IN THE UPPER TRIBUNAL **Appeal No. UA-2024-001099-V**
ADMINISTRATIVE APPEALS CHAMBER **[2025] UKUT 93 (AAC)**

Between:

GL

Appellant

- v –

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Ward, Ms R Smith and Ms E Bainbridge

Hearing date: 25 February 2025

Representation:
Appellant: In person
Respondent: Tim Wilkinson, instructed by DAC Beachcroft

Breach of the order below may constitute contempt of court and be punished by a fine or imprisonment.

The Upper Tribunal makes an Order under rule 14 prohibiting publication of any matter or disclosure of any documents likely to lead members of the public directly or indirectly to identify any of the following persons:

The Appellant
The Appellant's father and stepmother
The Appellant's children
The Appellant's former partner and father of her children
The girls involved in the incident for which the Appellant accepted a caution
The man involved in that incident
The Appellant's present partner, his former partner and their child

The initials used in this Decision are not the true initials of the persons concerned.

The Order is made with a view to preventing the jigsaw identification of those who, by virtue of youth or otherwise, the panel considers vulnerable. It supersedes the Order made by a Registrar on 9 October 2024. Save as above,

the application by DBS by letter dated 5 February 2025 for a total of 36 people to be made the subject of a rule 14 order is refused as disproportionate and unnecessary.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. On 13 November 2011 the Appellant, then aged 18, was cautioned for an offence contrary to section 14 of the Sexual Offences Act 2003. The offence was "Arrange/Facilitate the commission of a Child Sex Offence" and arose because she took two 14 years old girls who were friends of hers to meet her then boyfriend and encouraged them to drink alcohol, take cocaine and to give him oral sex. She was placed on the Sex Offenders Register until December 2013.

2. She had been included in the children's barred list and the adults' barred list on 16 February 2012 under paragraphs 2 and 8 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006. That paragraph provides for automatic inclusion on the lists, with the right to make representations.

3. The ISA (the DBS's predecessor) invited representations by letter dated 16 February 2012 . The Appellant told the DBS she never received the letter, although there is a purported signature for it (not in the Appellant's name). The Appellant does not dispute that it was sent and she does not say she made representations.

4. On 22 May 2024, the DBS decided to retain the Appellant on the children's barred list but removed her name from the adults' barred list because the "test for regulated activity" was not satisfied – there was no evidence that the Appellant had been engaged, was engaged or would be engaged in regulated activity relating to adults. From now on we only refer to provisions relevant to the children's barred list.

5. On 30 September 2023 the Appellant had contacted the DBS to ask to be removed. This crystallised into a request on 20 October 2023 to make late representations. In the DBS's letters dated 30 October 2023 and 1 February 2024, the DBS seem to have permitted her to make late representations (rather than having conducted a review). This must be under paragraph 17 of Schedule 3, as in force on 30 September 2023 (her first request to the DBS) or on any date after that and before 22 May 2024. 22 May 2024 is when the DBS wrote to her saying that they had decided that it was appropriate for her name to be retained in the children's barred list but had removed her from the adults' barred list.

6. Paragraph 17 of Schedule 3 to the 2006 Act provided, from 30 September 2023 to 22 May 2024 (as it does now)—

> "17(1) This paragraph applies to a person who is included in a barred list (except a person included in pursuance of paragraph 1 or 7) if, before he was included in the list, DBS was unable to ascertain his whereabouts.

> (2) This paragraph also applies to such a person if—
> (a) he did not, before the end of any time prescribed for the purpose, make representations as to why he should not be included in the list, and
> (b) DBS grants him permission to make such representations out of time.
>
> (3) If a person to whom this paragraph applies makes such representations after the prescribed time—
> (a) DBS must consider the representations, and
> (b) if it thinks that it is not appropriate for the person to be included in the list concerned, it must remove him from the list.
>
> (4) For the purposes of this paragraph, it is immaterial that any representations mentioned in sub-paragraph (3) relate to a time after the person was included in the list concerned."

7. So, the test for whether to remove from the list is whether it is appropriate for the person to be included: paragraph 17(3)(b).

8. Permission to appeal has been granted solely on the issue of whether it was proportionate for the Appellant to be retained on the children's barred list.

9. Safeguarding Vulnerable Groups Act 2006 s.4 materially provides:

> "(2) An appeal …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.
> …
> (5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS."

10. Placing the Appellant's name on the children's barred list did not involve the DBS in making findings of fact about the underlying incident and the Appellant does not dispute that she received the caution. All that is left to consider is whether the DBS made a mistake on any point of law. Even though a decision that it is <u>appropriate</u> to keep a person's name on a barred list is not a question of law or fact, whether it is <u>proportionate</u> to do so is a question of law and so the Upper Tribunal can consider it.

11.The need to consider what is "proportionate" arises because article 8 of the European Convention on Human Rights is engaged by a decision to place a person on a barred list and the case law tests the lawfulness of decisions to which article 8 applies by (among other things) their proportionality. Article 8 provides:

> "Right to respect for private and family life

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

12. Mr Wilkinson referred the panel to the recent decision in *KS v Disclosure and Barring Service* [2025] UKUT 45 (AAC) which helpfully drew together a number of the leading authorities. It is for the panel to reach our own decision on whether the decision was proportionate but we must give appropriate weight to the DBS's decision. Whether the decision is proportionate falls to be looked at on the circumstances down to the date it was taken.

13. *KS* applies the four-fold analysis of the Supreme Court in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700. Although Lords Sumption and Reed expressed themselves in formulating the doctrine of proportionality slightly differently, each confirmed there was no significant difference. Lord Sumption expressed the test thus:

> "the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective."

14. The Appellant, her father and step-mother (Mr and Mrs S) between them put the Appellant's case. In barest summary it is that she had been through the care system, had met up with the wrong people which led her to problematic drug and alcohol use and to follow the wrong path.She now, 10 years later, is a more mature person, with two children of her own. She wants to work and had obtained a job as a school cleaner which unfortunately she had to give up when she received a "breach of bar" letter, which she says was the first time she learned she had been barred. She very much regrets what she did. Her case is that it is not necessary to maintain barring her and doing so would impede her building on the progress she has already made towards a more healthy and settled lifestyle.

15. In their decision letter, DBS put matters in this way:

> "The context of the caution is you were found to have arranged for you and your two 14 year old friends to be picked up by your boyfriend and encouraged the two victims to drink alcohol, take cocaine and suck the penis of your partner.

In your representations you state that at the time of the offence you had left the care system, and met up with the wrong people. You also state you were a vulnerable 18 years old who was heavily under the influence of drugs and alcohol. You detail that going through the care system meant you had no sense of responsibility and that you had not learned that your actions had consequences. You state that you have changed considerably since the incident and have learned morals and values and that you would not act in the same manner again.

You detail that you secured a job as a cleaner in a school in May 2023 but had to leave when they learned of your caution in July 2023, which was upsetting. You detail in your representations that you are older now, with children of your own, but acknowledge that your children aren't currently in your care and that you hope to get them back to live with you.

You admitted in your police interview that you knew the victims were 14 years old and that you knew your boyfriend would expect sexual activity from the girls and facilitated this by inviting them along. It is also acknowledged that despite being the adult in the situation, you allowed the victims to drink alcohol and take drugs before encouraging them to perform oral sex on your boyfriend. You state that at the time you were heavily under the influence of drugs and alcohol and that this is what led you to act in this manner. You state that this is no longer the case but have provided no evidence to support this. It is also noted by you that your own children are not currently in your care, which further suggests that you have not amended your behaviour sufficiently for social services to believe you are suitable to care for them.

The DBS have considered all the information provided by you, including your representations, and consider that you pose an ongoing risk to children in the future. This is because you knowingly and willing arranged for two 14 years old girls to engage in sexual activity with an adult male. Alongside this you also prompted them to drink alcohol and take cocaine. You knowingly admitted that the girls were 14 and stated you knew the male would expect the victims to engage in sexual activity with him. You have claimed that your actions were because you yourself were heavily under the influence of drugs and alcohol at the time. You have provided no information to show that this is no longer the case and that you have adapted your behaviour accordingly.

You have admitted that the behaviour was inappropriate and have apologised for it, however the DBS has no information that you would not act in a similar manner in the future. You state that you fell in with the wrong crowd and the DBS has no information that you would act differently should something similar happen in the future. At the time you were 18 years old, and therefore an adult and have knowingly arranged for the two 14 years old victims to engage in illegal activity, namely drinking alcohol, taking drugs, and engaging in sexual activity despite not being old enough to consent. Roles in regulated activity with children could put you in a position of trust over those in your care and they would look to you for support. They would likely trust you and comply with any instructions you would give them and therefore this gives the DBS concerns. Should you repeat the harmful behaviour towards children in your care it is likely that they would suffer physical and significant emotional harm. As a person of responsibility, they would expect to trust you and for you to act

> in their best interests, however the behaviour you have displayed contradicts that you would be able to do this. The DBS have concerns that you may repeat the harmful behaviour in the future should you be given the opportunity.
>
> The impact of retention in the Children's Barred List could result in interference with your Article 8 rights under the European Convention on Human Rights. It is acknowledged that a retention would narrow your employment and volunteering opportunities and that you would be unable to work in regulated activity with children. A retention may also impact upon your financial wellbeing and future earnings. However, this is deemed necessary considering your potential risk of future harm. There may also be a level of stigma attached to retention in the barred lists. It is acknowledged that your convictions would be visible on your enhanced disclosure check but due to your risk this is not deemed an adequate safeguard alone. Having considered your rights balanced against the need to safeguard children from harm in regulated activity; it is both appropriate and proportionate to retain your name in the Children's Barred List."

16. By way of context to the offence, the boyfriend was 34 so the Appellant was much closer in age to the girls than to the boyfriend. Further, the Appellant had been in care following a very difficult childhood, the detail of which it is not necessary to set out here. We do not have a specific figure, but the evidence strongly suggests her IQ is on the low side. She would have been, in the panel's view, a very vulnerable individual at that time.

17. She was subsequently in a relationship with T, the father of her two children. That ended in 2016 in circumstances of domestic violence. In proceedings relating to the children, Mr and Mrs S were appointed under a Special Guardianship Order ("SGO").

18. Mr and Mrs S have since then had parental responsibility for the children, who live with them. Mrs S was only prepared to allow the Appellant contact with her children when she (Mrs S) felt the Appellant's behaviour had changed. She allowed her unsupervised contact from between 18 and 24 months ago. Overnight access was allowed, for each child alternately because of the children's own developmental issues, from about 12 months ago. Mr and Mrs S keep the social worker allocated to the SGO informed, not least as a protection for themselves, but Children's Social Care have gradually over time become increasingly reassured by how Mr and Mrs S are handling matters and in April 2024 closed their file. The SGO however remains in place.

19. In Autumn 2023 the Appellant began a relationship with a new partner, B. Mrs S was concerned to establish that B was a suitable person to move into a household where there were children and Children's Social Care completed a police check which demonstrated "no concerns" in that regard. She did initially consider B to be "controlling", but now realises that he has strengths in organisation, which he deploys in encouraging and ensuring the Appellant does what needs to be done, as indeed Mrs S does herself. Around the time the relationship began, the Appellant's visits to her children became less frequent. B himself has a child by a previous relationship and his ex-partner is reported to be concerned by the possibility of her child with B visiting the Appellant's home when the Appellant is on the barred list.

20. The Appellant and her children have benefitted from an enormous amount of support from Mr and Mrs S. In 2017 she completed the "Freedom Programme" with her local women's centre; this is a course directed to domestic abuse. She had some involvement, the extent of which is not in evidence, with her local drugs and alcohol service up to 2018, when she received an annual test. The only documentary evidence of the outcome of tests is that in 2018 a test reported her as clear of two drugs which had been identified as an issue when the court case regarding her children was going on (so in 2016 or 2017). Thereafter she visited drop-in arts and crafts sessions where counselling was available, but the extent of her participation is not in evidence and there are no records of the counselling.

21. In 2023, for the first time, the Appellant obtained a job, as a cleaner in a school. She had not previously attempted to get one. In the period from 2016 her focus had been on trying to get her children back and she had needed time to build herself up from 2016, which had been a low point. (The panel also notes that during the time of Covid from 2020-2022 it would have been very hard for someone to get a job if they did not have one already). She told the panel she would not know how to set about getting a job but a friend who worked at the same place told her they were hiring. The distress which she experienced when her work had to come to an end when she received the "breach of bar" letter is clear.

22. She re-engaged with the women's centre (for the first time in a while) after permission to appeal was given and was placed on the waiting list for a follow-up course, again in relation to domestic violence. She has the support of a mental health practitioner at her GP practice, but the postholder has only been in post since August 2024 and evidence from before then is very limited.

23. We begin our analysis by noting that the matters in para.22 do not materially add to our understanding of the circumstances down to the date of the DBS's decision and thus place no weight on them.

24. The objective of the barring scheme, in the most general terms, is to protect children and vulnerable adults from harm by those entrusted with their care in "regulated activity": *KS* at [58]. A decision under the barring scheme prohibiting the Appellant from engaging in regulated activity is rationally connected to the objective of the scheme. In terms of the *Bank Mellat* test, limbs (i) and (ii) are met.

25. In terms of limb (iii), the Appellant and her family could not suggest a less intrusive measure than barring. We record that barring is an "all or nothing" decision and there is no legal ability to impose conditions.

26. The panel canvassed with Mr Wilkinson reliance on a DBS certificate to inform prospective employers. That had been considered in the DBS's decision, the DBS view apparently being that while it might be in some cases, it was not appropriate to the level of risk which the Appellant poses. That therefore takes us to that issue.

27. It is not intended as a criticism of the Appellant, whose difficult circumstances past and, to some extent, present we acknowledge, to say that we consider the risk remains unacceptably high. The circumstances of the index offence are troubling, given the forethought and untruths involved, the boyfriend's threats to the girls having driven them around in his car not to take them home unless they complied with his requests, the exploitation in several different domains (under-age drinking, drugs, sexual activity), and the considerable age gap. We have not seen sufficient evidence to demonstrate that the Appellant has been off drugs on a sustained basis. We have

not seen any evidence at all that she has had appropriate professional help to examine what led her to commit the index offence or what the risk of reoffending is considered to be. While making due allowance for the fact that it was early days in a new relationship, not having been in one for 7 years, the reduction in time spent with the children when she became involved with B, when taken together with the index offence and the concerns which led to her being taken into care causes a degree of concern that she may be unduly compliant with the wishes of others, while the extent to which the help of B and of Mrs S is needed and her claimed inability to apply for a job (much less a proven ability to hold one down) suggests a rather passive personality, not helped by the limitations in her intellectual functioning. The view of the panel, informed by the expertise of its specialist members, is that those who have charge of children are particularly vulnerable to being approached by those wishing to have access to them for the wrong reasons and that it is important that those who engage in regulated activity with children, whether professionally or as volunteers, have sufficient robustness to deal with this. That the Appellant has been considered unsuitable by Children's Social Care and the courts to exercise her parental responsibility in respect of her own children is not determinative but points strongly in the same direction.

28. Here is an opportunity to mention that Mr and Mrs S had approached the SGO social worker to provide evidence, which was refused, apparently on legal advice concerned to data protection issues. That could have been overcome by the Upper Tribunal making an order (and, if necessary, the consent of the Family Court being obtained), but we consider that we have enough evidence regarding the arrangements contemplated by the SGO and their operation in practice to proceed without such a step.)

29. In general, cautions are regarded as "spent" for the purposes of the Rehabilitation of Offenders Act 1974, sch.2. It appears that a caution would show up on a Standard DBS check or an Enhanced DBS check, but not on a Basic DBS check: see https://www.gov.uk/government/organisations/disclosure-and-barring-service/about . In the absence of evidence, we are doubtful that all employers needing to make DBS checks would do so at all, or at the Standard level, for jobs such as cleaner. The potential that they do not, or would not engage with the outcome, coupled with the level of risk which for the reasons above we consider the Appellant poses, makes this not a suitable alternative.

30. We turn therefore to the fourth of the *Bank Mellat* limbs, namely "whether… a fair balance has been struck between the rights of the individual and the interests of the community". Mr S made a number of suggestions as to how barring might impact upon the Appellant, such as taking the children on holidays abroad. Some of these were the product of his own on-line investigation and we do not consider that they are borne out by the law. In some respects at least, he may have become confused with the constraints which follow from being on the Sex Offenders Register, which the Appellant no longer is. Being on a barring list does however prevent a person from working or volunteering to work in regulated activity with the group concerned. The Appellant has not suggested that she wants to do any voluntary work with children. In terms of employment, the job of cleaner which she had taken up, as her first job, is not one that can only be performed in settings where children are present. As the reason why the Appellant was removed from the adults barred list was that she did not meet the "regulated activity" condition, we further note that the same applies to

settings where vulnerable adults are present. Mr S suggested that contract cleaning companies will move their staff around and thus want the facility to deploy them to settings where a clear DBS certificate may be required. That may be so; we cannot know in the absence of evidence. There may in any event be undertakings which have their own cleaners, where the issue would not arise. We accept however that there may be some reduction in the number of cleaning posts which the Appellant could successfully apply for, though we cannot assess its extent. In any event, though, there will be other posts which the Appellant could fulfil even if on the children's and/or adults' Barred Lists. Unskilled manual work would be open to her, such as some forms of shop work, some catering jobs e.g. kitchen porter or some jobs working on a factory line. Her enthusiasm and ability to work is transferable.

31. It was also suggested that being barred would have implications for her personal and family life. Mr and Mrs S, whose commitment the panel acknowledges, indicated that they are not as young as they might be, nor in the best of health, and so it is a desirable aim going forward to move towards a situation where the Appellant plays a greater part and has a greater responsibility for her own children, via some kind of "shared care" arrangement. There was no real evidence before us of what part, if any, the barring of the Appellant had played in the proceedings relating to her own children. Our own view is that on any application to vary the existing arrangements Children's Social Care would have to reach their own decision on the basis of the law (and where relevant, guidance) applicable to them and that even if the Appellant's name were not to be on the barred list, Children's Social Care would assess what was best for the children, attributing such weight, if any, as they saw fit to the matter for which the Appellant was cautioned.

32. The other issue is the reported concern of B's ex-partner (see para 19 above). Section 58 of the 2006 Act provides:

> "(1) This Act does not apply to any activity which is carried out in the course of a family relationship.
>
> (2) This Act does not apply to any activity which is carried out–
>
> (a) in the course of a personal relationship, and
>
> (b) for no commercial consideration."

The issue with which we are concerned, as we understand it, is not that it is being said that the Appellant's barring would preclude her, as a matter of law, from B's child coming to stay with her and B, but what the fact of barring is thought to say about the Appellant's suitability. We consider that by enacting s.58 in the form it has, Parliament has acknowledged there may be difficult discussions among family and friends to be had about a person's suitability because the barring mechanisms have no application to family or personal relationships. Accordingly, we consider that the concerns of B's former partner are a matter which will need to be resolved, difficult as it may be, between the Appellant, B and her, just as it would be if the Appellant was not barred but was nonetheless known to have been cautioned for the original offence.

33. While we accept there will be some negative consequences for the Appellant of being barred, they are limited in extent and are outweighed by the importance of the aim of protecting the vulnerable group concerned (in this case, children). Accordingly, the appeal must be dismissed.

34. We acknowledge that our decision will doubtless come as a disappointment to the Appellant and to Mr and Mrs S.

C.G. Ward
Judge of the Upper Tribunal

Ms R. Smith
Member of the Upper Tribunal

Ms E Bainbridge
Member of the Upper Tribunal

Authorised for issue on 13 March 2025