

## **CDC case law update 22 – January 2018**

*This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases. Where legal issues arise specialist legal advice should be taken in relation to the particular case.*

### ***RF v Secretary of State for Work and Pensions (Mind and Equality and Human Rights Commission intervening) [2017] EWHC 3375 (Admin)***

*The High Court quashed the regulations for Personal Independence Payment (PIP) mobility component which discriminated against people with mental health problems.*

#### Case overview

The High Court allowed an application for judicial review in which the regulations which limited payment of Personal Independence Payment (PIP) mobility component to reasons 'other than psychological distress' were challenged as discriminatory against some disabled people, particularly those with mental health problems. The judgment shows the risk that public bodies can discriminate against different groups of disabled people, not simply against disabled people as a whole by comparison with non-disabled people.

#### Decision

The claim was brought by an individual, RF, supported by Mind and the Equality and Human Rights Commission who intervened in the case. The challenge was to a set of regulations (the Social Security (Personal Independence Payment) (Amendment) Regulations 2017) which limited payment of mobility component to people whose difficulties with travel arose for reasons 'other than psychological distress'. The definition of 'psychological distress' was 'distress related to an enduring mental health condition or an intellectual or cognitive impairment'. The regulations were intended to overturn an earlier decision of the Upper Tribunal which allowed people suffering psychological distress to obtain PIP mobility component. The effect of these regulations was therefore that many people with mental health problems and some people with learning disabilities and brain injuries were prevented from accessing the mobility component of PIP, even if their mental illness, learning disability or brain injury was so severe that they were entirely unable to travel, if the reason for this was psychological distress. The judge held this was likely to exclude tens of thousands of claimants from obtaining PIP mobility component.

The judge noted that the intention behind the new PIP scheme (as set out in official government documents) was to focus on the impact of a person's impairment, not the nature of the impairment. The documents leading up to the introduction of PIP did not suggest that people whose mobility difficulties arose from psychological distress would be treated differently than other disabled people. The regulations were only introduced in 2017 after the Upper Tribunal had held that the

government's interpretation of the original regulations as excluding people experiencing psychological distress from PIP mobility component was wrong.

The judge held that the PIP scheme fell within Article 1 of the First Protocol to the European Convention on Human Rights (A2P1), the right to peaceful enjoyment of possessions. It also fell within Article 8, the right to respect for family and private life. It therefore engaged Article 14, which prohibits discrimination in the enjoyment of convention rights. Disability is an 'other status' protected by Article 14. As such different treatment of disabled people in the same position as others will be unlawful if that difference in treatment cannot be objectively justified.

The judge held that the government could not justify the difference in treatment under the regulations of people experiencing psychological distress compared with other disabled people. Firstly, the objective of saving money could not justify the limitation of this group of disabled people's rights. Secondly, the measure was not 'rationally' connected to the objective of saving money, because the government could not establish that people experiencing psychological distress have a lower level of functional need than other disabled people. Thirdly, the measure was not the least intrusive measure that could have been used to achieve the objective of saving money. Finally, the measure did not strike a fair balance between the severity of the impact on people experiencing psychological distress and the importance of the objective. On this final point the judge referred to Article 19 of the UN Convention on the Rights of Persons with Disabilities, which protects disabled people's right to live independently and be included in the community.

The judge also found that (1) the regulations were *ultra vires*, being outside the power created by Part 4 of the Welfare Reform Act 2012 and (2) the defendant's failure to consult prior to making the regulations was unlawful.

#### What this means for children, young people and families

The direct impact of this judgment for disabled young people is that they will not be excluded from PIP mobility component if their difficulties with travel arise from psychological distress. However the government has been granted permission to appeal so the Court of Appeal may take a different view. Young people who may be affected by this judgment and their families should therefore take specialist welfare rights advice quickly.

***LATEST: The Government have announced they will not appeal against this ruling so the High Court's decision will stand.***

The wider implication of this judgment is to emphasise that disabled people with particular impairments have a right not to be discriminated against, not only by comparison with non-disabled people but by comparison with other groups of disabled people. For example, a disabled child or young person who was treated less favourably by a special school by reason of their particular impairment could bring a disability discrimination claim against that school, even though by definition all the children or young people attending that school would be 'disabled'. The school would then need to be able to objectively justify that difference in treatment.

### Implications for local authorities and other public bodies

In the first instance local authorities should ensure that advisers and parent groups are aware of this judgment, so that young people with mental health problems, learning disabilities or brain injuries are not wrongly excluded from PIP mobility component.

Local authorities and other public bodies will also be reminded by the judgment of the need to ensure that their policies and decisions do not impact differently on different groups of disabled people, unless this differential treatment can be objectively justified.