



Neutral Citation Number: [2025] UKUT 311 (AAC)
Appeal No. UA-2023-000195-V

RULE 14 Order: By an order dated 13 September 2023 as varied on 12 December 2024, the Upper Tribunal has prohibited the publication of any information which could lead members of the public to identify the appellant or five other individuals, or the school concerned. The Upper Tribunal further extends the order so as to apply to the individuals identified in this decision as MS, JS and CM.

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

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

WP

Appellant

- v -

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Ward, Mr J. Hutchinson and Ms J. Heggie

Hearing date: 2 September 2025

Mode of hearing: In person at Birmingham Civil Justice Centre, with an Italian interpreter in attendance

Representation:

Appellant: In person

Respondent: Ms Hafsah Masood, instructed by DLA Piper

On appeal from the Disclosure and Barring Service:

DBS Reference No: DBS/6191 009679962

Decision Date: 15 November 2022

SUMMARY OF DECISION

65.9 Safeguarding Vulnerable Groups – finding of fact

The Upper Tribunal, having reviewed oral and written evidence, concluded that the DBS's decision to include the appellant's name on the adults' and children's barred lists did not involve a mistake of fact or law.

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 panel follow.

DECISION

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

REASONS FOR DECISION

Introduction

1. The appellant appeals against the DBS's decision dated 15 November 2022 including his name in the children's barred list and adults' barred list on the ground of "relevant conduct".
2. In this decision we refer to people by their initials in order to preserve the anonymity required by the Rule 14 Order above and intend no disrespect.

Factual background

3. The appellant had worked as a transport assistant accompanying young people with special educational needs on a minibus to school. It was alleged, and the respondent (hereafter "DBS") found that:

"On various occasions between 1 January 2017 and April 2019, whilst working as a passenger assistant guide, you repeatedly intentionally physically and emotionally harmed student MS by:

- hitting his head against the bus window;
- hitting him on the side of his head;
- punching him on his back;
- pinching his nipples causing bruising to his chest;
- grabbing him by the neck causing pain;
- touching his groin over the top of his clothing whilst making sexual noises;
- rubbing your own penis over your clothing whilst looking at MS;
- making derogatory comments about his mobility;
- calling him names in relation to his physical appearance;
- making racist comments and telling him he must laugh;
- telling him he must blame his injuries on his fellow students as you would deny harming MS;
- threatening him that you would send people to MS's home address to harm him."

4. The appellant was prosecuted for offences under section 1 of the Children and Young Persons Act 1933 and on 31 January 2024 was acquitted.
5. The sexual references in the allegations and the evidence were approached by DBS (and the panel agrees) on the footing that if established they appeared to form part of bullying behaviour rather than motivated by any sexual intention on the part of the appellant.

6. The minibus was built as a 15 seater vehicle but some seats had been removed to accommodate a wheelchair. The 10 remaining passenger seats were laid out with a row of 4 single seats down the nearside and 3 pairs of seats down the offside. The vehicle was equipped with a lift at the rear to bring a wheelchair on board. The rear doors had glass panels through which a driver would be able to see traffic on the road behind the vehicle by using the rear view mirror.
7. Although the pupils who used the minibus fluctuated to a degree during the period with which we are concerned, there was a core group who were the sole users of the bus for the majority of the time: MS (the alleged victim), JS, AC and CM. All were teenage boys and the evidence suggests lively conversation between them on matters of interest to them ranging from politics to sex as well as unkind teasing.
8. MS was somewhat younger than most, if not all, of the others. He turned 13 in January 2017 and, the evidence suggests, somewhat chubby. He is autistic, has cerebral palsy, is significantly visually impaired and used a wheelchair for most of his mobility.
9. The bus driver was Mr SM. He took over the route in September 2017 and continued as the driver until April 2019. Sadly, he has since died.
10. The appellant, who presented his case to us fluently and without recourse to the interpreter save for the meaning of one or two words, told us that he is an actor and a drama teacher qualified in Italy and had previously worked in Scotland as a teaching assistant due to an issue concerning recognition of his qualification.
11. The appellant started as a passenger assistant guide in 2016. On 8 March 2019 there was an altercation with one of the students on the bus, CM, to which we refer further below. That month the appellant was moved from the route with which we are concerned to a vehicle serving a different route. In May 2019 he raised a grievance about alleged unpaid wages. An allegation was made in October 2019 that he had tapped a student forcefully on the shoulder and had shouted at students. He was suspended and resigned before disciplinary proceedings were completed. The DBS does not rely on the October 2019 allegation.

Legal framework

12. Schedule 3, para 3 of the Safeguarding Vulnerable Groups Act 2006 (“the 2006 Act”) materially provides:
 - “(1) This paragraph applies to a person if—
 - (a) it appears to DBS that the person —
 - (i) has (at any time) engaged in relevant conduct, and
 - (ii) is or has been, or might in future be, engaged in regulated activity relating to children, and
 - (b) DBS proposes to include him in the children's barred list.

(2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.

(3) DBS¹ must include the person in the children's barred list if—
(a) it is satisfied that the person has engaged in relevant conduct, [
(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
(b) it is satisfied that it is appropriate to include the person in the list.”

13. Para 4 provides:

“(1) For the purposes of paragraph 3 relevant conduct is—
(a) conduct which endangers a child or is likely to endanger a child;
(b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;

... .

(2) A person's conduct endangers a child if he—
(a) harms a child,
(b) causes a child to be harmed,
(c) puts a child at risk of harm,
(d) attempts to harm a child, or
(e) incites another to harm a child.

14. There are equivalent provisions for vulnerable adults which it is not necessary to set out.

15. Section 4(1) of the 2006 Act confers a right of appeal. The section makes the following relevant further provision:

“(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—
(a) on any point of law;
(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

... .

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

16. In hearing oral evidence and receiving written evidence and assessing it against the written material on which DBS based its decision we are following the principles set out in *Disclosure and Barring Service v RI* [2024] EWCA Civ 95. There was no dispute as to the relevant principles before us and we do not consider it necessary to quote from that case.

The decision under appeal

17. The decision under appeal is stated in the Introduction above.

The grounds of appeal and the parties' submissions

18. The appellant's grounds were in summary:

- a. The DBS had had insufficient regard to the evidence of SM, the bus driver
- b. The DBS should have waited for the end of the criminal proceedings
- c. MS had had the opportunity to raise concerns of ill-treatment by the appellant during counselling sessions but had not done so
- d. There is evidence to show a reason why certain of the statements may have been concocted
- e. A witness (AC) would provide a statement corroborating the appellant's version
- f. Insufficient weight had been given to the passage of time between the alleged conduct and when CM reported it.

19. At a permission hearing before Upper Tribunal Judge Citron, the appellant indicated that he would principally rely on his own oral evidence, the evidence of AC and that of Mrs JM, the widow of the late SM. The judge considered it was realistically arguable that the evidence on behalf of the appellant, if tested under cross-examination at a hearing, might be found to outweigh the evidence on which DBS had relied. Though the judge did not expressly limit the grant of permission, it is clear that it was the realistic possibility that DBS might be shown to have made a mistake of fact which led him to do so. In view of that, we focus on whether or not the DBS made a mistake of fact.

Analysis

20. We heard oral evidence from the appellant himself, JM and from Mr ST.

21. JM was able to give evidence of her late husband's character, approach to his work, his relationship with the appellant and how he had felt about the allegations against the appellant. She was not in a position to say what had or had not happened on the minibus itself beyond anything she had been told by her husband. Although he had given a statement which was referred to in the DBS bundle, it was not included within it. The appellant supplied it shortly before the hearing and thus we were able to read the late Mr SM's evidence on the matter.

22. ST had provided a character reference that was in the bundle. The appellant had not indicated in advance that ST would be giving evidence, much less provided the witness statement which directions would have required. We heard from him briefly, but did not permit him to give evidence straying materially beyond what was in the character reference.

23. The directions did not however clearly require the appellant to provide a witness statement of his own evidence and he had not done so. He had however

provided a document described as a skeleton argument, which mixed factual evidence with submissions as to why his appeal should be allowed. Following discussion with the parties and a short adjournment while SM's statement was located, it was agreed that the appellant's "skeleton argument", insofar as it contained assertions of fact, should be treated as his evidence-in-chief, on which Ms Masood would then be permitted to cross-examine. The appellant's oral evidence was generally measured in tone and moderate in content. His evidence was that he did not do any of the acts alleged. As to why MS and JS might have made allegations against him, he said he had been informed by AC that CM had put MS and JS up to doing so.

24. The DBS did not call any witnesses itself and relied on the material in the bundle.
25. We have reviewed the whole bundle but consider the following to be of principal relevance to the discussion which follows:
- a. A 2 page summary of an ABE interview given by MS to Police and what appears to be the first page (only) of the notes of that interview
 - b. A 2 page summary of an ABE interview given by JS to Police and the original notes of that interview
 - c. A witness statement by KS, MS's mother
 - d. A witness statement by JD, MS's father
 - e. A witness statement by AC
 - f. The minutes of a Position of Trust Review Meeting dated 17/7/20 which include a record of an oral report by the police of an informal discussion with a pupil whose name has been redacted but, as he is stated to be 2 years older than MS, is probably AC.
 - g. A statement by CM prepared by him on 10.3.19 following the altercation with the appellant 2 days previously.
 - h. Various character references in respect of the appellant.
26. We reject the appellant's suggestion of a conspiracy involving MS, JS, and CM to get him into trouble. There is no evidence of it beyond what he says he was told by AC, yet AC's witness statement, drafted by the appellant for AC to sign, makes no reference to it.
27. Nor do we find MS's behaviour to be consistent with a person trying to get another into trouble.
28. The allegations were raised some 9 months after the appellant had been moved to another route; had MS been out to land the appellant in trouble, he would be likely to have acted earlier. More probable in the view of the panel (in particular its specialist members) is that he was held back by fear and embarrassment.
29. Following disclosure, MS didn't want to talk about the matter and tended to minimise the matter, suggesting to his mother that the touching of his genitals over clothing, which appears from the summary of his later evidence to have occurred as a matter of routine ("would put his hand on his 'privates'...") might have been accidental. Again, not the action of someone trying to get another into trouble.

30. We also consider it unlikely that a teenage boy would have lightly agreed to go to court to give evidence, including about matters that would have been embarrassing. If the allegations were concocted, it would have required considerable thoroughness and boldness to maintain them in criminal proceedings.
31. We regard as far-fetched the suggestion that CM may have been the originator of the claimed conspiracy. On 10.3.19, in his rather impassioned statement, he writes that:

“The bottom line is that the people on the minibus do not like me and what they call their minibus.”

There is no discernible explanation for how CM, with his feelings of angry isolation from the others, can persuade MS and JS to make allegations against the appellant months later. It is true that a number of the allegations made by MS 9-12 months later find echoes in allegations made by CM in March 2019; however, we see that not as suggesting that CM provided the script, as it were, for MS’s subsequent complaint. Rather, we see it as relevant to the weight we attach to MS’s account, to which we now turn below.

32. The evidence of MS and JS is corroborative on a central core of issues, including that the appellant would sit on MS, slap him, bring his head onto contact with the window in a violent manner variously described as “slamming” or “smashing”, make fun of MS’s build by referring to “big boobies” or by grabbing his nipples and squeezing and would dance around in the bus. Their evidence as recorded is not so close as to suggest that they have conspired: MS, for instance also refers to being punched on the back, the appellant simulating masturbation while looking at MS, the appellant telling him to walk further and the appellant making racist remarks. There are discrepancies and minor inaccuracies, in particular about who sat where. Overall though, in the panel’s view, the degree of corroboration which exists between the evidence of MS and JS about the central core of issues gives it credibility, including adding weight to MS’s evidence where it goes beyond those issues.
33. We also derive assistance from the statement of CM which, 9 months before MS’s allegations, described the appellant doing impressions of MS masturbating, making racist remarks, regularly getting out of his seat and pulling MS’s glasses off and grabbing hold of his face. While we acknowledge that this statement was written shortly after CM and the appellant had had a row on the minibus, these matters go beyond the row and, if somewhat more limited, are broadly consistent with what JS and MS were later to go on to say.
34. The young person on the minibus who did not want to give a formal statement indicated that the appellant had engaged in a number of inappropriate behaviours on the minibus, including occasions of clipping MS round the ear.
35. By reason of the considerable and realistic extent of corroboration, we find MS’s evidence credible. Against that, we have the denials by the appellant and, in his

statement, AC and the evidence of a number of character witnesses. We also have the evidence of the minibus driver, SM.

36. We note that the driver would have had had reason to look in his rear view mirror, the doors of the minibus having windows in them. We also note that there were typically only 4 pupils on board, plus the appellant as escort, so the chance of acts being obscured by others getting in the way was slight. It is unfortunate that we are limited to reading SM's statement, without the opportunity to hear from him in person. We consider his statement is light on detail and includes a fair amount of subjectivity and euphemism. We are not told in terms what SM observed and regarded as 'manly behaviour' (inverted commas in original) or "jovial banter". What one person regards as "banter" another may regard as unacceptable teasing or harassment. What constitutes 'manly behaviour' as the phrase was used by SM is likewise unclear, although a partial flavour may perhaps be gleaned from the evidence of CM, who describes the appellant joining in looking for attractive girls from the bus and various conversations, involving the appellant as well as the pupils, around sexual themes. Further subjectivity is to be found where SM thought it was "just part of his personality" that the appellant was "very strong-willed and often quite loud". That it may be "just part of his personality" would not excuse strong-willed and/or loud behaviour if it was otherwise unacceptable.
37. The appellant described his relationship with SM as a "very good working relationship" and a "very amicable working relationship" but denied socialising. JM on the other hand, stated that the appellant was "always welcome", had brought his grandson to play with their own, that he and SM were "good friends" and that he would pop in for a cup of tea. We prefer the evidence of JM. We consider that the appellant deliberately sought to portray a more distant relationship with SM than was the case, in the hope that that would confer additional objectivity, and so authority, on SM's evidence. We do not doubt that the contents of SM's statement are true to the best of his knowledge and belief but we do think it likely that by reason of his friendship with the appellant, he has subconsciously minimised what he did see, by the use of euphemism and subjectivity. Nor do we expect that he would have seen everything: indeed, he makes only a qualified assertion that he would have noticed untoward events on the minibus, indicating that he "would generally be concentrating on the road".
38. There are statements from a number of character witnesses who speak well of the appellant. However, they were not on the minibus and cannot speak as to how he conducted himself in that situation, with those pupils.
39. We have explained above that we regard the passage of time before the allegations were made as consistent with a victim being reluctant to disclose allegations of ill-treatment against them until they felt it was safe enough to do so. As regards the point that MS had had numerous sessions with a counsellor but at no point had referred to these allegations, we do not know enough about the intended purpose of the counselling sessions to infer that MS would be likely to have raised the allegations then, if they were genuine.

40. We do not consider the fact that the appellant had raised a grievance against his employers to be material: there is no suggestion that the employers were instrumental in the present allegations, save that the fact that the appellant had been suspended regarding unrelated allegations may have contributed to there being a safe space for MS to make disclosure to his mother.
41. In conclusion on whether there was a material mistake of fact, we find the evidence of the pupils, specifically MS, credible; we reject the idea of a conspiracy orchestrated by CM and we consider the weight to be given to SM's evidence to be somewhat diminished for the reasons above. We find on the balance of probabilities that the allegations on the basis of which the DBS included the appellant's name in the children's barred list and the adults' barred list do not involve any mistake of fact. In performing the doubtless sometimes challenging duties of his post, the appellant resorted to what in his eyes (and in those of SM) was "banter" and to try to be "one of the lads". That in the panel's view was not a professional approach to performing the duties of the role and it resulted in the matters which are the subject of these proceedings, directed against a vulnerable young teenager.
42. We turn finally to ground b. The DBS did not err in law by not waiting for the end of the criminal proceedings. The standard of proof of an allegation is lower in civil proceedings than in criminal proceedings. The DBS's safeguarding responsibilities may require it to take action before the conclusion of what may be protracted criminal proceedings. While the existence of pending criminal proceedings may constrain what evidence can be provided to the DBS in the run-up to their decision, once the criminal proceedings are concluded, evidence from those proceedings may become available and can be relied upon on appeal to the Upper Tribunal (as the appellant has indeed done). Although the appellant's submissions referred to a large number of human rights cases, none assists us. The DBS is not a court or tribunal. The Upper Tribunal is and the process is human rights- compliant.

Christopher Ward
Judge of the Upper Tribunal

John Hutchinson
Member of the Upper Tribunal

Jo Heggie
Member of the Upper Tribunal

Authorised by the Judge for issue on 17 September 2025