IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No UA-2020-001647-V
[2024] UKUT 85 (AAC)

Between:

XYZ

Appellant

- v –

DBS

Respondent

Before: Upper Tribunal Judge Church and Tribunal Members Hutchinson and Stuart-Cole

Decided following an oral hearing at Field House, London on 22 November 2023

Representation:

Appellant:	Mr Gavin Dingley of counsel (instructed on a direct access basis)
Respondent:	Mr Ashley Serr and Ms Nia Marshall of counsel (instructed by the DBS legal department)

ORDERS UNDER RULE 14

Pursuant to rule 14(1)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Rules") the Upper Tribunal orders that no documents or information should be disclosed in relation to these proceedings that would tend to identify the Appellant, the complainant or any witness in these proceedings, as well as the school at which the Appellant taught.

Pursuant to rule 14(1)(b) of the UT Rules 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 the Appellant, the complainant, any other witness in these proceedings or the school at which the Appellant taught.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal: the decision of the Disclosure and Barring Service ("DBS") DBS made on 15 September 2020 to include the Appellant's name in the Children's Barred List was not based on any mistake of fact or error of law. The decision is confirmed.

REASONS FOR DECISION

What this appeal is about

1. This appeal is about the Appellant who was, until recently, a PE teacher at a secondary school. In August 2019 it was alleged that the Appellant had formed an inappropriate relationship with a 16-year-old girl whom he had taught, including giving her lifts in his car, communicating with her via Snapchat, urging her to use an app to conceal communications between them, and kissing her.

2. The pupil's father made a complaint to the pupil's school. He said he had become suspicious of his daughter's behaviour and decided to follow her on 13 August 2019. He said he witnessed her get into a white Audi with the Appellant, and he followed the car until he lost it near Hartlepool. The pupil initially denied any inappropriate relationship with the Appellant to her father and to the police officers who interviewed her. Her father says she then "broke down" and admitted to him that she had been in a relationship with the Appellant, that they had communicated through Snapchat, that since March 2019 the Appellant would regularly give her lifts in his car, and that they had kissed on 4 occasions. She said that she and the Appellant had discussed what to do if they were "found out" and had agreed to deny anything happened. The pupil was then interviewed by the police a second time and shared this version of events, and she shared a consistent version of events with children's services.

3. The Appellant was interviewed by the police on 14 August 2019 and gave a "no comment" interview on advice from his solicitor. His mobile devices were taken for examination. The Appellant met with the head teacher of the school which employed him and the parents of the pupil on 20 August 2019, at which the allegations were put to the Appellant by the head teacher. The Appellant made no comment upon legal advice. On 23 August 2019 the pupil met with the head teacher and said that she had been seeing [XYZ] and that they had been messaging on Snapchat and on an app called "calculator" since just after her 16th birthday, and [XYZ] had given her lifts in his car since March 2019.

4. The Appellant was not arrested or charged with any offence. The pupil declined to make a formal statement and the police decided to take no further action.

5. On 1 September 2019, following a brief investigation by his employer, which found the allegations to be proved, the Appellant was dismissed from his job at the school and referred to both the DBS and the Teaching Regulation Agency (**"TRA"**).

6. On 15 September 2020 the DBS decided to place the Appellant's name on the children's barred list, thereby preventing him from working with children (the **"Barring Decision"**).

7. In May 2021 a three-member professional conduct panel of the TRA (the **"TRA Panel"**) convened for a remote oral hearing. Having heard evidence and argument it

made findings of fact and, based on those findings, decided on 23 August 2021 that, while XYZ's conduct had breached the Teachers' Standards and demonstrated "extremely poor judgement", it was not misconduct so serious that it amounted to unacceptable professional conduct or conduct that may bring the profession into disrepute (the **"TRA Decision"**). The TRA Decision was not appealed.

8. This appeal is about whether the Barring Decision was based on a mistake of fact or law.

Preliminary issue: anonymity

9. The Appellant made an application for an anonymity order in respect of these proceedings. Generally speaking, there is a strong public interest in cases in courts and tribunals being conducted in public and in the identities of the parties and witnesses being made public. This is often referred to as the principle of 'open justice'. However, that public interest must always be weighed against countervailing factors, including the relevant individuals' private right for their private and family life to be respected.

10. When deciding whether to order anonymity in a case which relates to a barring decision, one must consider the nature of the barring scheme. The DBS does not make the names on the barred lists public. The fact of inclusion is known to the person named, to the DBS and to any party that applies for (and is entitled to apply for) a check of the register in relation to the individual in question (usually a prospective employer) but to no one else.

11. In *R (SXM) v Disclosure and Barring Service* [2020] EWHC 624 (Admin), [2020] 1 WLR 3259 the Administrative Court held that the disclosure to the complainant of the outcome of a referral to the DBS was inconsistent with the statutory structure and the public interest in protecting and safeguarding vulnerable groups was sufficiently protected by the barring decision itself and the facility for prospective employers or those otherwise entitled to obtain disclosure of the entry from the DBS.

12. The case for the pupil receiving anonymity is overwhelming given her age and vulnerability and given the sensitive nature of the evidence. While the case for the Appellant receiving anonymity is somewhat less strong, we were influenced by what the Appellant told us about the impact on his mental health of the reporting of his case before the Teaching Regulation Agency. We were also influenced by the fact that if the Appellant is identified there is a risk that the identity of the pupil might be ascertainable by way of what is sometimes called "jigsaw identification". For the same reason, we consider it appropriate to prevent any of the other witnesses, and indeed the school, from being identified too. In all the circumstances, the balance of interests favoured the making of an anonymity order in this case in the terms set out above.

13. For these reasons this judgment shall refer to the Appellant as **"XYZ"**, the pupil as **"Pupil A"**, her father as **"Father A"**, the school as **"the School"** and the School's head teacher as **"the Head Teacher"**.

The Barring Decision

14. The Barring Decision was made on the basis that:

a. XYZ has engaged in regulated activity with children because he has worked as a teacher,

b. XYZ has engaged in "relevant conduct" in relation to children, because he had engaged in inappropriate conduct of a sexual nature involving Pupil A (a child), and

c. it was appropriate and proportionate for XYZ's name to be included in the Children's Barred List.

15. The explanation that the DBS gave for the Barring Decision in its 'Final Decision Letter' was:

> "**How we reached this decision**
>
> Your representations did not challenge the findings made by us. We are now satisfied these allegations are proven on the balance of probabilities:
>
> - You, whilst employed as a teacher, entered into a relationship with [Pupil A], a year 11 pupil.
>
> Having considered of [sic] all the information available to it, the DBS is satisfied that you have engaged in relevant conduct in relation to children, specifically inappropriate conduct of a sexual nature involving a child.
>
> We are of the view that you, whilst employed as a teacher, entered into a relationship with [Pupil A], a year 11 pupil. The DBS hold concerns that you hold an exploitative attitude in that you breached a position of trust as a teacher to contact a student and form a personal relationship and it is reasonable to infer that you did so for your own gratification. We are further satisfied that you hold a significant sexual interest in teenage girls in that you have engaged in sexual activity with a 16 year old pupil by kissing her on 4 occasions. You have not recognised the harm that your actions have caused and have acted in a way that any reasonable person would deem irresponsible. Your actions have caused harm to the child in that she would cry when with her mum following the 'relationship' being discovered. The allegation was raised by [Father A] following a change in his daughters [sic] behaviour, he also reported a feeling of unease following the interaction at Webley [sic] stadium. There is nothing that would suggest that [Father A] had anything to gain by reporting this matter and the only reason that can be drawn from the available evidence is that police took no action due to [Pupil A]'s unwillingness to move forward with the case for fear of her identity being made public knowledge. It is also noted that the LADO substantiated the allegation against you.
>
> It is acknowledged that these appear to be the first incidents of any kind during your time in regulated activity; however there is an imbalance of power in that you were a teacher and [Pupil A] was a student. You abused your position of trust and exploited opportunities that arose. You contacted [Pupil A] when she turned 16, despite being employed as her teacher for a number of years prior to this. Your actions have been carried out over a sustained period of time and whilst it is acknowledged that there is no indication that you, having repeated your actions during your career in regulated activity, this does not diminish the risk you could pose in the future. You have not displayed any remorse or insight into the impact of your actions and you therefore presents [sic] an unacceptable future risk of harm to anyone in your care; the DBS cannot be certain that you would not act in the same way if presented with a similar situation. It is acknowledged that a

> large number of character references speak of your exemplary record and your passion for teaching; however this does not diminish the risk that you pose.
>
> Your rights as set out by Article 8 of the European Convention of Human Rights [sic] have been considered. However, the SVGA provides the DBS with the legal power to include you on the Children's Barred List and as such affords legitimacy to such a decision. The DBS has given regard to the fact that placing you on the Children's Barred List will last indefinitely and will interfere with your rights to earn a living within your chosen field in regulated activity. It is also recognised that your financial circumstances will be subsequently affected as a result of the restriction on your employment opportunities, as may your standard of living. Particularly as you have specifically chosen to work in the teaching sector, something you would no longer be able to do were your name to be added to the Children's Barred List. It will also affect your other roles related to sports coaching of children. However, a safeguarding decision must take into account not only the rights of the referred individual but also those of the vulnerable groups who may be at risk of harm as a result of your harmful behaviour. Taking this into consideration, it is deemed both necessary and proportionate to put further safeguards in place and even though information may be shared on your enhanced disclosure certificate, which prospective employers will see, this current safeguard is deemed to be insufficient.
>
> It is noted that the TRA are currently undertaking an investigation into your position, however their decision is not expected imminently and therefore it does not seem prudent to delay the decision making process further to await that outcome. If any new information comes to light following the TRA's decision, that is likely to alter the DBS decision then a review can be requested. Therefore there are not considered to be any robust safeguarding measures currently in place and whilst there is potential stigma attached to this outcome, should you choose to disclose it, you do pose a risk of causing sexual and emotional harm to children and a barring decision is reasonable in light of this.
>
> As a result, we included your name in the Children's Barred List using our barring powers as defined in Schedule 3, paragraph 3 of the Safeguarding Vulnerable Groups Act 2006 (SVGA) on 14 September 2020."

The TRA Decision

16. On 6 August 2021 (nearly a year after the Barring Decision) the TRA Panel made the TRA Decision. At the oral hearing the TRA Panel heard live oral evidence from Father A and the Head Teacher (called by the TRA) and also from XYZ. Each of these witnesses was available for cross examination. Pupil A did not attend and was not available for cross examination.

17. The TRA Panel found, on the basis of XYZ's admissions in a 'Statement of Agreed Facts' document, that:

> "[XYZ] engaged in and / or developed an inappropriate relationship with Pupil A, including by:
>
> Meeting up with and / or taking Pupil A on one or more occasions:

i. in his car;

ii. in / to Hartlepool on or around 13 August 2019;

iii. outside of School"

(see page 669 of the appeal bundle).

18. XYZ further accepted that this conduct amounted to "unacceptable professional conduct and conduct that may bring the profession into disrepute". The TRA Panel found these matters to be proved.

19. The TRA Panel went on to consider four further allegations, being that XYZ had engaged in and / or developed an inappropriate relationship with Pupil A by:

> "b. instructing and / or inviting Pupil A to communicate with [him] via Snapchat, which did not retain copies of [his] messages or encrypted [his] messages;
>
> c. communicating with Pupil A on one or more occasions between December 2018 and September 2019 using Snapchat;
>
> d. kissing Pupil A on one or more occasions;
>
> e. cuddling Pupil A on one or more occasions."

20. The TRA Panel found each of Father A, the Head Teacher and XYZ to be honest in the evidence they gave, but it noted that much of Father A and the Head Teacher's evidence was evidence of what they had been told by Pupil A, and it was troubled that Pupil A had not attended to give evidence and to have her evidence tested, that her evidence in her witness statement differed from that which she gave in her first police interview, and that no proper explanation had been given for her failure to attend and give evidence. The TRA Panel decided, therefore, to give Pupil A's evidence only very limited weight. The TRA Panel decided that Father A's evidence about seeing a photograph on Pupil A's mobile phone of Pupil A and XYZ kissing was honestly given but it considered that Father A may have misinterpreted the photograph as he viewed it only fleetingly.

21. The TRA Panel did not find any of the further allegations proved. Based on its findings of fact the TRA Panel decided that while XYZ's developing an inappropriate relationship with Pupil A by meeting up with her in his car, in or to Hartlepool and outside of school was "ill-advised and inappropriate" (see page 678 of the appeal bundle), there was "no discernible pattern to it" and it decided that such conduct was not "conduct of a sexual nature" and was not "sexually motivated" (see pages 677-8 of the appeal bundle). It concluded that XYZ's conduct did not amount to conduct which may bring the teaching profession into disrepute.

22. We discuss the TRA Panel's decision making and its reasons further in paragraphs 91 to 100 below.

The legal issues in this appeal

23. XYZ accepts that he has worked in regulated activity with children as a teacher, and he accepts that he intends to engage in regulated activity with children in the future as a sports coach.

24. However, he disagrees strongly with the Barring Decision and with the findings of fact on which it was based. While he now accepts having given lifts to Pupil A in his car alone on two occasions, and accepts (in retrospect) that this was inappropriate, he

denies vehemently having had any form of sexual relationship with, or sexual interest in, Pupil A.

25. He denies that he communicated with Pupil A on social media, he denies that he asked Pupil A to use an app to conceal communications between them, and he denies ever kissing Pupil A. He also denies having any sexual interest in teenage girls.

26. He says that the findings of the TRA Panel, which followed a contested hearing before an expert panel at which live evidence was given and at which the parties were represented, establish that the Barring Decision was based on mistakes of fact and should be set aside.

27. His appeal raises three main legal issues to be addressed by this panel:

a. did DBS err in law by making a final decision to place XYZ's name on the Children's Barred List without a hearing, when it knew that issues of fact central to the referral were due to be determined by the TRA at a hearing where the parties would be able to call witnesses?

b. what is the significance of the TRA Decision? In particular, are the findings of fact made by the TRA Panel binding on the DBS, or indeed on the Upper Tribunal?

c. was the Barring Decision based upon a mistake of fact? In particular:

i. was the DBS under a misapprehension that XYZ did not challenge the findings of fact set out in the "Minded to Bar" letter?

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

The statutory framework

28. Because the nature and extent of the Upper Tribunal's jurisdiction and powers in relation to appeals against barring decisions is somewhat unusual, we set out below an outline of the statutory framework for appeals such as this.

29. DBS was established by the Protection of Freedoms Act 2012, taking on the functions of the Criminal Records Bureau and the Independent Safeguarding Authority. One of its main functions is the maintenance of the children's barred list and the adults' barred list (the **"Barred Lists"**, and each a **"Barred List"**). Its power and duty to do so arises under the Safeguarding Vulnerable Groups Act 2006 (the **"2006 Act"**).

Duty to maintain the Barred Lists

30. Section 2(1)(a) of the 2006 Act places a duty on the DBS to maintain the Barred Lists. Under Section 3(2)(a) of the 2006 Act a person is barred from "regulated activity" relating to children if they are included in the children's barred list. Under Section 3(3)(a) a person is barred from "regulated activity" relating to vulnerable adults if they are included in the adults' barred list.

Criteria for inclusion in the children's barred list

31. Schedule 3 to the 2006 Act applies for the purposes of DBS determining whether an individual is included in either or both Barred Lists.

32. By section 59 of the 2006 Act "child" means a person who has not attained the age of 18.

33. Under Section 3(2)(a) of the 2006 Act a person is barred from "regulated activity" relating to children if they are included in the children's barred list.

34. XYZ has been included by the DBS on the children's barred list pursuant to Schedule 3, Part 1, paragraph 3 of the SVGA (which relates to children and is headed "Behaviour")

35. Paragraph 3 of Part 1 of Schedule 3 to the 2006 Act provides:

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

36. By section 5(1) of the 2006 Act, a reference to regulated activity relating to children must be construed in accordance with Part 1 of Schedule 4. Regulated activity relating to children includes any form of care or supervision of children (paragraph 2(1)(b) of Schedule 4), and any form of advice or guidance provided wholly or mainly for children (paragraph 2(1)(c) of Schedule 4) carried out frequently by the same person (paragraph 1(1)(b) of Schedule 4). XYZ does not dispute that teaching or providing sports coaching amounts to "regulated activity".

37. "Relevant conduct" in relation to children is explained in paragraph 4 of Part 1 of Schedule 3 to the 2006 Act as follows:

> "4. (1) For the purses of paragraph 3 relevant conduct is –
>
> (a) conduct which endangers a child or is likely to endanger a child;
>
> (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
>
> (c) conduct involving sexual material relating to children (including possession of such material);
>
> (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
>
> (e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate.

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

(a) harms a child,

(b) causes a child to be harmed,

(c) puts a child at risk of harm,

(d) attempts to harm a child, or

(e) incites another to harm a child. …"

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

38. Section 4 of the 2006 Act provides for a right of appeal to the Upper Tribunal in limited circumstances:

"**4. Appeals**

(1) An individual who is included in a barred list may appeal to the Upper Tribunal against-

…..

(b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;

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

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

(a) on any point of law;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

43. In *DBS v JHB* [2023] EWCA Civ 982 the Court of Appeal returned to the issue of the extent of the Upper Tribunal's jurisdiction under the 2006 Act on issues of mistake of fact. Laing LJ said that a finding may be "wrong" even if there was some evidence to support it, or it was not irrational, and it may also be "wrong" if it is a finding about which the Upper Tribunal has heard evidence which was not before the DBS, and that new evidence shows that a finding by the DBS was wrong (see paragraph [95]).

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

DBS if it had first identified that the DBS had made a finding which was not available to it on the evidence on the balance of probabilities.

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

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

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

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

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

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

Issue 1: Did DBS err in law by making a final decision to place XYZ's name on the Children's Barred List without awaiting the outcome of the TRA proceedings?

48. Mr Dingley said that, since it knew that the TRA proceedings were on foot and that those proceedings would typically involve the hearing of live evidence and the opportunity to cross-examine witnesses, the DBS should have delayed making a final decision on XYZ's referral until the TRA proceedings had concluded. This, he says, would have avoided the situation which eventuated, with the DBS making what XYZ maintains were mistaken findings of fact.

49. This submission ignores the fact that the DBS is a creature of statute with a statutory responsibility to carry out its safeguarding role as provided by the 2006 Act. When a matter is referred to it, the DBS has no option but to consider the referral and

to decide whether the criteria for inclusion are met. If it finds that the criteria are met, then the DBS must place the referred person's name on the applicable list or lists.

50. The 2006 Act does not contain any provision requiring the DBS to await the conclusion of other proceedings that relate to matters common to the referral before deciding whether to make a final barring decision. The 2006 Act does not empower the DBS to make an 'interim' barring decision pending the determination of other proceedings, which leaves a potential "safeguarding gap" during which the referred person would be entitled to continue to work in regulated activity, potentially exposing vulnerable people to an unacceptable risk of harm in the period up to the DBS making its decision whether to bar. Had Parliament intended that the DBS should not make a final decision before other proceedings had been concluded, it would surely have said so.

51. The 2006 Act does provide for the right of a barred person to apply for a review of their inclusion in a barred list in certain circumstances (see paragraph 18 of Schedule 1 to the 2006 Act) (a **"Paragraph 18 Review"**). It also gives the DBS a power to review its barring decisions at any time (provided that no application for a Paragraph 18 Review has been made and no Paragraph 18 Review is ongoing) if it is satisfied in the light of a) information which it didn't have at the time of the person's inclusion in the list, (b) any change in circumstances in relation to the person concerned, or (c) any error by DBS, that it is not appropriate for the person to be included in the list (see paragraph 18A of Schedule 3 to the 2006 Act). It is clear from the inclusion of these powers in the statute that Parliament intended that a barring decision would survive contradictory findings in other proceedings, and would stand unless and until the DBS carried out such a review and found that inclusion in the list was no longer appropriate.

52. The DBS acknowledged in its Final Decision Letter that the TRA was at that time undertaking an investigation in relation to XYZ, but it noted that the TRA proceedings were not expected to conclude imminently (the TRA Decision came about a year later) and it referenced the availability of a review should new information come to light. In the circumstances it was open to the DBS to proceed to make a final barring decision.

53. For these reasons, we are not persuaded that the DBS's decision to make the Barring Decision prior to the conclusion of the TRA proceedings was in error of law.

Issue 2: What is the significance of the TRA Decision?

54. Mr Dingley pointed out that the TRA Decision was reached by an expert panel following an adversarial hearing at which both parties were represented, live evidence was given, and witnesses were cross-examined. The allegations which it considered were practically identical to those which the DBS found to be proved on the balance of probabilities, and upon which it based the Barring Decision. The TRA Panel's findings of fact differed in important respects from those made by the DBS. In particular, while the DBS found that XYZ had, while employed as a teacher, entered into a relationship with Pupil A, including messaging with her, meeting her outside school, giving her lifts in his car, and kissing her on 4 occasions, and that this amounted to conduct of a sexual nature involving a child, the TRA Panel decided that XYZ had not instructed and/or invited Pupil A to communicate with him via Snapchat or encrypted messages, did not communicate with Pupil A using Snapchat, and that XYZ did not kiss or cuddle Pupil A. While the TRA Panel found (based on XYZ's admissions, that XYZ did give Pupil A lifts in his car alone outside school, including to Hartlepool, it did not find that this conduct was conduct of a sexual nature or that it was sexually motivated.

55. Mr Dingley maintained that there was nothing improper in the findings reached by the TRA Panel. In any event, he argued, even if a tribunal makes a "wrong" decision, it is a fundamental principle of English law that such a decision stands for so long as it is not successfully appealed. He relied on *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 at [30] for the proposition that the principles of cause of action estoppel apply to a decision of a regulatory body such as the TRA just as they do to a court of competent jurisdiction. While XYZ has criticised the TRA Decision, he did not appeal it. It therefore stands, whatever imperfections it may contain.

56. By contrast, he submitted, the Barring Decision was reached without a hearing, without the benefit of any live evidence, and without XYZ being given an opportunity to test the evidence which the DBS relied upon as establishing that he had engaged in "relevant conduct" in relation to children. As such, Mr Dingley argued, the TRA Decision should, at the very least, be accorded significant weight.

57. Indeed, he went considerably further: it would be inappropriate, he said, for the Upper Tribunal to engage in a 'review' of the TRA Decision, and it would be res judicata and an abuse of process for the Upper Tribunal either to make findings of fact that contradicted the findings reached by the TRA Panel or to find that the TRA Panel's findings were in error.

58. He cited Lord Sumption's discussion of the principles of res judicata in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46 at [17] et seq.

> "17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different judicial origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M&W 494, 504 (Parke B) … Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoystead v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings

matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.

18. It is only in relatively recent times that the courts have endeavoured to impose some coherent scheme on these disparate areas of law. The starting point is the statement of principle of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115. This was an action by the former business partner of a deceased for an account of sums due to him by the estate. There had previously been similar proceedings between the same parties in Newfoundland in which an account had been ordered and taken, and judgment given for sums found to be due to the estate. The personal representative and the next of kin applied for an injunction to restrain the proceedings, raising what would now be called cause of action estoppel. The issue was whether the partner could reopen the matter in England by proving transactions not before the Newfoundland court when it took its own account. The Vice-Chancellor said:

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time … Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

59. Mr Dingley said that these principles had clear application in these proceedings, where the subject matter is substantially the same, the burden is on the party seeking to establish misconduct/relevant conduct, and the standard of proof to be applied is identical (being the civil standard).

60. The first thing to say about this argument is that the Barring Decision was made a year *before* the TRA Decision, not after it. This appeal is about whether the Barring Decision was based on a mistake of fact or involved a mistake of law. The determination of that exercise cannot properly be characterised as an attempt by the DBS (or indeed the Upper Tribunal) to "re-litigate" the TRA Decision.

61. Second, we are unpersuaded that any of the species of estoppel or quasi-estoppel, or other substantive or procedural rules identified by Lord Sumption in *Virgin Atlantic v Zodiac* (see paragraph 58 above) is applicable to the current situation.

Neither is the Supreme Court's decision in *Coke-Wallis* (see paragraph 55 above) of assistance to the Appellant. While the TRA would generally be bound by its own findings, the DBS was not party to the TRA proceedings concerning XYZ, and it would have had no standing to appeal the outcome even had it wished to.

62. Mr Dingley's response to that is that the DBS was aware of the TRA proceedings and, had XYZ appealed, it could have applied to be joined as an interested party. However, he did not refer me to any authority for the proposition that a non-party was bound in any way by the outcome of proceedings simply because he was aware of their existence and could possibly have applied to join as an interested party in the event that an appeal was brought.

63. Mr Serr, for the DBS, directed us to the dicta of Newey LJ in *Greene v Davies* [2022] EWCA Civ 414 at [54] on the issue of whether inviting a Court or tribunal to make findings inconsistent with findings made in earlier proceedings amounted to an abuse of process. Newey LJ acknowledged that it *could* be, but said that it *needn't* be an abuse of process:

> "54. … it is not necessarily an abuse of process to invite a Court or tribunal to make a finding inconsistent with one made in earlier proceedings. To quote Sir Andrew Morritt V-C in *Bairstow*, at para 38, "[a] collateral attack on an earlier decision of a court of competent jurisdiction may but is not necessarily an abuse of the process of the court". *R v L* demonstrates that a person can be the subject of a criminal prosecution requiring proof beyond reasonable doubt despite a High Court judge having concluded that guilt had not been proved even to the civil standard. Equally it can be seen from *Ashraf v General Dental Council* that disciplinary proceedings can potentially be brought "on substantially the same subject matter as had been the subject of failed criminal proceedings". Similarly, a determination by a civil Court cannot necessarily preclude disciplinary proceedings based on allegations which the civil Court had rejected …"

64. There is nothing in the 2006 Act (or elsewhere in statute) that requires the DBS to accept the factual findings of any other decision-making body, including a regulator such as the TRA (exercising the powers of the Secretary of State for Education). The status of findings of fact made by a 'competent body' (defined in paragraph 16 to Schedule 3 to the 2006 Act) is dealt with in Schedule 3 to the 2006 Act. However, it provides only that, where the DBS must give a person an opportunity to make representations, that does not include the opportunity to make representations that findings of fact made by a competent body were wrongly made. In other words, the findings of fact in such proceedings before competent bodies are binding on the referred person who was party to those proceedings. It says nothing about them being binding on the DBS. That position is consistent with the common law principles rehearsed by Lord Sumption in *Virgin Atlantic v Zodiac* in the passage quoted above in paragraph 58, and with the decision in *Coke-Wallis* referred to above in paragraph 55.

65. Mr Dingley says that the Upper Tribunal's role is circumscribed by the findings of fact made by the TRA Panel, on the basis that they were the product of a process that, given that it involved the giving of live evidence and an opportunity to challenge that evidence, was superior to the process carried out by the DBS. He says it would be improper for the Upper Tribunal to make any finding that contradicts the findings of fact comprised in the TRA Decision, and the Upper Tribunal may only uphold the Barring

Decision if it was a decision that was still open to the DBS if any findings of fact that conflict with the TRA Panel's findings are ignored. This is a striking proposition indeed. Parliament has given the Upper Tribunal, a superior court of record, a statutory jurisdiction to decide appeals in respect of barring decisions based on mistake of fact (and law). There is no basis in statute, in the authorities, or in principle for circumscribing the jurisdiction of the Upper Tribunal in the way suggested by Mr Dingley.

66. For all these reasons, we do not accept that it is either improper or an abuse of process for the DBS to resist XYZ's appeal on the basis that it made no material mistake of fact. Neither do we accept that the Upper Tribunal is bound to adopt the TRA's findings.

67. So, what is the status of the TRA Decision vis-a-vis the Upper Tribunal? It is evidence of what was said at the hearing, of what the TRA Panel decided, and why it decided as it did. It represents no more than that. The Upper Tribunal must give the findings of the TRA Panel appropriate weight, just as it must give appropriate weight to the Barring Decision, and to all the other evidence before it. Our task is to make our own assessment of all the evidence before us to decide whether the Barring Decision was based on a mistake of fact.

68. We discuss what we made of the evidence in paragraphs 128 to 142 below

Issue 2: Was the Barring Decision based upon a material mistake of fact?

XYZ's representations didn't challenge the DBS's findings of fact

69. Mr Dingley argued that the Barring Decision proceeded from the mistaken starting point that XYZ did not challenge the findings set out in the DBS's 'Minded to Bar' letter. At the permission stage I was persuaded that this ground of appeal was arguable. I explained my reasons for this in my grant of permission as follows:

> "11.The Respondent's "Final Decision" letter sets out the Decision to include the Appellant in the Children's Barred List and explains how it reached the Decision. Immediately under the heading "How we reached this decision" the letter (which was addressed to the Appellant) states:
>
> > "Your representations did not challenge the findings made by us."
>
> 12. However, in response to the "Minded to Bar" letter (and prior to the "Final Decision" letter) the Appellant's counsel sent detailed representations to the Respondent on 5 June 2020, and again on 7 September 2020. Those representations made it abundantly clear that the Appellant disputed the allegations. Indeed in paragraph 8 of the 5th June 2020 letter it was stated:
>
> > "These submissions constitute a direct challenge to both the rationality and wrongly made factual assertions by the Disclosure and Barring Service."
>
> 13. The Respondent clearly made a mistake of fact when it said that its findings had not been challenged. I need to consider, though, whether it is arguable that the Decision was "based" on that mistake of fact. In this connection it is important to read the statement quoted in the paragraph above in context:
>
> > "Your representations did not challenge the findings made by us. We are now satisfied these allegations are proven on the balance of probabilities:

- You, whilst employed as a teacher, entered into a relationship with [Pupil A], a year 11 pupil.

Having considered all of the information available to it, the DBS is satisfied that you have engaged in relevant conduct in relation to children, specifically inappropriate conduct of a sexual nature involving a child."

14. Given the way the second sentence follows immediately after the first, and given both the lack of reference elsewhere in the letter to any of the points raised in challenge and the very light reasoning provided by the Respondent to explain its finding that the allegations are proved, I am satisfied that it is at least arguable that the Decision was "based" on the mistake of fact that the allegations were not disputed. I am therefore persuaded that Ground 1 warrants a grant of permission to appeal to the Upper Tribunal."

70. The hurdle at the permission stage was 'arguability', which is a relatively low hurdle. At the appeal stage we must be satisfied that there was indeed a mistake if we are to allow the appeal.

71. While the 'Final Decision' letter makes no reference to the challenges made by Mr Dingley in his letters in response to the 'Minded to Bar' letter, the Barring Decision Process document makes repeated reference to them. For example, in the "Allegations or Circumstances" section under the heading "POST REPS" on page 805 of the Appeal Bundle it is stated:

> "Whilst it is accepted that [XYZ] denies the allegation and has challenged the evidence used to make the finding …."

72. In the "Exploitive attitudes" section under "POST REPS" on page 809 of the Appeal Bundle it is stated:

> "[XYZ] continues to deny the allegation but does not offer any reasoning as to why [Pupil A] would fabricate her account"

73. Further, the "Representations" section at page 815 of the Appeal Bundle include the following bullets:

- No criminal charges were brought against [XYZ]
- He gave no comment during police interview as instructed by his legal representative at the time – he was a voluntary attendee at the police station
- He denies all allegations
- He did not say that 'things happened' to [the Head Teacher]
- [XYZ] refutes the contents of the meeting minutes
- The evidence relied upon by DBS is 3rd party and hearsay

74. It also refers to there being 21 character references from a mix of colleagues, employers, parents and ski pupils, saying that these references speak to [XYZ]'s passion for teaching, his professionalism, his exemplary record, and that the referres are unaware of any safeguarding concerns in respect of [XYZ].

75. These statements in the Barring Process Document demonstrate with adequate clarity that, despite what was said in the 'Final Decision' letter, the decision maker was

not under a misapprehension that XYZ did not challenge the allegations against him. While the 'Final Decision Letter' is wrong when it says XYZ's representations did not challenge the findings made by the DBS, that error was not a material one. The decision maker clearly took into account the representations made on XYZ's behalf and grappled with them in the explanation of how the Barring Decision was reached.

76. For these reasons, while the statement that XYZ didn't challenge the findings set out in the Minded to Bar letter was inaccurate and unfortunate, we are not persuaded that the Barring Decision was based on a misunderstanding that XYZ did notvigorously deny the allegations made against him.

Findings that XYZ holds an exploitative attitude, formed a personal relationship with Pupil A for his own gratification, and holds a significant sexual interest in teenage girls, having engaged in sexual activity with a 16-year-old pupil by kissing her on 4 occasions

77. The DBS found that XYZ had engaged in inappropriate conduct of a sexual nature involving a child by engaging in sexual activity with Pupil A by kissing her on 4 occasions, but in its 'Final Decision' letter there is very little explanation of how the decision maker assessed and weighed the evidence.

78. However, an analysis of the evidence is provided in the Barring Decision Process document. The DBS relied principally on:

a. the typed minutes of the 'Allegation Management Meeting' in respect of XYZ chaired by the Local Authority Designated Officer on 19 August 2019.

b. the typed notes of meetings between XYZ and the Head Teacher on 20 August 2019 and 1 September 2019 (which are each signed by the Head Teacher but not by XYZ),

c. the typed notes of a meeting between the Head Teacher, Father A and Mother A on 21 August 2019 (signed by all attendees),

d. a document headed "Eye Witness Statement: [Father A]", signed by Father A and the Head Teacher,

e. the typed notes of a meeting between the Head Teacher and Pupil A on 23 August 2019 (signed by both attendees),

f. the referral document, and

g. the letter dated 20 November 20019 from the Information Management Unit Manager at Northumbria Police summarising the allegations made to the police on 13 August 2019 by Father A, the extent of the police investigation, and the fact that the police had decided to take no further action.

79. DBS also had 22 supportive character references from colleagues, parents of pupils, employers and ski pupils that spoke to XYZ's professionalism and his passion for teaching and coaching. None of them voiced safeguarding concerns.

80. The DBS acknowledged that XYZ "refutes all the allegations in full and denies that any of the aforementioned conduct or alleged facts are correct as recorded in any of the attachments, annexes and submissions within the 'minded to bar' letter, save that [Pupil A] was a year 11 pupil at [the School] until June 2019 and [XYZ] was a P.E. Teacher at the School until September 2019."

81. The DBS acknowledged that there were limitations to the evidence before it, including that it had no first-hand evidence either from Pupil A or Father A, but it decided that the account of the allegations made by Pupil A provided by the police was "credible". The DBS considered that there was no reason why Pupil A would fabricate her account, especially since she had initially denied any kind of inappropriate relationship with XYZ and had been upset that these matters were discovered. The DBS thought that Pupil A only admitted to the contact with XYZ when Father A told her that he had seen her get into a white Audi car with XYZ.

82. While the DBS acknowledged that they had no evidence (other than the hearsay evidence of Pupil A's allegations) of any messages or calls being exchanged on Snapchat or the "calculator" app, they noted that XYZ's mobile number had been stored on Pupil A's mobile phone under the name "Tony", which the DBS decided was intended to disguise that the number in question was XYZ's.

83. At the time that the DBS made the Barring Decision XYZ had made a bare denial of the allegations against him. There was no burden on XYZ to prove the allegations to be false or to provide an explanation as to why Pupil A, or indeed Father A, might fabricate allegations against him.

84. However, the DBS was entitled to consider the evidence before it, which was limited to written evidence, and it had a broad discretion as to how to evaluate that evidence. It found the indirect written evidence of what Pupil A and Father A had said to be credible, and it was persuaded not only that the things they are reported to have said were indeed said, but also (on the balance of probabilities) that the allegations reported to have been made were true.

85. The DBS found, based on the written evidence available to it, that XYZ had, while employed as a teacher, entered into a relationship with Pupil A, a year 11 pupil, including messaging with her, meeting her outside school, giving her lifts in his car, and kissing her on 4 occasions. It decided that this amounted to conduct of a sexual nature involving a child.

86. While another decision maker may well have come to a different assessment of the evidence and arrived at different findings of fact based on its assessment, the way that the DBS assessed the evidence, and the findings of fact it made, were within the range of options reasonably open to it when it made the Barring Decision.

87. While acknowledging that there was no evidence to indicate that XYZ had behaved in this way before, the DBS inferred from these primary findings that XYZ had a "specific sexual interest in teenage girls", which gave rise to:

a. "definite concerns" that he may cross such moral boundaries again to enter into another relationship involving exploitation of a power differential and an abuse of trust to facilitate sexual activity with a child,

b. "definite concerns" in relation to XYZ holding exploitative attitudes, and

c. "some concerns" as to callousness/lack of empathy and irresponsibility and recklessness.

88. While the DBS's decision making could have been better explained, and while its findings were not the only findings open to them on the evidence, we are satisfied that the findings on which the Barring Decision were based were open to the DBS based on the evidence before them.

89. Since the date of the Barring Decision further evidence in relation to the allegations has become available. We are entitled to consider that evidence to decide whether, notwithstanding that the findings made by the DBS were open to them on the evidence before them, any of those findings were mistaken. That includes the TRA Decision.

The evidence before the TRA and the TRA Decision

90. The TRA Panel, unlike the DBS, had the opportunity to hear oral evidence from XYZ, which was tested by cross-examination by the TRA's counsel. It also heard from Father A and the Head Teacher, whose evidence was tested by cross-examination by XYZ's counsel.

91. The TRA Panel explained what it made of the witnesses who attended the hearing as follows:

> "In the panel's view, Father A did attempt to assist the panel in their understanding of the facts in dispute. Father A appeared to the panel to be honest in terms of what he was stating he had been told by his daughter.
>
> The panel found [the Head Teacher] to be generally honest in his recollection of events, but his evidence was predominantly limited to what he had been told by others. Whilst [the Head Teacher's] view, when interviewing [XYZ], was that [XYZ] was accepting of some of the concerns raised, the panel gave this view little credence, as it became evident that this was based on [XYZ's] body language rather than any actual admissions.
>
> [XYZ] was similarly consistent in his evidence to the panel, both written and oral, although the panel did feel the answers he gave, on occasion, were minimal when he could have provided additional information on matters. However, overall, the panel found him to be forthcoming with his case. The panel also accepted that, considering the unusual and informal approach taken during the School's investigation, his refusal to answer questions at that stage would not be held against him."

92. By contrast, it decided that Pupil A's evidence was to be given minimal weight:

> "Pupil A, who is now over 18 years of age, had not attended to give evidence to the panel and no proper explanation had been given for her absence. She had provided a signed witness statement to be used in these proceedings and was therefore aware that some action was being taken by the TRA against [XYZ].
>
> Pupil A's evidence, which was strongly disputed by [XYZ] and differed from her earlier accounts of events, was disputed hearsay and the panel could only place minimal weight on it."

93. As well as Pupil A's evidence not having been tested at the hearing, the TRA Panel was troubled by Pupil A's account having changed dramatically from her first police interview (in which she denied any relationship between herself and XYZ) and the later account that Pupil A gave to her father, the police, the Head Teacher and children's services, upon which the DBS relied to reach its findings of fact.

94. Given this assessment of Pupil A's evidence, while the TRA Panel accepted Father A's and the Head Teacher's evidence of what Pupil A had told them, it did not accept the truth of her reported statements.

95. The TRA Panel explained its decision making on the allegations about use of social media as follows:

> "Due to the nature of the method by which messages were said to be exchanged between [XYZ] and Pupil A, the panel did not have any documentary evidence that could provide indisputable evidence as to whether messages were exchanged. In determining these two particulars of the allegation, the panel was therefore predominantly reliant on the written and oral evidence given by Father A, [the Head Teacher] and [XYZ], as well as the written evidence of Pupil A" (see page 675 of the appeal bundle).

96. The TRA Panel summarised its assessment of the evidence as follows:

> "In circumstances where the decisive evidence in a disputed case arises from a witness who has altered her account, does not attend to give evidence, and no understandable reason is put forward for this absence, the panel was not persuaded that there was sufficient evidence that messages had been exchanged between [XYZ] and Pupil A by Snapchat. In contrast, [XYZ] had attended to give evidence and be cross-examined, and the panel found him to be generally credible."

97. In terms of the allegations of kissing and cuddling (allegations 1d. and e.), the TRA Panel explained its decision making as follows:

> "The panel first heard evidence on this allegation from Father A. He explained to the panel that, when Pupil A's mobile phones were returned to the family by the police he saw one photo of Pupil A kissing [XYZ] on the cheek. Father A described this as a "selfie" taken in a car.
>
> Father A stated that there were other photos but looking at one was "enough" and that he only looked at the photo very briefly.
>
> Father A denied that he was lying in respect of the police telling him to destroy evidence. He told the panel that the police never expected the concerns to reach this far.
>
> In live evidence, [XYZ] maintained his position that there was no photo of any kissing or cuddling with Pupil A as he said it simply did not happen.
>
> The panel noted Pupil A's witness statement, within which she says that she first kissed [XYZ] in June 2019 and again in August 2019.
>
> Again, the panel did not have concerns that Father A was doing anything other than his best to give his honest interpretation of events. Nevertheless, the TRA's case at its highest was that Father A, fleetingly, saw a photo of what he took to be a kiss between [XYZ] and his daughter. In the panel's view, there is a clear difference between being an eye-witness to an ongoing event, as opposed to the same person interpreting what they see on a phone screen following a brief look.
>
> The panel accepted that, whilst a copy of the purported photo would be highly beneficial, such first-hand documentary evidence was not necessarily needed for this allegation to be proved. However, this allegation did require stronger evidence than a father and his interpretation of a photo. The panel did feel that Father A's interpretation of the photo may have been influenced by circumstances leading up to his brief look at it.

> The panel also noted that Pupil A, within the record of her fast-track interview, made no mention of her kissing, or being kissed by [XYZ] nor cuddling. While the panel appreciated that this account was likely to be a replication of other evidence before it regarding Pupil A's first account to police, it did also re-emphasise that Pupil A's account had not been consistent throughout the proceedings and had dramatically changed.
>
> For confirmation, and for the reasons given previously, the panel considered [the Head Teacher] to give honest evidence as to what he had been told by Pupil A. However, in the circumstances, his evidence was given limited weight as, again, it was his recollection of what he had been told by Pupil A.
>
> In the panel's view a witness's fleeting glance of a photograph on a small mobile phone screen, and the fact that a photo is in itself a momentary recording of an event, was insufficient to persuade the panel that the TRA had discharged its burden on these particulars of allegation.
>
> Such serious allegations, especially when denied, require substantial evidence to determine them proved. Such evidence was not present in this case and, as a result, the panel do not find either allegation proved."

98. Allegation 2 was that the conduct which XYZ had been found to have engaged in (i.e. that described in allegation 1 a.) was conduct of a sexual nature and / or was sexually motivated. The TRA Panel did not find this allegation to have been made out. It explained that:

> "A person meeting up with another person, in a car or otherwise, in the absence of any other factors, is clearly not behaviour that is sexual in nature and the panel did not find the first part of allegation 2 proved.
>
> With regard to [XYZ]'s behaviour being sexually motivated, there was insufficient circumstantial evidence for any proper inference to be drawn that this was the case. While the proven conduct was clearly ill-advised and inappropriate, there was no discernible pattern to it, or the surrounding behaviour, to determine that it was sexually motivated.
>
> The panel therefore determined all of allegation 2 to be not proved."

99. Given its finding that XYZ's conduct amounted to misconduct, it then went on to consider whether that misconduct was so serious that it amounted to unacceptable professional conduct or conduct that may bring the teaching profession into disrepute. It decided that it was neither.

100. The TRA Panel clearly took a very different view of the evidence from the DBS and it reached findings which directly contradicted those of the DBS. However, this doesn't necessarily establish that the findings of the DBS were mistaken.

The oral evidence at the hearing before the Upper Tribunal

101. XYZ attended the hearing before the Upper Tribunal and gave evidence under affirmation. He adopted his witness statement made on 16 October 2023 as his evidence in chief and made himself available for cross-examination by Mr Serr on behalf of the Respondent and for questioning by the panel. We were therefore able to make our own assessment of his evidence.

102. XYZ explained that he had gone into ski coaching on leaving college and later decided to undertake a degree in quantity surveying. He qualified as a quantity surveyor but he didn't enjoy the work and so returned to sports coaching, both in skiing and cricket. He started teaching sport in schools in 2015 under the supervision of a qualified teacher. He took his first classes unsupervised in 2016, and qualified as a teacher in March 2017.

103. He taught pupils in years 3-11 (the pupils being aged between 8 and 16). He explained that all pupils leave the School at the end of their GCSE year (Year 11).

104. His evidence was that he had taught PE to Pupil A at some time between 2016 and 2017, when she would have been 13-14 years old, but he had little contact with Pupil A at that time. Pupil A did not initially choose PE as one of her GCSE subjects, but in January 2018 (when she was 14 or 15 years old, and in Year 10) she dropped music GCSE and took up PE GCSE instead.

105. XYZ said that when Pupil A decided to switch from music to PE, the Head Teacher asked him to give her extra lessons so that she could catch up on the first term of the GCSE PE course, which she had missed. He explained that these were classroom-based theory sessions. The lessons took place twice a week in the mornings before the start of regular lessons. He said that, while the lessons were 1:1, he and Pupil A were not in the classroom alone. He said there would be other staff around and his room was opposite the Head Teacher's office. The doors would be left open in line with the School's protocols. As well as these lessons, he taught Pupil A 5 group lessons a week with her GCSE cohort.

106. When asked by Mr Serr whether he developed a close relationship with Pupil A during this period, he said he got to know her "no more than another pupil". He said that, towards the end of her GCSE course, Pupil A would sometimes speak about her parents and her GCSEs, but not so much in 1:1 situations.

107. When challenged by Mr Serr about his reference in paragraph 8 of his witness statement to her mentioning family in some 1:1 sessions, he said that the 1:1 sessions took place in a room with other people present, that he listened to what she said, but these comments were not particularly directed at him. He said Pupil A would talk about her mother nagging her about her GCSEs. He denied her having talked about boyfriends or other personal things.

108. When Mr Serr asked XYZ whether he had directed Pupil A to the school counsellor, he said that he had not, but he did approach the Head Teacher about the issues raised by Pupil A. He said that, as a newly qualified teacher, he had a mentor, but he was "not 100% sure" that he raised anything about Pupil A with his mentor, and thought he had discussed these matters only with the Head Teacher.

109. Under questioning by Mr Serr, XYZ said that he didn't recall having been given any instructions about the importance of professional boundaries with female pupils, but said he had attended a safeguarding course.

110. Mr Serr put to XYZ that Pupil A said (at page 537 of the appeal bundle) that:

a. XYZ had added her as a contact on Snapchat on her sixteenth birthday and wished her a happy birthday,

b. that XYZ had subsequently wished her a happy Christmas,

c. the messages started again in the Spring term of Year 11, and

d. she stored XYZ's contact details in her phone under the name "Tony" so no-one would know that it was XYZ she was messaging.

111. XYZ accepted he had a Snapchat account but said this was used only in the context of his cricket team, which was nothing to do with the School. He accepted that it would have been inappropriate for him to exchange greetings on Snapchat in the way that Pupil A had alleged, but he denied having any contact with Pupil A on social media. He said Pupil A's account was a fabrication.

112. When Mr Serr put to XYZ Pupil A's assertions that they had used a 'calculator' app to message each other undetected and had kissed, XYZ said these claims were untrue and "never happened".

113. Mr Serr asked XYZ whether anything in his interactions with Pupil A, or anything said by colleagues, had led him to believe that Pupil A might have a tendency to fantasise, but he said it had not, and he couldn't remember ever saying anything to the Head Teacher to this effect.

114. Mr Serr questioned XYZ about the reference at page 497 of the appeal bundle (which formed part of the TRA Decision) to his being unsure how Pupil A became aware of some personal information about him, and XYZ clarified that the information in question was about his brother having recently died.

115. XYZ accepted that in February or March of 2019, a few months before Pupil A was due to sit her GCSEs, she talked to him about her mum and dad, but he did not get the impression that Pupil A had "crossed a boundary". XYZ said he would have done something about it if he thought that she had.

116. XYZ denied Pupil A's account that they had arranged for him to give Pupil A lifts in his car. He pointed out that this allegation didn't feature in Pupil A's first statement to the police.

117. XYZ accepted that he gave Pupil A a lift in his car once before her GCSE exams, but explained that this was with other pupils and was in the context of going to get lunch from McDonald's for the class as a pre-exam treat. He said the trip had the express permission of the Head Teacher.

118. XYZ also accepted he met Pupil A on two occasions either at, or near, football matches. One occasion was at the Stadium of Light and the other was in in London. On both occasions Pupil A was with her family and XYZ was with his friends. He said that at the match at the Stadium of Light he spoke to Pupil A, Father A and Pupil A's brother. Both the encounters were, he said, entirely coincidental and unplanned. When Mr Serr suggested that they could be seen as deliberate meeting, XYZ explained that Sunderland fans tended to congregate at or near a particular bar in London when the team was playing in London, so it wasn't especially surprising that he and Pupil A's family encountered each other there. He added that the following day he had bumped into the Head Teacher at Wembley without arranging to meet him. Further, around three months ago, he had seen Pupil A and her family on a train.

119. XYZ accepted that he had given Pupil A lifts in his car alone on two occasions in the summer after her GCSEs. He said both meetings were, again, coincidental and unplanned.

120. XYZ said that on one occasion, in early August 2019, he was shopping for new cricket trousers in Newcastle when he bumped into Pupil A. They spoke and he agreed to give her a lift to Sunderland. When Mr Serr asked whether he dropped her at her

house, XYZ said he took her to the address she told him, which was near a hotel. He said he didn't know whether that was where she lived, and he didn't ask her. He just dropped her where she asked to be dropped. He said it wasn't a professional thing to do and, "looking back", he wouldn't do it again. He denied Pupil A's allegation that he took her to McDonalds or the Metro Centre, and denied Father A's inference that he might have taken Pupil A to an ice cream parlour.

121. XYZ said that on another occasion, on 13 August 2019, he was driving in his car on his way back to Sunderland after a game of golf when he saw Pupil A waiting at a bus stop. He again offered her a lift. He said Pupil A told him she was going to be early to meet her cousin, so he drove "the longer way around", taking the A19 towards Hartlepool then to the south of Sunderland on the coast road, and he dropped her off in Sunderland. He said he "wasn't 100% sure" that he had gone directly into Hartlepool, but that it was possible he had gone into part of Hartlepool.

122. XYZ said that, while he now accepted that giving Pupil A the lift home from Newcastle was inappropriate, this hadn't occurred to him in the period between that lift and his giving her a lift from the bus stop. He said that if he had thought it to be inappropriate, he wouldn't have done it. He said he just didn't think it "a big deal", and he had been naïve. It was an error of judgement, and he would change it if he could.

123. Mr Serr put to XYZ that he had only quite recently completed his teacher training, and his training on safeguarding and the importance of boundaries would have been fresh in his mind. XYZ said his background was specifically in sports coaching, and that it was common for him to have to take athletes to skiing or cricketing events in his car. Mr Serr put to XYZ that these lifts were different to the lifts he had given Pupil A because they were given in the context of his role as a sports coach, while the lifts to Pupil A were nothing to do with his role as her PE teacher. XYZ accepted this.

124. Mr Serr put to XYZ that the first time he admitted to giving any lifts to Pupil A was before the TRA panel. Prior to that he had given "no comment" interviews to the police and he had not taken the opportunity to refute or explain the allegations made at his meetings with the Head Teacher. XYZ said he went "no comment" in the police interviews on advice from his solicitor. He said that at the meetings with the Head Teacher he was there to listen, again on advice, and he was "not in a good place". He robustly denied making any "admission" that "something happened" and clarified that the supposed "admission" claimed was based not on anything he had said but rather on the Head Teacher's supposed interpretation of his "body language".

125. XYZ pointed to deficiencies in the process relating to his dismissal by the School. He noted that there were two different versions of the supposed letter of dismissal, and he received neither version, although he said he did receive his P45. He said he wasn't stable at the time, he was getting counselling, and it didn't even cross his mind to challenge his dismissal, even though he was a member of a union.

126. In re-examination XYZ said that the early August meeting was not witnessed by anyone, so the only people who knew about it were himself and Pupil A. He said he was not trying to hide anything from the tribunal.

127. In response to questions from the panel, XYZ said he hadn't ever picked up any other students outside school, other than to games or events in the context of his coaching/teaching role. When asked why he decided to do so with Pupil A he said he probably thought that it was OK because, having completed her GCSEs, she was no longer a pupil at the School.

Our assessment of the evidence

128. As discussed above, we are not bound by the TRA Panel's findings, but we should have regard to them and give them the weight that is appropriate in all the circumstances. The question we need to ask ourselves is not whether the TRA Panel was entitled to come to the findings that it reached on the evidence before it, but rather whether anything in the TRA Decision demonstrates that the Barring Decision was based on any finding of fact that was "mistaken" or "wrong".

129. The TRA Panel did not make many positive findings of fact: it found, based on XYZ's admissions in the "Statement of Agreed Facts" document, that XYZ engaged in an inappropriate relationship with Pupil A by giving her lifts in his car on two occasions in August 2019. However, it did not find these meetings to have been planned and it did not find that the relationship between XYZ and Pupil A was sexual in nature. Neither did it find the other allegations (that XYZ instructed / invited Pupil A to communicate with him via Snapchat, that he communicated with Pupil A using Snapchat, or that he kissed or cuddled Pupil A) to be made out.

130. Although the TRA Panel assessed the witnesses at the hearing to be broadly honest and reliable, the findings it made (or declined to make) were based principally on its assessment that Pupil A's evidence should be given only minimal weight and the burden being on the TRA to prove the allegations, rather than any particularly compelling evidence being given by the witnesses who gave oral evidence before it. We were also concerned that the TRA Panel's explanation of its reason for finding the allegations of communications between Pupil A and XYZ on social media to be unproven included a statement that "the panel did not have any documentary evidence that could provide indisputable evidence as to whether messages were exchanged". This indicates that the TRA Panel might have applied a much higher standard than the civil standard which it should have applied when deciding whether the allegations were true.

131. We too heard evidence from XYZ, and we were able to form our own view on him as a witness and on the reliability of his evidence. The TRA Panel found XYZ to be "forthcoming" in his evidence (albeit that it also noted that "the answers he gave, on occasion, were minimal when he could have provided additional information on matters") (see page 675 of the appeal bundle). We did not find him to be "forthcoming".

132. XYZ accepted, as he had done in the TRA proceedings, that he gave Pupil A lifts alone in his car outside school on the two occasions in August. In response to questioning from the panel about whether he had ever given lifts to other lone pupils, XYZ said he had. However, these lifts were given to athletes in the context of his role as a coach, and were to fixtures or events. Crucially, they had a professional justification and so were entirely different in character to the lifts given to Pupil A. XYZ accepted that the lifts he gave to Pupil A were nothing to do with his job.

133. Given that the TRA Panel's assessment of the weight to be given to Pupil A's evidence was heavily influenced by her having changed her evidence from her initial response to being challenged by her father (that there was nothing going on between her and XYZ) to making the allegations, we feel bound to point out the turnaround in XYZ's evidence: although he provided "no comment" responses in his interviews with the police and the Head Teacher, in his representations to the DBS he categorically denied the allegations not only of having an inappropriate relationship with Pupil A, but also of having given Pupil A lifts in his car. He now accepts that he did give lifts to Pupil A, and he accepts (albeit in retrospect only) that his relationship with Pupil A was

inappropriate, and that he hasn't given lifts to other pupils without a professional justification for doing so.

134. Given these admissions, we find XYZ's response to Mr Serr's questioning about whether he had developed a close relationship with Pupil A ("no more than another pupil") to lack credibility.

135. We do not accept XYZ's evidence that he did not appreciate at the time that giving lifts to Pupil A was inappropriate. Having recently completed training in safeguarding in the course of his qualification as a teacher, XYZ would have been fully aware at the time he gave the lifts to Pupil A that giving lifts to a lone 16-year-old pupil or former pupil was inappropriate. Given that, we consider that the fact that he chose to give lifts to this lone pupil was compelling evidence that he had developed an unusually close, and inappropriate, relationship with Pupil A.

136. We were troubled by the long detour (into, or near to, Hartlepool) which XYZ now admits to taking when he gave Pupil A the lift on 13 August 2019. His explanation for doing so was that Pupil A told him that, because she was now travelling by car rather than the bus, she would be early to meet her cousin, so he decided to take a longer route. We find this explanation to be unconvincing and untrue.

137. XYZ could have dropped Pupil A off early at her destination, but he chose instead to extend the drive. We find that XYZ took this lengthy and indirect route because he wanted to spend time alone with Pupil A. We find that he was motivated to spend time alone with Pupil A because he was, as Pupil A claimed, in an inappropriate personal relationship with her, a relationship which he knew to be wrong. In the absence of any credible explanation from XYZ of his actions we infer that his pursuit of a personal relationship with Pupil A was sexually motivated. We can see no other reason why a teacher would engage in such reckless unprofessional behaviour.

138. XYZ's case in his representations was that all Pupil A's allegations were concocted by her for unknown reasons. She made specific allegations about the use of apps to communicate in secret and the giving of lifts outside school, as well as kissing XYZ on four occasions (but, she insisted, nothing further than that). XYZ's evidence to us was that both occasions on which he gave lifts to Pupil A were unplanned and purely coincidental, just as he maintained that his meeting Pupil A and her family at two football matches was unplanned and coincidental. In the light of the evidence as a whole, we find this to be improbable. It is much more likely in our view that XYZ and Pupil A were communicating with each other to arrange to meet. Had they done so in the way alleged by Pupil A this would explain the lack of any record of communications on XYZ's and Pupil A's mobile phones.

139. We find it more likely that Pupil A was telling the truth about:

a. being in a relationship with XYZ,

b. their secret messaging, and

c. their having kissed on four occasions

(just as she was telling the truth about being given lifts by XYZ in his car outside school) than that XYZ was telling the truth about:

a. the meetings between him and Pupil A being wholly unplanned,

b. their relationship being no closer than his relationship with any other pupil, and

c. his deciding to give her lifts on two occasions with no professional reason to do so, including going on a long drive to or near Hartlepool, when he had no personal relationship with Pupil A and no sexual interest in her.

140. XYZ had also argued at an earlier stage that the Barring Decision was in error of law because it was irrational and Wednesbury unreasonable for the DBS to find that XYZ had an "exploitative attitude" or a "significant sexual interest in teenage girls".

141. This argument was premised on XYZ's position that his relationship with Pupil A was limited to his professional relationship with her and his having given her lifts in his car on two occasions outside school, which were purely coincidental and not motivated by any sexual interest in Pupil A.

142. As explained above, like the DBS, we consider it more likely than not that XYZ was in an inappropriate relationship with Pupil A and he kissed her on four occasions, albeit that no further sexual activity occurred.

143. It was neither irrational nor unreasonable for the DBS to find that XYZ had a sexual interest in Pupil A. Further, having found that XYZ had a sexual interest in Pupil A (a teenage girl), and had engaged in sexual activity with her, it was entitled to infer that he had a "significant sexual interest in teenage girls". That is the case even in the absence of any evidence or allegation that he had pursued sexual relationships with any other teenage girls. XYZ's willingness to cross professional and moral boundaries to exploit the imbalance of power between himself and Pupil A to satisfy his own ends was an adequate basis for the DBS's finding that XYZ had an "exploitative attitude".

144. Nothing in the TRA Decision, and nothing in the other new evidence before us, persuades us that the Barring Decision was based on any material mistake of fact.

145. The Barring Decision is therefore confirmed, and the appeal is dismissed.

Thomas Church
Judge of the Upper Tribunal

Mr John Hutchinson
Tribunal Member

Dr Elizabeth Stuart-Cole
Tribunal Member

Authorised for issue on 19 March 2024