

CDC case law update

X v The Governing Body of a School (SEN) [2015] UKUT 0007 (AAC)

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.

Case overview

This appeal addresses the position where a child who would otherwise be 'disabled' for the purposes of the Equality Act 2010 loses the benefit of that legal protection because of their behaviour.

The case involved the Upper Tribunal interpreting regulation 4(1) of the Equality Act 2010 (Disability) Regulations 2010.¹ This reads in full:

'For the purposes of the Act the following conditions are to be treated as not amounting to impairments:

- (a) a tendency to set fires;
- (b) a tendency to steal;
- (c) a tendency to physical or sexual abuse of other persons;
- (d) exhibitionism; and
- (e) voyeurism.'

What these matters have in common is that they are deemed to be 'anti-social' behaviour.

The parents, Mr and Mrs X, challenged the exclusion of their daughter 'S' from her primary school on the grounds of disability discrimination.² S has a diagnosis of autism and experiences difficulties with language, motor skills, sensory modulation and learning. She was aged six when she was excluded.

The First-Tier Tribunal dismissed their appeal on the basis that S came within regulation 4(1)(c) because she had a 'tendency to physical...abuse of other persons'.

The parents appealed to the Upper Tribunal. The Upper Tribunal found that the First-Tier Tribunal had taken the wrong approach to the test in regulation 4(1)(c). However the Upper Tribunal re-made the decision for themselves, found that S came within the terms of regulation 4(1)(c) applying the correct test and so dismissed the claim for disability discrimination.

Decision

The Upper Tribunal asked itself three questions:

1. Does regulation 4(1) apply to children under the age of 18? (section F of the decision)

¹ Made under section 6(6) of and paragraph 1 of Schedule 1 to the Equality Act 2010.

² Section 85 of the Equality Act 2010 provides that a responsible body of a school must not discriminate against a pupil, including by excluding them from the school.

2. Does regulation 4(1) apply where the condition arises in consequence of an impairment that is already protected under the provisions of section 6 of the 2010 Act, i.e. a disability? (section G)
3. What is the meaning of 'a tendency to physical...abuse of other persons' under regulation 4(1)(c)? (section H)

The answers to these questions were as follows:

1. Regulation 4(1) applies equally to children and adults. The attempts by the Appellant's lawyers to distinguish children's cases, including by reference to international human rights instruments and guidance documents, were all rejected.
2. It did not matter that any tendency to physical abuse S may have arose out of an impairment (autism) that was itself protected under section 6 of the 2010 Act. The Upper Tribunal referred back to case law decided under the Disability Discrimination Act (DDA) 1995 in support of this conclusion. It noted that Parliament had re-enacted the relevant provisions in the same terms as was used in the DDA 1995 and so had not taken the opportunity to overturn the old case law. The relevant statutory guidance³ also reflected the previous case law.
3. The phrase 'a tendency to physical or sexual abuse of other persons' must be considered in the round. The following guidance was given:
 - a. A tribunal must consider all the circumstances of each individual case.
 - b. There must always be an element of violent conduct. The greater the level of violence, the more likely it is that the test is met.
 - c. There is no requirement for knowledge on the part of the person that what they are doing is wrong. However 'if the conduct complained of constituted something akin to a spasmodic reflex, in our judgment it would not meet the terms of the definition'. It seems that the behaviour must be at least to some extent voluntary if the definition is to be met.
 - d. If there is 'some sort of misuse of power or coercion', a lower level of violence might meet the definition. On the other hand 'a finding of physical abuse in the absence of such factors would be likely to require careful justification'.
 - e. There is no requirement for the behaviour to be frequent or regular. It also may not matter if the tendency is only displaced in response to certain trigger events – this does not mean that it is not present at other times.

Applying these tests, the Upper Tribunal found that S did have a tendency to physical abuse. It held that 'even if S's violent conduct constituted a form of "frustrated lashing out" triggered by particular stresses, we are satisfied that the conduct constituted evidence of S's condition of a tendency to physical abuse of other persons'.

³ Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability.

The Upper Tribunal took account of S's young age and the absence of 'any power abuse or coercion on her part'. As such 'careful justification' was required for a finding that regulation 4(1)(c) applied. This justification was present because of the 'significant element of violent conduct on the part of S', as set out in the decision at para 129.

The Upper Tribunal's conclusions followed at paras 130-131:

'...in our view the degree of sustained violence significantly outweighs the factors which suggest that there was no tendency to physical abuse of other persons on the part of S. Thus, we are satisfied, on a balance of probabilities, that S's behaviour manifested a condition of a tendency to physical abuse of other persons.

Even though that tendency arose in consequence of S's autism, regulation 4(1)(c) of the 2010 Regulations applies...'

As a result, in relation to the behaviour which led to S's exclusions she was not to be treated as having an impairment, meaning she was not 'disabled' for the purposes of section 6 of the Equality Act 2010.⁴ Her parents' claim was therefore dismissed.

What this means for children, young people and families

The decision of the Upper Tribunal reinforces the legal position that some disabled children (and adults) will lose the protection of anti-discrimination law where their behaviour is 'anti-social'. The most common problem will be where the child's behaviour amounts to a 'tendency to physical...abuse of other persons'.

Before claiming disability discrimination, it will be necessary for children, young people and families to think about whether the responsible body will rely on regulation 4. Can it be said that the treatment complained of, for example a school exclusion, is related to the child's 'tendency to physical abuse'? Some key factors would seem to be:

1. How much violence can be shown to have been used by the child?
2. Is the violence to some extent voluntary?
3. Is there any evidence of misuse of power or coercion?
4. Is there evidence of a 'tendency' (although this part of the test seems to have been set at a low level)?

It is important for families to note that even where a child may behave in a way that brings them within the definition in regulation 4(1), a claim of disability discrimination can still be made in relation to treatment which does not relate to that behaviour. An example given in the guidance, and repeated by the Upper Tribunal, is a young man with ADHD which results in both exhibitionist behaviour and an inability to concentrate. If he is treated less favourably as a result of exhibitionism he cannot claim disability discrimination; see regulation 4(1)(d). However if the treatment related to his inability to concentrate he would be entitled to bring a claim or seek remedial action by the responsible body, for example that reasonable adjustments should be made.

⁴ Section 6(1) of the Equality Act 2010 begins 'A person (P) has a disability if (a) P has a physical or mental impairment, and...'

The Upper Tribunal highlighted in its decision that even though a child whose behaviour comes within regulation 4(1) is excluded from the protection of the Equality Act 2010, they are still entitled to support under Part 3 of the Children and Families Act 2014 in relation to their special educational needs. Further CDC would note that they enjoy the same human right to education as all other children under Article 2 of the First Protocol to the European Convention on Human Rights. So a suitable education must be provided to the child – although not necessarily at a school which may have excluded them as a result of their behaviour.

Implications for local authorities and other public bodies

Local authorities, school governing bodies and other public bodies will need to consider regulation 4(1) in any case where it is said that disability discrimination has taken place and violence is a relevant factor. The other exclusions in regulation 4(1) should also be borne in mind but are less likely to arise.

Local authorities must also respond quickly to situations where children's special educational needs are not being met, including where necessary by carrying out a statutory assessment and putting in place an Education, Health and Care Plan.

Section 19 of the Education Act 1996 requires suitable education to be provided to all children at all times. This applies equally to children whose behaviour may bring them within the definition in regulation 4(1). A failure to provide such education may result not only in a breach of the 1996 Act but also in a breach of the child's human rights.

CDC is concerned about the consequences of the Upper Tribunal's judgment, which appear to seriously undermine the protections of the Equality Act 2010 for some disabled children, for example those with autism. We will be exploring with the new government the possibility of amending regulation 4(1) to make clear that it only applies where there is no underlying disability. We will update through the [CDC Digest](#) if there is any suggestion that the regulation will be amended.

Judgment available at: <http://www.osscsc.gov.uk/Aspx/view.aspx?id=4399>