IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-002014-V
[2024] UKUT 367 (AAC)

On appeal from the Disclosure and Barring Service

Between:

J.H.B.

Appellant

- v -

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Nicholas Wikeley
Upper Tribunal Member Roger Graham
Upper Tribunal Member Suzanna Jacoby

Hearing date: 22 October 2024
Decision date: 18 November 2024

Representation:
Appellant: In person
Respondent: Ms Carine Patry KC, instructed by the DBS Legal Team

DECISION

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

2. The Respondent's decision taken on 22 January 2021 to retain the Appellant's name on the Children's Barred List and to include his name on the Adults' Barred List did not involve any mistake of fact or error of law. The Respondent's decision is accordingly confirmed.

This Decision and the Orders that follow are given under section 4(5) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

ORDERS

Pursuant to rule 14(1)(a) the Upper Tribunal orders that no documents or information should be disclosed in relation to these proceedings that would tend to identify any person who has been involved in the circumstances giving rise to this appeal.

Pursuant to rule 14(1)(b) the Upper Tribunal orders that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify either the Appellant or other individuals involved in this matter.

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case to anyone who has been the complainant of a sexual offence. No matter relating to the complainants shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of a sexual offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

REASONS FOR DECISION

The outcome of this appeal to the Upper Tribunal in a sentence

1. We dismiss the Appellant's appeal to the Upper Tribunal.

2. We recognise this decision will be a considerable disappointment to the Appellant. However, one reason for our decision is that the right of appeal in safeguarding cases is not a 'full merits review' type of appeal. Instead it is limited in the way summarised in the next paragraph. In particular, the decision as to whether it is "appropriate" to bar a person carries no right of appeal to the Upper Tribunal.

A summary of the Upper Tribunal's decision

3. We conclude that the Disclosure and Barring Service's decision involves no mistake of fact or error of law, which are the only bases on which we can interfere with that decision. Accordingly, we must confirm the Respondent's decision to retain the Appellant's name on the Children's Barred List and to include his name on the Adults' Barred List.

The rule 14 Orders on this appeal

4. We refer to the Appellant in this decision as Mr B in order to preserve his privacy and anonymity. For that same reason, we make the rule 14 Orders included at the head of this decision. We are satisfied that any publication or disclosure that would tend to identify any person who has been involved in the circumstances giving rise to this appeal would be likely to cause serious harm to those persons. Having regard to the interests of justice, we were accordingly satisfied that it is proportionate to make the rule 14 Orders.

The Upper Tribunal oral hearing of the appeal

5. We held an oral hearing of Mr B's appeal at the Birmingham Civil & Family Justice Centre on 22 October 2024. The Appellant attended in person, representing himself. Ms Carine Patry KC appeared on behalf of the Respondent (the Disclosure and Barring Service or 'the DBS'). The hearing lasted from 11 a.m. to 3.10 p.m. with a 45-minute break for lunch. Mr B gave evidence on oath (and was cross-examined extensively by Ms Patry on that evidence) from 11.35 a.m. until 1.15 p.m. The hearing was digitally recorded in the usual way, which stands as the record of the proceedings. It is not standard practice in the Upper Tribunal for an official transcript of a hearing to be produced.

A very brief summary of the procedural background to this appeal

6. This appeal unfortunately has a long history.

7. The case concerns Mr B's appeal against the Disclosure and Barring Service's final decision, dated 22 January 2021, to retain his name on the Children's Barred List and to include his name on the Adults' Barred List under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act').

8. Initially at least, Mr B successfully appealed that DBS decision to the Upper Tribunal (*JHB v DBS*, under case reference V/0199/2021, decision dated 23 February 2022). The Upper Tribunal found that the DBS's decision involved mistakes of fact. The case was remitted to the DBS for reconsideration in the light of the facts as found by the Upper Tribunal. It may be, of course, that the DBS would have arrived at the same decision following such reconsideration.

9. However, rather than conduct a reconsideration as directed, the DBS then in turn appealed to the Court of Appeal against the decision of the Upper Tribunal (*DBS v JHB* [2023] EWCA Civ 982, decision dated 17 August 2023). The Court of Appeal allowed DBS's appeal and ordered that Mr B's appeal should be remitted to the Upper Tribunal for a new hearing before a differently constituted panel.

10. We are that new panel. We have considered the matter entirely afresh. We start by reminding ourselves about the statutory framework for barring decisions and in particular the scope of the right of appeal.

The statutory framework

11. An individual's appeal rights against a DBS barring decision are governed by section 4 of the 2006 Act:

> **4.**(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
>
> (a) …
>
> (b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;
>
> (c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.
>
> (2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—
>
> (a) on any point of law;
>
> (b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.
>
> **(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.**
>
> (4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.
>
> (5) Unless the Upper Tribunal finds that has made a mistake of law or fact, it must confirm the decision of DBS.
>
> (6) If the Upper Tribunal finds that DBS has made such a mistake it must—
>
> (a) direct DBS to remove the person from the list, or
>
> (b) remit the matter to DBS for a new decision.
>
> (7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—
>
> (a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and
>
> (b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.

12. We have highlighted sub-section (3), namely that "the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact". In effect, this means that the question of whether it is appropriate to bar a person is non-appealable. Instead, an appeal can succeed only if it can be shown that the DBS made a mistake of fact or an error of law (see sub-section (2)).

The guidance in the case law

13. The scope of the Upper Tribunal's jurisdiction in fact-finding was analysed in the decision of the three-judge panel in *PF v DBS* [2020] UKUT 256 (AAC). That judgment shows that there is no limit to the form that a mistake of fact may take, and it may consist of an incorrect finding, an incomplete finding or an omission. A mistake may be in a primary fact, or in an inference, but some mistake by the DBS must still be identified. It is not enough that the Upper Tribunal would have made a different finding. Furthermore, the Upper Tribunal in deciding an appeal is not limited to considering the appellant's criticism of the DBS's decision nor the evidence before the respondent, but it should assess the evidence as a whole, including the evidence that may be relevant to the reliability of the appellant's evidence. Finally, as already noted, the decision that it is appropriate to bar is not for the Upper Tribunal at all but is a matter for the DBS. The Upper Tribunal may consider the barring decision only in the context of whether it is proportionate. The test is a high one; only if the decision is irrational will it be met.

14. The Court of Appeal has also provided guidance in a series of cases, including in the case of *DBS v JHB* [2023] EWCA Civ 982 itself, when Mr B was the respondent to the DBS's further appeal. Ms Patry very fairly drew our attention to the subsequent decision of the Court of Appeal in *DBS v RI* [2024] EWCA Civ 95, in which a differently constituted Court expressed some difficulty with certain aspects of the decision in *DBS v JHB*. For example, Bean LJ held as follows in *DBS v RI*:

> 32. Turning to the decision of this court in *JHB,* Ms Patry prays in aid the observation in [93] that "on the authorities a disagreement in the evaluation of the evidence is not an error of fact". But that must be read in the context of the statement in the previous paragraph that it was a case where the UT was looking at "very substantially the same materials as the DBS". In contrast with the present case, JHB had given very limited oral evidence, which did not have a direct bearing on the decision to place him on the lists (see paragraph [90] of the judgment, cited above). Elisabeth Laing LJ went on to say at [95] that "a finding may also be 'wrong' for the purposes of s 4(2)(b) if it is a finding about which the UT has heard evidence that was not before the DBS and that new evidence shows that a finding by the DBS was wrong, as the UT itself explained in *PF*."
>
> 33. The *ratio* of *JHB* is difficult to discern, partly because this court found that the UT had erred in several respects any one of which might well have vitiated the decision. I venture to suggest that it may be authority for the proposition that if the UT has exactly the same material before it as was before the DBS, then the tribunal should not overturn the findings of the DBS unless they were irrational or there was simply no evidence to justify the decision. The same rule may apply where, as in the *JHB* case itself, oral

> evidence is given but not on matters relevant to the decision to place the appellant on one or both of the Barred Lists.
>
> 34. I reject Ms Patry's submission that the Upper Tribunal is in effect bound to ignore an appellant's oral evidence unless it contains something entirely new. Such an approach would be anomalous and unfair. It would be anomalous because, as Males LJ pointed out during oral argument, an appellant who attended the Upper Tribunal hearing and stated that she was innocent but was not cross-examined, would be liable to have her appeal dismissed because no item of fresh evidence had been put forward, whereas if she was cross-examined, and in the course of that cross-examination mentioned a new fact, that would confer on the UT a wider jurisdiction to allow the appeal on mistake of fact grounds. Usually courts and tribunals (and juries) think more highly of parties who have maintained a consistent account than those who come up with a new point for the first time in the witness box.
>
> 35. Such a technical approach would also, in my view, be clearly unjust. The DBS has draconian powers under the 2006 Act. A decision to place an individual on either or both of the Barred Lists is likely to bring their career to an end, possibly indefinitely. Parliament has given such a person the right of appeal to an independent and impartial tribunal which can hear oral evidence. It is in my view open to an appellant to give evidence that she did not do the act complained of and for the UT, if it accepts that case on the balance of probabilities, to overturn the decision.
>
> 36. I was unimpressed, indeed dismayed, by some of the policy arguments put forward in opposition to the UT having a broad jurisdiction to find a mistake of fact. One was that the DBS would have to devote greater resources to resisting appeals. Another is that the DBS might have to modify or abandon its policy of not calling complainants to give oral evidence before the UT.
>
> 37. As for the oral evidence of appellants before the UT, Ms Patry submitted that: "There is a danger of allowing people to turn up and say they are credible. The distinction on the case law is that those people may not give any new evidence – someone has already said everything [in writing], then they come on the day and they give oral evidence and the UT believes them." I have to say that I found this argument chilling. Of course some offenders, particularly some sexual predators, are superficially plausible. But 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.

15. Males LJ made observations to similar effect:

> 49. 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.

50. That conclusion is reinforced in the light of the ability of the Upper Tribunal to hear oral evidence, as occurred in the present case. Parliament must have contemplated that an appellant would be able to give evidence to the effect that 'I did not do it'; that the Upper Tribunal would be entitled to evaluate that evidence, together with all the other evidence in the case; and that if the Upper Tribunal was persuaded accordingly, the appeal would be allowed, without the Upper Tribunal needing to find any other mistake on the part of the DBS. Of course, the evidence might not be believed, but if evidence stands up well to cross examination, that must be a factor which Parliament expected and intended the Upper Tribunal to take into account. It is inconceivable that Parliament intended to place the Upper Tribunal in a position where, having considered all the evidence and despite being satisfied that the finding of the DBS was wrong, the Upper Tribunal was powerless to allow an appeal, for want of being able to identify any other mistake made by the DBS apart from the fact that it had reached the wrong conclusion.

51. In my judgment this follows from the terms of section 4(2)(b), and is also in accordance with the approach of the Upper Tribunal in *PF v DBS* [2020] UKUT 256 which, as confirmed in *Kihembo v DBS* [2023] EWCA Civ 1547 at [26], remains good law, despite what I would regard as the problematic decision of this court in *DBS v JHB* [2023] EWCA Civ 982. On behalf of the DBS, Ms Patry seized on a sentence in *PF* at [38] that 'It is not enough that the Upper Tribunal would have made different findings', but that sentence must be seen in the context of the decision as a whole, including the summary at [51] and the broad and general statement at [39]) that:

'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. …'

52. What then of the decision in *JHB*? It is not easy to discern the *ratio* of the decision, but it appears to have been along the following lines: (1) the only 'mistake' found by the Upper Tribunal 'was that the DBS had a mistaken view of the facts because the UT happened to differ from the DBS in its assessment of the same or very nearly the same materials' (see at [90]); (2) there is no 'mistake' by the DBS if it makes a finding which is open to it on the material before it ([93]); and (3) the proper approach of the Upper Tribunal to an appeal on a question of fact is as explained in cases such as *Volpi v Volpi* and *Subesh v SSHD* [2004] EWCA Civ 56, [2004] INLR 417 ([95]).

53. I would respectfully suggest that these cases are irrelevant to an appeal under section 4(2)(b) of the 2006 Act. They describe the approach of an appeal court which does not hear evidence for itself to a factual decision by a lower court which (usually but not always) has heard such evidence. But an appeal under section 4(2)(b) will generally involve the opposite situation, i.e. the DBS will have made a decision on the papers after considering written representations, while the Upper Tribunal is able to hear oral evidence. Moreover, the Upper Tribunal is the first independent judicial body to consider what will often be serious allegations against the barred person and its ability to determine the facts for itself (as distinct from whether those facts make it appropriate to include the person on the barred list, which is

> exclusively a matter for the DBS) is an important procedural protection (cf. *R (Royal College of Nursing) v SSHD* [2010] EWHC 2761 (Admin), [2011] PTSR 1193 at [102] and [103]).
>
> 54. It may be, nevertheless, that *JHB* is binding for what it decides. I would respectfully suggest, however, that its *ratio* must be confined to cases where the Upper Tribunal either hears no oral evidence at all, or no evidence which is relevant to the question whether the barred person committed the relevant act – in other words, where the evidence before the Upper Tribunal is the same as the evidence before the DBS. That was the position in *JHB*, where Lady Justice Elisabeth Laing explained at [90] that 'the UT heard very limited evidence from JHB, for example, that he had not been interviewed by the police about the allegation on which finding 3 was based'; and that 'The UT does not seem to have heard much evidence which had a direct bearing on the matters on which the DBS relied in making findings 2 and 3, let alone any significant evidence'.
>
> 55. *JHB* will not apply, therefore, when the appellant does give oral evidence. I accept Mr Kemp's submission that, when this happens, 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.

16. We now turn to the details of this appeal.

The process leading to the final barring decision under appeal

17. For present purposes we need only summarise the main features of the DBS decision-making process as follows.

18. On 15 June 2007 the Appellant was convicted in the Crown Court, following a guilty plea, of ‘Sexual Activity with a Female Child under 16 years (penetration)’. This conviction led to his inclusion on what was then known as ‘List 99’, the previous barred list. In 2009, as the 2006 Act replaced the previous lists, he was transferred (or ‘migrated’ to use the official jargon) to the children’s barred list.

19. In November 2018 Mr B contacted the DBS seeking a review of his inclusion on the children’s barred list. As part of the review process, the DBS sought additional information (e.g. from the police) and considered five further allegations in addition to the original conviction from 2007.

20. On 10 September 2020 the DBS wrote to the Appellant informing him that it was minded to retain his name on the children’s barred list but also to include his name on the adults’ barred list. This was on the basis of his original conviction and three (but not all five) of the further allegations which were considered by the DBS to be found proven on the balance of probabilities.

21. Mr B sent in representations to the DBS following the ‘Minded to Bar’ letter, including a risk assessment letter and subsequent report from a Dr Evans, Consultant Clinical and Forensic Psychologist, dated 23 September 2013 and 25 July 2016, which had been prepared in the context of the Appellant’s application in family proceedings for contact with his daughter.

22. On 22 January 2021 the DBS sent Mr B a final decision letter confirming the retention of his name on the children's barred list and also the inclusion of his name on the adults' barred list. The final decision letter noted the fact of the 2007 conviction and continued as follows, finding three of the further five allegations that were under consideration to have been made out:

> We are now satisfied these allegations are proven on the balance of probabilities:
>
> - [***Allegation 1***] On multiple unspecified dates in January and February 2006, you engaged in sexual activity with a 13-year-old female child (victim 1), which included touching and digitally penetrating her vagina.
> - [***Allegation 2***] On the night of 28/05/2010 you had non-consensual sexual intercourse with your girlfriend, a 16-year-old female (victim 2).
> - [***Allegation 3***] On 20/05/2010 you purchased alcohol for two females, aged 18 (victim 3) & 19; subsequently got into bed with them while they were sleeping and unaware of your actions, and then touched victim 3.
>
> 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, and conduct which, if repeated against or in relation to a child, would endanger that chid or would be likely to endanger him or her.

23. For clarity we should mention that 'victim 1' in relation to the first allegation was the same young girl who was the victim in the proceedings leading to the criminal conviction.

The notice of appeal

24. The Appellant's notice of appeal to the Upper Tribunal was drafted without the benefit of legal representation. In setting out his reasons for appealing, Mr B asserted that he did not know victim 1's age until he had been told by police and he denied that he had lied to Dr Evans. He added that victim 2 had withdrawn her complaint and that he went on to have a child and a five-year relationship with the young woman in question. In relation to victim 3, he said that there had been no complaint to the police at the time and he had never been spoken to about the matter. He said the law stated a person was innocent until proven guilty.

25. On 29 June 2021 Upper Tribunal Judge Jacobs gave Mr B permission to appeal, observing as follows:

> I have given permission because there is a 'point of law arising from a decision' … on which there is a realistic prospect of an appeal succeeding … There are matters of fact on which the DBS may have been mistaken. Of particular importance is the extent to which the appellant misled the doctor who undertook his risk assessment. There are also possible errors of law in the assessment of risk undertaken by the DBS. There is a good case that the DBS failed to give sufficient credit for the steps the appellant has taken to redeem himself and the recognition he has received over the years from various agencies and employers. That may have reached the point of perversity.

26. We now turn to consider the issues raised by the grounds of appeal in more detail. We do not consider that the grounds of appeal are limited by reference to the issues highlighted by Judge Jacobs in his grant of permission to appeal. However, those matters are a convenient place to start.

Misleading the doctor who carried out the risk assessment

The DBS's evaluation of the risk assessment letter and report

27. The DBS's final decision letter made the following findings in connection with the risk assessment letter and report:

> The DBS acknowledges that the NHS risk assessments you submitted as part of your representations make positive comments about you and your engagement with the treatment programme, as well as stating the risk level you presented at the time of writing was low. They also note that you could understand why you behaved in a reckless and inconsiderate manner at the time of your offending, and also speak positively of your work on victim empathy and understanding of remorse.
>
> However, very limited weight can be given to these as you have been dishonest with the psychologists during these assessments. This is because during your assessments you stated that you were not aware of victim 1's age at the time of your offending. However, you previously stated to the police during an interview that you were aware of her age. You had also at some point told victim 1 that she'd better not tell anyone because you could get arrested. This is a clear indication that you were aware of victim 1's age. You also told the psychologists you had admitted the conviction once you had been confronted with the DNA evidence, however, this was not the case as you gave further false information to the police to explain your behaviour at this point, in that you said that you were drunk and couldn't remember. The risk assessments were also conducted without the psychologists having the full knowledge of the further incidents of harmful behaviour, which the DBS is now satisfied are proven on the balance of probabilities.
>
> It is acknowledged that in your representations you: denied that you lied during these assessments; maintained you were unaware of victim 1's age at the time of your offending and stated that the psychologists were aware of these 'NFA' incidents. However, this is not accepted by the DBS given the available evidence.
>
> Furthermore, and importantly, the risk assessments in question were undertaken for the purposes of you gaining access to your daughter (S) and not in relation to the risk you would pose if you were to work in regulated activity with vulnerable groups.

28. Ms Patry, for the DBS, argued that the Respondent was entitled to make findings of fact in connection with the risk assessment that (a) Mr B had lied to Dr Evans about knowing Victim 1's age; (b) Mr B had lied to Dr Evans about admitting the offence; and (c) Dr Evans had not been aware of the Appellant's other harmful behaviour. We consider each of these issues in turn. In summary, we agree with points (a) and (c) but not point (b).

Lying about knowing Victim 1's age

29. Mr B's position is that he did not know Victim 1's age at the time of the offence and only became aware when he was told her true age by the police following his arrest. It is clear that he told Dr Evans that he was not aware that she was under 16 when he had sex with her. Thus, in the risk assessment letter Dr Evans referred to the Appellant "…not appreciating the real age of his victim" [p.27] and "He asserts that he did not know his victim to be only 13 years of age…" [p.30]. There are passages to similar effect in the later risk assessment report: "his victim, whom he later discovered was only 13 years old" [p.39]; "He said that he thought [Victim 1] was at least 16 years old by the way she was treated by the family" [p.39]; "He said he believed [Victim 1] was older as her mother allowed her to drink alcohol and she never talked about being in school or ever wore a school uniform around the house" [p.39]; "He again asserted that he had no idea [she] was only 13 years old until after he was arrested" [p.40]; "He added that [she] had never spoken about school and neither did her mother or his father. He continued that 'if there had been one comment about [her] being in school' his offence would never have occurred" [p.40].

30. Mr B maintained that position in his oral evidence before us. The difficulty we have with accepting that position is that the contemporaneous evidence is not consistent with that understanding. Notably in her police interview, Victim 1 stated that the Appellant had said to her "you'd better not tell anyone 'cos I could get arrested" [p.215]. We agree with Ms Patry that the only logical explanation for why he thought he might be arrested if she told anyone that they had had sex was because he knew she was underage. There is corroboration from Victim 1's mother, who told the police that "I can't remember exactly how [the Appellant] found out how old [Victim 1] were (sic), but he knew that" [p.191]. In addition, during his police interview on 14 March 2007 (when he was still denying that any sexual activity had taken place between them), the Appellant stated that he "classed [Victim 1] as a friend and he knew that at that time she was about 13, 14 years of age but she acted more mature in her behaviour. He said that she was clever and acted responsibly" [p.231].

31. In the light of all the evidence we both read and heard, we cannot be certain that Mr B knew at the time of the offence that Victim 1 was aged 13. However, given not least that he was staying over two or three times a week for a couple of months before the index offence, we are satisfied on the balance of probabilities that he knew at the time that she was underage. It follows that he sought to mislead Dr Evans. He succeeded in doing so, as the risk assessment report characterises his harmful conduct in terms of "irresponsible" or "reckless" behaviour rather than deliberate and knowing behaviour. It follows too that the DBS was entitled to place less weight on the risk assessment report.

Lying about admitting the offence

32. Dr Evans recorded that Mr B "said that he admitted it [i.e. the offence] once he was confronted with the DNA evidence" [p.40]. It is relevant to consider the time-line here. The DNA forensic report confirming that the Appellant was the father of Victim 1's child was dated 5 February 2007 [p.198]. That evidence was put to Mr B in a police interview on 14 March 2007 but his immediate response was to continue to deny that he had had sex with Victim 1. At first he said "Well, I find that hard because I had mumps the year before and I'm not being rude or cheeky

but in adults it sends you infertile, so I know that I'm not the baby's father". He further told the officers that that he had a 98% chance of being infertile" [pp.222 and 223]. He was then asked why it mattered if he was infertile if he didn't have sex with Victim 1. He replied: "Well it wouldn't, because I haven't had sex with [Victim 1]". Then he was asked again "You have had sex with her, haven't you?" and he replied "No" and when told that the DNA report stated that he was the father he stated "Well, it's wrong" [p.223]. He repeatedly stated that he was not in a sexual relationship with Victim 1 and did not have sex with her [p.224]. Later in the same interview he asserted that it was possible that he "can't remember". When asked if it was his case that he was so drunk that he could not remember having sex with her, he replied "Well, it's possible 'coz I can't remember" [p.226]. The conclusion of the interview appears to be that he could not remember having sex with her at all. As such he did not admit the offence at the very time when he was confronted by the DNA evidence. However, we do find that he must have admitted the offence at some point fairly shortly after that police interview. We say that as the Crown Court judge's sentencing remarks (on 13 August 2007, some five months later) recognised that the Appellant had pleaded guilty at "the first available opportunity", a factor for which he was given credit in terms of sentencing [p.73]. We agree with the previous panel in their analysis: "It is correct that he did not instantly accept it when informed of the result during a police interview. But he did accept responsibility by the time he came to plead. There is no evidence of exactly when he made his decision between those events. To treat this short delay as a factor to undermine Mr Evans' assessment is unrealistic" (para.34 p.392).

The doctor not being aware of other harmful behaviour

33. The DBS concluded that Dr Evans had not been aware of the Appellant's other harmful behaviour with Victims 2 and 3. The first risk assessment letter makes no mention at all of any other behaviour other than the index offence itself. The second report contains a lengthy description of the circumstances which led to the Appellant's conviction but there is no mention of the earlier behaviour with Victim 1 which formed the basis of Allegation 1. It also included no detail at all of the later incident with Victim 2, despite the fact that Mr B was interviewed by the police about this matter. The only mention of any other behaviour is at paragraph 6.1 of the report where the doctor records that the Appellant "added that he had been arrested and interviewed over alleged offences both before and after his index offence but he insisted that he was not guilty of the allegations that were made against him". Mr B does not appear to have given the doctor any further details. It also appears that the doctor did not ask him any further questions or indeed consider these allegations prior to assessing risk.

34. Finally, we attach no real significance to the fact that the doctor was unaware of the incident involving Victim 3, not least as Mr B himself was not aware of this complaint until he received the 'Minded to Bar' correspondence from the DBS, which was several years after Dr Evans carried out the risk assessments.

Conclusion on the risk assessment letter and report

35. We therefore consider that the DBS was entitled to conclude that limited weight should be accorded to the risk assessment letter and report. This is because (i) they were prepared for different reasons (namely the risk to his own child); (ii) the doctor was unaware of the other harmful behaviour engaged in by the Appellant,

including with Victim 1 herself, all of which was relevant to risk; and (iii) the Appellant had lied to the doctor about either knowing the victim's age or knowing that she was underage. We do not consider that Mr B had also lied to the doctor about when he had told the truth to the police, but any such mistake was not material given our other findings. It follows we consider there was no material mistake of fact by the DBS.

The risk profile

36. The Upper Tribunal's grant of permission to appeal raised the possibility that there may have been "errors of law in the assessment of risk undertaken by the DBS. There is a good case that the DBS failed to give sufficient credit for the steps the appellant has taken to redeem himself and the recognition he has received over the years from various agencies and employers. That may have reached the point of perversity."

37. However, we find that the DBS had relatively little information before it about such matters when it made its barring decision. As the Court of Appeal observed (at para.22):

> The DBS had no information about JHB's character, apart from the assessments [by Dr Evans] and limited information from social services that, in 2017, JHB was married with one child. Despite prompting in the 'Minded to Bar' letter, JHB had not, in his final representations, provided any more information in support of his character. The DBS acknowledged that it did not know about any 'further proven incidents of concern'. But the passage of time since May 2010 did not negate the significance of his past behaviour, or of 'the resultant concerns'. The representations had little impact on 'significant concerns' about his 'considerably harmful behaviour' and the risk he might present if he were to work in regulated activity with children and vulnerable adults in the future.

38. At the oral hearing before us Mr B gave evidence about his family circumstances and his work since he served his sentence of imprisonment for the index offence. He explained that he had four children of his own – "the one he went to prison for", the one who was the subject of Dr Evans's report and two others (now aged seven and five years old). He also explained that he had two step-children (aged 13 and 11) with his current partner. He told us that Social Services had not raised any concerns about him.

39. Mr B also explained how over the years he had built up a career in the security industry, providing security at e.g. night clubs and events. However, the Security Industry Authority (SIA) had it seems recently withdrawn his licence because of his DBS listing and he was now unemployed, although undertaking some charitable work.

40. Mr B also produced evidence to us that he had been removed from the sex offenders register in July 2024. As Ms Patry pointed out, the test under section 91C of the Sexual Offences Act 2003 is very different to that under the 2006 Act. Accordingly, it does not follow that removal from the register also means removal from the DBS barred list.

41. It is undoubtedly to the Appellant's credit that he has been able to gain a series of qualifications (e.g. as a First Responder) whilst working in the security industry. However, such considerations essentially go to the question of appropriateness, which is exclusively a matter for the DBS to determine. We cannot identify any material mistake of fact in the DBS's approach to such matters.

42. As noted above, we do not regard Mr B's appeal as being restricted to the issues highlighted by the grant of permission to appeal. We have considered the appeal in the round, and bearing in mind that the Appellant is a litigant in person and has not had the benefit of professional legal advice. We therefore make the following further observations and findings about the three allegations (separate to, and in addition to, the conviction) which the DBS found to be proven on the balance of probabilities.

Allegation 1

43. Allegation 1 is that "On multiple unspecified dates in January and February 2006, you engaged in sexual activity with a 13-year-old female child (victim 1), which included touching and digitally penetrating her vagina."

44. We reiterate for clarity that Victim 1 was the same individual who was the victim of the offence for which the Appellant was convicted.

45. It is right to say that the Appellant's notice of appeal did not challenge Allegation 1. It is also right to say that, at the original appeal hearing before the Upper Tribunal, Mr B accepted that this finding was correct. He did not seek to suggest otherwise at the re-hearing of his appeal.

46. We simply note that at the re-hearing Mr B described the activity in question as "extended foreplay". We have to say we regard that description as at the very least an unfortunate choice of words. We say that in the light of the detailed and graphic account given by Victim 1 in her police interview, e.g. "Told him to stop it, he did but then did it other times" [p.212].

47. There is no mistake of fact or error of law in the DBS's finding about Allegation 1.

Allegation 2

48. Allegation 2 is that "On the night of 28/05/2010 you had non-consensual sexual intercourse with your girlfriend, a 16-year-old female (victim 2)."

49. The context for this allegation was helpfully summarised by the previous panel in its decision at paragraph 10 [p.387] (they referred to the Appellant as 'JHB'). We do not consider this passage was called into question by the judgment of the Court of Appeal:

> 10. This incident began on the evening of 28 May and lasted through the following night. At the time, JHB and victim 2 had known each other for a month and had been going out together for a week. They had had sex on a couple of occasions. There are witness statements from JHB, victim 2 and three others. it is not easy to read them, given the numerous redactions to conceal the identity of anyone except JHB. As there were five people present, it is not easy to work out exactly who is saying what about whom. A confused picture emerges. Inevitably, there are differences between the accounts, explained in part by different people giving accounts of what they saw and did, with no one person giving a full account of the events. The

> recollections may also be affected by the witnesses' own drinking. What is clear is that a large amount of different alcoholic drinks were consumed over the course of the evening, sometimes mixed. Victim 2 is described as being in various states of inebriation, although it is not clear whether the evidence conflicts or describes her state at different times in the evening. At its worst, she is described as having to be more or less carried home. When they got to a flat, approaching midnight, JHB and victim 2 had sex. The issue is whether the intercourse that took place was consensual.

50. The previous panel reached the conclusion that the available evidence did not support a finding that the sexual intercourse was non-consensual. We have read the same evidence as the last panel, which we have considered afresh, but we have also heard different oral evidence about the incident. This has led us to reach a different conclusion to our colleagues who heard the appeal first time around. We conclude that there is no mistake of fact in the DBS's finding that the sexual intercourse was non-consensual. We consider the evidence of Victim 2 and Mr B in turn.

51. Victim 2 was interviewed by the police on 30 May 2010, just 48 hours after the events in question [pp.253-259]. She had no recollection of intercourse having taken place. She described considerable consumption of alcohol ("That's all I remember": [p.253]). For example, she described drinking vodka and Red Bull while she was out: "drank it straight down (10 seconds) felt quite drunk – couldn't walk properly carried on drinking the Lambrini as well (*Q:1-10 drunk?*) = 8, I was falling all over the place" [p.255]. Later in the interview, after giving an account of being sick and waking up, she stated "Felt it [having sex] would have been wrong as I was drunk. I was 'on' [her period] so wouldn't have felt comfy doing it with him. Feels she was too drunk to say yes so he's took advantage."

52. However, on 5 October 2010 (and so four months later) Victim 2 made a retraction statement [p.292]: "I would like to say that he did not rape me. I have not been forced into making this statement. I am now back in a relationship with [Mr B]. It has been explained that the case will now be filed as no crime". As anticipated, in the light of that statement the CPS decided that a jury would not conclude that the Appellant did not believe that he had consent and so no further action was taken [p.243]. It should be added that Mr B and Victim 2's relationship continued for some years and they went on to have a daughter together.

53. The previous panel summarised Mr B's evidence in the following terms (although it is not entirely clear how much of this summary is based on the documentary records and how much is based on oral evidence they heard):

> 11. JHB said that victim 2 had been telling him all evening that he was 'going to get it later'. At the flat, she laid on the bed and told him that she wanted sex. On a scale of 0-10 for drunkenness, he said that both were 6/7/8 at this stage (pages 249 and 290). He climbed on top of her and they had sex until she told him she wanted to be sick. At this point, he put her at 10 on the scale. She was sick, after which he cleaned up her and her vomit, and washed her clothes. He put her to bed and they slept together with another female witness. All three were clothed. Victim 2 woke several times during the night, asking if they had had sex and he said they had. She kept asking him for sex again. He denied saying 'Yes, I shagged you five times and also

did you up your arse'. After he left the next morning, she rang him a number of times and asked him to go back.

54. Mr B's evidence to us was markedly different in at least one important respect. Under cross-examination by Ms Patry, he asserted that he had had sex with Victim 2 earlier in the day, before they had gone out to get alcohol and before they had both got 'wasted'. He repeatedly stated to us that he had only had sex with Victim 2 on one occasion that day, which was consensual sex. He could not recall precisely when they had had sex earlier in the day, but he was adamant it had been before she had got drunk. In answering a question from one of the specialist members, he repeated that he had not had sex with Victim 2 while she was intoxicated as he did not want to end up back in prison.

55. Yet when the Appellant was interviewed by police on 30 May 2020 (two days after the incident), he described having consensual sex with Victim 2 in the evening or at night: [p.290]. For example, he said that they had started having sex and that Victim 2 "didn't seem that drunk until she said that she was going to be sick" [p.289]. In the same interview he stated that he had stopped as soon as Victim 2 said she was about to be sick [p.290]. When pressed by Ms Patry about these divergent accounts, he said it was a long time ago and he could not remember the police interview. He added that Victim 2 would support his account that the sex was consensual, but she did not wish to come to court to testify as she was in a new relationship.

56. We remind ourselves that in *DBS v RI* Males LJ observed that the fact that an appellant undergoes 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". The Appellant's evidence on this point did not go well. His account at the time and before the first appeal hearing was that he had had sex with Victim 2 that evening, after they had been out drinking, and which had been consensual sex, and that he had stopped when she said she was going to be sick. His account before us was that they had had sex only once and earlier in the same day, before they had both started drinking alcohol. He was unable to provide a satisfactory explanation for these two wholly inconsistent accounts. They cannot both be true.

57. We do not place any great weight on Victim 2's retraction of her complaint. Mr B told us that he was under bail conditions not to contact her. He also told us that she had dropped the complaint before they had got back into a relationship. However, this is not accurate – her retraction statement states quite clearly that "I am now back in a relationship with [Mr B]."

58. In all the circumstances we find there is no mistake of fact in the finding by the DBS that Allegation 2 is made out.

Allegation 3

59. Allegation 3 is that "On 20/05/2010 you purchased alcohol for two females, aged 18 (victim 3) & 19; subsequently got into bed with them while they were sleeping and unaware of your actions, and then touched victim 3."

60. It is fair to say there is relatively little information about this incident in the appeal bundle. Such evidence as there is consists of a short but contemporaneous police report [pp.297-301]. The summary reads as follows: "On the 22/05/2020 police received a 3rd hand report whereby it was alleged that [Mr B] had tried to take

advantage of young girls by offering them alcohol. The 3rd party stated they were not sure how [Mr B] took advantage or how far he got." The source of this allegation (the name of the 3rd party) is redacted and so is unknown.

61. A police officer spoke to Victim 3 and recorded their account as follows:

> I have attended and spoken to [Victim 3] who is 18 yrs old. She stated that she is friends with [Mr B] and has known him since Oct. '09. On Thursday 20th May [Mr B] bought alcohol for them both and they got drunk along with [redacted]. They all then went back to [redacted] room and the two girls got into bed and [he] got on the sofa. [Victim 3] states when she woke, [he] was in bed with them. She stated that he had touched her but refused to say where and wouldn't disclose any further details. She spent time with [Mr B] yesterday and doesn't wish to make any complaints or provide a statement."

62. The police report added that the other young woman had been spoken to, but she did not wish to discuss the matter or make any complaint. There is no suggestion that the police interviewed the Appellant in connection with this report.

63. Mr B confirmed in his oral evidence that he had not been spoken to by the police at the time (or indeed subsequently) about the incident. We accept that evidence. Indeed, he said that the first he had heard of the allegation was when he had received the 'Minded to Bar' letter. He explained to us that Victim 3 was a family friend and that she and the other young woman were both staying at the Project, in effect a hostel for young people who could no longer live at home. He said that he had been booked in and authorised as an overnight guest. He denied getting into bed with the two young women. He stated that he had to leave early and so had got onto (not, he said, into) the bed and leant over the other girl to shake Victim 3 to say that he was going. This was because he did not wish to leave them asleep with the door unlocked after he had left.

64. We note that Allegation 3 is framed in relatively narrow terms. It does not involve a specific allegation of *inappropriate* touching, but rather just touching. We have to say we were somewhat puzzled by Mr B's detailed account of the incident and in particular the justification he advanced for touching Victim 3. We observe that this is the first time he has provided this explanation – indeed he told our colleagues at the original hearing that "he had no recollection of the incident" [para 21, p.390].

65. Be all that as it may, we are not satisfied that there was any mistake of fact or error of law in the DBS's finding that Allegation 3 was made out. The nature of the allegation is plainly much less serious than Allegations 1 and 2, but the weight to be attached to Allegation 3 in the risk assessment is a matter for the DBS to determine.

Conclusions on the grounds of appeal

66. We are unable to identify any material mistake of fact or error of law on the part of the DBS. It follows that we conclude that none of the grounds of appeal is made out and so we must dismiss the appeal.

67. We would simply add that the reality is that a main thrust of Mr B's arguments went to the issue of whether it was still appropriate for him to be barred so many years after the incidents in question. However, as we have explained above, the

issue of appropriateness is by statute a matter exclusively for the DBS to decide. As such it carries no right of appeal to the Upper Tribunal.

Disposal

68. Having decided that the DBS decision does not involve any mistake of fact or error of law, there can only be one outcome to this appeal. This is because section 4(5) of the 2006 Act states as follows:

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

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

Conclusion

70. It follows from our reasons as set out above that the Appellant's (second) appeal to the Upper Tribunal is refused.

Nicholas Wikeley
Judge of the Upper Tribunal

Mr Roger Graham
Specialist Member of the Upper Tribunal

Ms Suzanna Jacoby
Specialist Member of the Upper Tribunal

Approved for issue on 18 November 2024