



Neutral Citation Number: [2026] UKUT 175 (AAC)
Appeal No. UA-2024-000252-V

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:
No one shall disclose or publish the name or address of any of the following:
(a) A, who is the Appellant in these proceedings;
(b) M; and
(c) C, who are referred to using the initials “A”, “M” and “C” respectively in this
decision;
or any matter likely to lead members of the public to identify and of the persons
mentioned at (a), (b) and/or (c) above.**

**Any breach of this order is liable to be treated as a contempt of court and may
be punishable by imprisonment, fine or other sanctions under section 25 of the
Tribunals, Courts and Enforcement Act 2007. The maximum punishment that
may be imposed is a sentence of two years’ imprisonment and/or an unlimited
fine.**

Between:

A

Appellant

- v -

Disclosure and Barring Service

Respondent

**Before: Upper Tribunal Judge L. Joanne Smith
Specialist Member J. Hutchinson
Specialist Member R. Smith**

Hearing date(s): 13 October 2025

Mode of hearing: In person

Representation:

Appellant: Unrepresented

Respondent: Mr A. Serr of Counsel, instructed by DLA Piper UK LLP

*On appeal from the decision of the Disclosure and Barring Service:
DBS reference: 01019329297
Decision letter: 31 January 2024*

DECISION

The decision of the Upper Tribunal is to **DISMISS** the appeal.

SUMMARY OF DECISION

This is an appeal against the decision of the Disclosure and Barring Service dated 31 January 2024 to include the Appellant's name on the Children's Barred List following a conviction in 2023 for an offence under s.9(1) Sexual Offences Act 2003. The offence related to the Appellant engaging in sexual activity with a 15-year-old, former pupil, in 2005. The Upper Tribunal determined that the DBS did not err in fact in determining that Appellant posed a risk to children and did not err in law in assessing the proportionality of its barring decision. The appeal was dismissed.

Keywords: Safeguarding Vulnerable Groups (65.1 Children's Barred List; 65.8 Proportionality; 65.9 Findings of fact (risk of harm); 65.10 Materiality)

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.

REASONS FOR DECISION

Introduction

1. This is A's appeal against the decision of the Disclosure and Barring Service ("DBS"), communicated in a final decision letter ("FDL") dated 31 January 2024, to include his name on the Children's Barred List ("CBL") in accordance with paragraph 2 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the Act").
2. The appeal was considered at an oral hearing which took place on 13 October 2025 in Manchester. We are grateful to counsel for the Respondent, for the preparation of his skeleton argument in advance of the hearing, and for his oral submissions during the appeal. We are also grateful for the Appellant's oral evidence which was of great assistance to the panel.

The Legal Framework

3. The DBS is responsible for deciding, under the Safeguarding Vulnerable Groups Act 2006 (the “Act”), whether individuals should be placed on the CBL and/or the Adults’ Barred List (“ABL”), to prohibit them from undertaking “regulated activity” with either children, vulnerable adults or both (ss. 2-3 and Schedule 3 of the Act). “Regulated activity” is defined in section 5 and Schedule 4 of the Act and fundamentally amounts to undertaking teaching and/or caring roles involving children and/or vulnerable adults.
4. The DBS decision to include the Appellant’s name on the CBL was made under paragraph 2 of Schedule 3 to the Act. This provision allows for automatic barring, as a result of a caution or conviction for a specified offence, subject to the right of the person to make representations regarding the proposal to include him/her on the barred list(s). Paragraph 2 of Schedule 3 to the Act states:

“Inclusion subject to consideration of representations

- 2(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.*
- (2) Sub-paragraph (4) applies if it appears to DBS that—*
- (a) this paragraph applies to a person, and*
 - (b) the person is or has been, or might in future be, engaged in regulated activity relating to children.*
- (4) DBS must give the person the opportunity to make representations as to why the person should not be included in the children's barred list.*
- (5) Sub-paragraph (6) applies if—*
- (a) the person does not make representations before the end of any time prescribed for the purpose, or*
 - (b) the duty in sub-paragraph (4) does not apply by virtue of paragraph 16(2).*
- (6) If DBS —*
- (a) is satisfied that this paragraph applies to the person, and*
 - (b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children,*
it must include the person in the list.
- (7) Sub-paragraph (8) applies if the person makes representations before the end of any time prescribed for the purpose.*
- (8) If DBS —*
- (a) is satisfied that this paragraph applies to the person,*
 - (b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and*
 - (c) is satisfied that it is appropriate to include the person in the children's barred list,*
it must include the person in the list.”

5. The “criteria prescribed” for the purposes of paragraph 2(1) of Schedule 3 to the Act, are set out in Regulation 4 of the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (“the Regulations”). Regulation 4(5) provides for automatic inclusion in the CBL, with the right to make representations, where, “...*the person has, on or after the relevant date, been convicted of, or cautioned in relation to, an offence specified in paragraph 2 of the Schedule*”.

The right to appeal

6. Section 4(2) of the Act confers a right of appeal to the Upper Tribunal against a decision of the DBS in two situations. The first is on the ground of the DBS having made “a mistake on any point of law” (s.4(2)(a)). The second is on the ground of the DBS having made “a mistake in any finding of fact which it has made and on which the decision [to include a person on a barred list] was based” (s.4(2)(b)). Section 4(3) of the Act provides that “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”. Consequently, the question of appropriateness for including a person’s name on a barred list, is exclusively a matter for the DBS to determine and not something that the Upper Tribunal can interfere with.
7. On appeal, it is for the appellant to demonstrate a mistake of law or a mistake of fact upon which the decision to bar was based (*PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC at [49])). The Upper Tribunal must confirm the decision of the DBS unless it finds that the DBS has made a mistake of law or fact (s.4(5)). If the Upper Tribunal finds that the DBS has made such a mistake, it must either direct the DBS to remove the person from the relevant barred list(s) or remit the matter to the DBS for a fresh decision to be made (s.4(6)). Where the Upper Tribunal remits a matter back to the DBS, it may set out any findings of fact which it has made and on which the DBS must base its new decision. The person must be removed from the barred list(s) until the DBS makes its new decision, unless the Upper Tribunal directs otherwise (s.4(7)).

The DBS decision

8. The conviction upon which the decision to bar the Appellant is based, was for the offence specified under s.9(1) of the Sexual Offences Act 2003. An offence contrary to this section of the Sexual Offences Act 2003 is included within the table at Part 2 of paragraph 2 of the Schedule to the Regulations and thus amounts to a “criteria prescribed” for the purposes of the barring decision under appeal. The DBS, in its FDL, explained the conviction as follows:

“You were convicted of Sexual Activity Female Child U16 Offender 18 or over Penetrate Anus/Vagina/Mouth by Penis/Body Part on 10/08/2023.”

It continued:

“Between 3 July 2005 and 18 July 2005, whilst employed as a Teacher at [named High School] you engaged in sexual intercourse with a 15 year old child who you had been the form tutor of for several years, which resulted in her becoming pregnant.”

9. In addition to this, the DBS was also satisfied that the Appellant had engaged in the following conduct:

“Whilst employed as an Arts Teacher at [named College] [the Appellant]:

- Pushed a 12 year old male student out of a classroom and into a corridor on or around 22 April 2010 [allegation 1]*
- Ignored the School’s instructions regarding discipline of the students as explained by [named employer] on 23 and 24 March 2010 [allegation 2]*

Also whilst employed at [named High School] as a Teacher of Physical Education and Art, you:

- Made inappropriate physical contact with Student C, by grabbing him in the groin area on or around 30 October 2006.” [allegation 3]*

10. The DBS considered that the Appellant met the criteria for regulated activity (as required by paragraph 2(6)(b) of Schedule 3 to the Act) by virtue of his work as a teacher and an application for an enhanced disclosure check for a further teaching post. The Appellant made representations to the DBS (including references) in letters dated 20 November 2023 and 19 January 2024. Taking account of the representations, which were received within the relevant timeframe, the DBS determined that it was “appropriate” to include the Appellant’s name on the CBL (paragraphs 2(7) and (8) of Schedule 3 to the Act). Having satisfied itself that the requirements of paragraph 2 were met, the DBS was obliged to bar the Appellant

Permission to appeal

11. By decision authorised for issue on 23 January 2025, Judge L. Joanne Smith granted permission to appeal on the following grounds:

“Mindful of the Upper Tribunal decision in MM v DBS [2023] UKUT 275 (AAC), I find it arguable that the DBS erred in law in its consideration of the proportionality/rationality of its decision, given the significant passage of time between the incident in question and the decision to bar, as well as the circumstances and events taking place during that period.”

The evidence at the appeal

12. The Respondent relied upon its bundle of written documents in evidence at the appeal. This included, amongst other things, details of the offence and police investigation, and the Appellant's representations to the DBS. The Appellant gave oral evidence in support of his case, this being fresh evidence that the DBS had not had an opportunity to consider when making its barring decision. The Appellant was cross examined by Mr Serr acting on behalf of the Respondent.
13. The Appellant explained that he gained his first teaching position in September 2000, when he became a Physical Education teacher at the High School named in the allegations. He was the form teacher for pupil, M, for a number of years. M left the school in May 2005, after completing her GCSE exams.
14. In late July 2005, the Appellant was at a nightclub with friends when he came across M and recognised her from school. They spent the night together and a few weeks later, M told the Appellant she was pregnant. M decided to "do the right thing" and they started a relationship. Their son, C, was born in April 2006. The relationship broke down shortly after C's birth. The Appellant and M separated but they remained in contact. The Appellant supported M financially. He had a good relationship with M's mother. After the separation, the Appellant became C's main carer, but he saw his mother, M, regularly. At the age of 13/14 years old, C had an argument with M resulting in him moving in with the Appellant on a full-time basis.
15. On 28 March 2013, following reports to the school because of the allegations outlined in the DBS final decision letter, a professional conduct panel for the Teaching Regulation Agency determined that the Appellant was guilty of unacceptable professional conduct capable of bringing the profession into disrepute. He was prohibited from teaching indefinitely and was not entitled to apply for restoration of his eligibility to teach. C was approximately six years old when this happened.
16. With regards to the conviction, on which the decision to bar the Appellant is based, M made a complaint to the police in early 2021. The Appellant was interviewed under caution in March 2021 and again in May 2022. He consistently denied any knowledge that M was underage when they met in the nightclub in July 2005. He was charged with the offence of sexual activity with a child under s.9(1) of the Sexual Offences Act 2003.
17. The Appellant was 30 years old when he met M in the nightclub in July 2005. It is an undisputed fact that M had fallen pregnant when she was 15 years old, approximately ten days before her 16th birthday. The Appellant explained in evidence, as he did in his representations to the DBS, that he pleaded not guilty

to the charge as he did not reasonably believe that M was underage when they engaged in intercourse. He explained in evidence that he was not aware that she had not yet reached her 16th birthday when they met in the nightclub. He had been drinking that night. He drank heavily at the time. The Appellant, when cross examined about his not guilty plea, stated that on reflection, he would have done things differently had this all happened now, but this is years after the event. He did not state what he would have done differently.

18. Mr Serr, in cross-examination, asked the Appellant when he realised that M was 16 years old. The Appellant stated that he first realised this when he was in interview at the police station. He stated that M had always said she was 16 years old and the question never came up despite the fact, as pointed out by Mr Serr, that she had just left school in May 2005, a matter of weeks before they met in the nightclub.
19. The Appellant was convicted of the s.9(1) offence, after trial, on 10 August 2023. He was sentenced to 3 years imprisonment and his name was placed on the Sex Offenders Register for life. He explained in evidence, that during his time in prison, he completed a Thinking Skills course, a Victim Awareness course and a course on drugs and alcohol with the Drugs and Alcohol Recovery Team (DART). He did not undertake any sexual offence courses as they were not offered to him. He became a qualified "listener" to support other prisoners. He was also an education mentor acting as the "go to" person for guidance on training and courses. During time in an open prison, he was the "driver", which is a position of trust, requiring him to transport others, including other prisoners, to places beyond the prison walls e.g. to hospital appointments. He was released in February 2025 after serving 18 months of his three-year sentence.
20. The Appellant remains on licence for the final 18 months of his sentence. He is not permitted to contact M or her mother during this period. He has not spoken to M for approximately seven years in any event. Upon his release, the Appellant found a room in a house of multiple occupation where his friend was staying. On the date of the appeal hearing, the Appellant was due to collect the keys to a new flat of his own, having secured employment and having repaired the relationship with his son, C. C had returned to his mother's address when the Appellant was convicted. However, only three months later social services became involved, and C was taken into care. He lived in supported accommodation for the duration of the Appellant's sentence of imprisonment.
21. The Appellant is in regular contact with the probation service as required by the terms of his release. At the start he was high risk and saw them weekly but now he is lower risk and sees them fortnightly. He is undertaking work with probation, for example considering the feelings of the victim and thinking about how he would feel if his offence happened to his daughter (born from a different

relationship). He no longer drinks alcohol to excess in the same manner that he did in July 2005.

22. The Appellant started fitness tuition in 2009 and later started work in construction recruitment in 2010. He never wishes to teach again, having left the profession long before the DBS decision. He enjoys martial arts and boxing. While he has not engaged in coaching these sports as yet, he would like to do so, and that includes being able to coach both adults and children. The barring decision prevents him from coaching children. The barring decision has not had any financial impact upon him.
23. In evidence, the Appellant accepts that his relationship with M was “inappropriate”. He states that he should have been aware of her age. He regrets what happened and feels sorry that she fell pregnant at such a young age. However, he believes he did the right thing in supporting her. Finances, he stated, caused a rift between the pair and the relationship fell apart. He understands her vulnerability and how the relationship affected her. He views his actions as “crazy” and stated that he would not entertain such an idea now. He believes he is now a different person to the teacher who had a relationship with M.
24. When asked, in cross-examination, why he felt the relationship was inappropriate, the Appellant replied that this is because M was only a child. While she was 16 years old (15 years old at the start) he was nearly 30 years old i.e., twice her age and such an age gap is inappropriate. He felt that his alcohol consumption that night was no excuse for his behaviour. He denied any suggestion of “grooming” M for his own gratification.
25. In respect of the other allegations mentioned in the DBS decision letter, the Appellant states that he pushed a male student out of a classroom because two male students were fighting and he had to protect a female student close by (allegation 1). The Appellant agreed that he had pulled student B’s blazer in the process of separating student B from another student with whom he was fighting on the floor (allegation 2). The Appellant was a cover teacher for that class, and on reflection he stated that he should have just let them fight. The incident involving a strike to another student’s groin was in self-defence, as the student had the Appellant in a headlock (allegation 3). The Appellant reported that incident to the police. He explained in evidence that it was a tough school. Nevertheless, he states that he accepted full responsibility for his mistakes and takes no issue with these findings made by the DBS.

Analysis

26. The evidence presented by the DBS was not capable of being challenged at the hearing as it was paper based evidence. The fact of the Appellant's conviction was not capable of challenge in any event as the Appellant was found guilty of the s.9(1) offence and we are not entitled to look behind that finding of guilt. It is a finding made by a different court and we have no jurisdiction to challenge it. There was no challenge to the DBS' finding of "regulated activity". The matters for determination by the Upper Tribunal were (i) whether the DBS had erred in fact in finding that the Appellant posed a risk of harm to children, a fact upon which it based its decision to bar, and (ii) whether the DBS had erred in its determination that the barring decision was proportionate.
27. We found the Appellant's evidence, as tested by Mr Serr, to be open and honest. It was consistent with the account he had given to the DBS in his representations regarding the decision to bar. This credibility allowed us to accept what the Appellant told us. We note that the Appellant stated in evidence that he did not know that M was underage when they had sex, and that he first realised her age, at the time of the offence, when he was being interviewed by the police. We did not take these claims into account in making our decision, as the offence underlying the conviction is a matter of fact. However, we did note that these comments highlight that the Appellant does not accept the full basis of the offence and the conviction.

Did the DBS make an error of fact on which the decision is based?

28. On 10 August 2023, the Appellant was convicted of an offence under s.9(1) of the Sexual Offences Act 2003, which states:

"9(1) A person aged 18 or over (A) commits an offence if – (a) he intentionally touches another person (B), (b) the touching is sexual, and (c) either – (i) B is under 16 and A does not reasonably believe that B is 16 or over, or (ii) B is under 13."

29. The incident leading to the conviction took place in July 2005, almost 20 years prior to the barring decision, on 31 January 2024. Between date of the incident (July 2005) and the date of the barring decision (January 2024), the Appellant committed no other offences, although the DBS found there were three other incidents that took place in 2006 and in 2010, which demonstrated behaviour "*likely to cause or expose a child to emotional and physical harm*" (page 2 of the FDL [123]). The Appellant ceased teaching in/around 2009, a number of years before he was officially banned from teaching by the Teaching Regulation Agency, in 2013. The Appellant served 18 months of his three-year sentence and was released in February 2025. The DBS was aware of these facts (save for

the length of time served) when it made its barring decision. The first question for us to determine, is whether the DBS erred in fact, when it found that the Appellant continued “*to pose a significant and unacceptable risk of future harm to children in regulated activity*” (page 4 of the FDL [125]) given the long period of time that elapsed between the behaviour leading to the Appellant’s conviction. The finding of risk was a fact that added to the factors which led the DBS to determine that it was “appropriate” to include his name on the CBL.

The law

30. The scope of the Upper Tribunal’s error of fact jurisdiction under s.4(2)(b) of the Act was outlined in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC) and was subsequently endorsed by the Court of Appeal in *Disclosure and Barring Service v RI* [2024] EWCA Civ 95. The starting point is the DBS decision (*PF* at [28]). The Upper Tribunal must carefully distinguish findings of fact from “*value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness*” (*Disclosure and Barring Service v AB* [2021] EWCA Civ 1575 at [55]). It may not interfere with the latter. “[*A finding of fact*] includes matters such as who did what, when, where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs.” (*PF* at [39]).
31. As stated by the Upper Tribunal in *PF*, “[*o*]ne way, but not the only way, to show a mistake is to call further evidence to show that a different finding should have been made. The mistake [*of fact*] does not have to have been one on the evidence before the DBS. It is sufficient if the mistake only appears in the light of further evidence or consideration” (at [42]). Therefore, when determining whether the DBS made a mistake of fact, the Upper Tribunal should consider all the evidence before it and it is entitled to consider fresh evidence that was not before the DBS (*PF* at [51]). Fresh evidence can comprise the oral evidence of the Appellant, even if such oral evidence is essentially the same in content as the written representations made to the DBS (*RI* at [55]). Where the Upper Tribunal has before it the same evidence that was before the DBS, it should not overturn a finding simply because it would have reached a different conclusion on the evidence. This is because “*a disagreement about the evaluation of the evidence is not an ‘error of fact’*” (*Disclosure and Barring Service v JHB* [2023] EWCA Civ 982 at [93]; *PF* at [38]).
32. A mistake of fact means a finding of fact that is “wrong” (*PF* at [38]). The Upper Tribunal determined that, “[*t*]here is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact” (*PF* at [39]). A finding may be “wrong” if it is a finding about which the Upper Tribunal has heard evidence which was not before the DBS, and that new evidence shows

- that a finding by the DBS was wrong (*JHB* at [95]). A finding may be wrong even if there was some evidence to support it, or it was not irrational (*JHB* at [95]).
33. If the Upper Tribunal identifies that the DBS made an error of fact, then the Upper Tribunal may carry out its own evaluation of the entirety of the evidence and make its own findings (*JHB*). If the Upper Tribunal does not identify an error of fact, or indeed an error of law, the DBS decision must stand (*PF*).
 34. The Upper Tribunal is not entitled to interfere with the DBS' consideration of what is "appropriate" as this does not amount to a matter of law or a matter of fact (section 4(3) of the Act). It is, however, entitled to consider a finding of fact by the DBS that an individual poses "a risk" of harm. Where a person is found to present a risk of harm, the level of risk posed is relevant to the question of whether inclusion on the barred list is "appropriate" (*AB v DBS* [2022] UKUT 134 (AAC) at [48]). Any assessment of the "level of the risk posed" remains a matter only for the expertise of the DBS, this amounting to a value judgement arising from the finding of fact as to risk itself (*AB v DBS* [2022] UKUT 134 (AAC) at [49]–[52], [64]).
 35. A significant passage of time between the date of the incident which gives rise to the decision to bar and the date of the decision itself, has the potential to eliminate and/or reduce such risk. In the case of *MM v DBS* [2023] UKUT 275 (AAC), approximately 22 years had elapsed between MM's "relevant conduct" and the related barring decisions in his case. There had been no further convictions or evidence of similar conduct within that period which potentially demonstrated that the risk of repetition was so low as to make the barring decision disproportionate. Acknowledging that this is a common scenario, where it is difficult for the Appellant to prove a reduction in risk while on the barred list, the Upper Tribunal determined that the answer to the dilemma is the Appellant's "*insight*" as to what had taken place. At paragraph 64, the Upper Tribunal reasoned:

"[w]hile the passage of time without further offending is clearly positive, it does not on its own necessarily demonstrate a reduction in risk. However, if a barred person is able to demonstrate that in time they have achieved an understanding of what drove them to carry out the conduct of concern and what the potential triggers to a repetition of their behaviour might be, and if they can show that they have learned strategies to prevent them from responding to those triggers in a potentially harmful way, or taken steps to manage the risk of them responding in a potentially harmful way, these things are all capable of establishing a reduction in risk. Such a reduction in risk is, in turn, capable of tipping the balance between what is proportionate and what is not, when it comes to inclusion in the Barred Lists."

The DBS decision in more detail

36. The DBS utilised the Structured Judgement Process (SJP) as its risk assessment tool, finding that the Appellant “*may pose a risk to children in regulated activity...*” as he “*...may prioritise [his] own sexual needs above the needs of the children in [his] care which could result in [him] repeating [his] behaviour by abusing [his] position of trust...*” (page 3 of the FDL at [124]). It did not consider it necessary to complete a full risk assessment to establish that an “unacceptable” risk of harm remained in the Appellant’s case. This is because the DBS found that the Appellant’s written representations (contained in letters dated 20 November 2023 [104–107] and 19 January 2024 [120-121]) did not demonstrate any insight into his behaviour, maintained his position that he believed M was 16 years old at the time of the offence and suggested that he had not successfully addressed his behaviour (see “Risk Assessment Summary” in the Barring Decision Summary document at [153]).
37. In reaching its barring decision, the DBS acknowledged “*that [the Appellant] engaged in the sexually harmful behaviour in July 2005 and that [he has] not received any cautions or convictions for any similar behaviour since*”. It also acknowledged, “*that there have been no further concerns raised regarding [the Appellant’s] discipline of male children since 2010*”. However, the DBS stated that “*the passage of time alone is insufficient to negate the risk of harm posed to children in regulated activity*” (page 2 of the FDL at [124]) finding that, “*there is no information to indicate that [the Appellant has] expressed any insight, regret or remorse for the harmful impact that [his] behaviour would have had on the victim as a 15 year old.*” It continued that “*there is also no information to indicate that [the Appellant has] demonstrated insight into the factors that drove [him] to engage in such harmful behaviour or that [he has] engaged in any interventions to address these factors*” (page 3 of the FDL at [125]). The DBS was concerned that the Appellant consistently maintained his position that he believed M was 16 years old at the time of the offence.
38. The DBS summarised its position at page 4 of its FDL [125], “*[G]iven the nature of your previous behaviour towards children in regulated activity and the concerns raised above, the DBS is satisfied that you continue to pose a significant and unacceptable risk of future harm to children in regulated activity. We are therefore satisfied that it is appropriate to include [the Appellant] in the Children’s Barred List.*” In the absence of insight, the passage of time alone was insufficient for the DBS to negate its finding that the Appellant constitutes a risk of harm to children. The finding of risk played a significant part in its determination that it was “appropriate” to bar the Appellant.

Discussion

39. Mr Serr, on behalf of the DBS, submits that the decision to bar the Appellant is entirely rational, submitting that although the incident resulting in the index offence occurred around 20 years prior to the barring decision, it is a serious sexual offence towards a minor and must be treated accordingly. It is the time gap between the incident which gave rise to the conviction and the decision to bar the Appellant which is the key issue in this appeal. This is because the passage of time has the potential to reduce or eliminate any future risk of harm.
40. In *MM*, the Upper Tribunal determined that the passage of time without further offending, while positive, is not enough on its own to demonstrate a reduction in risk; “insight” is the factor with the potential to alter the balance. Insight, it decided, refers to gaining an understanding of: what caused the Appellant to behave as he did; the potential triggers; learning strategies to apply to the triggers to avoid repetition of the behaviour; and/or the taking of other steps to manage the risk of repetition (see FDL at [124-125]).
41. Mr Serr argues that the DBS took account of the time gap between the incident and the conviction when making its barring decision (page 3 of the FDL at [124]), but the DBS found that there was no indication that the Appellant had demonstrated insight into the factors that drove him to engage in his behaviour. He therefore submits that the decision is not made in error of fact or of law and the appeal should be dismissed. Mr Serr highlights that the conviction was recorded two years ago in circumstances where the Appellant pleaded not guilty, causing M to have to give evidence at trial, and this he submits, indicates a lack of insight on the part of the Appellant. Mr Serr submits that at the time of the trial, many years after the index incident, it was open to the Appellant to reflect on his knowledge at the time and to admit wrongdoing. He submits such reflection would have been the best evidence of insight, however the Appellant insisted on taking the matter to trial. Mr Serr raises concern that the Appellant refuses to admit that M was under 16 years old at the time they met in the nightclub.
42. When considering the Appellant’s evidence on this particular point, we note that he admits (and always has admitted) the actus reus (physical) elements of the offence, i.e., that he (aged over 18 years old) intentionally touched another person (M), aged under 16 years old, and the touching was sexual (penetration). The Appellant accepts, as a matter of fact, that M was under the age of 16 years at the time of the offence. However, he denies (and continues to deny) the requisite knowledge (mens rea) at the time of the sexual touching i.e., that he did not reasonably believe that M was under 16 years old at the time. The question of whether the Appellant could reasonably have known M’s age at the time of the sexual touching is a question of the Appellant’s reasonable knowledge at a specific point in time. In light of his claim, the Appellant was entitled to run this

as a defence to the charge laid against him. If entitled to run a defence, and therefore to require M to give evidence at trial, we do not consider it proper for the DBS to use that fact punitively in its barring decision. However, the jury rejected this defence and he was convicted. Having been convicted and having not challenged (or successfully challenged) that conviction, it is a matter of fact that the Appellant did not reasonably believe that M was aged 16 years or over at the time of the sexual touching. Thus, the DBS' finding that "we do not find it plausible that [the Appellant] reasonably believed the victim to be 16 years of age" (page 2 of the FDL at [123]) cannot be said to be a mistake of fact.

43. It is correct that the DBS considered the significant passage of time and the lack of convictions within this time when making its barring decision (page 3 of the FDL at [124]). It also acknowledged the references provided by the Appellant. It noted, in line with the decision in *MM*, that the passage of time alone is insufficient to negate the risk of harm, and looked for evidence of insight. The DBS found that there was "*no information to indicate that [the Appellant had] expressed any insight, regret or remorse for the harmful impact that [his] behaviour would have had on the victim as a 15 year old child*" (page 4 of the FDL at [125]).
44. We note that the Appellant's written representations, received and considered by the DBS, reflect on the unacceptability of his behaviour, as well as his regret and his remorse. In his lengthy written representations dated 20 November 2023, the Appellant described the facts of his conviction as a one-off, "stupid mistake" and provided six character references to support his contention that he is a kind, good and responsible person. On page 3 of his letter dated 20 November 2023 [106] the Appellant wrote, "*I do admit that my actions that night were unacceptable. I'm remorseful and full of guilt. I'm being punished and understand why. I should have understood my position in the school at the time. My behaviour was disgraceful. I'm now paying the price for my actions that night.*"
45. The Appellant repeated his regret and remorse in his oral evidence on appeal, and we found these to be credible reflections. He continued, very frankly, that his behaviour was "unacceptable". When asked why, he stated that M was only a child and there was a large age gap between the pair, as he was 30 years old at the time. He acknowledged that while alcohol played a part in his decision making, it was not an excuse, and he had significantly adjusted his alcohol intake after undertaking work with the alcohol and drugs team while incarcerated. The Appellant states that he would have done things differently had they happened now, as he has matured and is now a very different person. We find the DBS erred in finding that there was no indication that the Appellant had expressed any insight, regret or remorse as he had expressed these things in his written representations and repeated them again in oral evidence.

46. Mr Serr accurately submits that remorse shown after the date of the decision is not a relevant matter that can be taken into consideration by the Upper Tribunal on appeal (*SD v DBS* [2024] UKUT 249 (AAC)) therefore the remorse timeframe stops after 31 January 2024. He submits that the ability to undertake a paragraph 18A review deals with matters post-dating the date of decision. Indeed, the Upper Tribunal in *SD v DBS* stated, at paragraph 26, that a “*change of circumstances is outside the scope of an appeal*” therefore evidence of change of attitude, or indeed evidence of remorse shown after the event, does not affect the facts of the past and cannot therefore demonstrate a mistake of fact in a decision that is based upon facts as they obtained at a particular time (see paragraphs 22, 24). However, the Appellant had expressed regret and remorse (guilt) in his written representations dated 20 November 2023. The DBS is wrong to have found that there was “no indication” of these things.
47. We find the points raised by the Appellant in oral evidence, and stated in his written representations, demonstrate some insight into what drove him to engage in the harmful behaviour, namely immaturity and alcohol. He understands that one trigger is alcohol and has learned strategies to avoid reacting to such a trigger in the future by successfully reducing his alcohol intake through courses while incarcerated. We find the Appellant demonstrated insight into steps taken to manage the risk of repeat behaviour. For example, while serving his prison sentence, the Appellant completed courses in thinking skills and victim awareness. While on licence with probation, he completed a course which required him to think about the consequences of his behaviour were this to happen to his own daughter. These were matters not known by the DBS at the time of the decision as they transpired during oral evidence.
48. Despite these insights, the Appellant continues to deny that he knew or could reasonably have known that M was aged 15 years old at the time they met in the nightclub. This inability to accept his conviction, we consider, demonstrates a lack of reflection and of insight into his behaviour. One valuable insight, based upon his claims, would be that he ought not to have disregarded M’s age before becoming sexually involved with her, particularly as he recognised her from school and knew that she had only recently left. It demonstrates a lack of insight, given his claims, not to reflect on the age of M upon knowledge that she became pregnant, given the extent of the responsibility she was taking on. Such reflections could have bolstered insight of taking steps to manage the risk of repetition.
49. Notably, also, the Appellant made no mention of sexual desire, which must have been a significant part of the reason why M’s age was disregarded before engaging in sexual activity with her when he knew, and it has been accepted that, she had only recently left school. Equally, the Appellant did not undertake any sexual offence course while in prison. He states that this was not offered to him.

Where an offender denies the sexual offence for which he has been convicted (here, a denial of the mens rea), it is not generally considered appropriate to make someone complete a sexual offence course as reflection can only come about with acceptance of the wrongdoing. The Appellant, we find, lacks offence specific insight.

50. Overall, while the Appellant did demonstrate some insight, in the tribunal's view the most significant insight was not forthcoming. The Appellant was an adult teacher in a school of adolescent children. Not only was there a significant age gap between he and M, but he was in a position of trust and of responsibility as her teacher. His actions in engaging in sexual activity with a minor pupil, despite her having left the school just prior to that, still abused the position of trust and the balance of power between the pair. That is the ultimate wrongdoing in this case. It is, no doubt, for this reason that the s.9 offence gains its position as a trigger to the auto bar with reps barring decision mechanism. Mr Serr highlights the DBS' finding that the Appellant had crossed professional boundaries with a child, prioritising his sexual needs without regard for the welfare of the child (page 3 of the FDL at [124]). The DBS concluded that it was satisfied that the Appellant continued "*to pose a significant and unacceptable risk of future harm to children in regulated activity [and is] therefore satisfied that it is appropriate to include [the Appellant's name] in the Children's Barred List*" (page 4 of the FDL at [125]).
51. With consideration of the totality of the evidence before us, we do not consider that our findings of insight are sufficient, despite the passage of time, to negate the DBS' finding that the Appellant poses a risk of future harm to children in regulated activity. This is particularly so due to the lack of offence specific insight and insight into the abuse of position of trust and of power, as outlined above. Whether the Appellant poses a "significant" and "unacceptable" risk to children is a matter that we are not at liberty to interfere with as these are value judgements as to the level of risk, rather than a finding of fact that risk exists (see AB).
52. Section 4(6) of the Act states that if the Upper Tribunal finds that the DBS made a mistake of fact upon which the decision to bar was based, the Upper Tribunal must direct the removal of the Appellant's name from the barred list(s) or remit the matter to the DBS for a fresh decision. Although we found the DBS to have erred in finding that there was no indication of insight, we do not consider that mistake to have a material impact upon the decision to bar, as the level of insight which we have identified is insufficient to negate the consequential, and more significant DBS finding, that the Appellant poses a risk of harm to children in regulated activity. As we find the error to be immaterial to the outcome decision, we are not required to adopt the s.4(6) procedure outlined above (*R(Royal College of Nursing) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin). [2011] 1 WLR 1193 at [102]; *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC) at [51]). This ground of appeal is dismissed.

Proportionality

53. Moving on then to the question of proportionality. The Respondent submits that the decision to bar the Appellant is not disproportionate as the index offence is of the utmost seriousness, particularly when coupled with findings of further behaviour which demonstrates violence towards young people. As highlighted by the Teaching Regulation Agency in its decision letter, the Respondent submits that the Appellant's behaviour demonstrates an abuse of a position of trust, as well as a repeated failure to observe professional boundaries between teachers and pupils.

The law

54. Section 6(1) of the Human Rights Act 1998 provides that, "it is unlawful for a public authority to act in a way that is incompatible with a Convention right." A barring decision made by the DBS engages the Appellant's Article 8 right to respect for his private and family life, his home and his correspondence. This is a qualified right, which permits interference that is "in accordance with the law and is necessary in a democratic society ...". Whether or not an act of a public authority is incompatible with a Convention right will often turn on whether it complies with the principle of proportionality. The Upper Tribunal is entitled to consider whether the barred decision is proportionate and in the event of such a challenge, it must conduct a proportionality analysis for itself (see *Re B (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911). The analysis will depend on whether DBS's findings were both rational and complete. An error of fact or an error of law may affect the proportionality of DBS's decision. Whether a decision of DBS is disproportionate is an issue of law: *R (Royal College of Nursing) v Secretary of State for the Home Department* [2011] PTSR 1193 at [104] and *B v Independent Safeguarding Authority (Royal College of Nursing intervening)* [2013] 1 WLR 308 at [14].
55. The proper approach to proportionality was outlined in the recent case of *KS v DBS* [2025] UKUT 045 (AAC). The test of proportionality must be applied "by reference to the circumstances prevailing when the issue has to be decided" (*Wilson v First County Trust (No 2)* [2004] 1 AC 816 at [61]) i.e., the date of the decision under appeal (*KS* at [43]). Proportionality is distinct from appropriateness. It sets the limit as to what may be appropriate, but it is never appropriate for the DBS to make a decision which is disproportionate. Equally, proportionality is only part of what is appropriate, therefore the DBS need not find it appropriate to bar in a case where it finds it is proportionate to do so (*KS* at [47]). In making its own assessment of proportionality, the Upper Tribunal must have regard to the DBS' statutory role as the primary decision maker and must assess the appropriate weight to be given to the DBS' analysis of the matter (*KS* at [53]). In *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, at

paragraph 16, Lord Hoffman stated that “[i]f [a] local authority exercises [a] power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights.” Thus rationality and *Wednesbury* unreasonableness are not matters of concern for an assessment of proportionality (KS at [50]).

56. The test for determining proportionality, is the four-stage test set out by Lord Reed in *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC 39. The test is as follows: (1) *whether the objective of the measure is sufficiently important to justify the limitation of a protected right*. As the objective of the DBS, in the most general terms, is to protect children and vulnerable adults from harm by those entrusted with their care in regulated activity, that objective is sufficiently important to justify interfering with the barred individual’s exercise of their Article 8 Convention rights (KS at [58]); (2) *whether the measure is rationally connected to the objective*. The DBS’ decision under the barring scheme prohibits the barred individual from engaging in regulated activity, which is rationally connected to the objective of the scheme (KS at [59]); (3) *whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective*. The DBS has no power to limit the extent to which the bar applies. It cannot apply a temporary bar while it investigates the care, nor can it limit the scope of the bar to specified types of regulated activity. It cannot permit a person to engage in regulated activity subject to conditions. It may not include a person’s name on the barred list(s) unless and until a trigger under the 2006 Act is engaged and the statutory conditions for barring are satisfied. Once satisfied, the DBS is under a duty to include the person in either or both of the barred lists (KS at [61]); (4) *whether balancing the severity of the measure’s effects on the rights of the persons to who it applied against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter*. This involves a balancing exercise between the severity of the effects on the barred individual’s exercise of their Article 8 Convention right and the importance of the objective of barring them from regulated activity. This is a matter of judgement (KS at [71]).

Analysis

57. We must decide for ourselves whether the DBS’s decision was proportionate and we do so in accordance with the decision of the Upper Tribunal in *KS v Disclosure and Barring Service* [2025] UKUT 45 (AAC), applying the four criteria set out by Lord Reed in *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC 39 as referenced in Section V of that decision.
58. The first two questions do not lend themselves to much discussion. Firstly, *is the objective of the measure sufficiently important to justify the limitation of a protected right?* The “measure” is the barring decision made by the DBS under

the Act. Its objective, in general terms, is to protect children and vulnerable adults from harm caused by those entrusted with their care, within the context of specified “regulated activity”. That objective is sufficiently important to justify the interference with the Appellant’s exercise of his Article 8 Convention rights. Secondly, *is the measure rationally connected to the objective?* The DBS’ barring decision (the measure) prohibits the Appellant from engaging in regulated activity with children (the objective). This is rationally connected to the objective of the barring scheme under the Act which is designed to protect children from harm by those entrusted with their care.

59. The third question in *Bank Mellat* opens the case for some debate. This asks *whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective*. The DBS included the Appellant’s name on the CBL in light of his conviction for the offence under s.9(1) of the Sexual Offences Act 2003. This amounted to a specified trigger under the Act entitling it to do so if, after receiving timely representations, it was deemed “appropriate”. However, the DBS must still consider whether a measure less intrusive than inclusion on the barred list could have been used and which would still achieve the objective of protecting children from harm.
60. It is an agreed fact that the Appellant has been banned from teaching indefinitely since March 2013 and remains so. This prevents him from engaging in teaching activity with children. His name is included on the sex offenders register following the conviction and will remain on there indefinitely. This requires the Appellant to provide the police with personal information, and keep that information up to date, so that his whereabouts and activity can be monitored to reduce the likelihood of further offending. We considered whether these arguably less intrusive measures amounted to sufficient protection for children without the need to bar the Appellant. We were unable to identify any other measure that would offer protection and none were suggested.
61. Mr Serr, on behalf of the Respondent, submitted that these measures were insufficient protection for children as the DBS is concerned with all regulated contact with children, not just teaching. Consequently, while a teaching ban would protect children in a teaching context, it would not serve to protect children within other regulated contexts. He submits that the sex offenders register is a general protective factor and agrees that the Appellant’s conviction and his inclusion on the register would be discovered by a potential employer undertaking the prescribed checks prior to employment. However, he submits that the discretion as to whether to employ or engage the services of the Appellant in regulated activity, regardless of what shows up on such checks, remains with the employer. By including the Appellant’s name on the CBL, this discretion is removed from the employer, and the protection of children achieves certainty.

62. We find ourselves in agreement with Mr Serr. It is fair to say that there is a degree of protection offered by the teaching ban and inclusion on the sex offender's register, however, such protection is not foolproof and allows scope for discretion. Such discretion could unacceptably compromise the achievement of the objective i.e., the protection of children in regulated activity. There is no scope for discretion when a person's name is included on the CBL.
63. Finally, we turn to the fourth and final question: *whether balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter*. As we know, this is a balancing exercise between the severity of the effects on the barred individual's exercise of their Article 8 Convention rights i.e., the limitations placed on the Appellant's life by virtue of inclusion on the barred list(s), and the importance of barring them from regulated activity to protect children. In oral evidence, we heard much about the Appellant's life circumstances, career choices, family life, positive actions while imprisoned and his life post-conviction and sentence, however not all of these matters impact upon the question of proportionality. The objective for including the Appellant on the CBL is to protect children from harm from those entrusted with their care in regulated activity. His inclusion on the CBL prevents the Appellant from working in regulated activity which naturally contributes towards achieving that objective. This is the effect on the Appellant's article 8 rights and it is the severity of this effect that is a matter of judgement for the Upper Tribunal in this case. We need only concern ourselves with matters that affect this test.
64. Inclusion on the CBL certainly limits the Appellant's ability to work in regulated activity with children, and this includes limiting his ability to teach and his wish to coach martial arts and/or boxing to children. He has been a teacher of children for some time, but prior to the teaching ban imposed in March 2013, the Appellant left teaching and took up employment in fitness tuition and in recruitment. He voluntarily removed himself from teaching prior to the teaching ban. His teaching skills are clearly transferrable to other employment which is not regulated. The Appellant is not barred from regulated activity with vulnerable adults. Consequently, while limited, he retains the availability of a fairly wide range of career options. Of course, by making certain employment options unavailable to the Appellant, his earning capacity is potentially reduced. However, he remains in a position to earn and by his own admission, his earning capacity has not, in fact, been reduced. He has not taught since 2009 and has been able to find suitably paid employment in other fields e.g. fitness training and recruitment. He has been able to engage in martial arts and boxing. It is possible, and indeed it has already been possible, for the Appellant to live a comfortable life and to support family members in the fields of employment that remain open to him.

65. In terms of the Appellant's mental well-being, we were presented with no evidence that this has been impacted. The Appellant presented as a strong individual who was determined to ensure that his history did not hold him back. While he did not raise stigma as having an impact upon him, we consider that a conviction for a sexual offence and inclusion on the sexual offences register is likely to carry greater stigma than the fact that his name is included on the barred list. Nevertheless, the Appellant has gone to great lengths to overcome any stigma by securing accommodation, suitable employment and by repairing his relationship with C upon release from his sentence. This demonstrates an admirable ability to move forward. While these aspects are certainly important to consider, of greater importance is protecting children from harm, and this, we find, outweighs the limited reduction in the Appellant's standard of living in this particular case.
66. Consequently, having considered the four-stage test in *Bank Mellat*, we find that the DBS' decision to include the Appellant's name on the CBL is proportionate, and is not therefore made in error of law.

Conclusion

67. For the reasons outlined in this decision, we find that the Respondent did not err in law, nor did it make a material error of fact upon which its barring decision is based. We therefore dismiss this appeal and confirm the decision of the Disclosure and Barring Service dated 31 January 2024 to include the Appellant's name on the Children's Barred List.

L. Joanne Smith
Judge of the Upper Tribunal

Mr J. Hutchinson
Specialist Member of the Upper Tribunal

Ms R. Smith
Specialist Member of the Upper Tribunal

(Authorised for issue on)
29 April 2026