IN THE UPPER TRIBUNAL **Case No. UA-2022-001706-V**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 332 (AAC)**

Between:

AA

Appellant

-v-

Disclosure and Barring Service

Respondent

Before Upper Tribunal Judge Church
Tribunal Member Jacoby
Tribunal Member Turner

Decided following an oral hearing at Field House, London on 27 August 2024

Representation: Ms Maria Scotland of counsel, instructed by Duncan Lewis Solicitors, represented the Appellant
Ms Bronia Hartley of counsel, instructed by DLA Piper LLP, represented the Respondent

DECISION OF THE UPPER TRIBUNAL

On appeal from: Disclosure and Barring Service (**"DBS"**)
DBS Reference: P00003MPY6D
Final Decision Letter: 30 August 2022

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (**"SVGA"**)

The appeal is allowed.

The decision of the DBS made on 30 August 2022 to place the Appellant's name on the Children's Barred List involved a mistake on a point of law.

Pursuant to section 4(6)(b) of SVGA the Upper Tribunal remits the matter to the DBS for a new decision.

The Upper Tribunal directs that the DBS shall not remove the Appellant's name from the Children's Barred List pending the making of the new decision.

REASONS FOR DECISION

What this case is about

1. This case concerns allegations that the Appellant, who at the relevant time worked on a largely voluntary basis as an Arabic teacher at a madrassa, sexually assaulted three girls aged 8-9 years old who were pupils at the madrassa.

2. Despite the Appellant being acquitted of all charges in a Crown Court trial in relation to the allegations, the DBS found the allegations proved on the balance of probabilities, and decided on the basis of those findings to retain his name on the Children's Barred List.

3. The SVGA requires the DBS to ask itself three questions when determining whether an individual should be placed on, or should remain on, a barred list:

    a. is it satisfied that the individual engaged has (at any time) engaged in 'relevant conduct' (as defined in the SVGA and as explained below)?

    b. does it have reason to believe that the individual is, or has been, or might in the future be, engaged in 'regulated activity' relating to children?

    c. is it satisfied that it is appropriate to include the individual in the list?

4. If the answer to each of these questions is "yes" it must place, or retain, the individual's name on the Children's Barred List.

5. The Appellant accepts that he has been, and might in the future be, engaged in 'regulated activity' and he also accepts that the conduct which the DBS say he engaged in amounts to 'relevant conduct' in relation to children for the purposes of the SVGA. However, he says that he did no such thing. He says he didn't touch the complainant children at all, let alone touch them sexually, and he maintains that they made up the allegations and told lies about him. In the language of the SVGA, he says that the Barring Decision was based on material mistakes of fact.

6. The Appellant also argues that the DBS made mistakes of law in reaching its decision to include his name on the Children's Barred List.

7. The Appellant asks the Upper Tribunal to direct that his name be removed from the Children's Barred List. He says he has no plans to return to teaching, but he wants to obtain a licence to operate as a black cab driver to support his family better, and having his name on the Children's Barred List prevents him from doing that.

8. The DBS resists the appeal, argues that its decision to place the Appellant's name on the Children's Barred List, while not perfect, involved no material mistake of fact or law, and says that it should be upheld.

Factual background, and the decision under appeal

9. Following the Appellant's acquittal in the Crown Court trial, the DBS reviewed the evidence and wrote the Appellant a 'minded to bar' letter informing him that it was minded to place his name on the Children's Barred List and inviting him to make representations should he disagree with his proposed inclusion. Having received no representations from the Appellant, the DBS completed its decision-making process,

deciding to place the Appellant's name on the Children's Barred List (the **"Initial Barring Decision"**).

10. The Initial Barring Decision was communicated in a 'final decision letter' dated 8 November 2018, but it appears that while the letter was sent by DBS it was not received by the Appellant. The Appellant was unaware that his name had been placed on any barred list until he applied for a job with Transport for London. When he became aware that his name was on the Children's Barred List he was given permission to make late representations against his barring, which he duly did.

11. The DBS reviewed the evidence, considered the Appellant's representations, and issued a 'minded to retain' letter setting out its findings and inviting him to make further representations, which he duly did. Following a review of the further representations and all the written evidence the DBS made a new decision on the papers. It explained its decision and the reasons for it in a 'final decision letter' dated 30 August 2022. It decided that it was appropriate for the Appellant's name to remain on the Children's Barred List (the **"Barring Decision"**). It based the Barring Decision (which was addressed to the Appellant and so refers to him as "you") on new primary findings of fact (which differed from the findings of fact on which the Initial Barring Decision was made, including in that they related to sexual touching of three children, while the Initial Barring Decision was based on findings of sexual touching of five children).

12. The primary findings of fact upon which the Barring Decision was based are:

> "1. On Monday 21st March 2016, while teaching at the BWC you sexually abused KJ (8y old girl) by: unzipping her jacket, touching and squeezing her bottom and breasts with both hands, and touching/scratching her vaginal area over the top of her clothing.
> 2. On more than one occasion between June 2015 and the 23rd March 2016, whilst teaching at the BWC, you sexually abused KJ (8y old girl) by: unzipping her jacket, touching and squeezing her bottom and breasts with both hands over the top of her clothing.
> 3. On more than one occasion between 7th and 23rd of March 2016, while teaching at the BWC you sexually abused MB (9y old girl) by: unzipping her jacket, touching and squeezing her bottom and breasts with both hands over the top of her clothing, and on one occasion kissed her on the cheek.
> 4. On an unspecified single occasion prior to the 23rd March 2016, while teaching at the BWC you tickled MT (8y old female child) on the stomach area" (together, the **"Primary Findings of Fact"**).

13. Based on these primary findings it made secondary findings by inference that:

   a. the Appellant caused emotional harm to the children;

   b. the Appellant took advantage of a power differential and exploited his position as an adult male figure of authority;

   c. the Appellant has a sexual interest in children;

   d. there was an escalation in the Appellant's behaviour;

   e. the Appellant has failed to take responsibility for his actions;

f. the Appellant has not shown any insight into his behaviour and harm caused;

g. the Appellant represents a future risk of significant harm; and

h. the Appellant poses a risk of sexual and emotional harm towards children

(together, the **"Secondary Findings of Fact"**).

14. The Barring Decision (not the Initial Barring Decision) is the decision under appeal.

The permission stage

15. The Appellant applied to the Upper Tribunal for permission to appeal the Barring Decision, maintaining that he had been falsely accused and the DBS's decision making was factually and legally flawed.

16. I ordered further disclosure by DBS and gave the Appellant an opportunity to file perfected grounds of appeal in response. On 2 February 2024 I granted permission to appeal against the Barring Decision. In my decision notice I explained my reasons for granting permission, and the scope of my grant of permission as follows:

> "18. .... where there is new evidence that wasn't considered by the Respondent, the Upper Tribunal is permitted to consider that evidence to assist it to decide whether the Respondent's decision was based on a mistake of fact. In this case we have the transcript of evidence that was given at the criminal trial. It may well be that, should the matter go to a full hearing, the Upper Tribunal may hear live evidence tested under cross-examination ...
> 20. My grant of permission is unrestricted."
> [See page 605 of the Upper Tribunal bundle, at paragraph 18].

17. I ordered an oral hearing of the substantive appeal, which took place on 27 August 2024 before a three-member panel with expert members at Field House, London. Both parties were represented by counsel and the hearing was assisted by Mr Adan Mohamed Jama, a Somali interpreter.

The Appellant's perfected grounds of appeal

18. The Appellant's perfected grounds of appeal are, in summary, that:

a. the DBS's Primary Findings of Fact are mistaken and are also irrational on the evidence, and therefore in mistake of law, and given these flaws in the Primary Findings of Fact, the Secondary Findings of Fact made based on those flawed findings are unsustainable (**"Ground 1"**).

b. the DBS failed to have regard to relevant factors in reaching its finding that the Appellant had engaged in 'relevant conduct' (including failing to refer in its structured judgment process document to the Appellant's good character, the trial judge's comments about his credibility, the weight given to the "not guilty" verdicts following testing of the allegations at the criminal trial), the weight given to the admission that complainants KJ and MB spoke to each other about the allegations prior to the disclosure, the lack of evidence of prior sexually inappropriate conduct, the fact that there was no CCTV footage to

substantiate the allegations, and there being significant differences between the complainants' evidence in their written statements and their oral evidence at trial) (**"Ground 2"**),

c. the DBS made a procedural error amounting to a material mistake of law in completing its structured judgment process without first having obtained the transcripts of the criminal proceedings (**"Ground 3"**),

d. even if the DBS was entitled to make the findings that it did, the Appellant's continued inclusion in the Children's Barred List represented a disproportionate interference with his Article 8 right to respect for his private and family life, and was in error of law (**"Ground 4"**).

The statutory framework relating to barring

19. The 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 SVGA.

Duty to maintain the Barred Lists

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

Criteria for inclusion in the Barred Lists

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

22. Under Section 3(2)(a) SVGA a person is barred from "regulated activity" relating to children if they are included in the Children's Barred List, and under Section 3(3)(a) 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.

23. The Appellant has been included by the DBS on the Children's Barred List pursuant to Schedule 3, Part 1, paragraph 3 SVGA (which relates to children and is headed "Behaviour") and in the adults' barred list pursuant to Schedule 3, Part 2, paragraph 9 SVGA (the equivalent provision relating to vulnerable adults, which is also headed "Behaviour").

24. Paragraph 3 of Part 1 of Schedule 3 to the SVGA 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. ..."

25. 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. By section 59 SVGA "child" means a person who has not attained the age of 18. 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).

26. "Relevant conduct" in relation to children is explained in paragraph 4 of Part 1 of Schedule 3 to the SVGA 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

27. Section 4 SVGA sets out the Upper Tribunal's jurisdiction and powers in respect of appeals against decisions of the DBS. It provides (so far as relevant):

"**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 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."

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

28. 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.

29. 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."

30. 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."

31. 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."

32. 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 SVGA 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]).

33. 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.

34. 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])

35. 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]).

36. 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."

The oral hearing of the substantive appeal

37. At the oral hearing of the substantive appeal, we had the benefit of hearing oral evidence from AA, who was cross-examined by Ms Hartley on behalf of the DBS, and who was also questioned by the panel.

38. AA said that at the time of the allegations he had been teaching at the madrassa for about 4 years. The classes were on Mondays and Wednesdays after the pupils' school day from 5-7pm, and on Saturday mornings. He explained that he and another male colleague each taught one of the two boys' classes (of about 25-30 boys each) and a female colleague taught the girls' class (of about 15-20 girls). The children ranged in age from 5 to 16.

39. In response to questioning by Tribunal Member Turner about what safeguarding training he had undertaken and what safeguarding measures were in place at the madrassa, AA said he had worked under the director of the madrassa for six months with the director teaching, and that every 6-8 months he would report to the director. He said that the director had given him some safeguarding training, and in terms of supervision, the madrassa was linked to a mosque and about every three weeks there would be a lecture from the mosque. He said that, for example, there had been a talk about how to protect the youth from knife crime. In terms of support, he said that he could seek advice from the director or other teachers.

40. He described the hall where the lessons took place as a single room divided by a curtain. When they arrived, the girls had to pass through the boys' area to get to their side of the curtain. The boys (and male staff) had to pass through the girls' area to go to the toilet.

41. AA explained that it was the job of [Sabriye] (a male member of staff who was not a teacher) to open the school in the morning, and no children would go into the school before [Sabriye] had opened up. The Appellant confirmed that he had a key to the school, as did all other members of staff, but he said he was never the first person to arrive at the school.

42. When it was put to him in cross-examination that KJ and MB had said that their parents would drop them off early at the madrassa, AA said that he couldn’t remember that. He said that there was sometimes one student there when he arrived but he didn’t know whether she was early.

43. AA said he had been authorised by the Director of the school to speak with parents about their children’s progress. In each case, the child’s teacher would tell him how the child was progressing, and he would pass that information on to the parents. He said he would also discuss discipline matters, such as if a pupil hadn’t been doing their homework, and this role extended to the girls as well as the boys. He said the girls’ teacher didn’t speak fluent English, so would speak to him about her pupils in Somali, and because the girls didn’t understand Somali, they would just see their teacher talking to him and then see him talking to their parents and assume that he was telling their parents something negative. It was put to AA in cross-examination that while in his police interview he had distanced himself from the children who made the allegations, saying he had had no dealings with them, and when asked by police whether he had met KJ’s parents he had said that he only greeted her father but had made no conversation, and by the time of the Crown Court trial he said he had spoken to the father to report behavioural concerns, and suggested this as a motive for KJ telling lies about him. At the Upper Tribunal hearing AA said that he had spoken to KJ’s father many times about KJ chatting in class, but he had only done so a couple of times “recently” (i.e. in the period leading to the allegations). He said that talking in class was not a big deal and he considered it to be “in the nature of children”. He said he never spoke to the children to tell them that they had a detention.

44. AA said that the only contact he had with the girls was speaking from the other side of the curtain to tell them to quieten down, or sometimes putting his head around the curtain to say “girls, please lower your voice”, and if they didn’t stop, he would pull the curtain and say “please stop”. AA said that sometimes he would have to speak to the girls, saying things like “respect your teacher”, or “do your classwork”, but the female teacher was always present. AA said that the children used to be scared of him but he didn’t know why.

45. AA said that unlike the male staff, the female teacher would never go outside because she was the only female and she couldn’t leave the girls alone. AA said that if the children are left alone they might start throwing pencils, and their teacher would be responsible for managing their behaviour. He also said that the girls wouldn’t go into the school unless the female teacher was there, but Ms Hartley pointed out that in the judge’s summing up of the evidence in the Crown Court trial he said that on 21 March 2016 the girls were already in the girls’ area when the female teacher arrived late. AA accepted that she was late that day, but said that generally if the teacher was not there the girls wouldn’t go in, and this was the only occasion on which she was late.

46. AA was adamant that he has never touched any of the female pupils, and had not even shaken hands with them. He said his religious beliefs prevented him from doing such a thing. When asked what would happen if the girls needed help for any reason, AA said that in an emergency he would help, but there would be a female teacher present.

47. AA said it would have been impossible for him to do what he is alleged to have done because he would have been observed by other staff members, parents and/or other pupils, some of whom were teenagers with smartphones who could have photographed or filmed him.

48. When it was put to him that KJ and MB had said that there was sometimes another teacher in the building when he touched them and he still did it, but if anyone came he would push them away, AA said he remembered that being said, but it was not true and "completely made up". He said that all three girls had told lies about him and that it was not really three separate allegations, but rather a single allegation because the children had spoken to each other. He said that while KJ had continued to allege that he had sexually assaulted her, her explanation was completely different from what she had said in police interview. He said that what MB said both in police interview and in court was a lie, as she was not even at the madrassa on the day he is alleged to have sexually assaulted her and that she was "clearly lying".

49. AA said that on Monday 21 March he was late travelling to the school from Harlesden, arriving at the school only at about 5:35-5:40 pm. He said all the pupils and teachers were already there and the other male teacher was taking his class.

50. AA said the girls had all told lies. He said that on the night of 21 March 2016 MB and KJ had slept in the same house and so had had an opportunity to talk to each other and to prepare for when they knew they would be interviewed. When Ms Hartley asked AA whether he was saying that the girls made up the detailed allegations against him over "a couple of detentions" he said that he was "not saying that they had the intention to do something bad", but he still maintained that they were lying.

51. AA emphasized that the case has damaged his dignity and made him decide not to return to teaching or to live in the same area. He said it took him 18 months after his trial to get his life settled again and he now hopes to become a black cab driver to support his family better, but he is unable to do this because his name remains on the Children's Barred List.

Our assessment of AA's oral evidence

52. The oral evidence given at the Upper Tribunal hearing was clearly not available to the decision maker at DBS, but we are entitled to take it, and the transcript of the Crown Court trial, into account when considering whether the DBS made a material mistake of fact on which the Barring Decision was based.

53. What the Appellant said in his live evidence was broadly consistent with his previous written representations, and with his case at his criminal trial. However, there was nothing in what he said that persuaded us that the DBS had necessarily erred in preferring the children's evidence over AA's evidence.

54. As Ms Hartley said following conclusion of AA's evidence at the hearing, we were left in the same place that DBS was when it made the Barring Decision: there were inconsistencies in the children's evidence, but there were also inconsistencies in AA's own evidence. The DBS was entitled to decide that, notwithstanding the inconsistencies and imperfections in the children's evidence, it should be preferred to AA's evidence.

Why we have decided to allow the appeal

55. However, we do have significant concerns about the DBS's decision making in this case. It is notable that in KJ's police interview with DC Beavis she told him that AA "hits people with rulers and stuff, on children" (see page [142] of the appeal bundle) She explained "He will hit me first of all really hard and then punish me too" (see page [144] of the appeal bundle). This was explored further in interview:

DC B: "Has he ever hit you before?"

KJ: "No"

DC B: "But you said you've seen him hit other children"

KJ: "Very hard"

DC B: "With a ruler"

KJ: "Yes"

DC B: "And where did he hit them with a ruler?"

KJ: "On the face, on the hand … anywhere on their body"

DC B: "Wow! And was that witnessed by any of the teachers"

KJ: "Only two, a female teacher"

DC B: "Do you know her by name"

KJ: [shakes her head]

56. It does not appear that these allegations of physical chastisement were addressed in the evidence at the criminal trial, and the DBS has not addressed them in its explanation of its evaluation of the credibility of the respective witnesses and the reliability of their evidence.

57. There is a further passage after KJ made the allegation about AA "scratching [her] privates" (see page [149] of the appeal bundle) in which DC Beavis asked about whether that behaviour had stopped as she had said she had hoped it would:

DC B: So were you hoping he'd just stop eventually

KJ: Yeah

DC B: But he's not stopping

KJ: [shakes her head]

DC B: Is it getting worse

KJ: Yes it's getting very worse. When he was scratching my privates he was very very rough and now he's doing it to nearly everybody in the class" (see page [150] of the appeal bundle).

58. It seems unlikely that AA would have found the opportunity to do this to "nearly everybody in the class" and the DBS doesn't appear to have explored this allegation in any depth, made any finding on it, or to explain how it affected its assessment of the reliability of KJ's other evidence.

59. Just because a witness's evidence on one matter is found to be unreliable doesn't mean that none of their evidence may be relied upon, but if KJ's allegations

of physical chastisement (or indeed about AA scratching the "privates" of nearly everyone in her class) were found to be unreliable (certainly they don't appear to have been relied upon either in the criminal trial or in the DBS's decision making), the DBS should have explained how and why it decided that KJ's other evidence about the sexual assaults on her was nonetheless reliable. Without such an explanation we cannot understand whether the DBS was entitled to evaluate the evidence as it did. If it didn't consider this evidence when deciding on the truth of the allegations, that too would amount to an error of law because it was clearly relevant to an assessment of that issue.

60. The DBS also failed adequately to say in its reasons whether it found that KJ was present at the madrassa on 21 March 2016 (and why) and, if it accepted that she wasn't present on that day, how it nonetheless found that AA had sexually assaulted her on that day.

61. These amount to material errors of law.

62. AA has argued that the DBS erred in various other ways, but because we have decided to remit the Barring Decision to the DBS to make a fresh decision (so any further errors of fact or law that the DBS may have made will be subsumed into the remitted decision), it is not appropriate for us to rule on each of them.

Disposal

63. The material errors of law that we have identified make it appropriate to allow the appeal.

64. Had we decided that the DBS had based the Barring Decision on material mistakes of fact and that, had those mistakes not been made it would have been bound to remove AA's name from the Children's Barred List we would have directed his removal from the list. However, since we are not so persuaded, it is appropriate to remit the matter back to the DBS to make a fresh decision. The DBS will not be bound by any of the previous decision maker's findings.

65. We direct that AA's name shall not be removed from the Children's Barred List pending the remaking of the Barring Decision.

Thomas Church
Judge of the Upper Tribunal
Tribunal Member Jacoby
Tribunal Member Turner

Authorised for issue on
18 October 2024
Corrected on 30 October 2024