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

18. The Tribunal clarified two issues with Counsel before taking oral evidence. The first was that we had no copies of the text messages which allegedly support a conversation between the appellant and the first complainant. They are referred to in the bundle and we will deal with the references in the analysis.

19. Mr Serr, for the DBS, confirmed that he did not propose to ask the appellant about an incident that occurred when he was a young child as he was of the view he had had no opportunity to present a defence, he was very young and given his age it would be dangerous to rely on it, although he did not make a general concession that the Tribunal should not take it into account. We agree with Mr Serr that given the DBS did not take this into account, that the incident was old and he was young that it would be dangerous for us to rely on this in any way. The Tribunal do not rely on this piece of evidence in our findings.

20. The appellant affirmed his statement we were given on the morning of the hearing. He told us he was currently working as an apprentice technician testing steel and will have been working for the same employer for a year in November 2024. He is the father of two children one of whom is not his biological child, whom he wants to adopt. He would be unable to do this if he was on the children's barred list. He sees both children regularly. Social services were involved for about a year but are not anymore as they do not consider him a threat to the children. He is in a relationship with a supportive partner, (not the mother of the children) and has been in this relationship for two years.

21. He confirmed that he was voluntarily interviewed by the police, investigated by the safeguarding part of a football club and the FA as a result of the allegations.

22. The documents include an interview by the FA at page 70 of the bundle. The interview was a zoom call. The appellant told us that there were connection issues, and he had a lot going on in his life at that time and so he was not "100% focused" on the investigation. It was difficult being investigated as he knows the allegations are not true, but he understands that kids need to be kept safe as he is a father.

23. He was 15 years old when the first allegations were said to have been committed. By the time he was charged he was 18 years old. He was trying to pursue a career in football and was also a father, so it was a difficult time for him.

24. With respect to the second allegation by his previous girlfriend's sister he said he was upstairs, and he didn't put his hands anywhere near her although in his written statement he said that he did put his hands on her shoulders. He was immature at the time, and he made a joke.

25. The appellant was asked what motivated him to pursue the appeal. He said that he wanted to adopt his son and he could not do this with the barring in place. He said he decided to follow a different career given the decision of the FA but that football was his life.

26. He confirmed that he attended a SEN school due to a diagnosis of ADHD at the end of primary school. He took medication for this through school but does not

anymore. His ADHD still affects him, but he has strategies to deal with it. He confirms that the complainant in this allegation did not attend the same school. There were only about 3 girls there and he was 100% sure that she was not one of them. This was relevant as there was a reference in the evidence that the complainant and the appellant met at school.

27. He denies he messaged the complainant. He did not know her, and he cannot shed any light on the text messages.

28. During cross examination he explained that in July 2018 when the first and more serious allegation was said to have occurred, he was 15 years old. He had been diagnosed with ADHD before secondary school but could not recall whether he was taking medication over this time. He said he was excluded from primary school and expelled before this SATS. He said he couldn't recall the behaviour that led to his being expelled but he could not concentrate, he would distract others and then be sent somewhere else. He was asked if this was because of fighting and he did not think it was.

29. After being expelled he went to a place for pupils not in school and eventually got a place at a SEN school around the age of 12. He stayed at this school until he left secondary education in year 11 when he was 15 or 16. He did not sit GCSE's as his attendance was "topsy turvy". This was because he dealt with his mental health by running away. He was depressed and self-harmed by trying to strangle himself with his jumper. There was a "chill out" room at school where he would go when this happened. He thinks he was under the care of CAMHS and thought he had a mental health nurse but could not remember their name. The only medication he took was for ADHD. He was put on a football course aimed at kids with additional needs which helped him a lot although he still struggled at school.

30. Mr Serr referred the appellant to his first police interview in February 2019 and his description of arguing. In the interview he described that arguments with his sister would make him a bit more aggressive than arguments with his mum, that he would scream and shout at her, that he chased a referee around the pitch threatening to kick his head in after a decision went against him. In answer to a question whether he could remember any other occasions when the decision had not gone his way and he reacted he said, "not really". In answer to questions he said he had had physical fights with male friends but never with a girl.

31. When asked by Mr Serr whether it was fair to say he had problems with aggression he said his sister knew how to wind him up. He said the fights were very few and far between, but he did remember chasing the referee in primary school. He said once he was taking medication he was more under control with his emotions, and he started taking this when he was 12/13 when he was just starting secondary school.

32. Mr Serr took the appellant to his interview at page 222 of the bundle where he was asked about sex. He said he could not remember saying the things in the interview, but he was under a lot of pressure, and it was a long time ago. When asked about how many times he had had sex and the names of the girls he said he didn't know. Mr Serr said it was surprising he didn't know the names of the girls, but the appellant referred to the length of time and the pressure he was under at the

time. He said he would have had sex with the children's mother but he could not remember the interview.

33. He was then taken by Mr Serr to the police interview of the complainant in November 2018 (a few months after the incident).

34. The complainant in this interview said that she met the appellant through a named friend who had apparently introduced them, that they had met at the park near the beginning of July and that they were friends on snapchat. The appellant denied knowing the friend, that he met the complainant at the park or that he talked to her on snapchat, but he did have contact with boys and girls on snapchat.

35. He said he never went to the park named by the complainant which is near where he lived. He did go to another park with his brother and his friends. He was asked why she would have made this up and said that he did not know her so he did not know why. He did not know her or where she lived. He did look her address up after the acquittal and it was a 40 minute walk from his home. He denied ever being at her house.

36. He was asked whether he owned a black tracksuit at that time as that was what he was described as wearing and said he did but pointed out that every kid at that age owns a black tracksuit. He did not own the brand of underwear the complainant refers to in her interview.

37. He denied the other allegations put to him. He was taken to page 228 of the bundle and where the officers put text messages to him. The appellant had given his telephone to the police voluntarily although in the interview they described the telephones as being seized. The officers say, "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 [the complainant] would say that this [appellant] with your telephone number has raped her?" The appellant answers "I don't know."

38. Mr Serr asked the appellant how she got his telephone number and he said he did not know. He said he was shown the marks across her chest but reiterated that he did not have anything to do with them or know how they happened. He denied any text message conversation with the complainant. He said if they were snap chat conversations the number would not have come up and the messages disappear. He said he did not have a conversation with the complainant as he did not know her. He thinks the messages he was shown were from her phone.

39. We do not have the text messages or what they said. In the interview with the appellant the interview says that the text messages were read out to the appellant but does not include the content of the text messages. There are references to them saying that they said the text messages confirmed that nonconsensual sex had taken place, that the person, purportedly the appellant, apologised and said he was not taking his medication. The appellant denied he had a text message conversation at all.

40. He said when not taking medication he would play on his xbox or use music. He also denied seeing text messages but was shown snapchat messages. He said

further investigation of the phone was going to be carried out by his defence but that did not happen as the case did not proceed.

41. Mr Serr then referred to page 58 which is and updated an unsigned summary from the South Yorkshire Police. The summary says:

> "[the appellant] was voluntarily interviewed by the South Yorkshire Police on 14.02.2019 denying ever meeting the complainant or even knowing her. Both the complainant and [the appellant's] mobile phones were forensically examined. 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."

42. The statement then goes onto confirm that the complainant identified the appellant, retracted her statement saying she did not want to report the matter to the police in the first place and accepted that she tried to contact the appellant as she wanted an apology from him. She later withdrew her retraction but then refused to engage and so no evidence was offered, and the appellant was acquitted. Before the trial but after the allegation was made, the complainant did contact the appellant's girlfriend telling her that he got her pregnant. She must have found her from his facebook page where he said he was in a relationship with her. The complainant then started a fake account on face book and messaged the appellant. The appellant told his solicitor and he never responded to the message. He was told that if he did contact her, he would be arrested. Some contact was confirmed in one of the statements of the complainant withdrawing support for the case in a statement dated 14/11/2020 at pp 53 where she says that she had contacted him telling him she is retracting her account and hoping he would apologise.

43. Mr Serr noted that the appellant was permanently barred from football and took him to the interview by the FA in January 2023. In that he was asked about the text messages and did not deny texting her. The note of the interview is as follows: After denying knowing the complainant he was asked,

> "Okay. Because there were reports, as well. That there'd been text messages between you two. So how did you have each other's numbers? The appellant replied, "Honestly I don't know." The interviewer said, "When you had messaged that person, who did you think it was if you didn't know her?" The appellant answered "this was a long time ago. Genuinely can't remember." The appellant said at the time of the FA interview he was struggling with his mental health and was not giving proper answers.

44. The appellant was also asked about how the complainant would have his picture. He said "On snapchat, there's a thing that you used to do where you shout people out and put people in your story to get more people adding you. Everyone used to do it and I was doing it obviously as well."

45. Mr Serr also asked whether the appellant went to school with the complainant. In the police summary at page 30 of the bundle and in a statement by T/Superintendent of South Yorkshire Police on 3 April 2019 it is said that the appellant went to school with the complainant and that is where they met. The appellant said he was 100% sure he did not. There were only 3 girls at his school, and they were not the complainant.

46. In terms of allegation 2 which is set out at page 33 of the bundle the appellant said that this did happen but not in the way it was described. He said he potentially had sent a snapchat message asking her to come upstairs but did not physically touch her. In his written statement which we received today he said he vaguely recalled the incident. He said he did not remember sending a message her. He said she was upstairs, and he put his hands on her shoulders. The comment saying he "fancied her" was a joke. When asked about any motive for her to report this he said they did not get on, she knew about the other allegation and her father did not like him. He told his girlfriend at the time, and she agreed with his assessment and they stayed together.

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