IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2023-000221-V
[2024] UKUT 377 (AAC)

On appeal from the Disclosure and Barring Service

Between:

HNO

Appellant

\- v –

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Meleri Tudur, Specialist Members Rachael Smith and Suzanna Jacoby

Hearing date: 23 September 2024
Decision date: 25 November 2024

Representation:

Appellant:	Representing himself and joined the hearing by video from his home in Nigeria
Respondent:	Mr Bayne, counsel for the Respondent.

Anonymity Order

The Upper Tribunal made an order on the 9 August 2023 prohibiting the publication of the names of the service users and two of the children referred to in the proceedings as Girl A and Girl B, pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.
A further anonymity order made on the 7 November 2024 prohibited the publication of the names or social media handles or any other information likely to lead members of the public to identify a further 13 individuals identified in the appellant's application.

DECISION

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

REASONS FOR DECISION

Introduction

1. The Appellant appealed to the Upper Tribunal against the decision of the Disclosure and Barring Service (the DBS) made on the 22 October 2022 to place the Appellant's name on both the Children and Adults' Barred Lists. Permission to appeal was granted on limited grounds by Upper Tribunal Judge Church on the 15 March 2024.

2. An oral hearing was held by video on the 23 September 2024. The Appellant represented himself and the DBS was represented by Mr Bayne. We are grateful to both for their written and oral submissions.

3. The basis of the barring decision were the following four grounds: firstly, that the Appellant had engaged in a video call with a 15 year old female whilst at work at the care home and feeding a vulnerable 89 year old resident. Secondly, that the Appellant had harassed two 15 year old girls through social media, texts and approaching them in the street. Thirdly, that he had asked a 15 year old girl for sex and fourth, that he had asked a 15 year old girl if she could obtain marijuana for him.

4. The Appellant accepted that his conduct in relation to the vulnerable adult had been inappropriate but disputed the other allegations.

5. The appeal focuses on whether the decision was based on error of fact as alleged by the Appellant. We have found that there are no material errors of law or fact and that the Appellant's name should remain on both lists.

The statutory framework

6. The Safeguarding Vulnerable Groups Act 2006 ('the Act') section 2 requires the DBS to maintain the children and the adults' barred list. By virtue of section 2, Schedule 3 applies for the purpose of determining whether an individual is included in the lists.

7. Section 3 provides that a person is barred from regulated activity relating to children, if the person is included in the child's barred list and is barred from regulated activity relating to vulnerable adults, if the person is included in the adults' barred list. Regulated Activity is determined in accordance with section 5 of and Schedule 4 to the 2006 Act.

8. Section 4 of the Act provides that:

> (1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
>
> > (a) . . . .
> >
> > (b) a decision under paragraph 3, 5, 9 or 11 of Schedule 3 to include him in the list;
> >
> > (c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.
>
> (2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—
>
> > (a) on any point of law;

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

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

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

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

(6) If the Upper Tribunal finds that DBS has made such a mistake it must—

(a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—

(a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.

9. ‘Relevant conduct’ is defined under paragraphs 4 and 10 of Schedule 3 to the Act which are set out below, paragraph 4 relating to the children’s list and paragraph 10 relating to the adults’ list:

4(1) For the purposes of paragraph 3 relevant conduct is—

(a) conduct which endangers a child or is likely to endanger a child;

(b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;

(c)conduct involving sexual material relating to children (including possession of such material);

(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;

(e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate.

10(1) For the purposes of paragraph 9 relevant conduct is—

(a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;

(b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;

(c) conduct involving sexual material relating to children (including possession of such material);

(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;

(e) conduct of a sexual nature involving a vulnerable adult, if it appears to DBS that the conduct is inappropriate.

Upper Tribunal Powers on Appeal

11. Section 4(2) of the Act sets out the limited bases for an appeal to the Upper Tribunal against a barring decision:

"(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—
(a) on any point of law;
(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.
(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact."

12. A person included in either barred list may appeal to the Upper Tribunal on the grounds that the DBS has made a mistake of law or a mistake of fact on which the decision was based. Any mistake of fact or law, must be material to the ultimate decision i.e. it may have changed the outcome of the decision.

13. The appropriateness of a person's inclusion on either barred list is not within the Upper Tribunal's jurisdiction on an appeal. The Upper Tribunal does, however, have jurisdiction to determine whether DBS's decision to bar is irrational or disproportionate, because that would be an error of law.

14. In PF v DBS [2020] UK UT 256 (AAC), a Presidential Panel of the UT (Administrative Appeals Chamber) chaired by Farbey J said:
"37. Section 4(2)(b) refers to a 'mistake' in the findings of fact made by the DBS and on which the decision was based. There is no avoiding that condition. The issue at the mistake phase is defined by reference to the existence or otherwise of a mistake. If the Upper Tribunal cannot identify a mistake, section 4(5) provides that it must confirm the DBS's decision. That decision stands unless and until the tribunal has decided that there has been a mistake."

15. The senior courts have recently considered the extent of the mistake of fact jurisdiction in the Upper Tribunal. The Court of Appeal stated in DBS v AB [2021] EWCA Civ 1575, with respect for the need to distinguish findings of fact from value judgments at para 55L "First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter."

16. The scope of the mistake of fact jurisdiction was also considered by the Court of Appeal in the cases of Kihembo v DBS [2023] EWCA Civ 1547 and in DBS v RI [2024] EWCA Civ 95. In both cases, the Court of Appeal confirmed that PF v DBS is good law. In RI v DBS, Bean LJ rejected the DBS's argument that the Upper Tribunal was in effect bound to ignore an Appellant's oral evidence unless it contains something entirely new. In paragraph 35, he stated "It is in my view open to an appellant to give evidence that she did not do the act complained of and for the UT, if it accepts that case on the balance of probabilities, to overturn the decision." He went on to state at [37] that: "…where Parliament has created a tribunal with the power to hear oral evidence it entrusts the tribunal with the task of deciding, by reference to all the oral and written evidence in the case, whether a witness is telling the truth."

Procedural history

17. The Appellant was employed as a care assistant and team leader providing care to elderly and vulnerable service users. It was not in dispute that he was engaged in a regulated activity.

18. On the 20 October 2022, the Respondent issued a final decision letter placing the Appellant's name on both barred lists.

19. The Appellant had contacted the service on the 13 October 2022 to say that he wished to make representations in response to the Minded to Bar letter but had not been able to do so because he had moved away from the address provided to the DBS.

20. The Appellant submitted a late appeal against the decision on the 20 December 2022, which was received by the Upper Tribunal on the 22 December 2022. The application stated that the appellant wanted "..an opportunity to explain as I have not been able to explain to [his employers]) that I had no bad intention to hurt the resident or cause him any harm."

21. It was unclear on what basis the appeal was being made or what material mistake of fact it was alleged that the Respondent had made.

22. In his application, the Appellant admitted that he had made a Facetime call to a teenage girl whilst feeding a vulnerable service user suffering from dementia and acknowledged that this was inappropriate behaviour.

23. By an order issued by the Tribunal on the 15 March 2023, the Appellant was invited to clarify his grounds of appeal and identify the mistake of fact it was alleged that the Respondent had made. The Appellant did not respond to the order within the given deadline but later submitted amended grounds of appeal setting out his challenge based on four grounds.

24. On the 21 March 2024, UT Judge Church gave permission to appeal on three grounds namely that on dates prior to the 31 March 2022:

a) The Appellant had not harassed the girls on social media and in the street;
b) The Appellant had not asked teenage girls whether they could get him marijuana
c) The Appellant had not asked a teenage girl to have sex with him.

25. The final hearing of the appeal was conducted by video using the Cloud Video Platform (CVP) to enable the Appellant to participate in the hearing from his home in Nigeria. Nigeria is a country which has granted permission for its citizens to give evidence to courts and tribunals in the UK. The Tribunal was satisfied that it was an appropriate form of hearing for the appeal.

26. The hearing was listed at 10.30am on the 23 September 2024, but the Appellant did not join the hearing until 11.17am. The Tribunal had waited until 11am before starting the hearing, to allow the Appellant time to join or to contact the Tribunal to explain his absence. When no further message was received, and the Tribunal being satisfied that the Appellant had been notified of the hearing, the Tribunal concluded that the hearing should be conducted in his absence, pursuant to rule 38 of the Upper Tribunal Procedure Rules. When he then joined, the hearing was stopped and restarted, with the introductions repeated so that the Appellant did not miss any part of the proceedings/hearing. Towards the end of the hearing, the Tribunal encountered some breaking up of the sound from the Appellant, and the Appellant was requested

to repeat his comments to ensure that all of his representations had been fully understood.

27. The Appellant had not submitted a witness statement to the Tribunal but had provided a document setting out his amended grounds of appeal, explaining the details of his challenge and providing additional evidence in support of his appeal. At the start of the hearing, it was suggested to the Appellant that if he consented, the Tribunal could use the amended grounds of appeal, which he had prepared in response to the Tribunal's directions, as his statement of evidence and Mr Bayne, the Respondent's representative, could cross examine him in relation to the information provided in the amended grounds. The Appellant agreed that he would give oral evidence and affirmed before responding to Mr Bayne's questions.

28. The Tribunal asked the Appellant to clarify some of the information in his statement and Mr Bayne provided closing submissions before the Appellant concluded the hearing with his own closing comments.

29. Following the conclusion of the hearing, on the 14 October 2024, the Respondent's representatives wrote to the Tribunal stating that it appeared that some documents provided by the Appellant in evidence had been omitted from the final hearing bundle. The email provided new copies of pages 1 – 51 of the bundle and these did include some evidence not previously seen by the Tribunal. The Appellant had obtained copies of text messages between him and the young people with whom it was alleged that he had inappropriate exchanges, and some of these had not previously been seen by the Tribunal.

30. We have read the evidence, both in the 312-page hearing bundle and the additional 51 pages provided after the hearing and taken it all into consideration in reaching our conclusions. We considered whether it was necessary to reconvene to hear further submissions from the parties regarding the additional evidence provided after the hearing, but concluded that the issues had all been covered in the hearing and that the documents were, in fact, self-explanatory. It was not, therefore, necessary to reconvene the hearing because the Appellant had submitted the documents himself in the original appeal and had covered the relevant submissions at the hearing.

31. In an email dated 14 October 2024, the Respondent requested that further individuals referred to in the documents provided by the Appellant in support of his appeal should be the subject of an order pursuant to rule 14(1)(b) to prohibit disclosure of the names of the individuals in the decision, to avoid jigsaw identification of the individuals. By order dated 7 November 2024, the Tribunal granted anonymity to the individuals concerned.

Evidence

32. The employer at the care home, where the Appellant was employed as a team leader and care worker, received two complaints by email on the 31 March 2022, from the parents of two teenage girls, that the Appellant had been engaged in inappropriate conduct by firstly, making a Facetime call to Girl A whilst feeding a vulnerable resident and secondly, harassing the two girls, Girl A and Girl B, around the village and by text messages. The employer held meetings with the parents on the 31 March 2022 and recorded a telephone interview with one of the girls, Girl A.

33. On the 1 April 2022, the employer held a meeting with the Appellant to obtain his response to the evidence gathered. The Appellant was shown the video footage of the Facetime call and told of the allegations made that he had asked two girls to provide him with marijuana and asked a girl to sleep with him. The Appellant admitted the inappropriate conduct relating to the vulnerable service user and was summarily dismissed for gross misconduct. The dismissal letter provided a right of appeal to be exercised within 7 days of the date of the letter.

34. The Appellant did not appeal the dismissal within the seven day window granted and the employer referred the matter to the DBS on the 8 April 2022. The employer provided a transcript of the interview with the girls' parents, the recorded conversation by telephone with Girl A and a further telephone conversation with her as evidence to the DBS with the referral form dated 8 April 2022. The employer was unable to provide a copy of the video of the Facetime call because of restrictions on the DBS email box size.

35. Evidence produced by the employer following the complaints by the girls' parents included screenshots of conversations between Girl A and Girl B. The first exchange timed at 20.22 concluded as follows:

"Why did u give him ur nb silly xxx"

"I didn't he found me on ig xx"

"Im not private on ig and he found me no clue how and he face timed me on it xx"

36. A subsequent screen shot timed at 20.28 states:

"Where xx"

"No clue sorry xx"

"Round cric ask [K] he walks round cric all the time xx"

"And we was out like Christmas brake and we was by the like light things by pines and he found us there some how xx"

"I'll ask my mate.. she works at pines xxx"

"Do they both work at pines xx"

"He does aswell bcs he told us, and he was asking us for marawana don't know how to spell haha xx"

"Well I know H does bcs he told us in street when he came up to use xx"

"Is the other one coloured too ye?"

"☺"

37. In oral evidence, the Appellant explained that he had first met the two girls, Girl A and Girl B, at a bus stop in the village when he was returning home from work. He initially denied having any romantic interest in the girls, but in response to questions from the Tribunal, confirmed that he had found Girl A "beautiful", believed her to be older than she was and wanted to befriend her in the hope that he might, in time, establish a relationship with her. He wanted to see "where it would go.".

38. He asserted that the girls had introduced him to the Snapchat social media application and that Girl A had been "chatting with him", calling him "babe" and saying he was her boyfriend in chat messages in the app. He gave evidence that he had corrected her use of that terminology because she already had a boyfriend and provided a printout in support of this evidence from his phone. When she had fallen out with her boyfriend, the Appellant explained that he had intervened to try to get the

boyfriend to apologise to her, so that Girl A would see that he was a good friend to her. He claimed that he had terminated the conversations with her, once he discovered that she already had a boyfriend.

39. The Appellant gave evidence that he believed that the allegations made against him had been made maliciously because of racist prejudice against him. He had been subject to abuse in a Snapchat voice call by an unknown male, had received racist text messages and was subjected to threats when he was on his way to work one dark evening, by a male and a female, but he did not know who they were.

40. The Appellant had produced in evidence transcripts of “chats” he had had with Girl A and other girls, during a period spanning from 25 January 2022 to the 7 February 2022. These were the conversations that he had been able to download but he did not think that they were a complete record of all the “chats” he had with Girl A. The letter submitted with the appeal application confirmed at paragraph 2 (page 8 of the bundle) that he had regular contact with members of the group using WhatsApp, Snapchat and Instagram social media platforms. The Appellant produced evidence of printed excerpts from his ‘chat’ but from only one of the platforms.

41. Relying on the dates provided by the Appellant in his handwritten annotations to the printed “chats”, there were a large number of exchanges on the 25 and 26 January 2022 which related to a falling out between Girl A and her boyfriend and the Appellant’s attempts to encourage them to reconcile. The exchanges continued during the next few days and the Appellant stated that he was not Girl A’s “baby” and that she should chat to her boyfriend. On the 4 February 2022, the Appellant contacted Girl A again and asked whether her relationship with her boyfriend had broken up and asking for details about who had ended the relationship.

42. The Appellant’s explanation for the sharing of information on social media was that when he had first met the girls, there was a group of two girls and three boys at the bus stop. The Appellant had been joined into a social media group with the boys because they shared an interest in football. He had only recently moved to the UK from Nigeria with his brother and was living on the outskirts of the village and working at the care home. The evidence of the Appellant was that he had not obtained the girls’ phone numbers directly from them but from the boyfriend of Girl A.

43. The Appellant gave evidence that he did not think it was fair that he was being criticised for his contact with the girls through social media, when they had been the ones to introduce him to Snapchat and had set up the group in which he was included. His evidence was that he had not asked the girl for her number but had obtained it from her boyfriend.

44. He produced evidence that he had asked the girls how old they were in the text messages shared between them. A transcript setting out a conversation with Girl A stated as follows:

“Girl A: “You told my mates you are going to chop their dicks off”

“Appellant’s response: Making you smile enough every day of your life will be my priority.
Yes I told him that because am not a gay
In my country we hate gay”

“Girl A: But that’s not right I like dick”

“Appellant’s response: Don’t worry you will have enough of me when you want it

Am black and stronger
As long as you have turned 18 I will do anything for you"

"Girl A : " I have a boyfriend"

45. Interspersed with the conversation with Girl A were other text messages with two others. In one of the exchanges, the Appellant asked another girl how old she was and she replied that she was 16. The Appellant's message to her was:
"Since I saw your picture with Girl A I have always thought about you….."
And I wish we can be friends and see where it takes us to."

There followed a message wishing the girl a Happy Valentine's day and saying that Girl A had told him that the girl had a boyfriend.

46. In oral evidence, the Appellant explained that he had not appealed the dismissal decision because he did not have the funds to do so; he had not responded to the Minded to Bar letter because he had not received it – having relocated to Bournemouth and relying on his brother, who was still employed at the care home to tell him about the content of his postal correspondence. His brother had expressed reluctance to help him, in case he placed his own employment in jeopardy and consequently, only when his brother had secured alternative employment had he been able to garner his assistance. Finally, his new manager in Bournemouth had helped him to prepare his grounds of appeal and present them to the Tribunal.

47. The Appellant was adamant in oral evidence that in the course of the interview with his employer, he had denied the allegations about harassing the girls, asking for marijuana and sex. He insisted that he had denied all these allegations at the initial interview with his employer: he had admitted only to the inappropriate Facetime call. He could not offer any explanation why the interview notes only referred to the allegations and did not contain his denials or make any reference to them.

48. During the course of the investigation into the complaints against the Appellant, the employer had spoken to Girl A and her parent. Girl A had spoken on the phone to the employer and confirmed that the Appellant had asked her to sleep with him and to get him marijuana. She stated that he had been hanging around outside the pub where she worked and in the bus stop and followed them around the village. She had been scared to go our because of his interest. In a second recorded conversation, Girl A explained how the Appellant had asked her friend if she would have sex with him. Girl A had subsequently blocked the Appellant from Instagram so that he couldn't message her.

Analysis and conclusion

49. This was purely an error of fact case. The Appellant's position was that the DBS had made a mistake of fact in concluding that he had harassed the two girls on social media and in the street; he denied having a sexual interest in young girls and denied that he had asked the girls for marijuana or asked one of them for sex.

50. In deciding this appeal, we have taken into account all the documentary material before us, including the written arguments contained in the DBS's response to the appeal and the Appellant's amended grounds, additional documentary evidence and oral evidence. We have taken into account all that was said at the hearing including the written and oral submissions of the Respondent's representative as well as those of the Appellant.

51. We have had the benefit of all the documentary evidence which was before the DBS which was properly and fully disclosed pursuant to the Upper Tribunal's directions. We have had, in addition to that, additional documentary evidence from the Appellant and the valuable benefit of hearing oral evidence from the Appellant which was tested by way of cross-examination and probed by further questions asked by the Upper Tribunal's panel members.

52. Here, we are dealing with a dispute of fact. We are not restricted to a consideration of the material which was before the DBS when it made its findings of fact and its decision (see paragraphs 42 and 51(c) of the decision of the Upper Tribunal in PF). We have the DBS reasoning as set out in its decision letter before us and we have taken account of it, in the context of the evidence as a whole (para 49 of PF). We bear in mind that aspects of the DBS's reasoning may assist us in making our own assessment of the evidence which is before us and which is now supplemented by additional evidence over and above that which was before the DBS. We have borne in mind that it is for the Appellant to show, on a balance of probabilities, that the DBS has made a mistake of fact.

53. We considered first of all, the appeal against the finding that the Appellant had harassed two girls on social media and in the street. We considered the evidence in support of that allegation. We read the 'chats' and considered the Appellant's explanation of their meaning and his evidence about the events which occurred.

54. The Appellant sought to blame the two girls for introducing him to the Snapchat application and then using inappropriate language with him, calling him 'baby' and 'boyfriend' but we found such use minimal within the printed chats and concluded that a 30-year old man should have realised the immaturity of the girls and taken into consideration that he was the adult and was responsible for his own conduct and behaviour. Even if the girls had sought to befriend him, it was his responsibility, as the adult, to maintain boundaries and ensure that there were no inappropriate exchanges between them.

55. The majority of the exchanges with Girl A occurred over a period of time from the last week in January through to February. The Appellant's evidence is that he joined the Snapchat app on the 23 January 2022 at the instigation of the girls.

56. The contents of the chat recorded on the 24 January 2022 with the boys about football, includes a reference to the Appellant finding Girl A on Instagram, which corroborates Girl A's version of events and contradicts his own version that he was given the number by her boyfriend. There is no doubt that the direct contact between the Appellant and Girl A started then, the question is whether it amounted to harassment.

57. Noting the tone, for instance where the Appellant was demanding that the girl show him her face in their exchanges, the timing, the content and the volume of the exchanges with Girl A, together with the Appellant's oral evidence at the hearing that he was hoping to demonstrate himself as a good friend and hoping that the exchanges would develop into a relationship, amounted to conduct which can be described as harassment and also potentially, as grooming of the girl. Girl A's stated fear of walking the streets and leaving her job at the pub if the Appellant was about, add to a picture of harassment.

58. The Appellant's evidence was internally inconsistent. The Appellant vehemently denied the allegations made against him that he harassed the girls both in social media and in the street. He stated that he had stopped the text conversations with Girl A, when he found out she had a boyfriend but the evidence from the printed "chats" indicates otherwise. He was actively continuing the chats with Girl A even though he was aware that she had a boyfriend and discussed the relationship with both of them, albeit in an attempt to ensure the continuation of that relationship. His stated motive however was to try to ingratiate himself with Girl A in the hope that a relationship would develop with him over time.

59. We concluded that the Appellant's evidence about his conversations with Girl A was unreliable, because he said two inconsistent things: the first was that he had stopped contacting Girl A when he found she had a boyfriend. The second was his assertion that he had no sexual interest in young girls, yet in oral evidence he stated that his motive for intervening in the relationship between Girl A and her boyfriend was in the hope that she would trust him as a good friend and that a relationship would develop between them.

60. Contemporaneous texts from Girl A to Girl B confirm that she did not provide her number to the Appellant, but that he found her on Instagram and contacted her directly and called her using that platform. We concluded that we preferred the evidence of Girl A and B and that both the social media interaction and exchanges in the street amounted to harassment of them because the contact was high volume and became unwanted, leading to Girl A's blocking of him on Instagram.

61. The girls' evidence was that the Appellant had asked the two girls when he met them, what was their age. His evidence was that they had not told him, their evidence was that they had told him 15, because they thought that would mean he would leave them alone. We preferred the evidence of the two girls because they would have no reason to fabricate that element of the evidence and the Appellant's printed texts indicate that this was a question that he often posed when communicating with girls.

62. There were some elements of the girls' disclosed "chats" which could be interpreted in more than one way and we were aware and took into consideration that we did not have all the dialogue or the full chat conversations in evidence before us. There was, however, sufficient evidence in the "chats" of the Appellant's attempts to befriend and develop his relationship with Girl A and also requests that she introduce him to eligible girlfriends at her school, and interspersed with those messages, texts to other young girls who told him that they were under 18. These conversations lend support to the conclusion and finding that he had a sexual interest in young girls.

63. Moving on to the second ground of appeal, the evidence about the request for sex had been presented as evidence by Girl A, directly to the employer during an interview with Girl A's mother, held on the 31 March 2022.

64. The internal inconsistency in the Appellant's evidence was that in his initial evidence he denied any sexual interest in the girls but in answer to the tribunal's questions, he admitted that he had been hoping to develop a relationship with Girl A, who had been described by him as "beautiful". His denial of his interest in teenage girls is not credible, because in the "chats" presented in evidence, there are

examples of the Appellant checking the ages of the girls with whom he was communicating, he suggested that they could introduce him to friends at school and was open about seeking to find himself a girlfriend and his readiness to wait for someone until they reached the age of 18. All of these elements indicate an interest in young girls and reflect the fact that he was aware that they were under the age of 18 years.

65. Girl A's evidence in the telephone interview by the employer was that the Appellant had asked her to sleep with him and in the second, recorded conversation, she stated that the Appellant had also asked Girl B for sex. We preferred the evidence of Girl A and accept it as more likely than not that the Appellant had asked both girls for sex.

66. The final ground was that the Appellant had not asked teenage girls for marijuana. We noted that texts made contemporaneously between the girls referred to a request for marijuana. There was no explanation offered by the Appellant why such an exchange would have taken place between them at the time if it had not been true.

67. We preferred the evidence of the girls because Girl A's version of events was consistent and was corroborated by the Appellant's own evidence, the evidence contained in the screen shots and chat conversations and the evidence in the employer's investigation interview that a request for marijuana had been made and find on a balance of probability that the Appellant asked the girls for marijuana.

68. In the investigation interview by the employer, the Appellant did not contest the allegations made against him in relation to the two young girls. The Appellant's oral evidence at the hearing was that he had denied the allegations in the course of the interview, but that no record was made of his denials. We did not find that assertion credible given the level of detail in the interview record. It is very unlikely that such an important denial would not have been recorded by the employer's note taker. We concluded that no such denials had been made in the course of the interview.

69. The employer's investigation resulted in a finding of gross misconduct and the Appellant's summary dismissal. The Appellant did not appeal against the dismissal decision on the 4 April 2022, despite being told that a right of appeal existed both during the interview with the employer on the 1 April 2022 and in the decision letter given to him subsequent to his interview. Reference was made in the course of the investigation interview and letter to the allegations about marijuana and sex, yet the Appellant did not contest those allegations. Furthermore, he did not respond to the Minded to Bar letter nor make any representations until after the deadline had passed. Not until he received a report from a new employer did he present his grounds of challenging the DBS decision to bar.

70. The Appellant's explanation for not challenging the evidence against him was that he was relying on his brother to assist him. His brother was however, reluctant to do anything for fear of losing his own job. We noted that the Appellant was able to express himself very clearly in the tribunal hearing, giving oral evidence before the tribunal and did so without the support of others. We accept that his new manager had assisted him in the preparation of his written amended grounds of appeal but he was capable of expressing himself clearly in oral evidence. We found his explanation for failing to challenge the evidence at the time of his dismissal as lacking credibility.

71. The Appellant suggested at the hearing that the allegations against him were made maliciously for racist reasons but we could not identify any reason why the girls would not be truthful in their evidence to the employer. We could not identify any reason why the girls would fabricate allegations against the Appellant and whilst it is shocking that the Appellant should have been the subject of racist comments and threats in a rural Welsh village, he did not attribute this to the girls and stated that he did not know who had made those comments and threats. We conclude that we prefer the evidence of Girl A and Girl B and find their accounts more reliable than that of the Appellant. We find as a fact that the Appellant asked two teenage girls if they could obtain marijuana for him and asked them for sex.

72. In this case, we have decided, on a balance of probability, that the factual findings of the DBS decision were correct: we could not identify any mistake or error of fact in their findings. That means that it is more likely than not that the facts found occurred. Because we have been unable to identify a mistake, the decision stands and we confirm the decision made to include the Appellant's name in both barred lists.

Appeal dismissed.

Meleri Tudur
Judge of the Upper Tribunal
Tribunal Member Suzanna Jacoby
Tribunal Member Rachael Smith

Authorised for issue on 25 November 2024