Neutral Citation Number: [2024] UKUT 426 (AAC) **Appeal No. UA-2022-001750-V**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

DMR

Appellant

- v -

Disclosure and Barring Service

Respondent

Before:	**Upper Tribunal Judge Church and Tribunal Members Hutchinson and Tynan**
Hearing date:	**8 November 2024**
Mode of hearing:	**Face-to-face hearing at Field House, London**

Representation:

Appellant:	Not represented
Respondent:	Ms Galina Ward KC of counsel, instructed by Ms Catherin Hazell (of DBS legal department)

On appeal from:

Decision maker:	The Disclosure and Barring Service
Reference No:	00964792938
Decision Date:	14 September 2022

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings. This order does not apply to: (a) the appellant; (b) any person to whom the appellant discloses such a matter or who learns of it through publication by the appellant; or (c) any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

SUMMARY OF DECISION

SAFEGUARDING (65)

This case raises issues about the extent to which the sharing by an individual of their personal beliefs on controversial topics can amount to 'relevant conduct' for the purposes of the Safeguarding Vulnerable Groups Act 2006 and the extent to which barring a person on the basis of their having shared their personally held views may be proportionate.

The panel decides that, while it would clearly be improper for the DBS to act as "thought police", barring people for the views that they hold or for expressing those views privately, the DBS did no such thing in this case.

The Appellant's opposition to gay marriage, his opposition to abortion in all but very limited circumstances, his belief that there are "only two biological genders" and his belief that transgender people require psychological help, are all beliefs which he is entitled to hold, and his simply holding those beliefs gives rise to no risk of harm to children. Neither does his expressing those views in his private life.

However, a person who works in regulated activity with children, such as a teacher, must take care when addressing such sensitive topics given the particular vulnerability of children, especially adolescent children, in relation to topics such as gender identity, sexuality and abortion. Making statements about such topics without taking such care is capable of amounting to 'relevant conduct' in relation to children because it may cause emotional harm or, if repeated, may risk emotional harm.

We find that it was irrational of the DBS to rely on DMR telling offensive jokes to colleagues as establishing 'relevant conduct' in relation to children in the absence of compelling evidence that he might repeat such conduct in relation to children. This was in error of law, but it was not material to the Barring Decision because the DBS was entitled to find that the things he said to students amounted to 'relevant conduct' in relation to children, and it would have placed DR's name on the children's barred list without relying on DMR telling such jokes. Given the potential for emotional harm as a result of his words, its decision to do so was not disproportionate.

Sutcliffe v Secretary of State for Education [2024] EWHC 1878 (Admin) discussed.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Disclosure and Barring Service did not involve any material mistake of fact or law. It is confirmed.

REASONS FOR DECISION

Introduction

1. This appeal is about the decision of the Disclosure and Barring Service (**"DBS"**) made on 14 September 2022 to place DMR's name on the children's barred list (the **"Barring Decision"**) on the basis that he had engaged in 'regulated activity' for the purposes of the Safeguarding Vulnerable Groups Act 2006 (the **"SVGA"**) by reason of his having worked as an English teacher, and he had engaged in 'relevant conduct' in relation to children for the purposes of the SVGA.

2. Somewhat unusually, the 'relevant conduct' relied upon by the DBS in this case concerned only things that DMR had said.

3. The appeal raises interesting issues about the extent to which the DBS may place someone on a barred list simply for sharing their personally held views on sensitive or controversial topics.

Factual and procedural background

4. DMR was at the relevant time employed by an academy trust (the **"Trust"**) as an English teacher at a secondary school (the **"School"**). DMR had been teaching for approximately 20 years.

5. On 18 May 2021 DMR was suspended by his employer following allegations that he had shared inappropriate personal views with students, had told offensive homophobic and racist joke and used transphobic language in front of colleagues, and had acted unprofessionally towards a student who had told him that they were questioning their gender identity.

6. Following a disciplinary hearing DMR was dismissed by the Trust on 2 July 2021. The Trust referred DMR to the Teaching Regulation Agency (**"TRA"**), which in turn made a referral to the DBS.

7.

The DBS was sent a letter explaining that DBS was considering whether to place his name on the children's barred list and inviting him to make representations should he consider that he shouldn't be barred, which he duly did.

8. DBS carried out an investigation which amounted to a review of the paper evidence provided in relation to the referral, including DMR's written representations. It did not hear any live evidence. It explained its findings of fact in its Final Decision Letter dated 14 September 2022 (which was addressed to DMR) as follows:

> "- Whilst employed at [the School] in the role of English Teacher, you made comments to students that reflected your own personal views, which were considered to be offensive and inappropriate. These included comments to the effect of:
>
> - transgender people were mentally ill and need psychological help,
> - there are only two genders scientifically,
> - you don't believe in gay marriage,
> - you don't agree with BLM and that it is a Marxist theory,
> - you do not agree with abortion …
>
> -Whilst employed at [the School], you told offensive jokes which were considered to be homophobic and racist, and also used language that was considered transphobic in nature in front of staff …
>
> - You made inappropriate and harmful comments to a student who had shared that they were exploring their gender identity."

9. The DBS decided that the behaviour it had found DMR to have engaged in amounted to 'relevant conduct' for the purposes of paragraphs 3(3)(a) and 4 of Schedule 3 to the SVGA, and that it was appropriate and proportionate to include his name in the children's barred list (see paragraph 3(3)(b) of Schedule 3 to the SVGA).

10. DMR disagreed with the Barring Decision and applied to the Upper Tribunal for permission to appeal. His grounds of appeal were, in summary:

a.

the making of the Barring Decision before the TRA proceedings were concluded was procedurally unfair as it denied DMR an opportunity to present his case to clear his name of wrongdoing; and

b. the findings on which the DBS relied as establishing 'relevant conduct' in relation to children involve no criminality, and DMR has been unfairly branded a "danger" to children simply for telling the truth and upsetting people.

11. DMR argued that the Barring Decision was, for these reasons, unlawful and immoral.

12. I wasn't persuaded that either of DMR's grounds of appeal was arguable with a 'realistic' prospect of success but I nonetheless granted permission because I was persuaded that this case raised in important question of law. I said:

> "This application raises issues about the extent to which the sharing by an individual of their personal beliefs on controversial topics can amount to 'relevant conduct' for the purposes of the 2006 Act and the extent to which barring a person on the basis of their having shared personally held views may be proportionate. I consider that this justifies a grant of permission to appeal."

13. I made directions and listed the matter for a face-to-face hearing. My grant of permission was unrestricted.

Legal framework

The statutory scheme

14. There are multiple gateways under Schedule 3 to the SVGA to a person's name being included on a barred list.

The 'relevant conduct' gateway

15. In this case the DBS relied upon the 'relevant conduct' gateway. That required the DBS to be 'satisfied' of three things:

a. that DMR was at the relevant time, had in the past been, or might in future be 'engaged' in, 'regulated activity' in relation to children (see paragraph 3(3)(aa) of Schedule 3 to the SVGA);

b. that DMR had 'engaged' in (see paragraph 3(3)(a) of Schedule 3 to the SVGA) 'relevant conduct' (defined in paragraph 4); and

c. that it was 'appropriate' (and proportionate) to include DMR on the barred list (see paragraph 3(3)(b) of Schedule 3 to the SVGA).

16. If the DBS was satisfied of all three matters above, it was required to place DMR's name on the children's barred list.

17. DMR accepts that the 'regulated activity' requirement is met in this case by reason of his long career as an English teacher, so there is no issue with regards to 15 a. above.

18. There is very little dispute between the parties in terms of the facts of the allegations. Rather, the dispute centres around whether the things that DMR said amount to 'relevant conduct' in relation to children (i.e. issue b. in paragraph 15 above).

19. In terms of issue c. in paragraph 15 above, 'appropriateness' is not a matter for the Upper Tribunal unless the decision-making around appropriateness is irrational (see below). The issue of 'proportionality' is, however, a live issue in the appeal.

The Upper Tribunal's jurisdiction under the SVGA

20. Section 4 of the SVGA sets out the circumstances in which an individual may appeal against the inclusion of their name in the barred lists or either of them. An appeal may be made only on 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 made (see section 4(1) and (2) of the SVGA).

21. An appeal under section 4 SVGA may only be made with the permission of the Upper Tribunal (see section 4(4) SVGA).

22. Unless the Upper Tribunal finds that the DBS has made a mistake of law or fact, it must confirm the decision of the DBS (see section 4(5) of the SVGA). If the Upper Tribunal finds that the DBS has made such a mistake it must either direct the DBS to remove the person from the list or remit the matter to DBS for a new decision.

23. Following *DBS v AB* [2021] EWCA Civ 1575 (***"DBS v AB"***), the usual order will be remission back to DBS unless no decision other than removal is possible on the facts.

24.

If the Upper Tribunal remits a matter to DBS under section 4(6)(b) the Upper Tribunal may set out any findings of fact which it has made (and on which the DBS must base its new decision) and the person must be removed from the list until the DBS makes its new decision, unless the Upper Tribunal directs otherwise.

25. Section 4(3) SVGA provides that, for the purposes of section 4(2) SVGA, whether or not it is 'appropriate' for an individual to be included in a barred list is "not a question of law or fact".

The relevant authorities

26. The relevant principles regarding factual mistakes have been set out in several recent decisions of the Court of Appeal (see *PF v DBS* [2020] UKUT 256 (AAC); *DBS v JHB* [2023] EWCA Civ 982; *Kihembo v DBS* [2023] EWCA Civ 1547; and *DBS v RI* [2024] EWCA Civ 95). These decisions are binding on the Upper Tribunal.

27. In relation to whether it is 'appropriate' to include a person in a barred list, the Upper Tribunal has only limited powers to intervene. This is clear from the section 4(3) SVGA and relevant case law. The scope for challenge by way of an appeal is effectively limited to a challenge on proportionality or rationality grounds. The DBS is well-equipped to make safeguarding decisions of this kind (*DBS v AB* (paras 43-44, 55, 66-75)).

28. At paragraph [55] of *DBS v AB*, the Court cautioned:

> "[The Upper Tribunal] will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter…".

and at paragraph [43], the Court stated:

> "…unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity…, is a matter for the DBS".

29. In the subsequent Upper Tribunal case, *AB v DBS* [2022] UKUT 134 (AAC), the Upper Tribunal decided (albeit in the context of a case that was based on the 'risk of harm' rather than the 'relevant conduct' gateway) that *DBS v AB* meant

that the Upper Tribunal could consider, on appeal under the SVGA, a finding of fact by DBS that an individual poses "a risk" of harm but not a DBS assessment of the "level of the risk posed" (see [49]-[52] and [64]).

30. When considering appeals of this nature, the Upper Tribunal:

> "must focus on the substance, not the form, and the appeal is against the decision as a whole and not the decision letter, let alone one paragraph… taken in isolation": *XY v ISA* [2011] UKUT 289 (AAC), [2012] AACR 13 (at [40]).

31. When considering the Barring Decision, the Upper Tribunal may need to consider both the Final Decision Letter and the document headed 'Barring Decision Summary' that is generated by DBS in the course of its decision-making process. The two together, in effect, set out the overall substantive decision and reasons (see *AB v DBS* [2016] UKUT 386 (AAC) at [35] and *Khakh v ISA* [2013] EWCA Civ 1341 at [6], [20] and [22]).

32. The statement of law in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 indicates that materiality and procedural fairness are essential features of an error of law and there is nothing in the SVGA which provides a basis for departing from that general principle (*CD v DBS* [2020] UKUT 219 (AAC)).

33. DBS is not a court of law. Reasons need only be sufficient/adequate. DBS does not need to engage with every potential issue raised. There are limits, too, as to how far DBS needs to go in terms of any duty to "investigate" matters or to gather further information for itself, but it must carry out its role in a way that is procedurally fair.

The Appellant's oral evidence at the hearing before the Upper Tribunal

34. DMR represented himself at the hearing. Having sworn to tell the truth, he gave mixed evidence and submissions, and he made himself available to be cross-examined.

35. He explained that he had been a teacher for over 20 years and had a passion for teaching. He said he teaches his pupils about the importance of critical thinking, of attacking "the argument not the person", and of the importance of resilience, including developing the ability to listen to views that differ from their own.

36.

He accepted most of what he is alleged to have said, but he disagreed with the DBS's characterisation of it. He said that allegations that he had encouraged other pupils to bully the child identified as 'Pupil A' were lies.

Allegation 1: Sharing views on controversial topics

37. DMR said he did not initiate any conversations about gender, abortion, gay marriage or other controversial topics. Rather, some pupils (especially the pupil identified as 'Pupil B') had, knowing him to be a Christian, asked him probing questions about his personal beliefs in the 5-10 minute recess before class while he was setting up for a lesson.

38. These questions were on controversial topics such as evolution and how many genders there were. He said the pupils were persistent in their questioning, and he considered the best way to "shut down" the questions was to answer them. He considered this strategy to have been successful because once he had answered them there was no further discussion of the topics once the lesson itself started.

39. DMR accepted that he said the following things to his students:

    a. there are "only two biological genders"

    b. there are "only two genders" and "if people think that there are more than two genders they need psychological help"

    c. "We don't believe in gay marriage" (explaining that the "we" referred to Christians)

    d. "I'm a Christian, what do you think?" (in response to a question about whether he opposed abortion)

40. He denied having criticised transgender people or "attacked them as human beings", saying that he had simply stated that there are two genders, and that this was "fact".

41. He denied telling pupils that they were "naïve" or "stupid", saying that this would amount to "an attack on the pupils and not the arguments", which was not what he taught.

42. He denied saying that Catholics were inferior to Protestants, and said instead that when he was asked about the Roman Catholic faith he had simply replied that he was Protestant.

Allegation 2: telling offensive homophobic and racist jokes

43. In relation to the allegations about his telling offensive jokes, he accepted that he had recounted to colleagues in the staff room a joke that he had heard an A level student tell. He described this as a cultural joke" which referenced the former "Top Gear" presenter Richard Hammond's car accident and Elton John:

> "What have Elton John and Richard Hammond got in common?"
>
> "They both have skid marks on their helmets."

44. He conceded that the joke was "a little bit vulgar", but he denied that it was homophobic.

45. The second joke was based on a pun and relied on stereotypical views of Irish people. He explained that it had featured in a film called 'The Devil's Own':

> "Did you hear about the Irishman who blew up a car?
>
> He burnt his lips on the exhaust pipe."

46. He denied that this joke was "offensive", but he accepted that offence had been taken. He said he apologised to the staff member who was upset by it (saying "I apologise if I've upset you", even though he didn't feel that the jokes were offensive), but the staff member just shouted and was rude.

47. He denied "whispering" the joke or lowering his voice, and said he just told it in a normal tone of voice at a volume that wouldn't disturb anyone given that they were in a small room.

Allegation 3: inappropriate and harmful behaviour towards Pupil A

48. DMR said that he had spoken to Pupil A outside the classroom before class. Pupil A asked to be referred to by a new name and pronouns, explaining that they were questioning their gender identity.

49. DMR said he offered support to Pupil A should they want "help with gender dysphoria". When it was put to him that the appeal panel had said that he failed to comply with the Trust's Code of Conduct and its safeguarding policies, DMR said that he had used the same language as was in the Trust's policy on transgender: "gender dysphoria".

50.

He denied that his response to Pupil A was inappropriate and said it would have been "wrong for [him] to tell a lie". He had merely "told the truth". He emphasized this to the panel, saying: "two genders: fact". He told the panel it would have been wrong for him to "affirm a lie" and if he did then he wouldn't have been "doing his job as an educator to teach the truth". He said it was necessary to present young people with 'realities' to make them 'resilient learners'.

51. When DMR was asked to comment on the entries in the DBS's "Structured Judgement Process" document that refer to a "lack of empathy" and "irresponsible and reckless behaviour", DMR commented that it would have been irresponsible for him to have said that you could have "as many genders as you like".

52. He said that albeit that "perhaps I came across as blunt" he "can't apologise for what I said - it was correct".

53. DMR says he made an offer to the school to make a video apology to anyone offended by anything he said (although he maintains that everything that he said was simply the truth) but this offer was either ignored or rejected by his employer.

54. He strenuously denied that he failed to treat Pupil A, or any other pupil or staff member, with dignity and respect, and says rather that the pupils and the school failed to treat him with dignity and respect.

55. DMR complained that the hearing of his case before the TRA had been postponed four times, and this was in breach of his Article 6 right to a fair hearing within a reasonable time.

Discussion

56. The DBS didn't hear oral evidence, so none of the evidence relied upon by DBS had been tested. We had the advantage of hearing his live evidence. Ms Ward KC had the opportunity to cross-examine him, and the panel also had the chance to question him.

57. Much of what DMR disputed (such as making derogatory comments about non-binary people, encouraging other pupils to bully Pupil A, and saying that Catholics were inferior to Protestants) was not in fact relied upon by the DBS, and so was irrelevant.

58.

DMR was forthright in his evidence. There was remarkably little dispute about what was and wasn't said. When asked to do so he repeated the jokes that he had told in the staff room, and he confirmed what he told the students in terms of his personal views on sensitive topics. We found his evidence on this to be reliable.

59. We accepted DMR's evidence that he didn't whisper the jokes or lower his voice when sharing the jokes. We formed the impression of DMR as someone who didn't necessarily think about the offence that he might cause, didn't necessarily stop to consider whether his jokes were appropriate, and didn't consider telling such jokes to be a big deal. That he felt comfortable telling the jokes around colleagues does not, however, demonstrate that they were not racist or homophobic in character. We discuss this issue below.

60. Even if the DBS was mistaken about DMR telling the jokes to his colleagues in a whisper or *sotto voce*, we are not persuaded that DBS based the Barring Decision on any material mistake of fact. That is because even had it decided that DMR delivered the jokes at a normal volume it is unlikely that it would have made a different decision.

61. This appeal was much more about whether what DMR said, given the circumstances in which he said it, amounted to 'relevant conduct'.

Relevant conduct

62. 'Relevant conduct' in relation to a child is defined in paragraph 4(1) of Schedule 3 to the SVGA as including (a) conduct which endangers a child or is likely to endanger a child and (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him.

63. Paragraph 4(2) provides that conduct endangers a child if it (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.

64. There is no restriction on the form that 'harm' may take: it may be physical, sexual, psychological, emotional or financial.

Allegations 1 and 3

65. Because they are of a similar nature and because they overlap, we shall deal with Allegations 1 and 3 together.

66. DMR's case in respect of these allegations was:

a.

he did not initiate the discussions on controversial topics, which were introduced by the students,

b. when he shared his personal views, it was with pedagogical intent: he was teaching his students to become 'resilient learners',

c. his views were "fact" and he would have been failing in his duty as a teacher if he were to "affirm a lie", and

d. he offered Pupil A support.

67. We did not consider it particularly important whether the topics were introduced by DMR or by the students. Barring is not about culpability, it is about safeguarding vulnerable people. The context of DMR's comments is that they were made when he was a teacher in charge of a class (albeit before the lesson had started). He was the adult in the room, and he shouldn't have allowed himself to be led by the children.

68. The issue is whether the way that DMR addressed the topics caused harm to a child or put a child at risk of harm. Whether the topics were introduced because DMR was motivated to introduce them, or because he was manipulated by his students to discuss them, doesn't really matter.

69. DMR's second argument was much more to the point. DMR was a secondary school teacher. Students, especially in secondary and tertiary education, are expected to be challenged and to be exposed to different viewpoints.

70. Teaching should equip students with the skills and knowledge to explore political and social issues critically, to weigh evidence, to debate and to make reasoned arguments. Teachers should help their students learn how to evaluate issues for themselves, to be curious to understand others' perspectives, to seek to persuade others, and to have the flexibility and curiosity to be open to being persuaded by others. Some teachers do this very well, but it is tricky to pull it off. It requires skill, care, and a considerable degree of thought.

71. Children are vulnerable. That is why they are singled out by the SVGA as being in need of safeguarding. Their brains and bodies are still developing, and during secondary education there is the significant added complication of students experiencing major hormonal changes. They are in the process of figuring out who they are and while they are doing that they need to be handled with care. They are impressionable and views expressed by others can be very influential,

and also very hurtful, whether those others are friends, family members, social media influencers or teachers.

72. DMR demonstrated a striking lack of understanding of his pastoral responsibilities to the children in his care. Instead, on his own evidence, DMR allowed himself to be drawn by the students into answering their questions on sensitive issues. This was clearly not part of his lesson plan, and it was dangerous territory to enter without a plan. Some of the pupils might well have regarded this as good sport, but DMR should have been alive to the risk that some in the class might be emotionally harmed by it.

73. DMR was on notice that one student in the class was questioning their gender identity, so he knew that his saying that there were "only two genders" and that anyone who believed otherwise "needs psychological help" would risk causing emotional harm to at least one pupil.

74. Given typical class sizes, it was reasonably likely that other students in the class might be questioning their sexuality, or might be gay, or might be pregnant, or might have terminated a pregnancy. It was irresponsible for DMR to have shared his personal views on these topics in the manner that he did.

75. We are not persuaded that when DMR shared his views on these matters he did so with a pedagogical intent. He didn't introduce these views in the context of a considered discussion, highlighting to the students the range of views on the topics. Rather, he "owned" the views he articulated to the class, and he insisted that they were not opinion, but "fact".

76. He didn't appear to appreciate the irony of his saying that he wanted to encourage the students to become 'resilient learners' by exposing them to views with which they might not agree, while displaying his own inability to understand that his views are part of a multiplicity of views that may legitimately be held.

77. DMR said that, far from failing to respect Pupil A, he had offered to support Pupil A should they want help in relation to gender dysphoria. DMR said that this was the term was used in the School's own transgender policy. In the context of what DMR said about there being "only two biological genders" and that this was "fact", we find DMR's supposed offer of help to have been inappropriate, as it failed to accord appropriate dignity and respect to what Pupil A had just disclosed to him.

78.

DMR relied upon the recent decision of the High Court in *Sutcliffe v Secretary of State for Education* [2024] EWHC 1878 (Admin), as establishing that teachers had a right to freedom of thought, conscience, religion and expression "just as much as anyone else" (per Pepperall J at [1]).

79. That case was an appeal brought by a teacher against the TRA's decision to ban him from teaching as a result of conduct which included misgendering a transgender child and sharing his views on homosexuality in an inappropriate way. There are some similarities between that case and this one. The principal issue in *Sutcliffe* was whether Mr Sutcliffe's conduct complied with the Teachers' Standards. In this case the issue is whether DMR's conduct amounted to 'relevant conduct'.

80. Mr Sutcliffe lost his appeal because he was found to have breached a provision in the Teachers' Standards that required teachers to treat pupils with dignity, show tolerance and respect for the rights of others, and to have proper and professional regard for the ethos, policies and practices of the school in which they teach. In his judgment Pepperall J. highlighted the impact that a teacher's words could have on pupils:

> "1 … A teacher's right to believe that no one can self-identify as a different gender and that homosexuality is a sin against God is protected by law, but that doesn't entitle the teacher to fail to treat transgender, gay and lesbian pupils with anything short of the dignity and respect with which all schoolchildren must be treated or justify a failure to safeguard the best interests and wellbeing of such children.
>
> 2. This case is not about a teacher who accidentally failed to follow a school's policy of referring to a transgender pupil by the child's chosen pronouns or even about a teacher who reconciled his religious convictions with such policy by choosing to avoid pronouns altogether and referring to the child by name. Rather, it is about a teacher who deliberately used female pronouns to refer to a transgender male pupil both in the classroom and then on national television in such a way that he would be "outed" without any apparent regard for a vulnerable child who was thereby caused significant distress. Further, it is about a teacher who told his class that homosexuality is a sin and implied that

> homosexuals might be cured through God without any apparent regard for the gay and lesbian children in his class and who made them feel that their teacher regarded them as worthless."

81. We agree that DMR has a right to respect for those rights, but his rights must be balanced against the rights of others, including the rights of the students in his care. DBS expressly recognised DMR's right to hold his opinions, and explained that its decision to place his name on the children's barred list was made not on the basis of what he believed but on how he expressed his beliefs:

> "The concerns of the DBS do not relate to your personal opinions, but the fact that you considered it appropriate to express views on sensitive subjects that included protected factors within a classroom setting, without thought of the impact on those who may be directly affected by the topic areas." (see page 329 of the appeal bundle)

82. It was likely that Pupil A would be emotionally harmed by DMR's comments, both when he made them outside the classroom and when he spoke to the class about his views when answering questions put by students.

83. There was also a significant risk that others in the class might have been harmed by how DMR expressed his beliefs inside the classroom.

84. From DMR's evidence at the hearing before the Upper Tribunal it is clear that there is a very high risk of repetition of similar behaviour because DMR insisted that he had been right to say what he did, and indeed that he would have been failing in his duty as an educator had he behaved differently and "affirmed a lie". We note also that throughout the hearing before the Upper Tribunal DMR referred to Pupil A using female pronouns, which can have been no accident, and which indicated that DMR feels defiant and indeed righteous about his conduct. It also demonstrates that he has very little insight into the potential of his words to harm vulnerable adolescents.

Allegation 2

85. I shall deal briefly with the allegation about the telling of jokes to colleagues.

86. DMR admitted telling the jokes, and accepted that they were perhaps in poor taste, but he denied that the Elton John joke was homophobic or that the Irish joke was racist, because he said there was no element of hate towards gay

people or Irish people in those jokes, and his understanding of homophobia and racism was that hate was a necessary component. DMR said that some of the staff swore a lot, and he was surprised that they appear to have taken offence at "a joke about race that was not racist".

87. We find that the jokes that DMR told to colleagues were inappropriate, and we found that they were racist and homophobic in character.

88. However, while telling the jokes to colleagues at work was properly a disciplinary matter, we do not consider it to be a safeguarding matter. The telling of the jokes was relied on by the DBS not because DMR's conduct in telling the jokes to his colleagues was considered to be harmful, but rather on the basis that if he repeated that conduct in relation to a child it would amount to relevant conduct in relation to children. That is a peculiar quirk of the way that the SVGA works (see paragraph 4(1)(b) of Schedule 3 to the SVGA).

89. However, that provision must be applied rationally, and so it follows that a relevant factor would be whether there is a real risk that DMR would repeat such conduct in relation to children. Although there was evidence of recklessness and lack of judgment on the part of DMR in relation to the way that he has chosen to express his views, there was no compelling evidence to suggest that he might tell racist or homophobic jokes to children.

90. As such, it was irrational for DBS to rely on it, and that is an error of law. However, the error is not material because as explained above, we are satisfied that DMR engaged in much more concerning conduct in relation to his students, particularly Pupil A, and we have no doubt that the DBS would still have decided to place DMR's name on the children's barred list even without reliance on Allegation 2, and that decision would still be a proportionate one.

Making decision prior to TRA

91. Despite what DMR says about being assured that the DBS would not make a decision on his case until the TRA proceedings had come to an end, it is clear from the Minded to Bar letter (see page 292 of the appeal bundle) that it said the opposite: it stated expressly that it would not wait for the TRA proceedings to conclude. Although DMR said that this was "not his interpretation", we find it impossible to place any other interpretation on it.

92. The TRA and the DBS are separate bodies with separate statutory responsibilities. The DBS is under a statutory obligation to consider referrals

made to it and if the conditions to barring are met it must place a referred person's name on a relevant barred list. The SVGA sets out the circumstances in which the DBS must take into account the decisions of other decision makers. The SVGA places no requirement on the DBS to await the outcome of the TRA proceedings.

93. The DBS made no mistake of law in this regard.

Conduct not criminal

94. DMR's ground of appeal to the effect that nothing that he had done had constituted a criminal offence can be dealt with briefly: the test for "relevant conduct" does not include any requirement that the conduct constitutes a criminal offence.

95. The DBS made no mistake of law in this regard.

96. DMR's opposition to gay marriage, his opposition to abortion in all but very limited circumstances, his belief that there are "only two biological genders" and his belief that transgender people require psychological help, are all beliefs which he is entitled to hold, and his simply holding those beliefs gives rise to no risk of harm to children. Neither does his expressing those views in his private life. It would clearly be improper for the DBS to seek to act as the "thought police", but the DBS did no such thing in this case.

97. However, a person who works in regulated activity with children, such as a teacher, must take care when addressing matters like gender identity, sexuality and abortion, given the particular vulnerability of children. Making statements about such topics without taking due care is capable of amounting to 'relevant conduct' in relation to children because it may cause emotional harm or, if repeated, may risk emotional harm.

98. In this case the DBS was entitled to find that DMR's statements, in the context in which they were made, amounted to 'relevant conduct', and it was entitled to place DMR's name on the children's barred list. Given the potential for serious emotional harm, its decision to do so was not disproportionate, whether proportionality is determined on the basis of a review of the DBS's proportionality assessment or on the basis of the Upper Tribunal's own assessment of proportionality.

Conclusion

99. We therefore conclude that the decision of the DBS was not based on any material mistake of fact or law. We dismiss the appeal. The Barring Decision is confirmed.

Thomas Church
Judge of the Upper Tribunal
Tribunal Member Hutchinson
Tribunal Member Tynan

Authorised by the Judge for issue on 13 December 2024