestion that it was fabricated and we consider on the balance of probabilities that it is highly unlikely that it was concocted. On the contrary, all the evidence points to the fact that Student A liked PQ and did not want to get him into trouble. The unfolding exchanges with the teacher at School A, prompted in part by Student A's friend, were typical of the disclosure of a credible safeguarding concern.

80. Allegation 6 does not involve any material mistake of fact and is accordingly made out.

Conclusions on grounds of appeal

81. It follows that we conclude there is no error of law or material mistake of fact by the DBS in relation to five of the six allegations relied upon by the Respondent to support the barring decision. The exception is Allegation 2, which we find not to be sustained and to involve a material mistake of fact.

Disposal

82. We now have to consider the impact of our conclusions on the grounds of appeal on the overall decision by the Respondent to include the Appellant on the children's barred list. The fact that we have found that Allegation 2 is not made out does not undermine the overall DBS decision. Indeed, the Appellant's admitted conduct in (1) carrying out an inappropriate investigation into the original rumour (Allegation 1), (2) gifting a student his jacket (Allegation 3), and (3) hugging a student outside school (Allegation 6) amounts to relevant conduct such that it was appropriate to place PQ on the barred list. In that context we acknowledge that the issue of appropriateness is exclusively one for the DBS to assess. This conclusion is all the more so when taken together with the contested aspects of Allegations 4, 5 and 6, in respect of which the Appellant's challenges are dismissed. It follows that we see no realistic prospect of any other outcome were we to allow the appeal and remit the matter to the DBS for a fresh decision.

83. Having decided that the overall DBS decision does not involve any material 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.

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

Conclusion

85. It follows from our reasons as set out above that the Appellant's appeal to the Upper Tribunal must be dismissed.

Nicholas Wikeley
Judge of the Upper Tribunal

Mr John Hutchinson
Specialist Member of the Upper Tribunal

Ms Suzanna Jacoby
Specialist Member of the Upper Tribunal

Approved for issue on 5 June 2024