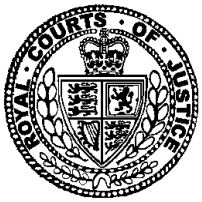

Neutral Citation Number: [2025] EWCA Civ 124

Case No: CA-2023-002390

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Hemingway
UA-2022-000899-V

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2025

Before :

LADY JUSTICE MACUR
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE STUART-SMITH

- -

Between :

A	**Appellant**
- and -	
Disclosure and Barring Service	**Respondent**

- -
- -

The Appellant appeared as a Litigant in Person
Samantha Broadfoot KC (instructed by **DBS Legal Services**) for the **Respondent**

Hearing dates: 23 January 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Macur LJ:

Introduction

1. The appellant's name is anonymised in accordance with the order made by the single judge, which continued the order made by the Upper Tribunal ("UT") pursuant to Rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. This is an appeal against the decision of the Upper Tribunal (UA-2022-000899-V) which dismissed A's appeal from a decision of the Disclosure and Barring Service ("DBS") not to remove him from the Children's Barred List ("CBL").

3. A appears in person. He maintains, as he has throughout his interaction with the DBS and the UT, that "the key bit in all this" is that the test for 'regulated activity', that is, as defined by Schedule 4 , paragraph 2(1) of the Safeguarding Vulnerable Groups Act 2006 ("SVGA"), has not been met. It is apparent from his document headed "Grounds of Appeal Response to the Upper Tribunal's Decision to Dismiss" that he also challenges the UT decision to uphold the DBS decision as proportionate.

4. Ms Broadfoot KC appears on behalf of the DBS to resist the appeal. She did not appear in the Tribunal below. She contends that the UT made no error of law, and its decision is inviolable.

Background

5. The UT dealt with the 'background circumstances and the giving of permission' in paragraphs [9] to [16] of its judgment as follows:

> "9. The appellant is an adult male. He has an interest in association football. He has a number of criminal convictions including convictions for offences with a sexual element. None of the victims of the sexual offences were minors at the time the offending behaviour took place. Prior to the committing of the sexual offences A amassed a small number of convictions for relatively minor and non-sexual matters which the DBS has not relied on and which we have not considered to be relevant to our deliberations.
>
> 10. There came a time which we think must have been around 2008, when A's former partner lost a child due to an ectopic pregnancy. A claims that trauma he experienced as a result of that led to his "going off the rails" and committing various offences.
>
> 11. As to the relevant offending history, the DBS, in the decision letter, listed the convictions of A upon which it relied as follows:
>
> "1. 16/10/2009 - Commit any Offence Other Than by Means of Kidnap/False Imprisonment With Intent to Commit Relevant Sexual Offence on 08/02/2009;
>
> 2. 16/10/2009 - Indictable Common Assault on 08/02/2009;

3. 16/10/2009 - Assault Occasioning Actual Bodily Harm on 13/08/2008;

4. 02/08/2012 - Sexual Assault - Intentionally Touch Female - No Penetration on 19/11/2011."

12. There are, before us, a number of witness statements and other documents relating to the detail of the allegations which were directed towards A and which led to the above convictions. There is divergence of some significance between what the complainants have had to say about the offending and what A himself has had to say about it. We shall address that divergence in more detail below.

13. A was also charged with certain offences which had a sexual element but in respect of which he was acquitted following criminal proceedings. The behaviour which led to those charges was said to have occurred during a not dissimilar period of time to that in which the offences which led to the convictions were committed. The DBS, in its decision letter, had this to say about those matters:

"You have not commented on the allegations put to you in our letter to you dated 19 October 2021 other than to state that they were found in court to be untrue, and that it is unjust and unfair to include these in any decision. However, the DBS makes its own evidence based findings to the civil standard of proof on the balance of probabilities. Therefore, the findings made by the DBS for the reasons given in our letter to you of 19 October 2021 and the information enclosed with it, have not been addressed and the allegations below remain proved on the balance of probabilities.

1. That in the early hours of 11/05/2008 you picked up a sex worker, CM, and after driving to a secluded spot, assaulted her by pinning her to the floor and performing a sex act.

2. That in the early hours of 08/02/2009, you assaulted CM after going with her to a hotel.

3. That on 16/03/2008, you picked up TR while she was working as a prostitute and refused to stop the car to allow her out, causing her to jump from the moving car.

4. That on 25/05/2008, under the guise of viewing an apartment, you grabbed at NG, and made unwanted advances to her, causing her fear and distress".

14. As to sentencing, in relation to the various convictions of 16 October 2009, A received a sentence of twelve months imprisonment suspended for two years, as well as a supervision

> order and a sex offender's notice. As to the conviction of 2 August 2012, it is recorded that he received a supervision requirement, a sexual offences prevention order (SOPO) and a sex offenders notice.
>
> 15. A has not subsequently re-offended. On 17 July 2010, and so prior to the most recent conviction, it was decided by the Independent Safeguarding Authority (the predecessor of the DBS) to include A in the CBL and the ABL. On 19 January 2011 it was decided by the Independent Safeguarding Authority, notwithstanding representations made to it by A, to retain his name in both lists. Following the conviction of 2 August 2012, A is said to have settled down. By that time, he had entered into a relationship with his current partner and the couple now have young children. On 22 June 2017 he asked that the SOPO be discharged. On 22 October 2018 it was indicated on behalf of the relevant Chief Constable that the police would not object to the discharge of the SOPO. In a letter addressed to the relevant Crown Court it was stated on behalf of the police;
>
> "[A] has explained that he now has a stable job and family, with a partner and [a specified number of young children]. He states that his offending behaviour took place when he was younger and unfortunately became involved with drink and drugs. He has now turned his life around and expresses remorse for his behaviour at that time. He wants to become more involved with his children's activities, but the Order prevents him from doing so. In considering this matter, [the relevant police force] can confirm that [A] is in a stable relationship and has become a "family man", working hard and caring for his [a specified number of young children], both of whom have disabilities. There are no recent concerns about his behaviour, and he has cooperated with the police. In the circumstances, the police have no objections to the discharge of the Order. The court will note that given the sexual offence which [A] committed in 2009, he will remain on the sex offender's register until October 2019 and [A] is aware of this".
>
> 16. On 26 October 2018 the relevant Crown Court discharged the SOPO."

6. On 3 May 2019, A asked the DBS to review his inclusion in the adult barred list ("ABL") and the CBL; see Schedule 3, paragraph [18] of SVGA. The minimum barred period elapsed shortly thereafter, and DBS conducted the review. A made representations, the effect of which was to secure his removal from the ABL, on the basis that the test with respect to regulated activity with vulnerable adults was not met, that is as defined by Schedule 4, Part 2, paragraph 7 SVGA, but not to remove him from the CBL since the DBS were satisfied that the criteria for regulated activity was made out "because you have expressed a wish to coach children's football teams, a position for which [an organisation in the vicinity where the appellant resides] required an enhanced disclosure and barred list check".

7. The DBS letter, dated 18 January 2022 gave reasons for its decisions in terms:

> "The DBS considers that the circumstances of the convictions and findings both indicate that over a period between March 2008 and November 2011 you displayed an entitlement to sex, poor emotional and urge management and a lack of empathy for your female victims. The offences and behaviours included violence, violence with intent to commit a sexual offence, sexual assault and unwanted sexual advances which caused fear and distress to the victims. You have stated that you went off the rails and turned to drugs and alcohol after the tragic loss of your baby. However, whilst the DBS acknowledges the trauma such a sad event may cause, the 2012 conviction was for a sexual assault committed when you were in a stable relationship with your girlfriend (now wife). Therefore, it is considered that you engaged in criminal behaviour and other harmful behaviour over a range of contexts. The behaviour was opportunistic (Offence 1, 2 and 4, and allegation 4) or within the context of transactional relationships with sex workers (Offence 3 and allegations 1,2 and 3). A common trait is that they were against the wishes of the victims and that there was physical or sexual violence or fear of it. All the convictions and allegations displayed an entitlement to sex on your terms upon which you were prepared to act against the victims will. You have displayed a failure to manage your physical and emotional urges in a way that has caused both physical, sexual and emotional harm to the victims. Your callous disregard for their wishes shows a lack of empathy towards female victims which is considered to be an unacceptable risk of harm should it occur within regulated activity. The length of time between the 2008 offending behaviour and the offending behaviour in December 2011 gives further concern that this was not behaviour driven by personal circumstances but by an attitude which placed your own urges above the victims' and disregarded their wishes and feelings.
>
> It is acknowledged that there have been no further convictions since 2012 and that you completed the Sex Offenders Treatment Programme and engaged well with probation to recognise triggers for offending behaviour. It is also recognised that your SOPO was discharged early in 2018. However, throughout your earlier representations and in those of 13 December 2021, you sought to characterise the circumstances which led to your conviction for assault with intent to commit a relevant sexual assault, as being "flirtatious". You also stated in the letter of 13 December 2021 that you explained your rationale for the 2012 conviction for sexual assault in previous representations. In these, you stated that you wished you had not pleaded guilty, and that the conviction should "not have taken place". You also questioned the motives of the victim. However, it remains that the DBS prefers the victim's version of events and your recent

reiteration of this denial and the continued minimising of your behaviour towards the victim of the 2009 conviction continues to give the DBS significant concerns that you lack insight into the seriousness of the impact of your behaviour upon the victims. It is also noted that in expressing remorse you limit it to the victim of the offence of 8 February 2009. Therefore, the DBS has not been given sufficient assurance that the risk your opportunistic harmful behaviour presents to females has been addressed.

It is acknowledged that the age of your youngest victim is nineteen (rather than the eighteen to forties age range stated in the letter of 19 October 2021) however, this does not change the opinion of the DBS that your opportunism and the age range of the victims is such that significant concerns remain, that, under certain circumstances, you present a risk of harm to physically mature females who might be under the age of eighteen and therefore are children in terms of the SVGA (2006).

It is also recognised that your harmful behaviour was committed outside of regulated activity settings. However, the DBS believes that the continuing lack of empathy together with the opportunism of your past behaviour and your willingness to use violence to meet your urges, is such that the risk of harmful behaviour to older female children remains and that it is not appropriate to remove your name from the Children's Barred List.

You have stated that you wish to help with your sons' football teams, that your eldest son is [a specified age] and that the DBS bar is what is preventing you from doing this. The DBS accepts, therefore, that this interferes with your rights under Article 8 of the ECHR and your ability to volunteer for this activity. The DBS is also aware of the potential stigma that inclusion in the Children's Barred List may attract should you choose to disclose it. However, the DBS considers the risk of harm we believe you present to children in regulated activity outweighs this consideration.

You have stated that the organisation which you seek to volunteer with is aware of your convictions, that you have explained the circumstances, and they wish you to continue. However, they will not be aware of the other findings of the DBS or the concerns the DBS has about the risk that you pose to children who are not necessarily within the age range they deal with. It is also noted that they may not be aware of the case material available to the DBS. Therefore, it is considered that this, of itself, is not sufficient to safeguard against the risk of harm that the DBS considers you present.

> It is recognised that the DBS believes the potential risk you pose to children is not to the age range which you wish to volunteer with. However, the DBS has a duty to consider the safeguarding of all children and the entirety of the children's workforce. There is no scope within the legislation to impose a bar from working with a particular children's age group and in light of that, it is recommended that your name remains included in the Children's Barred List.
>
> The DBS must also take into account public confidence, and it is considered that a reasonable member of the public with all of the available information would have their confidence in the ability of the DBS to perform its legislative safeguarding duties if a person with such convictions and proven behaviour was permitted to engage in regulated activity with vulnerable groups".

8. A successfully sought permission to appeal to the UT against the decision; see section 4(1)(c) and (4) SVGA. At the hearing on 2 June, A was questioned by the UT and was cross examined by counsel representing DBS. A said he wanted to "help out" at football matches and was not seeking to be a football coach and had never applied for such a position. The Level 1 coaching course required renewal every three years. A had completed the Level 1 Course, at the invitation of 'M' (see paragraph [33] of UT judgment below). A said that the relevant 'Town Foundation' had paid £300 for him to undertake the course, and he had completed it over nine weeks, attending one evening per week. He had 'done the course' before he was asked to help with junior team coaching. He had not moved on to the Level 2 course. He only wanted to be involved "in a minimal way". His life was in "a different place". His conviction of 2 August 2012 was "mistaken". He had not described his behaviour leading to conviction in October 2009 as simply "flirtatious", but his actions had been misunderstood, and there were mitigating circumstances. The incident on 8 February 2009 which led to his conviction did not involve a sexual assault. He had never offended against children. He did "take ownership" for what he had done, and he feared that the listing would impact upon opportunities to advance in his professional career, which did not involve interaction with children in any regulated activity.

9. The UT decision was promulgated on 2 September 2023. The 'reasoning' is found in paragraphs [28] to [51]. In paragraphs [28] to [36] the UT dealt with A's contention that the DBS had made a 'mistake of fact'.

> "28. We shall start with the way in which the DBS dealt with the regulated activity test. As was pointed out in the grant of permission to appeal, no-one has suggested that A "is or has been "engaged in such regulated activity. But, nevertheless, the test is satisfied if he "might in future be". Mr Serr submits to us that that element of the test sets a low bar. We agree, on the wording, that it does. But care has to be taken to avoid setting the bar so low that virtually anyone might fall within it. For example, it would not be enough, in our view, for an individual to fall within the regulated activity test as it might be applied to football coaching, for that individual to have an interest in football and

to have some spare time which could be filled by coaching. There needs to be some evidence-based reason to think, in our view, that the individual genuinely might take up relevant regulated activity. A conclusion that a person might in future undertake such activity might be underpinned by, for example, conduct such as a previous serious expression of interest in performing such activity or the seeking out of knowledge or qualifications which might be required for the proper performance of such activity although we do not at all regard that as amounting to an exhaustive list or the specifying of essential requirements. We simply say that those sorts of factors might, in some cases, be useful pointers.

29. As to the evidence in this case, we remind ourselves that A has clearly stated to us and indeed to the DBS, that he does not intend to involve himself in football coaching. He was very firm about that in his evidence to us. We note his contention (which we accept) that he has not at any point applied for a post, either paid or voluntary, as a football coach. But we do not accept, as A seemed to us to argue, that the lack of a specific application is, of itself, determinative of the issue as to what he might relevantly seek to do in the future. It is the evidence as a whole that needs to be considered.

30. There is some relevant documentary material before us. We have a letter of 25 March 2019 written by a person we shall simply refer to as B. That person describes A as being "a very close friend to me". It appears the two bonded as friends through their fondness for football. B says of A

"I know [the appellant] is keen to get involved with coaching at football to be honest [the appellant] and I have grown up with football since young children playing on the local fields. [The appellant's] oldest child [the name of the child] plays for his local team but whilst this ''barring" is in place it would mean he is unable to which is upsetting because I know [the appellant] wants to make up for his past mistakes by giving something back to the community but he is unable to whilst this is in place. I know [the appellant] has completed his Level 1 FA Coaching, working hard to get the coaching qualification he needs".

31. On the face of it, that is a letter from someone who knows A very well and has known him on a long-term basis (the letter suggests for in excess of thirty years) and which indicates an interest or perhaps intention on the part of A to involve himself in some capacity with football coaching and who is seeking a qualification he might need in order to do so. The content of the letter sits unhappily, in our view, with the assertion A has made, more than once, that he simply has in mind activity such as "running the line" which is how he summarised his intentions at the permission hearing (see paragraph 15 of the grant of

permission). Before us, when the relevant content of that letter was put to him, A said he had not wanted to be "the overall coach" that he had "never applied to coach junior football" and he reiterated that his intentions had been limited to running the line.

32. We have mentioned that A was successful in having his SOPO discharged. On 22 June 2017 he wrote a letter in support of his application, which he addressed to the Legal Services Department of his local police force, in which he said "I would love to be able to get involved with coaching at football as my oldest plays for his local team but whilst this SOPO is in place it would mean I would fail a Basic CRB check which is upsetting because I feel like I want to make up for my past mistakes but I'm unable to whilst this is in place". In a letter he sent to the DBS on 13 December 2021 he said, amongst other things "...I haven't applied I have been asked to help with coaching with my sons football team and would like to help but due to this barring being in place I am unable to do this". He added "The coaching is never in an unsupervised capacity. It would be helping the players in positional awareness and passing on what we have learnt over the years playing football to help them progress. All I want to do is help them and do good". Whilst we note the reference to coaching only in an [un]supervised capacity, we do think what is said about helping with positional awareness shows an intention to do more, perhaps quite a lot more, than simply "run the line".

33. There is, of course, the fact that A has obtained his Level 1 Football coaching qualification. Mr Serr argues that his having done the course is a good indication as to what he might seek to do at some point in the future with respect to football coaching. He effectively poses the question, why would a person undertake a football coaching course if they did not at least contemplate the possibility of coaching football at some future point? A has said he undertook the course to support his brother. He has produced a letter which is undated, but which appears at page 393 of the Upper Tribunal bundle, and which is written by a person we shall simply call M. It seems that M had got to know A in her former role as a disability development manager for the football foundation with which A has been associated. She said she had met A through his attending mental health football sessions "where he supported his brother... who suffers from mental health issues". She said that "participants of the session had the opportunity to complete the FA Level 1 Football qualification" and that whilst A "didn't want to coach due to his family commitments I explained it would be a good qualification to have".

34. As we say, we accept that A has not actually applied for a position as a coach. We accept, insofar as it might be relevant, that he did not himself apply for an enhanced DBS check with a view to taking a coaching position. But the DBS's finding on that point, in the decision letter of 18 January 2022, was simply to the effect that one had been applied for. Further, the DBS did not in that letter make a finding that he had applied for a post coaching football. It did not, therefore, make any mistake of fact with respect to those specific matters. There is inconsistency in A's contention to us (and at the permission stage) that he only envisaged running the line, with indications he himself gave to the DBS and to the police regarding his SOPO discharge application, which point to a more general and less limited intention to pursue football coaching in some capacity. We also think the content of the letter written by B to be of significance. The relevant content which we have set out above does, we think, suggest a keenness to become involved with coaching football and also suggests that the coaching course was completed with a view to enabling him to do so ("to get the coaching qualification he needs"). We note M's letter and the explanation that he had become involved simply to support his brother, but we find that unpersuasive because he could have done so in ways other than undertaking the course himself and because it is essentially in conflict with what is said in the letter written by B who, as we say, is a close and long-term friend. We also have some concerns as to the overall credibility of A. We have detected inconsistency as to his future intentions (whether he intended to simply run the line or whether he intended to do more than that) and we are concerned as to his continued protestations of innocence with respect to the conviction of 2012 and his apparent denial of having any intent to commit an offence of a sexual nature despite his conviction for precisely that, following a trial, in 2009. If it is A's contention that the DBS's finding (if that is what it is to be characterised as) that he might in future be involved in regulated activity as a coach is mistaken, we would reject that contention. We think that, overall, the evidence does point to that. If A's contention is that the DBS has overlooked matters (such as the fact he has not applied for a coaching position), or has misapplied the test we would, again, reject that. The DBS's consideration has been thorough and careful. It was clear that it was concerned, with respect to regulated activity, with what A might do in the future as opposed to what he was doing or had done in the past. It was permissible for it to rely simply on future intentions, and it did not mis-direct itself in that regard.

35. There is, though, the question of the ban imposed upon the appellant by the FA. We had before us a letter sent by the FA to A which is dated 20 March 2019. The letter itself is a brief document which includes this wording:

> "This letter is to inform you that you have been served with a Permanent Suspension from football. The reason for this is The Football Association has received notification that you are barred from regulated activity relating to children, in accordance with Section 3 of the Safeguarding Vulnerable Groups Act 2006...."
>
> 36. Documentation which accompanied the letter specified what was considered to be "football related activity" which A was banned from undertaking but also referred to a process of six-monthly reviews which would occur "until there is a material change in the circumstances on which the order was made". A has said, as a fall-back position, that even if he wanted to undertake football coaching in the future, he would not be able to because of the terms of the suspension. However, we accept the submission of Mr Serr to the effect that the suspension is expressed by the FA itself to have been imposed as a result of his listing by the DBS. As such, it seems to us that if A was no longer to be included in the CBL, the suspension would very probably be lifted because the express basis for it would no longer be extant."

10. The UT addressed "other concerns" raised by A in the hearing in paragraphs [38] to [47], namely:

    i) The DBS findings in relation to offences for which he had been tried and acquitted;

    ii) That he had not been convicted or accused of offences against children, and the positive report from social services and the police that he did not pose a risk to children. The youngest victim of his offending was 19;

    iii) His rehabilitation, in terms of his changed life style, the absence of any conviction since 2012 and the discharge of the SOPO;

    iv) His attendance upon the sex offender's treatment course.

11. The UT did so because it "thought it appropriate, and fair, to consider whether the DBS might have made mistakes of fact in finding he did commit the conduct which led to the charges being brought or might have made a mistake as to law in considering the conduct at all." The UT reviewed the witness statements and 'related documentation" which was described as "extensive"; noted the similar facts and time frame of those offences alleged to those for which he had been convicted and took into account A's evidence as to his own predicament of being dependent on drink and drugs at the time which the UT considered may have skewed his perception of what had occurred. The UT found no error in the DBS approach.

12. The UT noted the lack of criminal convictions, and the positive indications of A's rehabilitation, including his attendance upon the sex offender's treatment and alcohol abuse programmes and positive social services report and concluded: "So, there is material suggesting that A has made concerted efforts to rehabilitate himself and put

his offending history behind him. He is, in our view, to be commended for his efforts. He has done what one might expect of an individual who has offended in the way he has but who is keen to change. But that does not mean, of itself, that we must conclude that he now poses no risk."

13. The UT observed that the DBS found that the sexual offending had been persistent, over a few years. The UT itself found that A tended to "minimise [this] behaviour", although A expressly denied this to be the case, which the UT considered was "concerning." Although the UT were "prepared to accept that A is now in a stronger position to cope with traumatic events, the way in which such events led to such serious sexual offending causes ongoing concern. Putting all of that together we do not conclude that A, notwithstanding his obvious and creditable progress, poses no risk to anyone. We do not, therefore, conclude that the DBS has made a mistake in finding that he does."

14. It was by reference to the age of his youngest victim, and the circumstances in which she was targeted by A in February 2009, that the DBS concluded that A did pose a risk of harm to a limited class of children, namely "physically mature females who might be under the age of eighteen and are therefore children in terms of the SVGA (2006)". The UT recorded A's protest that it "was "sickening" for him to have to read a suggestion that he might be a risk to children [and that] I clearly know the difference between an adult woman and a child…you have no grounds to say that I could have targeted a child when all the victims were adults clearly not children. This is both unjust and unfair to suggest this and any court will see that". The UT noted, however, that "A has not really, though, specifically addressed the situation of a physically mature female under the age of eighteen."

15. The UT concluded:

> "48. We would accept without hesitation that the category of children identified as being at risk by the DBS is a very small proportion of children as a whole. But on one view, there is not necessarily a great difference between a woman aged nineteen and for example, a girl who is approaching the age of eighteen but who is physically mature. As we have said already, we understand the apparent oddness, at first blush of placing an individual on the CBL when that individual has only offended against adults. But we are not able to conclude that the DBS has made a mistake of fact in deciding that there would be risk to the small proportion of persons it has identified and who are regarded as children under the terms of the 2006 Act. Nor are we able to conclude that the DBS's reasoning as to that is irrational."

16. On the issue of proportionality, the UT found:

> "50. …The nature of the sexual offending is serious and troubling. When assessing matters of relevance to proportionality, which the DBS did in considerable detail in the Decision Barring Process document, reference was made to A's past behaviour demonstrating callousness and a lack of empathy with his victims, a belief in his entitlement to sex and an

> obsessive interest in sex. It is difficult to disagree with that. The DBS has taken into account the progress which A has made and which we have identified above. It has also taken into account the point that the behaviour which has led to A's listing was outside the scope of regulated activity. It also indicated it had taken into account the need for the public to have confidence in its ability to perform its legislative safeguarding duties and it expressed the view that such confidence would be eroded if it were to permit individuals with the "proven behaviours" demonstrated by A were permitted to engage in regulated activity with vulnerable groups. We have our doubts as to the legitimacy of that final consideration because if taken too far it might lead to individuals who have committed serious offences or offences which attract particularly strong societal disapproval being listed forever even if completely rehabilitated. But here ongoing risk has been found and the rehabilitation consideration has been factored in.
>
> 51. We take account of the fact that the DBS's conclusions as to risk mean that only a small section of children have been found to potentially be at risk. But the DBS has recognised this in its evaluation of proportionality. We accept that the retention of A in the CBL serves to limit his permitted involvement in football related activity with children to a very significant extent. But we accept Mr Serr's submission to the effect that there is no evidence that continued listing would adversely impact A's career prospects. There is no evidence that it has done so thus far, and A has not evinced a desire to be involved in regulated activity as a career. In any event, he has been able to find work in a number of fields in the past We do not think A's fears that he might face DBS checks in relation to any application for a senior position which does not involve working with children are well-founded. A also told us, at one point in the hearing that he was pursuing the appeal as a matter of principle. We accept that as a valid basis for challenging a decision of the DBS since nobody who does not deserve to be on a list should be, even if inclusion or retention in a list has no practical adverse impact. But we do not detect any error in fact or in law with the DBS's holistic assessment as to proportionality, so there is no basis for us to interfere with it."

Legal Framework

17. The relevant legal framework to be applied in considering inclusion or removal of a person's name in the CBL and/or ABL is to be found in sections 2 to 4, and Schedules 3 and 4 of the SVGA 2006. In summary, DBS must maintain the CBL and the ABL; section 2. A person will be barred from 'regulated activity' with children and/or vulnerable adults if his name is included in the CBL or ABL respectively; section 3. An individual who is included in a barred list may appeal to the UT against a decision not

to remove him from the relevant list; section 4(1)(c). An appeal may be made only on the grounds that DBS has made a mistake on any point of law or in any finding of fact which it has made and on which the decision mentioned in that subsection was based; section 4(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; section 4(3). Unless the UT finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS; section 4(5).

18. Save in circumstances that do not apply in this case as indicated in Schedule 3, paragraph 3(4) and (5) , the DBS must include a person in the CBL if it is satisfied that the person has, at any time, engaged in relevant conduct and has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children and it is satisfied it is appropriate to include the person; see Schedule 3 paragraph 3(3). (Emphasis provided).

19. 'Relevant conduct' includes "conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him"; that is including conduct which harms a child, or puts a child at risk of harm: see Schedule 3 paragraph 4(1)(b) and (2)(a)(b) and (c). (Emphasis provided)

20. Regulated activity includes any form of teaching, training or instruction of children which is carried out frequently by the same person or the period condition is met, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of adults, or unless on a regular basis, subject to the day to day supervision of another person who is engaging in regulated activity relating to children, provided such supervision is reasonable in all the circumstances for the purpose of protecting any children concerned in accordance with the guidance provided by the Secretary of State; Schedule 4 paragraphs 2(1)(a),(3A) (3)(C) and 5A (1) . Further, a person who is part of a group in relation to which another person engages in regulated activity relating to children does not engage in regulated activity only because he assists that person or does anything on behalf of or under the direction of them which would otherwise amount to engaging in regulated activity relating to children; Schedule 4 paragraph 5. The 'period condition' is satisfied if the person carrying out the activity does so at any time on more than three days in any period of 30 days; Schedule 4 paragraph 10 (1).

Arguments on Appeal

21. A has reiterated the points he made before the UT as indicated above. His 'key point' remains that there has been a mistake of fact since "the test for regulated activity has not been met." He said on several occasions that he "could understand [the DBS decision] if he had applied to coach a children's football team" but maintains he has never applied to do so, has no present intention to do so and is, in any event, unable to do so because his coaching qualification is now expired, and he is the subject of a 'Notice of Permanent Suspension from Football by the Football Association". A argues that the letter written by his friend B supporting the removal of the SOPO should not have been taken into account by the UT, since B misunderstood A's circumstances and the letter had been intended for a different purpose. Significantly, in A's view, recent advice he has received from the DBS confirms that that which he had once wished to do, namely 'run the line' and 'advising the coach', was not 'regulated activity'. As it was, his son now 14 doesn't play football, and it had been his son's team that had asked him to help. He has "a young family and 2 children with disabilities so I don't have

time to coach football in a regulated capacity and won't have in the future as they are lifelong disabilities". Therefore, it could not be "fairly said" that he 'might in future' engage in regulated activity. The DBS and UT had "set the bar too low" in his case.

22. A referred to the "Disclosure and Barring Service Regulated Activity and TRA guidance ("guidance") to its operational staff which he had not previously seen before it had been included in the 'Authorities Bundle' for this Court. He drew our attention to paragraphs 3.7 and 3.8 dealing with the "might in the future" test. The DBS advice was that the likelihood need to be "more than fanciful". Whilst the threshold was low, "there must be evidence upon which to base this assessment. It cannot be based on speculation alone." Further, according to paragraph 3.9 of the Guidance: "Where the legislative criteria for regulated activity with children are not met due to frequency, temporary or occasional work or supervision factors, consideration should be given as to whether it would be reasonable to conclude that the individual satisfies the TRA on the basis that they may carry out the activity often enough, not on a temporary or occasional or without supervision in the future.". Further, A submitted that paragraphs 4.28 and 4.29 of the guidance were relevant to his situation. They provide that:

> "4.28. If an individual has undergone training or achieved a qualification that relates to regulated activity that is group specific, then the TRA can be satisfied on the basis of 'might in the future' in relation to that group. "
>
> 4.29. If an individual has obtained a qualification or undergone training within the context of employment with a specific vulnerable group, it is unlikely this information alone would support the assessment that the individual 'Might in the Future' engage in regulated activity with the other group."

23. In terms of proportionality, he noted that the other authorities which the DBS had included in the bundle, all concerned individuals who had been convicted of offences against children. A's youngest victim was 19. He was not deemed a risk to vulnerable adults. He had received positive reports from the Social Services and the police force and his SOPO had been removed. He had been sentenced for his offences which were committed over 14 years ago. Football teams were single gender after a certain age and his son's team was all male. His professional advancement was compromised if an enhanced check with barred list check was made.

24. Ms Broadfoot KC emphasises that the Court of Appeal's role is to review the decision of the UT to determine whether it erred in law. The UT had addressed A's arguments as to the facts and upon the question of proportionality. The UT had noted A's evidence that the certificate requires renewal every three years and he had not undertaken the Level 2 course. A had not previously asserted that absent a coaching qualification that he would be unable to coach a junior football team. In any event, regardless that the certificate had expired, the fact that A had undertaken such a course was evidence which the DBS and UT would be entitled to conclude indicated an intention that "he might in the future" have sought to utilise the qualification. Nor had A suggested that any 'coaching' would be infrequent and unlikely to meet the test for regulated activity. The nature of the activity, namely his son's previous football training/matches were likely to occur weekly; the "period condition", provided by Schedule 4 paragraph 10 was "satisfied if the person carries out the activity at any time on more than three days in

any period of 30 days." Finally, the UT was entitled to take into account the stated reason for the implementation of the FA coaching ban which was the listing of A in the CBL. If A was removed from the list, the UT were entitled to find that the FA would likely remove his suspension.

25. Ms Broadfoot acknowledges that there is some overlap in terms of appropriateness and proportionality. However, unless the DBS had made a mistake of fact or law, "the assessment of the risk presented by [A], and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS." (See AB v DBS [2021] EWCA Civ 1575 at paragraphs [43] and [44]). The UT is "empowered to determine proportionality" although it must give appropriate weight to the decision of the specialist decision maker; see *B v Independent Safeguarding Authority [2012] EWCA Civ 977 at [15]*. The UT had clearly addressed the question of proportionality in the implicit knowledge that listing may engage A's article 8 Convention 'rights.' However, Article 8 provides a qualified right which the DBS is obliged to weigh against risk of harm to children. The UT had been right to conclude that the DBS had made a rational holistic assessment as to proportionality, with which it agreed.

Discussion

26. In *DBS v RI [2024] EWCA Civ 95* at *[29],* Bean LJ approved that section of a supplementary skeleton argument filed on behalf of the respondent in which it was stated:

> "The Upper Tribunal is entitled to make a finding that an appellant's denial of wrongdoing is credible, such that it is a mistake of fact to find that she did the impugned act. In so doing, the Upper Tribunal is entitled to hear oral evidence from an appellant and to assess it against the documentary evidence on which the DBS based its decision. That is different from merely reviewing the evidence that was before the DBS and coming to different conclusions (which is not open to the Upper Tribunal)."

This, he found, was in accordance with "the guidance given by the Presidential Panel of the Upper Tribunal in *PF* [2020] UKUT 256(AAC) approved by this court in *Kihembo* [2023] EWCA Civ 1547."

27. However, the nature of an appeal to the Court of Appeal from the UT is different to that of an appeal from the DBS to the UT. The appeal to this Court is subject to section 13 of the Tribunals, Courts and Enforcement Act 2007 and is confined to "any point of law arising from a decision made by the UT". The appeal is "limited to a review of the decision of the lower court (CPR 52.21). Because the Court of Appeal does not hear evidence, and … the decision of the lower court on a pure question of fact will only be held to be wrong if the decision is one which no reasonable judge could have reached (e.g. *Volpi v Volpi* [2022] EWCA Civ 464 at [2]"; see Males LJ at [46] in *DBS v RI* (above).

28. A has advanced his arguments respectfully, specifically acknowledging his lay status. His sense of injustice is unmistakable. It appears to me that he has understood that he must, and has attempted to, address the 'mistake of fact' which he says first the DBS

made, and then subsequently the UT confirmed; that is, that "he might in future be engaged in regulated activity relating to children." But he has done so in the belief and expectation that this Court may reach a different conclusion on the facts by reason of the same arguments he advanced below and now repeats, supplemented by the 'new' information that his 14 year old son is no longer playing football, and therefore it is unlikely that he will be 'running the line' or advising the coach on 'positional awareness.' Consequently, he misunderstands the position; this Court does not make findings of fact, but reviews the findings of fact made in the court or tribunal below.

29. I agree with Ms Broadfoot that there is no demonstrable error in the UT's approach to A's appeal from the DBS decision; see paragraphs [28], [50] and [51] of the UT judgment recorded above. The UT did not confine itself to a review of the DBS decision, which had been reached on the papers, but heard A's evidence, which is summarised in paragraph [29] of the UT judgment, and thereafter objectively analysed his protestations that he did not seek to coach junior football in the future in the context of the contemporaneous documents which he himself had produced for the purpose of his application to remove the SOPO and then when seeking to have his name removed from the CBL; see paragraphs [30] to [33] of the UT judgment. The UT formed an adverse view as to A's credibility based upon the inconsistent wishes that A had expressed to various bodies, as it identified in paragraph [34] as well as his protestations of innocence in relation to one of his convictions. I am satisfied that the UT were entitled to reject A's evidence on these contentious points and make the findings of fact on the whole of the evidence. A has determinedly challenged the same but I conclude he has not demonstrated that it was unreasonable to draw the adverse inferences regarding his stated intent that they did.

30. We were told by Ms Broadfoot that the 'Guidance' prepared for 'operational staff', upon which A now seeks to rely (see [22] above), was not before the UT. Accepting the parameters of the Guidance, which would hold no more than persuasive force so far as the UT were concerned, nevertheless, I do not see that the UT's approach to the 'might in the future' test conflicted with paragraphs 3.7 and 3.8 of the Guidance. The UT did not 'speculate' in making its assessment and rejected the DBS submissions which appeared to the UT to set the bar too low. Paragraph 4.28 and 4.29 of the Guidance do not assist A. The coaching certificate would cover junior as well as senior football leagues; in any event, the UT did not rely solely upon the coaching qualification as satisfying the 'might in the future' test.

31. The UT noted that A said that he would be 'supervised', but were dubious as to this claim; see paragraph [32] of the UT judgment recorded above. The UT judgment does not specifically refer to "the frequency" or "period condition" specified in Schedule 4(1)(b), but this was not in issue in the appeal before them.

32. Further, I find the UT's approach to 'proportionality' to be unassailable. Once the UT had confirmed the DBS 'finding' that there was evidence that A 'might in the future' seek to engage in coaching junior football teams, the balance had to be struck between the degree of risk of harm if the relevant conduct was repeated against children as opposed to the restriction upon A's activities. As to this, the UT bore in mind that A's past relevant conduct occurred over 12 years before and had been directed against adult females. The small cadre of children who were at risk were therefore limited to pubescent female minors. However, the UT rightly found that the DBS could not legitimately specify subgroups within the CBL and the ABL; the listing, if warranted

by the statutory scheme, must be in relation to all children or all vulnerable adults . The UT acknowledged A was 'in a different place' and was to be commended. However, the risk of harm was predicated upon what they found to be A's continued minimisation of past events and which, if directed against pubescent female minors, would constitute serious harm. It is difficult to say that this analysis is unreasonable.

33. It is understandable that A considers his listing in the CBL to be punitive, and 'unfair' since he has served his sentence for criminal acts against adults committed many years ago and in, what he sees to be as completely different personal circumstances. As the UT observed, correctly in my view, care must be taken not to base decisions on possible public perception and reaction to the nature of previous convictions absent an holistic approach to the evidence of a 'change of circumstances' and the individual's evidenced rehabilitation; see paragraph [50] of the UT decision recorded above. However, being entered in the DBS list is a safeguarding procedure and not an additional punishment and I find no legitimate basis to undermine the decision reached.

34. As indicated above, A has said that his 14-year-old son no longer plays football for the team which had invited A to assist. This is new information which impacts upon frequency and A's (lack of) motivation to coach junior football and **may** indicate a change of circumstances which will entitle A to make a Schedule 3, paragraph 18A review application to the DBS. However, these were not 'live' issues at the time of the appeal to the UT. It will be for the DBS, and not this Court, to consider whether this new information indicates a sufficient change in circumstances to grant permission for A's application to review his inclusion on the CBL.

Conclusion

35. For these reasons I would dismiss this appeal.

Nicola Davies LJ:

36. I agree.

Stuart-Smith LJ:

37. I also agree.