Appeal No. UA-2023-000471-V
[2024] UKUT 441 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the Disclosure and Barring Service

Between:

HLF

Appellant

- v -

The Disclosure and Barring Service

Respondent

Before: Judge Sarah Johnston, Sitting as a Judge of the Upper Tribunal, Josephine Heggie and Elizabeth Stuart-Cole

Hearing date: 30 October 2024
Decision date: 23 December 2024

Representation:
Appellant: Mr Matthew Stanbury Instructed by Thomas Woodward
Respondent: Mr Ashley Serr instructed by Farah Sheraz

ANONYMITY ORDER

On the 09 October 2023, the Upper Tribunal made the following order, which remains in force—

"3. Having considered the provisions of Rule 14(1)(a) and (b) of the 2008 Rules and the reasons given by the Respondent in the 20 September 2024 letter, 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. [C] - a mutual friend of the twelve-year-old female victim and the Appellant, who introduced the victim and the Appellant and is likely to be a child;
b. [K] - a family friend of the twelve-year old female victim, who is mentioned in connection with the relevant events and may be a child;
c. [KP];
d. [M] - a friend of the twelve-year-old female victim;
e. [JF]
f. ["C"], who is mentioned by the Appellant in connection with the relevant events and is likely to be a child;
g. [SWFCCP]
h. [SCSBC]
i. [CE]
j. [PC] Park

4. On 24 January 2025 the Upper Tribunal made a subsequent order prohibiting the disclosure of the name of the school in the published decision. This order remains in force.

5. Having considered the provisions of Rule 14(1)(b) of the 2008 Rules and the provisions of Sections 1 and 2 of the Sexual Offences Amendment Act 1992 ("SOAA 1992"), I order prohibiting publication of any information that is likely to lead to members of the public to identifying the twelve-year-old female victim referred to as "V" as someone against whom an offence of rape is alleged to have been committed.

Breach

Any breach of the order at paragraphs 3 and 4 above is liable to be treated as a contempt of court and punished accordingly (section 25 of the Tribunals, Courts and Enforcement Act 2007)"

Where there are initials in square brackets in that order, the names were given in the order. But those are not reproduced here since this decision will be published.

SUMMARY OF DECISION

Safeguarding Vulnerable Groups: Findings of fact (65.1 65.9)

The decision of the Tribunal was that there was a mistake of fact in the DBS decision in finding that an allegation against the appellant was proved. The appeal was allowed, and the Tribunal directed the appellant be removed from the Children's Barred List.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

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

2. The Respondent's decision taken on 09 January 2023 to include the Appellant's name on the Children's Barred List did involve a mistake of fact.

3. We direct the DBS to remove the appellant from the list.

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 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 Orders included at the head of this decision. We are satisfied that the appellant, and the others in the order should not be identified in this decision, whether directly by name or indirectly. We are also 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. Subsequently an order anonymising the school has been made and the decision is amended to reflect this. 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 09 January 2023 to include the appellant on the Children's Barred List. The material facts were summarised in the letter.

5. The barring letter set out:

> "We have considered all the information we hold and are satisfied of the following:
>
> On 27 July 2018, whilst aged 15 years old you have;
> - Removed the clothing of a 12 year old female against her will;
> - Touched her bottom;
> - Pushed her on to the bed and digitally penetrated her vagina despite her repeatedly telling you "no";
> - Made her suck your fingers;
> - Removed your trousers, grabbed her head and forced her to perform oral sex on you whilst also holding her arms above her head;
> - Forcibly opened her legs and inserted your penis into her vagina despite her trying to keep her legs closed;
> - Kissed her chest and neck causing love bites;
> - Attempted to strangle her as a means of keeping her still;
> - Straddled her shoulders whilst again placing your penis in her mouth;
> - Dragged her on top of you and again inserted your penis into her vagina;
> - Held her against the wall with your arms whilst digitally penetrating her vagina.
>
> On 15 April 2019, whilst aged 16 years old you have;

> Placed your hands on the shoulders of a female child aged 13 years old;
> Told her that you fancied her;
> Before then moving your hands down to her waist.
>
> Having considered this, DBS is satisfied you engaged in relevant conduct in relation to children. This is because you have engaged in inappropriate conduct of a sexual nature involving a child."

A summary of the material facts of the appellant's case

6. The appellant denies both the alleged offences. The first and most serious set of allegations in the Final Decision Letter of the DBS are set out above. The appellant says the allegations never happened, he did not know the complainant before the allegations, he never met the complainant and never went to her house. The appellant says he complied with all police requests including providing the police with his phone the first time he was approached by them, and the DNA samples were inconclusive. He says he was picked out in the line up as the girl had a picture of him from social media which she had already provided to the police. The appellant says there was no evidence of contact between them on social media before the allegations.

7. The DBS raised evidence of screen shots of conversations between the complainant and the appellant. The appellant says these were not dated the conversation did not flow and he did not have these conversations. The actual screen shots were not part of the written evidence before the Tribunal and we have not seen them, nor have the DBS to our knowledge. They were referred to in the interviews with the police but were not set out. The appellant was going to have an expert look at the screen shots to show that they were manipulated but the case was discontinued as the complainant withdrew support for it for the third and final time.

8. The allegations were at first said to have taken place on 23 July 2018, and then in the interview of the appellant on 21 July and then 27 July 2018 the last change being just before the trial. In the bundle a document from the appellants mother said that she had timed and dated conversations between her and the appellant on 23 July 2018 which would have provided an alibi. These were text conversations about the dog being unwell and needing to go to the vet. The appellant said he was at home looking after the dog when these texts were sent. On 27 July 2018 he was with his brother, his brother's partner and his sister as his sister was back from holiday so they were spending the day together. This is at para 28 of his statement which the Tribunal received this morning.

9. The appellant says he was in a relationship with another girl and a male friend of his obtained his password to his social media account. This friend sent messages pretending to be the appellant to this girlfriend (not the complainant) and her family were not happy with the content of the messages. He was not sure whether there was a link between the conversations with this girl and the complainant, but this was evidence that someone else had access to his social media account.

10. The appellant says the second allegation about his girlfriend's sister is wrong and was not sexual. He accepts that he told her he had fancied her before he met her sister and did not mean he fancied her at the time. He said that she may have interpreted this wrongly as she was aware of the previous allegations through her sister and the girl in this complaint and the father of his then girlfriend did not like him.

The statutory framework

11. The relevant legislation is in the Safeguarding Vulnerable Groups Act 2006. Inclusion in the children's barred list is governed by section 2 of that act and Part 1 of Schedule 3 to the act. The basis for the decision in this case was relevant conduct[1], so paragraphs 3, 4, 5, 9 and 10 of Schedule 3 are relevant.

12. Section 2 of the Act requires the DBS to maintain the children's 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 list. Regulated activity is determined in accordance with section 5 of, and Schedule 4 to, the 2006 Act. Both parties agree the appellant was engaged in regulated activity when he wanted to coach football.

13. Schedule 3 to the Act provides for inclusion by reference to "relevant conduct" by the person included in the list. The appellant must have been engaged in relevant conduct and regulated activity in the past, present or future. Relevant conduct is described in the Act as conduct which endangers or is likely to endanger a vulnerable adult by harming the vulnerable adult or putting the vulnerable adult at risk of harm.

14. 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.

15. In this case both parties agreed that we were considering mistake of fact.

Permission to Appeal

16. Permission was granted by Judge Johnston on the papers on 16 February 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 first victim were made out on the balance of probabilities. The appellant has always denied the allegations, was found not guilty as the complainant withdrew support for the prosecution and as a consequence the appellant was unable to present evidence or witnesses in front of a court.

17. The second allegation if it is the only one relied on may make a decision to bar disproportionate.

[1] Decision letter, page 9, fourth paragraph.

The oral evidence
Analysis

47. There are two allegations in this case but the first is the most significant. Mr Serr in his submissions said that 2nd allegation on its own not enough to justify barring decision – even taken at its highest. We agree and will therefore concentrate on the first allegation.

48. The evidence in support of the first allegation being made out on the balance of probabilities is the very detailed statement of the complainant who was 12 years old at the time. The detail in the statement is such that it is difficult to believe that the complainant made the entire assault up. Mr Serr said it was improbable that she made the accusation against someone she had never met not just to the police but to others.

49. The evidence before us that casts doubt on the allegation is in the witness statements for the case, the fact that no conclusive DNA was found, that we do not know what is said in the text messages as we do not have them, the dates the rape was meant to have occurred being noted as the 21 July 2018, the 23 July 2018 and the 27 July 2018. The final date of the eventual charges was 27 July 2018 but they had been 23 July 2028. The aunt with whom the complainant was staying was away from 26/27 July 2018 so the rape would have taken place before she was on holiday, but she received the texts from the complainant whilst away on holiday on 30 July 2018. It seems all witnesses thought the assault happened when the aunt was on holiday and the eventual charges were changed from 23 to 27 July 2018.

50. In the witness statements of others who spoke to the complainant about the allegations there is some doubt cast on who was the perpetrator. W5 who was a friend of the complainant's mother said that the complainant told her she had been raped through text messages whilst in the same room. She said at pp 40 of the bundle in her statement of 14.03.19 "I thought she was referring to something which had happened a few weeks prior," but the complainant said it had happened "this morning." Although she did not give a date it seems the aunt thought it was 27th July when she was meant to go and stay as the aunt was away. She said "I wanted to make sure that the complainant meant she had made it clear she did not want it to happen and that she had not gone along with anything with the boy to not lose face". On page 41 she said "there had been an incident where she had been messing with a boy a few weeks before." And at page 42 she said "Because [the complainant] was so adamant that she did not want to tell anyone it made me wonder if my initial thoughts were right. Had things just gone too far with a boy. I have tried to speak to [the complainant] about this. She has always been adamant she did not want to have sex and she tried to stop it."

51. In a statement taken on 08 April 2020 from the friend of the complainant's aunt W4 who had known her from birth she explains she offered to talk to the complainant who was "misbehaving". The complainant told her that there was a boy who made a pass at her who then told her that they had sex and she had not wanted to. The complainant showed her screen shots of text messages which said she did not want to have sex. She said "I saw the response but do not remember what he replied..." The complainant told her they had not used contraception, so she went to Boots to get some emergency contraception. She did not remember the

timescale with regards to when the incident took place and the purchase of the contraception. This meeting was said to have taken place in September/October so some weeks after the alleged rape making the need for any emergency contraception useless.

52. In a statement from her aunt taken on 12 March 2019 she (the complainant) was staying with her. She was due to go away the next morning and the complainant was to go and stay with a family friend. This was around 26/27 July 2018. She returned home on 31 July but had been contacted by the complainant on 30 July via messages. She said the complainant was upset as she had been arguing with her grandmother about having friends around. In the message she said she wanted the friend to come around as the complainant had been raped. This came as a shock to the aunt, but she was even more concerned as there had been something, which had happened a few weeks before this. She said that the complainant had had sex with a boy who thought she might have been pregnant. "…the circumstances of this all came out when some money went missing from my husband's wallet, When I asked the complainant about this she explained that she had taken the money but it was to give to [name redacted]. He had threatened to tell everyone she was a slag if she told anybody about the pregnancy. To stop him saying anything he had demanded £50 off her." She goes onto say that the money was collected by a friend called [the same first name as the appellant], and, "as you can imagine getting the messages from [the complainant] saying she had been raped sent my mind into a whirl. I asked her something similar to "Raped again?" so I could be sure she was not talking about [name redacted]. She then goes onto say that the complainant was being supported by the boy who she had had sex with and was blackmailing her. When discussing this the complainant was concentrating on the fact that [redacted name] could not come round and go upstairs.

53. She says at page 48 of the bundle "Regarding the whole matter I'm not 100% sure of what happened. My gut feeling with this is that [the complainant] was not happy with what happened."

54. These statements, although none of the witnesses were present do throw doubt on the allegations against the appellant as even those who are close to the complainant express doubt to the police.

55. There is conflicting evidence about whether the aunt was on holiday or not. We are told that the complainant went to the friend's home as her aunt was away. Her Aunt though was away on 26/27 July 2018 and this is said to have happened on 23 July 2018 although this was changed shortly before trial. In her witness statement the aunt said she was texted by the complainant on 30 July 2018. The aunt also refers to the complainant being blackmailed by another boy not the appellant and the appellant was collecting the money, but this seems to have happened at another time. The aunt says the complainant also says the appellant had become a good support to her regarding what had happened. There is no evidence from the boy who was said to have been blackmailing her nor any evidence that he was approached for a statement. There is no evidence in the interview with the complainant that she said the appellant was supporting her.

56. The complainant says the rape happened in her aunt's room. She says that the aunt was going to work so the aunt would have returned home. It seems unlikely

that the aunt would not have seen anything was remiss in her room given the ferocity of the attack. If the date was the later date, she was not back until 31st July 2018. There is no suggestion that the complainant went back to the house to tidy up and it is said that both the complainant and the appellant left the house at the same time. Again, there is no evidence that the aunt noticed anything in her room.

57. The complainant also said that she had met the appellant in a particular park and that they had been introduced by a friend. The appellant denies ever going to this park or knowing the complainant's friend. We have no evidence except the complainant's placing him at the park or being a friend of a friend – no statement from the friend and no witness to them meeting in the park.

58. We are told at page 151 of the bundle in representations which support the appellant dated 21 November 2023 that the DNA was inconclusive and so there is no evidence that puts the appellant at the scene apart from the evidence of the complainant.

59. In terms of identification the complainant had given the police a picture from face book of the appellant before he was cautioned. The complainant therefore knew who to choose from the identification pictures as she had given them the picture.

60. There was evidence of marks on the complainant that were referred to as "love bites." The complainant had taken pictures of these and given them to the police. The police did not have their own pictures. It seems clear from the statements of the other witnesses that there was another incident with another boy before the allegation. Therefore, the marks could have happened during the incident with the other boy.

61. We are told that the text messages were not timed or dated, the name was only the first name of the appellant, and the conversation did not flow. The police summary says "Text messages from both mobile phones indicated that sexual intercourse had taken place, and that the complainant did not consent. … When presented with the text messages [the appellant] did not accept sending the messages."

62. In the interview of the appellant the officers say when questioning the appellant at pp 228, "She's provided me with a screenshot of this [the appellant] that she's described in her video interview with that telephone number. Whose is that telephone number …?" They go onto say: "Tell me why [complainant] would say that this [appellant] with your telephone number has raped her?" the appellant answers "I don't know." It does not say where the telephone number is, whether it is attached to the conversations, or the picture of the appellant and we do not have the text messages in front of us. Neither did the DBS. The text messages say that there was an apology from the person who committed the offence as he had not taken his medication. This could point to the appellant as he took medication but it is far from conclusive. It also does not make sense that after the appellant had been interviewed by the police, she contacted him to ask for an apology. On her evidence she already had one.

63. Another piece of evidence that casts doubt on the complainant's allegation against the appellant is that the police in their summary at pp 30 say that the victim reported that she had arranged to meet a male who she knew from school called [the appellant]. When she was seen by T/Superintendent from South Yorkshire Police she said in a text message she was raped by a 15 year old from her school called [the appellant.] It is clear from the appellant's evidence that she could not have known him at school – he was at a school for those with special educational needs and there were three girls there. None of the girls was the complainant. In her interview she confirms she went to a school with a different name.

64. In terms of the 3 retractions by the complainant and the refusal to give evidence, we agree with Mr Serr that these are the classic examples of a young abuse victim. However, the appellant is right that her retraction from the case meant that her evidence was never tested in court and the appellant had no opportunity to tell a court his evidence.

65. We accept that it is more than likely that the complainant was raped. The detail of the statement would support this. The difficulty is that there is insufficient evidence to say that this attack was carried out by the appellant on the balance of probabilities given the doubt cast on this set out above.

66. Mr Serr also urges us to take into account that it passed the prosecution test and that that might bolster the suggestion that there were text messages that supported the allegation. As we do not have the text messages that is speculation.

67. The appellant was voluntarily interviewed, voluntarily handed in his telephone and cooperated with the police. He has always denied the allegation. He denies knowing the complainant.

68. The appellant says in his statement that on 23 July 2018 he was at home. He had text messages with his mother in the morning about the dog which he says confirms he was at home. In the afternoon he messaged his mother about the toilet being broken which again indicates he was at home. His mother came home at 15.30. The complaint says the appellant got to the house at about 9 or 930.

69. In the FA investigation at page 81 of the bundle it is clear that the FA assumed that the appellant had the complainant's number on his phone. They say "When discussing the text messages recovered by the Police between [the appellant] and the alleged victim, [the appellant] denied any knowledge and said that he did not know who he was messaging .. he was unable to explain how he came to have her number on his phone…". This interview with the FA was in January 2023 so some 5 years after the allegations. The appellant denies he knew the appellant to the police, to the DBS and to us in his statement at paragraph 13. He says "I have never been produced or seen any text message from complainant 1 to me. I do not believe that complainant 1 had my number to send the text message and it was never exhibited by complainant 1." In the interview with the FA, he was asked about text messages and how he had the complainant's number? His answer was "Honestly I don't know." They went on to ask, "When you had messaged that person, who did you think it was if you didn't know her?" He answered "This was a long time ago. Genuinely can't remember."

70. We do not know if the FA had the text messages, but it seems unlikely given they were not in the bundle before us and they were not exhibited in the material for the trial. These messages are mentioned in the police summary and the interviews, but the content is not known and it is not clear that the appellant had the complainant's number on his phone. The questions put to him by the police in his interview indicates she knew his telephone number, but it is not clear the text message was to his telephone number. We could not find evidence that the appellant had the complainant's number in the police interview with him. The appellant also voluntarily gave his phone tom the police as he was confident, they would not find any messages or contact between him and the complainant as he did not know her.

71. We have not seen the text messages as set out above and do not know where or if the number was on the telephone. We are told by the appellant he has never seen the number and the messages were not exhibited in the case. Given that we cannot be satisfied on the balance of probabilities that he did have her number or texted her.

72. There were also allegations that the complainant sent nude pictures to the complainant and later told her they were deleted. There was no evidence from the telephone in the bundle of these images. It may have been that they were not recoverable if they had been deleted but again that is speculation.

73. We find that the doubt cast on whether the appellant did rape the complainant is significant. As discussed above this comes from the witness evidence, the appellants evidence, the lack of the messages which would have been the strongest evidence before us, the inconsistencies in dates, the lack of DNA evidence, the lack of evidence showing that the appellant did know the complainant and inconsistencies in the evidence about the alleged blackmail. The FA decision is not persuasive given they interviewed the appellant so long after the allegations and they assumed he had the complainant's number which is not at all clear from the evidence before us and his evidence that he was suffering from poor mental health at the time.

74. The only evidence of previous violence is from the appellant himself. He said he had fights with friends but never girls, chased a referee around a football pitch when he was at primary school and argued with his sister. We do not accept that this evidence coupled with his diagnosis of ADHD would make him prone to doing the things he was alleged to do. The evidence of previous aggression is a far cry from the allegations before us today.

75. Mr Serr also relied on the evidence from W4 who was a mental health nurse said that the complainant was exhibiting signs of trauma. Given we do find that something happened at some stage to the complainant that is consistent. The fact that she was showing signs of trauma however does not show that the appellant caused the trauma.

76. This is a very difficult case but we must look at the evidence before us. On that evidence we do not find proved on the balance of probabilities that the allegation that the appellant raped the complainant are made out. As Mr Serr says and we agree that if we do not find this the second allegation would not reach the

threshold to bar the appellant and we agree we allow the appeal and direct the DBS to remove the appellant from the children's barred list.

Disposal

77. Having decided that the DBS decision made a mistake of fact, we direct the appellant is removed from the Children's Barred List.

Conclusion

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

Sarah Johnston
Sitting as Judge of the Upper Tribunal

Josephine Heggie
Specialist Member of the Upper Tribunal

Elisabeth Stuart- Cole
Specialist Member of the Upper Tribunal

Approved for issue on
30 December 2024