



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: UA-2021-000114-V
[2024] UKUT 291 (AAC)
CD V DISCLOSURE AND BARRING SERVICE**

THE UPPER TRIBUNAL ORDERS that:

No one shall, without the consent of the Upper Tribunal, publish or reveal the name or address of any of the following:

- (a) CD, who is the Appellant in these proceedings;**
- (b) any of the other persons mentioned in the documents or during the hearing;**

or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings.

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Decided following an oral hearing on 9 July 2024

Representatives

Appellant	Jenni Watson
Disclosure and Barring Service	Simon Lewis of counsel, instructed by DBS's legal Department

DECISION OF THE UPPER TRIBUNAL

On appeal from the Disclosure and Barring Service (DBS from now on)

DBS References: 00924601883 and 00980661216

Decision letters: 27 April 2021 and 20 April 2023

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA from now on):

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As DBS made mistakes in the findings of fact on which its decision was based, the Upper Tribunal, pursuant to section 4(6)(b) and (7)(a) and (b) of SVGA:

makes findings of fact and remits the matter to DBS for a new decision; and
directs that the appellant remain in the lists until DBS makes its new decision.

REASONS FOR DECISION

A. History and background

1. In 2021, DBS included CD in the children's barred list. Upper Tribunal Judge Jacobs gave CD permission to appeal against that decision and directed that the appeal be decided at an oral hearing. A few days before the hearing, CD's representative informed the Upper Tribunal that she did not have a full set of the papers. More or less at the same time, DBS included CD in the adults' barred list. Judge Jacobs gave permission to appeal against that decision. As the findings and reasoning in both decisions were effectively the same, both cases were heard together under the same Upper Tribunal reference number.

B. DBS's findings of fact

2. These were DBS's findings. We have inserted headings for ease of reference later.

Exposure

- On 4 January 2013, you intentionally exposed your genitals to two females aged 11 and 13 at ... Leisure Centre.

Personal boundaries

- You breached professional boundaries with students at Y Primary, by sending messages on notes attached to books.
- You breached professional boundaries by sending notes to a female student whilst working at Z Primary School.

Fixation

- You developed a fixation with Child A and breached professional boundaries through your engagement with her whilst employed at Y Primary School. Your actions included singling her out for preferential treatment, writing notes to her, hugging her water bottle when she was not present, asking her to stay in at lunchtimes, offering the class cookies if she would give you a hug, hugging her and touching her bottom, and asking her out on a date.

For completeness, DBS considered other allegations but found that they were not proven.

C. The legislation

The barring provisions

3. We set out the provisions of Schedule 3 SVGA relating to children; those relating to vulnerable adults are essentially the same. Paragraph 9 is the equivalent for vulnerable adults.

Behaviour

Paragraph 3

- (1) This paragraph applies to a person if—
 - (a) it appears to DBS that the person —
 - (i) has (at any time) engaged in relevant conduct, and
 - (ii) is or has been, or might in future be, engaged in regulated activity relating to children, and
 - (b) DBS proposes to include him in the children’s barred list.
- (2) DBS must give the person the opportunity to make representations as to why he should not be included in the children’s barred list.
- (3) DBS must include the person in the children’s barred list if—
 - (a) it is satisfied that the person has engaged in relevant conduct,
 - (aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
 - (b) it is satisfied that it is appropriate to include the person in the list.
- (4) This paragraph does not apply to a person if the relevant conduct consists only of an offence committed against a child before the commencement of section 2 and the court, having considered whether to make a disqualification order, decided not to.
- (5) In sub-paragraph (4)—
 - (a) the reference to an offence committed against a child must be construed in accordance with Part 2 of the Criminal Justice and Court Services Act 2000;
 - (b) a disqualification order is an order under section 28, 29 or 29A of that Act.

Paragraph 4

- (1) For the purposes 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);

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- (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.
- (3) 'Sexual material relating to children' means—
 - (a) indecent images of children, or
 - (b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.
- (4) 'Image' means an image produced by any means, whether of a real or imaginary subject.
- (5) A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes of this sub-paragraph.
- (6) For the purposes of sub-paragraph (1)(d) and (e), DBS must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate.

The appeal provisions

4. Section 4 SVGA contains the Upper Tribunal's jurisdiction and powers.

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.

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

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

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

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

(5) Unless the Upper Tribunal finds that 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.

...

D. Exposure

5. DBS found that:

On 4 January 2013, you intentionally exposed your genitals to two females aged 11 and 13 at ... Leisure Centre.

Events in 2013-2014 and their significance

6. This finding relates to an allegation that was the subject of a trial in the Crown Court in 2013. We have had the benefit of transcripts of some of the proceedings, which were not available to DBS when it made its decision. The judge directed the jury to acquit CD. DBS's record for CD contains information about the trial provided by the Metropolitan Police, which says that no evidence was offered (page 152). That is not correct. We saw the transcript of the judge directing the jury to acquit CD on the ground that the evidence against him was not reliable.

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7. The case was referred to DBS, who decided on 12 March 2014 that it was not appropriate to include CD in either list.

8. Although CD was acquitted, DBS was entitled, as was this tribunal, to consider whether on the balance of probability CD did intentionally expose himself. The standard of proof that we have to apply is the lower civil standard rather than the higher standard applied by the criminal court. And we are not concerned with the double intention required by the criminal charge – an intention to expose himself and an intention to cause alarm and distress. We are entitled to make our own assessment of the evidence, having heard CD’s denial. Having made that assessment, we have decided that this finding is not proven.

9. DBS was entitled to include CD in both lists, despite its decision in 2014 that he should not be included. This was not of itself a mistake of law: see *JT v Disclosure and Barring Service* [2022] UKUT 29 (AAC) and *SV v Disclosure and Barring Service* [2022] UKUT 55 (AAC).

The evidence of exposure

10. CD is said to have exposed his genitals by opening his towel on two separate occasions. He had been swimming and had returned to the men’s changing room. There are two entrances. One is used by visitors when they are clothed, as they arrive or leave. The other is used when visitors are wearing their swimming attire, as they go to and from the pool. The incident is said to have taken place in the latter entrance. The area is well frequented by visitors of all ages and genders.

11. The allegation was based on the evidence of two girls: N who was aged 11 and J who had by then turned 14. We find the evidence of N more reliable than that of J. N said that CD had exposed himself twice, for about five seconds on each occasion. She said that she had seen that he was not wearing anything under his towel. Later, though, she said this was what her friend J had told her and she did not believe that J would lie about that. When asked directly what she had seen, N told the judge that she had only seen the side of CD’s body and had not seen him naked.

12. J’s evidence was that she had seen CD’s penis. At first, she said that each exposure had lasted for two to three minutes, although she later modified this to one to two minutes. There had been a gap of five to ten minutes between exposures.

13. Our overall impression is that N, although the younger, was the more mature of the two. She did not see CD expose himself on either occasion and was not afraid to change her evidence to confess that she had merely accepted what her friend had told her. J’s evidence was more extravagantly expressed. Her time estimate was implausible, on account of both its duration and the frequency with which other visitors passed the entrance to the changing room. She was reluctant to accept that she might be mistaken about the time involved and, even when ‘driven’ (the judge’s word) to revise her evidence, her reduced estimate was equally implausible.

Other points

14. Mr Lewis made a number of points in support of DBS’s finding. We are not going to comment on all of them, but here are our comments on some of the points.

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15. It is correct that the police and the Crown Prosecution Service considered there was sufficient evidence to proceed on the criminal standard. But the judge did not.

16. It is correct that the girls identified CD at an identification parade. His identity as the person they saw is not in doubt. The issue for us was what he did.

17. CD answered 'no comment' during the police interview. It is difficult to know what to make of this as it is often done on legal advice; there was a solicitor present at the interview. The reliability of the evidence is far more important than speculation about the tactics adopted during the interview.

18. The LADO process found that the allegation was unsubstantiated, meaning neither proved or disproved, but 'it was agreed that on the balance of probabilities it is likely that you may pose a risk to children and vulnerable adults.' This does not help either way with whether or not CD exposed himself in the Leisure Centre. The same is true of the decision by the school where CD was working not to renew his contract. We also note that DBS took a different view from both LADO and the school when it decided in 2014 not to include CD in a barred list.

E. Personal boundaries

19. Our assessment of the evidence on these findings was made with the benefit of the practical knowledge and experience that the specialist members bring to this jurisdiction. We refer to what the Upper Tribunal said about their qualifications for appointment in *CM v Disclosure and Barring Service* [2015] UKUT 707 (AAC) at [59] to [64]. In this case, they have been particularly helpful in understanding and assessing the evidence about teaching practices and the realities of conduct in a classroom.

20. The findings reflect the analysis that the use of notes was of itself inappropriate. That is not correct. Teachers regularly use notes to communicate with pupils. There is nothing wrong in itself in putting notes into a pupil's book or attaching them to the back or expecting a response in some form. A note might also be put onto a pupil's desk, perhaps telling them to stop looking around and concentrate on the task in hand. Using these techniques is not necessarily cause for suspicion. What matters is what the notes say and their context.

21. The notes are used as a way of communicating privately. This avoids disclosing the comments, which may be critical or point out mistakes, to other pupils. Some pupils like this; others do not. Some would like it known if they have done well in an assignment. This can lead to resentment, jealousy and suspicion. But however the children feel, privacy is not of itself suspicious and it is not necessarily an indication that the communication is inappropriate. Criticisms by pupils of the practice may reflect their different opinion of its value.

22. Allocating tasks for pupils to undertake during breaks is an acceptable practice. To take CD's example during evidence, this might involve spending part of the break time to tidy the books on some shelves in the classroom. The idea is to teach a sense of responsibility. It does not necessarily show favouritism or a breach of professional boundaries, provided the tasks are distributed fairly. And a teacher is entitled to be annoyed if the child does not perform their allotted task. At page 111, Child A said of CD: 'He'd call us to help at lunch – even if we didn't want to go.' She also said that CD

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'would get mad if they weren't there – this happened in class and at lunchtimes when helping in the classroom.' That may indicate no more than the children's preference for spending the time with their friends and CD's natural reaction to the pupils' failure to co-operate.

23. CD told us that he used notes in his teaching, but always as a teaching tool and never inappropriately. As we have explained, we accept that notes can be used as a useful aid in teaching; their use is not of itself inappropriate. However, we find that CD has not always used notes appropriately and that, taken together with his behaviour during classes, his use shows that he breached personal boundaries with his pupils.

24. We begin by explaining why we have accepted the evidence from a small number of mostly self-selected pupils about how he has used the notes and how he has conducted himself in class.

25. First, there is consistence in the allegations that are made.

26. Second, there is evidence of similar behaviour in different school years and at different schools.

27. Most of the evidence comes from School Y, but there is also evidence of a complaint in School Z from 2017 (page 127). So, there were reports of CD drawing sad faces on notes in 2017 (page 127) and 2020 (page 703). And evidence of giving and withdrawing friendship from children in 2017 (page 127 again) and 2019 (page 126). Finally, there is note of a concern about boundaries with pupils in 2009-2010 (page 127). Any collusion between schools or pupils at different schools is inconceivable.

28. There is also evidence of consistent behaviour from year-to-year in School Y. Compare the children's evidence in 2019 at page 126 and evidence in 2020 relating to a previous school year at pages 111-112. We discuss the latter when we come to the Fixation finding. And see Child A's mention of CD using notes when teaching a Year 3 class (page 95). There is also limited evidence from other teachers, which was obtained from children after the allegations against CD were made (pages 96-97).

29. Third, the pupils give a balanced approach in their accounts. In particular, one child described feeling surprised and satisfied at getting a note from CD, but also feeling uncomfortable and not herself (page 126). The children recognised CD's popularity as a teacher, but also reported being troubled by some of his behaviour (page 126). They felt the need to question and challenge him what was happening (page 126).

30. Fourth, the pupils' description of how he made them feel fits with their account of his use of the notes.

31. Fifth, taken together their evidence produces a plausible account of a pattern of behaviour.

32. We come now to what that behaviour consisted of.

33. There is a theme of the use of friendship with pupils. To some it is given, from some it is withheld, from others it is withdrawn. CD asked a child to be his friend (page 127). After a discussion in class about CD's use of notes, he gave one pupil a note saying (page 126): 'you're not my friend anymore.' He asked another if she wanted to

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go on a date (page 112). These are not proper subjects for conversation. Some children saw themselves as CD's friend (page 95); another did not and felt excluded (page 97). The pattern casts doubt on his motive behind what might otherwise have been a genuine attempt to empathise with a shy pupil (page 95). Friendship is not a teaching tool.

34. Whatever CD's notes said, they were not simply used as a means of conveying comments on the pupils' work. If they had been, they would have been used consistently and pupils would not have noticed that CD was selective in who received them (pages 95 and 96). We have already mentioned what some notes said when discussing CD's use of friendship. He also used notes to make personal comments about pupils or his feelings for them. He said of one child 'I like your hair today' (page 111) and told another that 'I miss you' (page 703). This is not appropriate between teacher and pupils.

35. Physical contact, proximity and other forms of engagement can cross boundaries. Hugging a child may be appropriate in some circumstances, touching their bottom is not (page 111). There was nothing wrong with CD smiling at a pupil, but it was wrong to pick on individuals to the point that other pupils noticed it, and worse to ask one pupil to let him know if he saw it happening (page 126). Pupils should not be made to feel uncomfortable by the way he looked at them, as Child A and Child H did (page 96).

36. We now move to the Fixation finding before giving our conclusions.

F. Fixation

37. DBS found that:

You developed a fixation with Child A and breached professional boundaries through your engagement with her whilst employed at Y Primary School. Your actions included singling her out for preferential treatment, writing notes to her, hugging her water bottle when she was not present, asking her to stay in at lunchtimes, offering the class cookies if she would give you a hug, hugging her and touching her bottom, and asking her out on a date.

38. Ms Watson argued that DBS had consolidated findings about two different children, both of whom were called A in the documents. We accept that there has been some confusion. We sympathise with the caseworker, who was faced with evidence in which children were identified by letters. Unfortunately, the letters were not used consistently. In short, the caseworker referred to a child as Child A. That child was also known by other letters in the documents and other children were also labelled as Child A. The caseworker recognised that the children were not identified consistently by the same letter, but did not follow this through in the reasoning.

39. This is part of what the caseworker wrote on page 212:

Child A is a female student who was around the age of 8 at the time of the concerns. (Flag 16)

It has already been established in an earlier allegation that CD had sent notes to students and this included student A. A specific comment in relation to Child A was "I like your hair".

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Child A described CD as a friend as he empathised with her and understood how she felt. He would also encourage her (flag 8).

That is sufficient to make our point.

40. It is convenient to begin with Flag 13 (pages 111-112). This consists of three notes written in January 2020 following a conversation with a supervisor during the midday break. The children are identified by letters, including Child A. The language shows that the children were not then in Year 4. This is clearest in the third note on page 112, where the child is asked about the conversation with the supervisor and says:

Yes – it was about CD when we were in Y4.

To emphasise, the conversation took place in the 2019-2020 school year, and the children were no longer in Year 4. They could not have been in Year 4 in November 2019. A number of the findings listed to show fixation come from Flag 13. One is the remark about a child's hair, although it is given merely as an example and not identified as being sent to any particular child. Others including touching her bottom and asking her out for a date.

41. DBS's finding on fixation contains a non-exhaustive list, which is drawn from Flag 13. The problem is that the caseworker did not rely on that flag alone. The reasoning we have quoted referred to Flags 8 and 16 (pages 123 onwards). There is a long trail to Flags 8 and 16. It begins with the note dated 7 November 2019 and the subsequent investigation. This is our summary of the note. A child in CD's class had found a note in her tray saying 'I miss you' with a sad face. A teacher threw the note away and said 'maybe one your friends misses you.' Another child then said: 'oh CD always writes notes to A.' The teacher asked A, who said 'CD doesn't really write anything on the notes.' Another child then said that 'CD told him to let him know if he looks at A a lot.'

42. The original note is at page 703. It is handwritten, but redacted, leaving children identified by letters only. There is a transcription in Flag 15 (pages 117-118), in which the child is named – her name begins with A. There is also a typed copy at Flag 7 (on page 97), where the child is referred to as Child Z. To make matters more confusing, the typed version refers to a Child A, but this must be a different child from the one redacted to A in the original note.

43. The finding of the note led to a visit to the School by the Safeguarding in Schools' Lead on 8 November. Her report is Flag 8, to which the caseworker referred. She talked to five children and referred to them by letter: A, B and so on. It seems to us that Child A is the child redacted to A in the original note and called Child Z in the typed version. The record is summarised in Flag 16, to which the caseworker also referred, but the children are now identified with different letters. This time, Child A has become Child X.

44. If the finding on fixation had been based solely on Flag 13, it might have been sustainable. But the caseworker's analysis of the evidence that led to this finding took account of other evidence relating to different children. That undermines the reasoning and casts doubt on the conclusion of fixation.

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45. Mr Lewis argued that it did not matter if the caseworker had confused different children. Indeed, he argued that it made matters worse for CD, as he was fixating on two pupils rather than just one. We do not accept that argument. Proving a fixation depends on the number of instances. Reducing the number attributable to each child, weakens the proof.

46. We cannot find on the balance of probabilities that the actions identified by DBS show fixation on a particular individual. We do, though, find that the examples show CD failing to maintain professional boundaries and showing favouritism to particular pupils. We note that being selective and favouritism is the language used by the pupils in 2019 (page 126) and in 2020 (pages 111-112).

G. Our conclusions on boundaries and fixation

47. DBS's findings on professional boundaries are defective because they refer only to the sending of messages. We have given our conclusions on what the evidence shows about crossing personal boundaries. The finding on fixation is defective because it is based on a confusion of the children involved. The findings on the matters itemised in this finding provide further examples of crossing boundaries. There is one exception: asking a child to stay in at lunchtimes was probably no more than telling her to take her turn to tidy the classroom.

48. We consider that a more realistic analysis of the evidence as a whole is to replace DBS's three findings with a single finding that:

CD breached professional boundaries in the notes he passed to pupils, in his conversations with them, and by his behaviour towards them, including showing favouritism to particular pupils, especially girls.

H. Disposal

49. We have removed one finding and substituted a single finding for the others.

50. We have power to direct DBS to remove an appellant from a list under section 4(6)(a), but only if 'that is the only decision that DBS could lawfully reach in the light of the law and the facts as found by the Upper Tribunal.' See the decision of the Court of Appeal in *Disclosure and Barring Service v AB* [2022] 1 WLR 1022 at [73]. In view of the nature of the finding we have made, we consider that the Court of Appeal's test is not satisfied.

51. That is why we have remitted the case to DBS for a new decision under section 4(6)(b) and (7)(a) on the basis of our findings. There is no basis on which we could direct that CD be removed from the lists pending the new decision.

**Authorised for issue
on 17 September 2024**

**Edward Jacobs
Upper Tribunal Judge
Josephine Heggie
Rachael Smith
Members**