IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000965-V**
ADMINISTRATIVE APPEALS CHAMBER **[2025] UKUT 012 (AAC)**

On appeal from the Disclosure and Barring Service

Between:

MC

Appellant

- v -

The Disclosure and Barring Service

Respondent

Before: Judge Sarah Johnston, Sitting as a Judge of the Upper Tribunal, Christopher Akinleye and Suzanna Jacoby

Hearing date: 18 November 2024
Decision date: 7 January 2025

Representation:
Appellant: Ms Althea Brown instructed by Tim Haines
Respondent: Mr Simon Lewis Instructed by Mr Prag Sivaguru

ANONYMITY ORDER

The Tribunal makes the following order —

Having considered the provisions of Rule 14(1)(b) of the 2008 Rules I order prohibiting publication of any matter or disclosure of any documents likely to lead members of the public directly or indirectly to identify the following persons:

a. The appellant.

Breach

Any breach of the order is liable to be treated as a contempt of court and punished accordingly (section 25 of the Tribunals, Courts and Enforcement Act 2007).

DECISION

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

2. The Respondent's decision taken on 22 February 2022 to include the Appellant's name on the Vulnerable Adults and Children's Barred List did involve a mistake of fact.

3. We direct the DBS to remove the appellant from both lists.

4. This decision and the Orders that follow are given under section 4(5) and (6) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DECISION

1. We allow the appellant's appeal to the Upper Tribunal.

A summary of the Upper Tribunal's decision

2. We conclude that the Disclosure and Barring Service's decision does involve a mistake of fact which is material to the barring decision. Accordingly, we direct the DBS to remove the appellant from the Vulnerable Adult's List and Children's Barred List under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act').

The rule 14 Orders on this appeal

3. We refer to the appellant as the appellant in order to preserve his privacy and anonymity. For that same reason, we make the rule 14 Order included at the head of this decision. We are satisfied that the appellant, should not be identified in this decision, whether directly by name or indirectly. Having regard to the interests of justice, we were accordingly satisfied that it is proportionate to make the rule 14 orders.

The Barring Decision

4. This appeal concerns the barring decision of the DBS dated 26 February 2022 to include the appellant on the Vulnerable Adults' and Children's barred lists. The material facts were summarised in the letter.

5. The barring letter set out:

> "Between 30th June 2018 and 1 July 2018 you made a pass at Complainant 2 and without consent touched her breasts, then whilst she was asleep, inserted your fingers into her vagina and touched her breast/s without consent. The DBS is satisfied that you have engaged in conduct which harmed or could harm children and vulnerable adults."

6. The DBS found that the account/evidence of what she saw, heard and felt were detailed and clear and found her account reliable and credible. They say the complainant was explicit in terms of the appellant played drinking games and that the appellant sexually assaulted her by touching her breasts and inserting fingers into her vagina without her consent. They say W1 corroborates the complainant's account in confirming he got up to go to the toilet which she says woke her up. W1 also says she was emotionally distressed the next morning and that she disclosed she had been sexually assaulted/raped. The disclosure was almost immediate and spontaneous adding weight to her account.

7. They found that the telephone message to the complainant from the appellant is not an unfettered admission of rape but that it "was reasonable to conclude you were apologising for your behaviour, acknowledging culpability for breaching the

complainant's trust and that you had been disrespectful. Mentioning the police showed that there was a significant issue." As the appellant could not remember as he had been very drunk at the time, he was not in a position to challenge the specific details of the allegation. The DBS dismissed that he was only supporting a friend.

Permission to Appeal

8. Permission was granted by Judge Johnston on the papers on 16 July 2024. Her decision was made on the basis that there is a realistic prospect of success that the DBS made a mistake of fact in finding that the allegations against the complainant were proved. The permission decision notes that the case was not actioned by the police due to there being no forensic samples, no electronic evidence to consider nor third party accounts despite the mutual friend being in the same room, potential collusion with another person, and the complainant not wanting to pursue the allegation.

The statutory framework

9. Section 2 of the Act requires the DBS to maintain the children's barred list and the adults' barred list. By virtue of section 2, Schedule 3 to the act applies for the purpose of determining whether an individual is included in the lists. Section 3 provides that a person is barred from regulated activity relating to children if the person is included in the children's barred list and is barred from regulated activity relating to vulnerable adults if the person is included in the adults' barred list. Regulated activity is determined in accordance with section 5 of, and Schedule 4 to, the 2006 Act.

10. Schedule 3 to the Act provides for inclusion by reference to "relevant conduct" by the person included in the lists. The appellant must have been engaged in relevant conduct and the regulated activity test must be met. That is, that the person is or has been, or might in future be, engaged in regulated activity relating to children or vulnerable adults (paragraphs 3(1)(a)(ii) and 9(1)(a)(ii) of Schedule 3). Relevant conduct is defined in the Act as conduct which endangers or is likely to endanger a vulnerable adult or child by harming the adult or child or putting an adult or child at risk of harm.

11. Section 4 of the Act governs appeals. It provides that an appeal may be made to the Upper Tribunal against a DBS decision only on the grounds that the DBS has made a mistake on any point of law or in any finding of fact which the DBS has made and on which the decision was based. Subsection (3) of section 4 provides that, for the purposes of subsection 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.

The hearing

12. In this case both parties agreed that we were considering mistake of fact. Counsel for the appellant also relied on a mistake of law as the allegation or relevant conduct did not occur during the course of regulated activity and did not fall within the SVGA. We do not accept this submission. If the allegation is proved on the balance of probabilities, it would be relevant conduct required under the SVGA 2006. Relevant conduct is defined as "conduct which, if repeated against or in relation to a child/vulnerable adult, would endanger that child/adult or would be likely to endanger him;" Schedule 3 para 4(1)(b) and 10(1)(b). It does not have to have happened in

regulated activity; rather it has to be conduct which if repeated would endanger that child/adult or would be likely to endanger him. There was no dispute that the regulated activity test was met.

13. The fact that this relevant conduct did not occur during the course of regulated activity does not have a bearing. If it did the purpose of the Act would be lost. As Mr Lewis for the DBS pointed out if this were right a person could commit a heinous crime outside their regulated activity and not be barred. This cannot be right.

14. We therefore proceed on the basis that we are looking at the facts and whether the allegation can be proved on the balance of probabilities. Relevant here is the summary set out in PF v Disclosure and Barring Service [2020] UKUT 256 (AAC). At para 51. the Tribunal say;

> "a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).
>
> b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.
>
> c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.
>
> d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).
>
> e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.
>
> f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.
>
> g) The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker."

15. In this case we do not have any further evidence than that before the DBS. We are dealing with whether there has been a mistake of fact in that the DBS found the allegation to be proved on the balance of probabilities. Although we take into account the areas of special expertise of the DBS, findings of fact on the evidence are not an area of specialist expertise of the DBS in this case. As said in PF matters relating to the risk to the public would be a matter that engaged the DBS's expertise, but we are focused on whether the allegation is proved. The Upper Tribunal must be able to look

at the facts. That is why the right of appeal exists. Mr Lewis agreed for the DBS that we were considering whether there was a mistake of fact even though the appellant did not give oral evidence.

16. The starting point for us is the appellant must demonstrate a mistake of law or fact. We proceed on this basis.

17. The appellant declined to give evidence to the Tribunal. Counsel for the appellant submitted the appellant was not compellable.

18. Counsel for the DBS said he was not asking us to compel the appellant but referred us to Rule 5(3)(d) which gives the Tribunal the power "to permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party;".

19. He also referred us to Rule 15(1)(a), (b) and (e) which sets out the directions the UT can give on evidence and submissions.

> Rule **15.**—(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Upper Tribunal may give directions as to—
> (a) issues on which it requires evidence or submissions;
> (b) the nature of the evidence or submissions it requires;
> …
> (e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—
> (i) orally at a hearing; or
> (ii) by written submissions or witness statement;…

20. We decided not to require the appellant to give evidence under Rule 5(3)(d) or Rule 15. We made this decision on the basis that this was the appellant's appeal and it was his choice. This was a decision he reached with legal advice. We had evidence from him in the bundle and given his lack of recollection we agreed his oral evidence may not assist us further. His written evidence, through his solicitors, is that he woke up in a bed separate to the complainant. This evidence is in the bundle, as is his assertion that he had no recollection that anything had occurred. He has explained in writing why he sent the text message and although the DBS do not accept that, they were not asking us to direct oral evidence and so not objecting to the lack of opportunity to cross examine him on his evidence. His explanation in his representations of the text message is this; "The message sent by Mr C demonstrate an open and transparent approach by [the appellant]. He is doing nothing more than indicating that he wishes to cooperate with an investigation should there be one, He instructs that there is no other idea or motive."

21. Counsel for the appellant submitted that we could not draw an adverse inference from his decision not to give oral evidence. Counsel for the DBS said we could but that he was not asking us to do this.

22. Counsel for the appellant submitted that the burden of proof is on the DBS and cited Kihembo v DBS [2023] EWCA Civ 1547. At paragraph 31-32 the court say:

> "31. Strikingly the first sentence of paraph 11 reads "SJP has no mental health issues and is mentally competent, so why should we not believe her?

> 32. It is impossible to read paragraph 11 without concluding that the UT considered it was for the Appellant to give a satisfactory answer to their rhetorical question, itself based upon a flawed premise that complainants with capacity are credible, and those without are not, and thus to prove her innocence. In short, they appear to me to have reversed the burden of proof"

23. She submitted that the burden of proof was therefore on the DBS. She said in this case the DBS have failed to prove the allegation on the balance of probabilities and that that was the starting point for the Tribunal. We are bound to follow PF above and proceed on that basis.

24. She also submitted that we could not draw an adverse inference in the absence of explicit authority to do so.

25. Counsel for the DBS, although referring to authorities that suggest we could draw such an inference, was not submitting that we should. His submission was that we did not need to draw an adverse inference and therefore he was not asking us to do this.

26. We note the authorities cited by Counsel for the DBS. In JO v Disclosure and Barring Service [2023] UKUT 308 (AAC) UA-2021-000790-V the Tribunal said

> "41. We note that the Appellant did not attend the hearing of the appeal and was not cross examined but neither were the DBS's witnesses so there is no difference in the weight to be given to their written evidence. We draw no adverse inference from the Appellant's absence from the hearing because we accept her explanation for not attending."

27. In CNS -v- DBS (Safeguarding) [2024] UKUT 221 (AAC)130 the Tribunal says at para. 130:

> "Further, the DBS cannot properly be blamed for C having not provided any representations for it to consider in response to its "minded to bar" letter and the information attached to it. That was C's opportunity to set out her case "fully", provide any additional relevant documentary material, and emphasise any particular matters. Moreover, only limited information would appear to have been provided by C in the Appeal; notwithstanding the efforts of the UT to provide opportunities (both before and after the OPH). It was unhelpful, for example, that C did not provide a witness statement, despite being strongly encouraged by the UT to do so in the directions [218 (e.g. para 7-8)] following the OPH – although we draw no adverse inference against her, given she is not legally represented."

28. Counsel for the DBS also cited Wisniewski v. Central Manchester Health Authority [1998] PIQR P324, Brooke LJ said at page 340:

> "1. In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> 2. If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

> 3. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> 4. If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

29. We do find that we could draw an adverse inference given the cases cited above where an adverse inference was considered. However, we agree with the analysis in JO v Disclosure and Barring Service [2023] UKUT 308 (AAC) as there were no witnesses for the DBS who were giving oral evidence or available for cross examination, we find there is no difference to the weight to be given to the written evidence of all witnesses before us. We also take into account that the DBS did not ask us to draw an adverse inference in this case.

The facts and analysis

30. The alleged assault is described in the complainant's statement at page 46 to 51 of the bundle. The three friends had met in London and planned to go out and stay at a hotel in the same room on 30 June 2018. In the decision we refer to the friend who was with the appellant and the complainant, but not involved in the allegations, as W1.

31. After being out for some time eating and drinking alcohol the three friends returned to the hotel and played a drinking game "Never have I ever" consuming more alcohol. It is clear from the evidence before us that all three friends drank a significant amount of alcohol during the day and the evening. This included prosecco, tequila, and whisky. The friend, W1, went to bed earlier but was in the room all night. The complainant describes the drinking game as "a bit sexual" and that the appellant was flirting and chatting when he touched her breast. She told him to go to bed. At that stage the two went to their respective beds.

32. We deal with the documents which relay the facts as set out by the complainant in time although that is not the order they were in the bundle. The first is from a Senior Sister at the hospital the complainant went to when she arrived home from the weekend. She says as follows, "She told me she just past some exams and had just gone out on a night in London with friends and that she'd woken up and her male friend had been touching her breasts and vulva, and that she had pain in her throat and in her bum." The nurse made the call to the police having had the complainant's consent to do this.

33. The next document is headed flag 8 and is a witness statement from the PC attending the hospital. The police constable says "whilst [the complainant] has got into her bed, [the appellant] has gone to [the complainant's] bed and room and began talking to her. Whilst talking to her [the appellant] then began fondling [the complainant's] breast. The complainant has then told [the appellant] to stop this and leave her alone. [The complainant] states that the appellant then returned to his room and headed back to bed." This is confused as they were in one room and the statement refers to this.

34. The statement goes onto say, “At around 0500hrs that morning, [the complainant] has been woken up by [W1] using the bathroom. [The complainant] has then discovered that she is completely naked with no clothes on, and that [the appellant] is in bed with her with no clothes on and that the [appellant] has placed his finger inside of her vagina, of which she has at not point given consent. [The complainant] has then shouted at the [appellant] and told him to leave her alone, and slapped his face. The appellant has then returned again back to his room and gone back to bed. [The complainant] then stated she fell back to sleep and awoke a short while later and when she awoke she felt like the situation she had remembered with [the appellant] was some sort of dream, however the complainant stated at that point she continued to have pain in her throat, nipples neck and anus and [the complainant] believed that it was not a dream and that the events she described had actually happened. It was at that point she showered, left the hotel to travel back on a train to Worcestershire.”

35. W1 would have been in the toilet at this time and heard nothing. He was not aware whether the appellant was in the bed when he got up to go to the toilet and although he says he was when he came back he also says he did not register this.

36. The next document in the timeline which deals with the allegations is the document entitled Flag 1 Record of Taped interview. Ms Brown for the appellant submitted that this must be a summary. The interview was said to have taken 53 minutes, but we only have 2 1/2 pages of type. We agree it must be a summary and it is not clear what is directly said and what is summarised. It is dated 02/07/2018.

37. There are two statements about what happened from the complainant in this document. On the first page the complainant says this; “We sat on my bed chatting and playing some drinking games. He then came onto me and touched my breast and I told him to go to bed with [W1]. I then went to the bathroom to get changed into my pyjamas, brush my teeth and go to bed as well. I went to sleep around two, half two and the next thing I remember is my friend W1 went to the bathroom about 5 o’clock and that woke me up. It was then that I realised that I was naked and that my friend had his hand on my chest and on my vulva and as I was waking up could feel inserting his fingers into my vagina. I was quite shocked and asked him what he was doing and slipped his hand away and asked him as to why I was naked and he said that he did not know why. I knew things were not right so I confronted the appellant after I'd showered he stated that nothing had happened and that he was sorry that I thought something had happened and reassured me that nothing had happened. He started crying and I felt really guilty.” We know that the complainant did not shower until the morning and so this challenge happened then.

38. On the next page she says; “The next thing I know is waking up in my bed. I was slightly on my side facing the appellant with him having his fingers inside my vagina and touching my breasts. My clothes were on the floor next to me. I challenged him and he said that he had just rolled over and touched me. I got up and put my clothes on and he put his underpants on. W1 came out of the bathroom and went back to bed and sleep, he was very very drunk.”

39. There are differences in these two accounts. The first was that the appellant had his hands on her chest, the second is that they were touching her breasts. She says first that his hand was on her vulva but the second was she woke up with fingers in her vagina. She also says in the first account that she challenged him in the morning and

he said nothing had happened. The second was when she woke up he said he just rolled over and touched her. We know that he says that he was in the bed with W1 when she woke him up. In the statement to the police she says that when she woke in the morning, she thought it had been a dream but then believed it was true because of the pain. No injuries were found on examination when she went to the hospital. There are no forensic samples as the samples were lost.

40. The statement goes on to say; "When we got up, [the appellant] was fine and didn't really say anything or make much eye contact. [The complainant] asked him if he would tell her if anything had happened and he said of course he would because I'm his best friend." It seems therefore that at this stage the appellant did not believe anything had happened and that the complainant was still unsure.

41. They went for breakfast and the complainant says she knew that something was not right and that she was not going crazy. She says she remembers waking up with his fingers inside her.

42. At the pub for breakfast, the complainant said she went outside with W1 and told him about what had happened. He was oblivious that anything had gone on. He told her to call her boyfriend to meet her. When she was on the train, she texted her boyfriend and also called a friend who had previously made allegations against the appellant. The Tribunal note the DBS rejected the allegations made by this friend as not being made out on the balance of probabilities and did not use the allegation to inform their decision to bar the appellant. For this reason this allegation was not taken into account by the Tribunal.

43. The complainant went back to the hotel to collect her belongings and go home. She later says, "I think I may have some recollection of my knees being up by my chest and I can't say for definite if I remember a male being on top of me. It is the feeling I have inside of me on the morning that made me feel like I had been raped. I don't remember anything happening." (Pp 48 of the bundle.)

44. The appellant texted the complainant later that day. A screen shot of the message is in the bundle and reads: (pp51)

> "I'm sorry.
> I appreciate that I'm the last person you want to hear from this afternoon, and will understand if you can never trust me again, or forgive me.
> I am mortified and ashamed, because I have no recollection of anything happening between finishing our drinks and me moving into (W1's) bed other than a florid dream involving someone else. If you want to take this further via the police or the regulator, I will do everything I can to expedite and make the process smooth.
> What I did, whatever the circumstance, was a breach of trust and was completely disrespectful of you and the friendship that we had, and for that I am unconditionally and unlimitedly sorry. Whatever I can do, I will."

45. W1 confirmed that they were "all extremely tipsy" and he went to bed first. There were two beds and he was sharing one with the appellant and the single bed opposite was the one used by the complainant. He said that he woke up several hours later to use the toilet. He did not register that the appellant was not in his bed but he was not looking for him and when he stepped back into his bed the appellant was there although he did not register this. He slept again and when they woke, he noticed that

the complainant was “extremely silent” and the appellant was “sluggish.” He thought nothing of it because “everybody acts different when they’ve woken up or are hung over.”

46. W1 says they all showered and while the appellant was in the shower the complainant was “very silent and on her phone. I didn’t want to interrupt, and I couldn’t 100% tell that something was wrong, though she seemed defeated and upset. But again, she may have been concentrating on something alien to me. [The complainant] was complaining of her throat being in pain, and this may have been she wasn’t speaking.”

47. On the way to breakfast he was “almost 100%” sure something was wrong. When they were at the pub he “just about heard her say I thought you were my friend” to the appellant. At this point he asked what was going on. The complainant was almost in tears and he asked her whether she wanted to step outside. He asked the appellant to wait as he wanted to speak to the complainant alone.

48. She explained to him that “she woke up when [W1] had gone to the toilet with them both being naked and him being behind her. She had told him to go and sleep in my bed which he did. She told me her nipples were in pain and she couldn’t remember everything but she remembered ‘fingers going in.’” She was crying and W1 “wasn’t sure if they had both made a mistake when drunk, so I told her that she needs to contact her partner and tell him what happened. Then she said she had been raped. I was unsure how to respond, because from my point of view up to that point, rape includes struggle and she was not in pain that may have reflected a struggle, however, in the light of these events it appears that rape can be interpreted in more than one way.”

49. W1 did not hear any confrontation between the appellant and the complainant. This is despite the complainant’s account that she had shouted and slapped the appellant whilst W1 was in the toilet, and that by the time W1 had returned from the toilet, the appellant was in bed.

50. The statements of the complainant are not clear as she says that she woke up in the morning and thought it was a dream and then believed it was not. She also says she remembered something else but she did not know what happened.

51. The complainant went to the hospital with her boyfriend and the police were called. Later she said she no longer wishes to proceed with her allegation as there was only her words against the appellant’s. The DNA samples were lost and there is nothing in the hospital notes that supports any visible injuries.

52. The appellant was interviewed and gave a no comment interview. He says he did this on legal advice and denied the incident to the legal representative before the interview. This is in the letter from the solicitor to the DBS dated 08 October 2021.

53. The DBS say in their decision letter: “The DBS does not dispute that [the complainant] had consumed alcohol leading up to the assault. However, her account/evidence of what she saw, heard and felt were detailed and clear, the DBS has evaluated her account and deemed her to be reliable and credible. [The complainant] was explicit in terms of you suggesting the group return to the hotel room,

of you and [the complainant] playing drinking games and that you sexually assaulted her by touching her breasts and inserting your fingers into her vagina without her consent." The DBS were aware there was no independent evidence of the allegation. We note the complainant was not sure what had happened but then believed it had been due to pain she was experiencing. There is no evidence of injuries. Despite the fact there were 3 people in the room, W1 heard nothing.

54. The DBS rely on the statement of W1 which they describe as corroborating evidence. They point out that W1 corroborates the chronology of going back to the hotel, played drinking games, that he went to bed first and got up to go to the toilet. The appellant does not disagree with the chronology but W1's evidence does not corroborate the allegation as despite being in the room he did not hear or see anything. If anything, it refutes the allegation and there were two beds in the same room. W1 also says that the complainant was distressed and disclosed to him that she had been sexually assaulted. They say, "This emotionally distressed disclosure was almost immediate and spontaneous" … "thus adding weight to her account." But by this stage we know that the complainant having thought it was a dream believed it wasn't. Although the DBS says she has been clear she has in fact not been clear. She has twice referred to not being sure about what had happened and then said she was clear about one part of the allegation.

55. The DBS do recognise that the text message is not an unfettered admission of rape but say "it would be reasonable to conclude that you were apologising for your behaviour, acknowledging culpability for breaching [the complainant's] trust and that you had been disrespectful." By mentioning the police in the message, the DBS take that the appellant recognised this was a significant issue and given the appellant cannot remember what happened he is "not in a position to challenge the specific details of the allegation." The text message does apologise but says that he cannot remember what had happened. It is not an admission but an offer to cooperate with any investigation.

56. In terms of proportionality the DBS say that given the nature of the allegation the time that has passed does not mean the appellant is not a risk and in any event the time is not considered significant.

57. In deciding not to prosecute the police record in the Docket Closure Report dated 28/08/2020 at pp 79 of the bundle that the samples were lost, there is no electronic evidence nor third party accounts "the latter being despite the mutual friend being in another bed in the same hotel bedroom." She no longer wishes to proceed, and the police have a statement indicating her wish to withdraw her support and this "followed many attempts to get hold of her." The docket also notes that there were no visible injuries in the hospital notes.

58. The Docket also refers to the text message set out above. Under caution and through his representative the appellant responded saying "Having read the text, I believe that it was my response to [the complainant] after she confronted me the following morning (namely the 1 July 2018). She made an allegation against me. I had no idea what she was talking about but as a friend, I sent her the message that afternoon setting out my concern and my wish to help." They confirm he handed his phone in and gave the password. Although the police do use a different standard of proof there was no other evidence than the evidence of the complainant who had drunk

significant amounts of alcohol and expressed doubt that anything had happened before believing something had.

59. The appellant is a regulated healthcare professional and being on the lists would preclude him from working in his chosen profession as this would be regulated activity under the SVGA. He disclosed the allegations to the Regulator in 2018 whilst he was registered as a pre – registration trainee in 2018 and there was no further action from his professional body. Since being placed on the barred lists his professional body approved a voluntary removal application and his name as removed from the Register of Pharmacists on 6 June 2024. Ms Brown told us that the regulator could have opened an investigation at that stage but did not. We do not have any evidence of their process in front of us nor expertise with this regulator. We therefore do not take this into account except to say that the appellant showed some responsibility in removing himself in the circumstances he found himself.

60. This is a very difficult case, but we must look at the evidence before us. In all the circumstances set out above there is significant doubt over what, if anything, happened. The DBS needed to look critically at the evidence before them and not just believe the allegation was committed. The complainant says she woke up naked with no recollection of how that happened. We do not know if she removed her clothes and she does not say the appellant did this. W1 heard nothing despite the complainant saying she shouted at the appellant and slapped his face. There is no forensic evidence. The appellant denies anything had happened to the complainant and to the police in his later statement about the text message. All three friends had been drinking heavily. We find on the evidence before us there is no clear evidence of what actually occurred that night. The DBS only had the same evidence before them as we had (and Mr Lewis did not object to our considering whether there was a mistake of fact on that evidence). And on that evidence given the doubt the complainant expressed herself, we do not find on the balance of probabilities that the allegation is made out. The DBS therefore made a mistake of fact in finding that "Between 30th June 2018 and 1 July 2018 you made a pass at Complainant 2 and without consent touched her breasts, then whilst she was asleep, inserted your fingers into her vagina and touched her breast/s without consent".

Disposal

61. We therefore direct the DBS to remove the appellant from both lists.

Conclusion

62. It follows from our reasons as set out above that the appellant's appeal to the Upper Tribunal is allowed.

Sarah Johnston
Sitting as a Judge of the Upper Tribunal
Suzanna Jacoby
Specialist Member of the Upper Tribunal
Christopher Akinleye
Specialist Member of the Upper Tribunal

Approved for issue on 7 January 2025