HS/3177/2017

Attendances:

For the appellants: Stephen Broach (instructed by Irwin Mitchell)
For the respondent: Samantha Paxman (employed by Browne Jacobson)
For the First Interested Party: Sarah Hannett (instructed by the Government Legal Department)
For the Second Interested Party: Nick Armstrong (instructed by Clifford Chance, acting pro bono)

Decision: The decision dated 29 August 2017 of the First-tier Tribunal (Health, Education and Social Care Chamber) (Special Educational Needs and Disability) under reference number EH830/16/00043 is erroneous in law and is set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. I am able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is in the terms of the confidential consent order agreed by the appellants and respondent, attached hereto but not published with this decision.

I direct that there is to be no disclosure or publication of any matter likely to lead members of the public to identify the child with whom this appeal is concerned, pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS FOR DECISION

1. I held an oral hearing of this appeal on 3 and 4 July 2018. Representation of the parties was as set out above. I am grateful to all Counsel for their assistance in this case. The appellants' case is supported by the Equality and Human Rights Commission.

Terminology

2. In these Reasons:

"*L*" means the child with whom this case is concerned;

"*the appellants*" means L's parents;

"*the respondent*" means the responsible body of the school with whose decision this case is concerned;

"*the Secretary of State*" means the Secretary of State for Education, the First Interested Party;

"*NAS*" means the National Autistic Society, the Second Interested Party;

"*the school"* means the mainstream primary school attended by L between 2011 and 2016;

"*the tribunal"* means the First-tier Tribunal with whose decision this case is concerned.

Introduction

3. Evidence in this case suggests that some children with disabilities such as autism or attention deficit hyperactivity disorder ("ADHD") may lash out at others around them in school. In the case of children with autism this may be simply because of difficulties arising from being in the school environment. Challenging behaviour or 'meltdowns' may be caused by the child being overwhelmed with frustration arising from an inability to express their wants and needs, a reaction to unexpected changes to fixed daily routines and/or sensory overload. The particular child may have no intention to hurt others and their aggressive behaviour may be intrinsic to their underlying disability. Existing case law suggests that such children are presently outwith the protection of the Equality Act 2010 ("the Equality Act") insofar as their physically aggressive behaviour falls within the definition of a 'tendency to physical abuse.' As the Upper Tribunal Judge said in *C v Governing Body of I School (SEN) [2015] UKUT 0217 (AAC)* their 'tendency to physical abuse' is 'stripped out' of any recognition of their disability (paragraph 25.1). If they are excluded from school because of that behaviour, any claim against the school for discrimination arising out of a disability in relation to it would, under the current interpretation of the domestic law, be doomed to fail, without more. There would be no requirement for the school to explain why the exclusion was justified and proportionate or to address whether it had made reasonable adjustments which may have reduced the risk of the physically aggressive behaviour. The justification put forward is that the Equality Act 2010 should not provide protection for people where the effect of their condition involves 'criminal or anti-social activity' which has an impact on others, and decision-makers such as schools should not have to be called upon to justify the proportionality of their decisions.

4. L is one such child. He has autism, anxiety and Pathological Demand Avoidance. The appellants brought a claim in the tribunal under the Equality Act complaining of discrimination on the grounds of L's disability by the respondent in three respects. This appeal is concerned with only one of them, namely L's fixed term exclusion from the school on 25 February 2016 for a period of 1½ days. At that time L was 11 years old. The reason given for the exclusion was L's aggressive behaviour. The tribunal found that L had been involved in a number of incidents over a ten-month period, largely involving pulling, pushing and grabbing others. There was, however, one occasion when he hit a teaching assistant with a ruler, pulled her hair and punched her and another occasion when he hit the same teaching assistant with a book.

5. The tribunal considered that L generally met the definition of a disabled person for the purposes of section 6 of the Equality Act. However, it dismissed this part of the claim because L had been given the exclusion as a result of his 'tendency to physical abuse' and so, pursuant to the provisions of regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010 (S.I. 2010/2028) ("the 2010 Regulations"), was to be treated as not falling within the definition of 'disability.' The tribunal rejected the appellants' submission that regulation 4(1)(c) should be read down or disapplied so as to avoid a breach of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Article 14"). In those circumstances the tribunal was not required to, and did not, go on to address whether the respondent's decision temporarily to exclude L from school was a proportionate means of achieving a legitimate aim.

6. There is no challenge to the tribunal's finding that L had a 'tendency to physical abuse.' Rather, the issue on this appeal is whether the tribunal made an error of law in finding that L was not 'disabled' insofar as his 'tendency to physical abuse' was concerned. It falls to me to determine whether the current interpretation of regulation 4(1)(c) of the 2010 Regulations, which removes a 'tendency to physical abuse' from the definition of 'disability' for the purposes of the Equality Act, is compatible with Article 14 read with Article 2 of

Protocol 1 ("A2P1"). The appellants and NAS (which has been joined to this appeal as an interested party) say that it is not. The Secretary of State (who, likewise, has been joined as an interested party) submits that it is. The respondent is content to rely upon the submissions of the Secretary of State.

7. Two witness statements with exhibits were produced in evidence before me. NAS relied on the statement dated 30 May 2018 of Mr. Mark Lever, its Chief Executive Officer. The Secretary of State relied on the statement dated 20 June 2018 of Mr. Christopher Ball, a Policy Adviser in the Department for Education's Special Educational Needs and Disabilities, Alternative Provision and Attendance Unit. Mr. Ball has for the last two years been the lead official advising Ministers on the issues arising out of the 'tendency to physical abuse' exemption in relation to disabled children and young people.

The Equality Act

Overview

8. Part 2 of the Equality Act prohibits discrimination (as defined) on the grounds of protected characteristics (as defined). The remainder of the Act provides that discrimination on the grounds of a protected characteristic is unlawful in specified contexts, subject to exceptions.

Discrimination

9. By section 15(1):

> 'A person (A) discriminates against a disabled person (B) if-
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.'

10. Section 20 contains the duty to make reasonable adjustments. That duty includes the following requirement under section 20(3). It is called the first requirement:

> '… where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to the relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.'

11. The second requirement is not relevant to this appeal. Section 20(5) contains the third requirement, which is:

> '… a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.'

12. If a person fails to comply with the duty to make reasonable adjustments, by section 21(2) they will discriminate against the disabled person.

Discrimination in schools

13. Chapter 1 of Part 6 of the Equality Act deals with discrimination in schools. The appellants' claim was brought under section 85. Section 85(1) deals with discrimination in admissions to schools. Section 85(2) provides that:

> 'The responsible body of [a school to which this section applies] must not discriminate against a pupil-
> (a) in the way it provides education for the pupil;
> (b) in the way it affords the pupil access to a benefit, facility or service;
> (c) by not providing education for the pupil;
> (d) by not affording the pupil access to a benefit, facility or service;
> (e) by excluding the pupil from school;
> (f) by subjecting the pupil to any other detriment.'

14. Pursuant to section 85(6):

> 'A duty to make reasonable adjustments applies to the responsible body of such a school.'

15. Paragraph 2 of Schedule 13 to the Equality Act applies in respect of reasonable adjustments in schools. It imposes a duty on the responsible body of a school to comply with the first and third requirements in section 20 (paragraph 2(2)). According to paragraph 2(4):

> 'In relation to each requirement, the relevant matters are-
> (a) deciding who is offered admission as a pupil;
> (b) provision of education or access to a benefit, facility or service.'

16. It is common ground that it follows that the duty to make reasonable adjustments in schools is confined to the matters contained in sections 85(1) and (2)(a) to (d), but a claimant may rely on a failure to comply with the duty to make reasonable adjustments in support of an argument that the unfavourable treatment was not a proportionate means of achieving a legitimate aim (*C v Governing Body of I School* [2015] UKUT 217 (AAC)).

The definition of disability

17. By section 4 of the Equality Act a 'protected characteristic' includes 'disability.' Section 6(1) defines 'disability' in this way:

> 'A person (P) has a disability if –
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

18. Section 6(5) gives power to a Minister of the Crown to issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1). The relevant guidance is the 'Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability' (May 2011). I shall return to this below.

19. Section 6(6) gives effect to Schedule 1 to the Act. Paragraph 12 of Schedule 1 provides, so far as is material:

> '(1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks relevant.
> (2) an adjudicating body is-
> …
> (b) a tribunal …'

20. Paragraph 1 of Schedule 1 confers a power to make regulations 'for a condition of a prescribed description to be, or not to be, an impairment.'

The 2010 Regulations

21. The relevant regulations are the 2010 Regulations. Regulation 4 is headed 'Other conditions not to be treated as impairments' and provides as follows:

> '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.'

The historical context

22. For the purposes of this appeal it is important to put the Equality Act and 2010 Regulations in their historical context. Section 6(1) of, and paragraph 1 of, Schedule 1 to the Equality Act are, in all material respects, identical to section 1 of, and paragraph 1 of, Schedule 1 to the Disability Discrimination Act 1995 ("the DDA"), the predecessor legislation. Equally, regulation 4(1) of the 2010 Regulations is in identical terms to regulation 4(1) of the Disability Discrimination (Meaning of Disability) Regulations 1996 (SI 1996/1455). As originally enacted the regime did not apply to education but was extended to that field by the Special Educational Needs and Disability Act 2001.

23. The DDA and 1996 regulations were considered in *X Endowed Primary School v SENDIST and Mr and Mrs T and the National Autistic Society* [2009] EWHC 1842 (Admin) ("*the First X Case*"). In that case Lloyd Jones J concluded that regulation 4 applied not only to free-standing conditions but also to symptoms or manifestations of protected impairments.

24. It is of note that the Equality Act was enacted, and the 2010 Regulations made, following this decision. There is an Explanatory Memorandum to the 2010 Regulations ("the Explanatory Memorandum"). It contains the following provisions:

> '*2. Purpose of the instrument*
>
> This instrument supplements provisions in the Equality Act 2010 that provide protection from discrimination for disabled people. It makes provision on a range of technical issues that are not appropriate for inclusion in the Act itself. It supports the definition of disability in the Act by helping to define who is, and who is not, a disabled person for the purposes of gaining the protection of the Act.
>
> *7. Policy background*
>
> <u>What is being done and why</u>
>
> 7.1 … In general, the protection of the DDA has been carried forward to the disability provisions of the Equality Act … This instrument consolidates and applies various technical provisions relating to the definition of disability and the duties to make reasonable adjustments for disabled people, for the purposes of the Equality Act.
>
> <u>Definition of disability</u>
>
> 7.2 The disability provisions of the Equality Act provide protection from discrimination on the basis of the protected characteristic of disability, and the Act defines a disabled person … [The] definition of disability is intended to reflect what would generally be regarded as a disability.
>
> 7.3 This instrument prescribes that addictions to non-prescribed substances, and certain other conditions, like a tendency to steal, are excluded from being

> impairments and, consequently, from providing protection under the Act. These are excluded for public policy reasons, for example to avoid providing protection for people where the effect of their condition may involve anti-social or criminal activity. Or they are excluded because they are not conditions that are generally recognised as disabilities.'

25. The 'Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability' (May 2011) ("the Guidance") was issued by the Secretary of State pursuant to section 6(5) of the Equality Act. Whilst expressly recognising that it does not impose any legal obligations in itself, and that it is not an authoritative statement of the law, it re-states that paragraph 12 of Schedule 1 to the Act requires that an adjudicating body which is determining for any purpose of the Act whether a person is a disabled person, must take into account any aspect of the guidance which appears to it to be relevant.

26. The conditions which are not to be regarded as impairments for the purposes of the Act are set out at paragraph A12 of the Guidance. Paragraph A13 sets out that the exclusions apply: (i) where they constitute an impairment in themselves and (ii) where the tendencies 'arise as a consequence of, or a manifestation of, an impairment that constitutes a disability for the purposes of the Act.' It contains an often-cited case study highlighting how regulation 4 operates in practice:

> *'A young man has Attention Deficit Hyperactive Disorder (ADHD) which manifests itself in a number of ways, including exhibitionism and an inability to concentrate. The disorder, as an impairment which has a substantial and long-term adverse effect on the young person's ability to carry out normal day-to-day activities, would be a disability for the purposes of the Act.*
> *The young man is not entitled to the protection of the Act in relation to any discrimination he experiences as a consequence of his exhibitionism, because that is an excluded condition under the Act.*
> *However, he would be protected in relation to any discrimination that he experiences in relation to the non-excluded effects of his condition, such as inability to concentrate. For example, he would be entitled to any reasonable adjustments that are required as a consequence of those effects.'*

27. It was against this background that a Three Judge Panel of the Upper Tribunal (Administrative Appeals Chamber) considered the ambit of regulation 4(1) of the 2010 Regulations in *X v The Governing Body of a School (SEN)* [2015] UKUT 0007 (AAC) ("*the Second X Case*"). It reached a similar conclusion to that of Lloyd Jones J in the *First X Case*. The Panel considered that consideration had been given to the terms of the relevant body of regulations when the legislation was reviewed in 2010. It noted that the words of the Guidance differed from those of the one issued under the DDA and appeared to reflect the language used by Lloyd Jones J in the *First X Case.* It concluded that '[h]ad Parliament intended, in 2010, in the light of [the *First X Case*], to provide that the tendencies excluded by reg 4(1) applied only to free-standing conditions, we would have expected that to have been made clear in explicit terms in the enabling provisions and/or subordinate legislation. On the contrary, the relevant provisions were simply re-enacted in all material respects, without more.' (paragraph 87).

28. The Panel went on to give the following guidance as to how tribunals should approach the issue of whether a person has a 'tendency to physical … abuse of other persons.' Despite its length, it is necessary to set it out in full:

‘115. The issue is ultimately one of fact and is eminently appropriate for consideration by a tribunal. In addressing whether a person has “a tendency to physical … abuse of other persons” a tribunal must consider all the circumstances of each individual case. Against this background, we give the following guidance.

116. First, we note that Parliament has chosen not to use the phrase “physical violence”. We infer that there must always be an element of violent conduct. However, that on its own may not necessarily be sufficient to meet the definition. The greater the level of violence, the more readily it will fall within the meaning of “physical abuse”.

117. Secondly, there is no requirement for any knowledge on the part of the perpetrator that what they are doing is wrong. This is because the regulation is concerned with the manifestation of behaviour. We remind ourselves of the terms of paragraph 7.3 of the Explanatory Memorandum to the 2010 Regulations: The tendencies in regulation 4(1) are excluded for public policy reasons, “for example to avoid providing protection for people where the effect of their condition may involve anti-social or criminal activity”. 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.

118. Thirdly, the existence of some sort of misuse of power or coercion may lead to the conclusion that a much lower degree of violence than would otherwise fall within the terms of the regulation would suffice. Conversely, a finding of physical abuse in the absence of such factors would be likely to require careful justification.

119. Fourthly, whilst children are, as a matter of law, included within the ambit of regulation 4(1)(c), nevertheless as we have already observed, the stage of a child’s development is a factor which will fall to be considered in deciding whether or not that particular child has a condition so as to bring it within the remit of the regulation at all. If the child does have such a condition, then insofar as the child’s conduct manifests a tendency to physical abuse of other persons it will fall within the terms of the regulation.

120. Finally, it is not necessary for a tendency to physical abuse to be manifested frequently or regularly. It may be that the tendency is only displayed in response to certain trigger events, but that does not mean that it is not present at other times. In principle, in some circumstances such a tendency may be revealed in a one-off incident, so long as there is evidence of a tendency to physical abuse in the form of (for example) medical evidence. The regulation is less concerned with whether a particular incident constitutes actual abuse, but rather it focusses on whether the incident is indicative of a tendency to abuse.

121. In summary, a tribunal must approach its consideration of whether a person has “a tendency to physical … abuse of other persons” by reaching conclusions on the evidence, and then explaining why the undisputed facts and those it has found lead to its conclusion, having taken into account all the circumstances of the case including, where relevant, the matters set out above. In so ruling we are conscious that what may be a challenging task for a First-tier Tribunal of determining whether regulation 4(1)(c) is met may be yet harder for those in a busy school. However, that, in our judgment, flows from the legislative choice of a more complex concept such as “physical abuse” rather than, for instance, “violence” or “assault.”’

29. I need not set out the other domestic case law to which I was referred. I should note that it was common ground that whilst the current interpretation of regulation 4(1)(c) is clear, nevertheless in none of the cases has there been a discussion of the compatibility of the provision with Article 14.

Article 14

30. Article 14 provides:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

31. Article 14 is not a freestanding provision. It is to be considered in conjunction with one or more of the substantive rights and freedoms safeguarded elsewhere in the Convention. The relevant one here is A2P1 which provides that 'no person shall be denied the right to education…'

32. There is a significant degree of agreement between the parties as to the application of Article 14. It is common ground that the Article embraces indirect discrimination, described in *DH v Czech Republic* (2008) 47 EHRR 3 in this way: 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.' (paragraph 175). Further, the parties agree that I should adopt the following approach based on that propounded by Lord Wilson (with whom Lady Hale, Lord Clarke and Lord Reed agreed) in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250:

> (a) is the issue within the scope or ambit of another Convention right?
> (b) does L have a relevant 'status'?
> (c) is there differential treatment?
> (d) can the differential treatment be justified?

Scope and status

33. There is no dispute that the issue is within the scope or ambit of A2P1. Nor is there any issue that L has a relevant 'status' falling within 'other status'. Whilst there was a slight difference in the description of the appropriate 'status' suggested by the parties, they agreed that nothing really turned on the difference. I prefer that of Ms. Hannett, namely 'a child with a recognised condition that is more likely to result in a tendency to physical abuse.'

Analogous situation

34. The first substantive issue which I must decide is whether there is a difference in treatment between children with L's status and others in an analogous situation. If there is such an obvious relevant difference between L and those with whom he is compared that their positions cannot be described as analogous then the Article 14 claim will fall at this hurdle (*R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173). I bear in mind Lady Hale's counsel that 'unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.' (*AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434, paragraph 25).

35. The proposed comparator group is disabled children whose condition or impairment does not give rise to an enhanced tendency to physical abuse. Ms. Hannett contended that

the situations of the two groups are not analogous because for one group manifestation of the impairment involves behaviour that reaches the required threshold of quality and intensity so as to amount to a 'tendency to physical abuse' and for the other it does not. So there is, she submitted, such a qualitative difference between the groups that it is an obvious and relevant one.

36. Mr. Broach responded that this difference is in no way sufficient to make the situation of the two groups non-analogous. He pointed out that both groups contain children with a recognised impairment who meet the definition of disability under the Equality Act; both groups contain children who have arguably been subjected to discriminatory treatment which relates to their impairment and therefore (subject to regulation 4) their 'disability' and in both groups it is likely that the less favourable treatment or failure to make reasonable adjustments will relate to problematic behaviour or presentation, particularly in relation to the sub-groups of these two groups who are excluded from school. The only difference between the groups is that the problematic behaviour by one group will not amount to a 'tendency to physical abuse.' The comparator group will, therefore, contain children who have been verbally abusive or persistently disruptive or who have been physically aggressive to a level below the definition of 'tendency to physical abuse'. It is merely the nature of the problematic behaviour leading to the treatment that differs between the groups, and in some cases this will be only in terms of degree rather than type of behaviour.

37. I accept Mr. Broach's submissions. This is not the kind of case where an Article 14 claim should fail because there is not an analogous situation. The differences between the two groups are not very obvious relevant ones and, mindful of the exhortation of Lady Hale, I am of the view that I should concentrate on the issue of justification in this case.

Justification

38. It is well established that a difference in treatment is discriminatory if it has no objective and reasonable justification. It is equally well established that the onus is on the Secretary of State to justify the differential treatment. Whilst there is, inevitably, some overlap between the various factors, the parties' submissions were based upon the conventional four-stage test referred to by Lady Hale in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820 ("***Tigere"***) (at paragraph 33):

> (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right?
> (ii) is the measure rationally connected to that aim?
> (iii) could a less intrusive measure have been used?
> (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has fair balance been struck between the rights of the individual and the interests of the community?

39. In fact, I am of the view that it is only necessary for me to consider the first and fourth of these stages. I will not lengthen this judgment unnecessarily by addressing the second and third. Suffice to say, for present purposes I am prepared to assume that they are satisfied.

40. Before I address the substantive issues, I must consider the level of weight and respect that I should give to the justification put forward by the Secretary of State, the institutional decision-maker. The starting point must be the observations of the Grand Chamber in *Stec v United Kingdom* (2006) 43 EHRR 47 (paragraph 52):

> 'As a general rule, very weighty reasons would have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation."'

41. It is not in dispute that the same principles apply in the domestic context. Further, it is common ground that the test of 'manifestly without reasonable foundation' does not apply to the fourth ('fair balance') stage (*R (A) v Secretary of State for Health (Alliance for Choice and others intervening)* [2017] UKSC 41; [2017] 1 WLR 2492). Mr. Broach sought to persuade me that the 'manifestly without reasonable foundation' test is not applicable to any of the other stages either. As I propose to give substantive consideration to the first stage ('legitimate aim') I must address Mr. Broach's submissions on the issue.

42. I do not accept Mr. Broach's submission that discrimination on the grounds of disability falls within the type of core ground such as sex discrimination which was referred to in *Stec* that the more rigorous standard should be applied. So much was recognised in *Burnip v Birmingham City Council* [2012] EWCA Civ 629 (paragraph 28).

43. Mr. Broach also submitted that this is not the kind of case in which it has been held that the manifestly without reasonable foundation approach applies. He referred me to observations of Lady Hale in *Tigere.* Having recognised that the 'manifestly without reasonable foundation' margin of appreciation is generally afforded to the state on matters of political, economic or social strategy, Lady Hale noted that the test had also been employed in the area of welfare benefits. However, referring to *Ponomaryov v Bulgaria* (2011) 59 EHRR 799 (in which the issue was whether, having decided to provide secondary education free of charge, the state could deny that benefit to those without permanent residence permits) Lady Hale considered education to be 'rather different', the margin of appreciation being narrower because the right to education is given special protection by the Convention and 'is a right constitutive of a democratic society' (paragraph 32).

44. Ms. Hannett's submission in response was that *Tigere* dealt with a core A2P1 issue, namely the effective exclusion of certain international students from tertiary education because of the inability to obtain a student loan, whereas the case before me is one step away from that as it contains an exclusion from one of the procedural ways in which A2P1 may be given effect. I can see the force of that submission. In any event, be that as it may, I accept Ms. Hannett's submission that there is no *ratio* in *Tigere* to the effect that the correct standard is the normal proportionality standard rather than 'manifestly without reasonable foundation' in the education context.

45. I also accept Ms. Hannett's submission that the issue with which this case is concerned is quintessentially one of social policy. Ms. Hannett relied upon *Swift v Secretary of State for Justice* [2013] EWCA Civ 193; [2014] QB 373 in which a claim had been brought pursuant to section 1(3)(b) of the Fatal Accidents Act 1976 by a cohabiting partner of the deceased, whose period of cohabitation was insufficient to entitle her to make such a claim. Lord Dyson MR recognised that cases concerning state benefits constituted 'the most obvious examples of decisions by the legislature on questions of what is in the public interest on social or economic grounds' but he went on to observe that the question of whether or not there should be a statutory right of action in that case also gave rise to 'important and

difficult issues of social and economic policy' (paragraph 25) and a wide margin of appreciation should accordingly be applied. Lord Dyson cited the Grand Chamber decision in *Draon v France* (2005) 42 EHRR 807 in support of the proposition that the test of manifestly without reasonable foundation did not just apply to cases concerning state benefits: '…In matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight.' As Ms. Hannett pointed out, the question as to who should be defined as disabled is, likewise, one on which reasonable people could disagree.

46. Mr. Broach highlighted Lord Dyson's observation that the circumstances in *Swift* did not raise a 'technical legal question which has little or no social or economic consequences.' Despite the reference to 'technical issues' in the Explanatory Memorandum, I fail to see how the issue before me can properly be described as a 'technical' one and in any event, I am of the view that this case is predominantly one which has social consequences. In the circumstances, whilst I accept that the issues are by no means identical, I am satisfied that the case before me falls within a similar context to that in *Swift* in that it concerns construction of a class of individuals who are entitled to bring a cause of action. In short, I am concerned with a matter of social strategy. Accordingly, I start from the position that for the first three stages of the justification analysis one should apply the test of 'manifestly without reasonable foundation.'

47. Even so, as Lord Neuberger remarked in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311 (paragraph 57): 'there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable.'

48. In considering whether this point has been reached, a relevant factor is the extent to which the reasons put forward to justify the difference in treatment were in the decision-maker's mind at the time the decision was made. As Lord Kerr recognised in *In Re Brewster* [2017] UKSC 8; [2017] 1 WLR 519*: ...*'the margin of discretion may… take on a rather different hue when… it becomes clear that a particular measure is sought to be defended (at least in part) on grounds that were not present to the mind of the decision-maker at the time the decision was taken.' (paragraph 50). Nevertheless, Lord Kerr went on to acknowledge that 'even retrospective judgments … if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide' (paragraph 52).

49. To summarise, when considering the first three stages (including 'legitimate aim') in my judgment the 'manifestly without reasonable foundation' test is the appropriate one in this case, suitably adjusted insofar as the Secretary of State seeks to put forward post hoc justification.

50. I now turn to consider the first stage, namely whether the measure has a legitimate aim sufficient to justify the limitation of a fundamental right. It is settled law that '[w]hat has to be justified is not the measure in issue but the difference in treatment between one person or group and another' (per Lord Bingham in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, paragraph 68). In other words, it is the discriminatory effect of the measure which falls to be justified. Mr. Broach urged me to find that the test was narrowed by Lord Kerr in *R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32 when, having referred to Lord Bingham's words in *A v Secretary of State for the Home Department,* he went on to say that '[t]o be legitimate, therefore, the aim must address the perpetration of the unequal treatment, or, as Ms Monaghan put it, the aim must be intrinsically linked to the discriminatory treatment.'

According to Mr. Broach, the effect of these words is that I must consider not the general aim of the measure, but rather whether the perpetration of unequal treatment in this case has a legitimate aim.

51. I cannot accept Mr. Broach's submission. I prefer what Ms. Hannett (who appeared for the appellants in *Steinfeld*) had to say on this issue. Particularly given that there was no argument before the Supreme Court in the respect contended for by Mr. Broach, I am satisfied that Lord Kerr did nothing more than re-state the classic principle. His words must be read in the context of the issue in the case, which was whether the difference in treatment between same sex and heterosexual couples was being justified by a 'wait and see' approach. The thrust of Lord Kerr's observations is that the aim being advanced by the Government had nothing to do with the perpetration of the unequal treatment, no more and no less.

52. The aim advanced by the Secretary of State for the difference in treatment in this case is, in short, a generic policy aim to ensure that the Equality Act does not provide protection for people where the effect of their condition involves anti-social or criminal activity which has an impact on others, whether by actual or potential harm to the others' health or safety, or to their property. This extends to protecting the health and welfare of students and staff in schools. Ms. Hannett submitted that that public policy aim is clearly set out in paragraph 7.3 of the Explanatory Memorandum (see paragraph 24 above). The emphasis on the effect of the condition underlines that the aim contemplated both free-standing conditions and protected impairments.

53. Mr. Broach, on the other hand, submitted that the intention of the regulation was that only free-standing conditions would be included, as the limited policy objective was to exclude conditions that are 'not generally recognised as disabilities', as set out in the Explanatory Memorandum. In response, Ms. Hannett prayed in aid the Guidance (see paragraph 26 above) which makes it clear that the exclusions of regulation 4 apply not only to free-standing conditions but also to manifestations of underlying impairments.

54. There was nothing before me which persuaded me to form a view any different from that of the Three Judge Panel in the *Second X Case* that the Guidance 'accurately depicts precisely what Parliament intended' namely that regulation 4(1) applied to conditions arising in consequence of protected impairments as well as free-standing conditions. Like the Panel, I do not find statements of Ministers made in 1995 helpful, as they did not clearly state the intended meaning of the regulation at that stage.

55. Ms. Hannett went on to explain that what regulation 4 is intended to do, in a broader sense, is to mean that decision-makers do not have to justify what might otherwise be unlawful differences in treatment on the basis of disability. I see the force in Mr. Broach's submission that this explanation was set out in terms for the first time in the written submissions filed on behalf of the Secretary of State in this appeal, in which case I should conduct a more scrupulous examination of the justification than I would otherwise do. Nevertheless, I am of the view that the Secretary of State's explanation of the aim of regulation 4 is worthy of respect. Mindful of Lord Kerr's comments in *Brewster (*see paragraph 48 above), there is nothing before me to suggest that it was not made bona fide or outside the Secretary of State's sphere of competence.

56. In any case, irrespective of what weight I give to the Secretary of State's view, it seems to me that it is unarguable that the exclusion from the protection of the 2010 Act of those who have the excluded conditions has the legitimate aim put forward by the Secretary of State, such aim being sufficient to justify the difference in treatment between the two

groups with which I am concerned. As I have already said, for present purposes I will assume that the measure is rationally connected to the aim and that a less intrusive measure could not have been used. That brings me to what I consider to be the central issue in this case, namely: bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has fair balance been struck between the rights of the individual and the interests of the community?

57. I have already recited the agreement of the parties that the test of 'manifestly without reasonable foundation' does not apply to this stage of the analysis. Rather, I am required to decide the issue for myself, albeit giving 'appropriate' respect to the Secretary of State's decision. Ms. Hannett submitted that the Secretary of State takes the view that the balance as between the rights of children such as L on the one hand, and those of the community more broadly on the other, has been struck in the right place by regulation 4(1)(c).

58. There is a fundamental dispute as to what weight should be afforded to that decision in this case. Ms. Hannett submitted that it should be considerable, whilst Mr. Broach contended that it should be minimal. To a large extent the issue turns on whether the Secretary of State has carried out any - or at least any proper, considered - balancing exercise. Mr. Broach vehemently disagreed with Ms. Hannett's submission that the Secretary of State's stance is a considered one. In essence, Mr. Broach argued that the Secretary of State's decision is one which he has had to make prematurely, solely as a result of being joined to these proceedings, and it is not one which represents a properly considered opinion.

59. It is necessary, therefore, for me to examine the level of consideration which has been given to the balancing exercise. To that end, I must return to the historical context of the regulation. Whilst, for the reasons given above, I am prepared to accept that when the 2010 Regulations were passed it was intended that regulation 4(1)(c) applied to conditions caused by a protected impairment and the Secretary of State is taken to have known that it applied to children in the context of schools, nonetheless there is nothing before me to suggest that there was any attempt actively to consider whether the regulation struck a fair balance between the respective interests. It is one thing to have knowledge of what a regulation covers, but it is quite another to appreciate, address and assess whether it strikes a fair balance between the rights of children such as L and the countervailing community interest.

60. Significantly, as noted in paragraph 6 of the Explanatory Memorandum, as the instrument was subject to negative resolution procedure and did not amend primary legislation, no 'statement' was required. In other words, there was no requirement to consider whether the regulations were compatible with the Convention. Further, paragraph 8.1 recites that no specific consultation was undertaken on the instrument as the 2010 Regulations were seen as a rolling forward the previous legislative scheme, and paragraph 10.1 declares that '[t]he impact of this instrument on business and civil society organisations is considered to be negligible as it replaces existing legislation.' In short, when the Regulations were passed there does not appear to have been any substantive consideration of the interests to be weighed in the balance on the issue of proportionality under the Convention. No evidence to the contrary has been adduced.

61. As I have already said, Mr. Ball is the lead official advising Ministers on the issues arising in respect of the 'tendency to physical abuse' exemption in the context of Special Educational Needs and Disabilities. Mr. Ball's witness statement, together with its exhibits, contains the only substantive evidence adduced on behalf of the Secretary of State.

62. Mr. Ball's chronology of events begins with the publication of the report of the House of Lords Select Committee on the Equality Act 2010 and Disability ("the Select Committee"), the Select Committee having been appointed on 11 June 2015. Its report (*The Equality Act 2010: the impact on disabled people*) was published on 24 March 2016. It expressed concern that regulation 4(1) of the 2010 Regulations undermines the need to encourage and support schools to make adjustments for children and young people whose disability gives rise to challenging behaviour. Having considered the evidence before it, and having acknowledged (and indeed agreed) with the policy reason put forward for regulation 4 in the Explanatory Memorandum (paragraph 24 above**)**, the Select Committee said that it:

> 'believe[d] that treating a tendency to physical abuse as not amounting to an impairment has, unintentionally, discouraged schools from paying sufficient attention to their duties under the Act. Removal of the exclusion would allow a proper examination to be made of any suggestion of disability discrimination, including a failure to make a reasonable adjustment. This would not result in schools being required to tolerate violent behaviour—the flexibility of the reasonable adjustment duty would, for example, allow a school to take into account the needs of the wider school population.'

It concluded with the unqualified recommendation that the Regulations should be amended so that a 'tendency to physical … abuse of other persons' ceases to be treated as not amounting to an impairment for the purposes of the definition of 'disability'.

63. The Government's response to the Select Committee Report was published on 7 July 2016. It said it would 'consider how the exemption … applies to those under 18 in an education context.' I accept Ms. Hannett's submission that this does not amount to an acknowledgement by the Government that the existing system is problematic, but I also accept Mr. Broach's submission that there is a recognition that there is at least something to consider.

64. In the context of discussions on a Private Member's Bill, at a meeting on 29 November 2016 the then Minister confirmed to Martin Vickers MP that, to follow up on the Select Committee response, the Government would consult more widely on the pros and cons of the case for change. Mr. Ball acknowledges that the Minister emphasised that the Government 'had formed no concluded view at this stage on whether a change to the law would be appropriate.' Further, during Parliamentary Questions on 19 December 2016 the then Minister committed to a consultation early in the new year.

65. So, at the end of 2016 the position was that the then Minister had committed to consult more widely and the Government had not come to anything like a conclusion on the issue. In the event, the relevant Bill fell as a result of the General Election being called in April 2017. According to Mr. Ball, as a consequence of the election being called, Ministers did not take a decision on how to follow up the commitments to consult. Rather, from this time onwards work was done by officials with a view to putting advice to Ministers.

66. To that end, on 17 October 2017 officials (including Mr. Ball) met a number of stakeholders. The general purpose of the meeting was to gather further information about the issues. To enable frank discussion, it was agreed that what was said at the meeting would remain confidential. Mr. Ball has, however, produced a discussion paper which he prepared for the meeting. It sets out the background to the issue, summarises the arguments for and against amending the regulation and includes an assessment of the equality impact of a change in the law, concluding with the officials' belief that if regulation 4(1)(c) applied

only in relation to free-standing conditions in the area of SEN ("special educational needs") the number of exclusions of disabled children would be reduced for two reasons:

> 'directly, in the cases where schools and colleges would otherwise rely on the exemption; and indirectly, in that it would give an additional incentive to schools and colleges to ensure they make reasonable adjustments.'

67. Meanwhile, on 10 October 2017, the Prime Minister had announced the setting up of an independent review of exclusions, looking at why some children, including those with special educational needs, are over-represented in exclusions statistics ('the Timpson Review'). It is common ground that the review is not expected to focus on issues arising from the application of regulation 4(1)(c). According to Mr. Ball, Ministers will take forward the commitment to consider the Regulations separately, albeit informed by the evidence given to the Timpson Review and the outcome of this appeal.

68. In response to a request for a progress update over the Select Committee report, on 21 December 2017 - in relation to the issue of how regulation 4(1)(c) affects disabled children and young people - the then Minister indicated that consideration was being given as to 'how best to inform a decision about whether to change the law…' It is, therefore, abundantly clear that at the end of 2017 matters were still very much at the stage of work in progress, put at its highest.

69. Mr. Ball asserts that progress on the response to the Select Committee Report was effectively halted by the present proceedings, although he does not descend into the detail of why that should be the case. He does, however, recognise that whilst officials had engaged with a number of stakeholders supportive of the Select Committee's recommendation, they had not had the same level of engagement with (for example) schools and colleges, and teacher and support staff unions. Mr. Ball further recognises that Ministers would need to consider whether and if so how they would wish to broaden the evidence base before reaching a decision. Ms. Hannett emphasised that what engagement had taken place had been with those who take the line pursued by the appellants. That submission only goes so far. One simply cannot predict the stance or reasons of those with whom there has yet to be engagement. In any case I accept Mr. Broach's submissions that there has not been full or proper consultation, which is what the Minister committed to, and many interested parties who would seek to put their case in favour of the amendment recommended by the Select Committee have not yet been able to do so.

70. Ministers became involved again following notification that the present Secretary of State had been joined to this appeal as an interested party. In consequence, officials put two submissions to them. The first submission is dated 16 March 2018. It is subject to litigation privilege but the annex (which sets out the arguments for and against a change to the law) is exhibited to Mr. Ball's statement. It is right to say that the submission summarises the pros and cons of the current law. Mr. Ball says that the Minister considered the submission and approved the recommendations (which related to preparing to respond to the proceedings) on 20 March 2018. However, the terms of any recommendations which the submission may have contained are not before me. I accept that it is legally privileged.

71. The second submission is dated 10 April 2018. It sought Ministerial approval for proposals for finalising submissions to the Upper Tribunal. It is again subject to litigation privilege but again its two annexes are not, and they are exhibited to Mr. Ball's statement. They relate to the policy background and a Public Sector Equality Duty assessment. Mr. Ball says that Ministers considered this material and confirmed their approach to these

proceedings on 23 April 2018. He further says that this approach is reflected in Ms. Hannett's submissions of 25 April 2018.

72. Tellingly, Ms. Hannett accepted that the matter remains under review, and that one has not reached 'the last word.' She acknowledged that in July 2016 (some two years ago) the then Secretary of State committed to consider how the exemption around 'a tendency to physical abuse of other persons' applies to those under 18 in an education context, and that that commitment has not yet been fulfilled. Ms. Hannett indicated that upon the conclusion of this appeal the present Secretary of State will consider how to implement the commitment. I accept Mr. Broach's submission that the fact that the work is, apparently, far from completion strongly suggests that the Secretary of State has not carried out the required detailed evaluation of the respective interests and so has not yet formed a properly considered view.

73. Ms. Hannett was driven to the contention that I should infer, from the fact that she was appearing before me on instructions, that the Secretary of State had given her instructions to make the submissions that she did. Again, this submission only goes so far. Without more (and there is no more) Ms. Hannett's attendance before me, and the Secretary of State's stance in these proceedings, cannot of itself speak to consideration of justification. It cannot simply be taken as evidence that the Secretary of State has carefully weighed all of the competing considerations, carried out the requisite balancing exercise or come to a properly considered conclusion. There is absolutely nothing before me to indicate the extent of the Secretary of State's consideration of the various issues nor to explain how his conclusion has been reached. As Mr. Broach submitted, it is a striking feature of this case that there is no evidence on the issue of justification from the Secretary of State's point of view. Put starkly, I consider that there is no substantive evidence before me to inform me of the reasons why the Secretary of State is taking the position that he is or as to the extent of consideration that has been applied.

74. Thus, whilst there has, on any view, been *some* consideration of the respective issues, nonetheless on the basis of the evidence before me I do not regard myself to have the benefit of the considered opinion of the Secretary of State. Further, there is nothing before me to suggest that I should have any reassurance that there has been a proper evaluation of the competing interests or that the appropriate scrutiny has been given in other relevant spheres. It is accepted, for example, that there has been no proper consultation, there has been no scrutiny or endorsement by Parliament on the issue relating to the fair balance, there was no impact assessment of the Regulations when they were passed, nor were the Regulations considered and approved by affirmative resolution.

75. Being ever mindful of my duty to treat with 'appropriate' respect the decision of the Secretary of State that regulation 4(1)(c) strikes a fair balance, nevertheless in the absence of a properly considered balancing exercise I am forced to conclude that in this case, in carrying out my own evaluation of the competing factors, I can attach only very little weight to the Secretary of State's opinion.

76. I will go about the task in the following way. First, I will identify the detriment to the relevant group caused by the operation of the measure and I will then consider whether it is justified by reference to any countervailing community interest.

77. How severe are the consequences of the measure to the status group I am concerned with? The current application of regulation 4(1)(c) acts as what Mr. Broach described as a 'knockout blow' to any claim under the 2010 Act, to the extent that the claim relates to a tendency to physical abuse. It effectively allows schools to exclude children like

L without necessarily trying to meet their needs so far as that behaviour is concerned and/or provide the support that may enable them to manage their behaviour. Thus, even if the behaviour complained of was brought about by a school's failure to make reasonable adjustments, the school's decision to exclude as a result of it could not amount to discrimination under Equality Act. This means that schools may exclude children like L without having to explain or be held accountable for what, if any, reasonable adjustments they may or may not have made in respect of managing what may loosely be described as the physically aggressive behaviour.

78. As Mr. Broach pointed out, it is crucially important to note that if the regulation were *not* to apply to cases such as L's, schools would still not be required to tolerate violent behaviour at all costs, nor could it be said that they would be powerless to exclude such children. Rather, they would be able to rely upon a statutory justification defence to any claim brought against them. For example, a school could argue that a claim of discrimination arising from a disability should fail because it could show that the treatment complained of was 'a proportionate means of achieving a legitimate aim' (section 15(1)(b) of the Equality Act). So long as the school could show that the exclusion of a pupil who had been violent as a result of his/her disability was a proportionate response, taking into account the legitimate aim of protecting the needs, well-being and interests of the other pupils and staff, and any reasonable adjustments that have been made, the exclusion would in all likelihood be a lawful one. The emphasis is on 'reasonable' adjustments. There is no need to show that all possible adjustments have been made, irrespective of cost or practicalities. Further, naturally, the more serious the behaviour the easier it would be to justify the exclusion under the terms of the Equality Act. (Despite the attempts of Counsel to persuade me that, following the guidance laid down in the *Second X Case,* the threshold for a finding of a 'tendency to physical abuse' is a low one (per Mr. Broach) or a high one (per Ms. Hannett), I can only repeat that the question is ultimately one of fact which must be considered in the context of all of the circumstances of each individual case. The guidance is nuanced and, as was recognised, may be a challenging task to apply. Some cases may give the impression of the bar being low whilst others may indicate that it is rather higher. That is unfortunate but, as again was recognised, the concept of 'physical abuse' rather than, say,' violence' or 'assault' is a complex one and, in my judgment, leads to this state of affairs).

79. How many pupils whose physically aggressive behaviour constitutes a manifestation of their underlying impairment are affected by regulation 4(1)(c) as currently interpreted? Mr. Broach submitted that the potential impact is on tens of thousands of children with autism and a harder to define number of those with other impairments such as ADHD. Whilst Ms. Hannett cautioned that care needed to be taken with such a headline figure, she did not dispute that the potential impact of the regulation was upon a not insignificant number of children. Mr. Lever (the Chief Executive Officer of NAS) cited figures from the Department for Education showing that, nationally, just over four in ten of the reasons given by headteachers for excluding pupils with autism were physical assault against an adult or pupil. As Mr. Broach said, it is very likely that those children would be deemed to have 'a tendency to physical abuse' under the current interpretation of the regulation. Mr. Broach supported this submission by reference to other figures produced by Mr. Lever. Just over 30% of the 260 enquiries made in February and March 2018 to the NAS's dedicated School Exclusions Service involved a tendency to physical abuse. I am under no illusion, therefore, that the numbers involved are particularly significant.

80. Mr. Lever says that NAS believes that it is impossible to separate behaviour caused by a lack of support for an autistic child's needs from the disability itself. Excluding such children often has a massive impact upon them. They may have struggled to find school

placements in the first place and if excluded they may struggle to find them again. They may find themselves in pupil referral units with inappropriate peer groups, exposed to significant misbehaviour. They may be out of school for long periods. Ms. Hannett did not seek to challenge any of this. I am driven to conclude that it would be hard to overstate the impact of regulation 4(1)(c) on this particularly vulnerable cohort of children.

81. To my mind, a particularly weighty factor to be put in the balance is that aggressive behaviour is not a choice for autistic children. Mr. Broach forcefully submitted that it is not right that children such as L should lose the protection of the Equality Act through no fault of their own. Mr. Lever's evidence (backed-up by academic literature) is that an autism meltdown is not the same as a temper tantrum. It is not 'bad' or 'naughty' behaviour and should not be considered as such. Rather, such challenging behaviour is increasingly being described as 'distressed behaviour.' An autistic child who feels very anxious and stressed - for example, because they are experiencing sensory overload, or are overwhelmed by social demands and interactions - may behave in a way that cannot reasonably be described as a choice. They may not understand the effect of their behaviour and any prospect of punishment is unlikely to have any deterrent effect upon them. Nevertheless, according to the guidance given in the *Second X Case,* the fact that they are unaware that what they are doing is wrong is an irrelevant consideration in assessing whether they have a tendency to physical abuse.

82. In support of her submission that the impact of regulation 4(1)(c) on children such as L is tempered, Ms. Hannett relied on three arguments. Her first, that the threshold for the finding of a tendency to physical abuse is a high one, has been considered above. Ms. Hannett's second argument was that the exclusion is narrowly focused only on conduct which is a manifestation of a tendency to physical abuse; it does not remove the protection of the Equality Act for other behaviours. For example, she submitted, an excluded child may bring a claim for discrimination in respect of a failure to make reasonable adjustments in respect of their underlying impairment up to the point of exclusion. However, this argument wholly fails to acknowledge that the exclusion encompasses all relevant behaviour and is likely to go to the most important issues in a case. Further, the 'reasonable adjustments duty' applies only in the period leading up to the exclusion and does not cover any 'tendency to physical abuse.' Such limitations are exemplified in this very case, where the reasonable adjustments claimed by the appellants in the period prior to L's exclusion from school (such as failing to re-assign a teaching assistant and failing to implement certain agreed actions) fell away because they came within the scope of L's tendency to physical abuse. The effect of regulation 4, therefore, was to foreclose any consideration reasonable adjustments even in the run up to L's exclusion. I conclude that the relatively narrow focus of regulation 4(1)(c) does not serve to lessen the severity of its impact on the status group in any significant way.

83. Ms. Hannett's third argument was that a child excluded from school has other procedural safeguards, namely the right (in certain cases) to make representations to the governing body that the child should be reinstated and the right to seek the review of the exclusion by an Independent Review Panel under section 51A of the Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 (S.I. 2012/1033). Ms. Hannett rightly conceded the limited utility of each of these rights in this context, the former being available only in limited circumstances and the latter applying only to permanent exclusions and (in contrast to the First-tier Tribunal) not having the power to order that the child be reinstated to the school. Neither option would, in fact, have been available in this case.

84. An allied issue arose out of Dr. Armstrong's submission that regulation 4(1)(c) leads to there being no proper judicial scrutiny of whether an exclusion complied with the Convention, Ms. Hannett's response being the availability of a public law challenge on a claim for judicial review. Ms. Hannett contended that this wider legal regime, which is available to all and in which the proportionality of a claimed interference of Convention rights can be considered, shows that adequate protections remain for disabled children in school even where regulation 4(1)(c) applies so as to make unavailable a discrete cause of action under the Equality Act. In other words, children such as L are only prohibited from pursuing one of the routes by which a challenge may be brought to an exclusion. But it is surely not proportionate for a parent to have to bring a claim in the courts for judicial review (risking an adverse decision on costs and being subject to a much more formal regime) rather than simply appealing to the expert, informal First-tier Tribunal, relying on the provisions of the Equality Act. Dr. Armstrong highlighted the potential absurdity and disproportionality of parents first having to appeal to the First-tier Tribunal for a determination on whether their child had a 'tendency to physical abuse' and then, if it was found that they had, having to bring a further claim for judicial review. I accept the submission made both by Dr. Armstrong and Mr. Broach that judicial review does not provide a practical, effective facility for testing the proportionality of the exclusion in cases such as these. Given the above, I am of the view that the residual 'safeguards' set out above do not serve to assuage the impact of regulation 4(1)(c) on children such as L to any meaningful extent.

85. I turn now to consideration of the countervailing community interest. Ms. Hannett submitted that the impact of regulation 4(1)(c) on children in the position of L was outweighed by the community benefits of the measure for the following reasons.

86. First, Ms. Hannett submitted that violence is unacceptable in any context, including schools. Other pupils and school staff should not be required to tolerate a certain level of violence, even from those who have an underlying disability. A school should not be required to justify, in litigation, a decision to exclude a child in consequence of the manifestation of a tendency to physical abuse. In response, Mr. Broach made the valid point that children such as L have to be educated somewhere. It is simply not the case that excluding them from the protection of the Equality Act will somehow make their aggressive behaviour go away. Rather, it simply moves the problem to another part of the education system. Mr. Broach also rightly questioned why a school should not be required to justify (as in this case) excluding a child with autism where it is said that their physically aggressive behaviour results from a failure to meet their needs effectively. In my judgment, there is considerable force in Mr. Broach's submissions.

87. Secondly, Ms. Hannett submitted that when considering the arguments on the public interest side of the balance regulation 4 must be considered in its wider context and not limited to a tendency to physical abuse, nor to disabled children, nor to education, because this is a carefully calibrated scheme and the appellants' arguments should (but do not) apply with equal force across the regulation as a whole. Put another way, I should have regard to the wider application of the regulation (i.e. to other tendencies, to adults as well as to children and in all spheres in which the Equality Act applies). I do not agree. Indirect discrimination can - and in this case should - be viewed through the lens of a particular status group. It can be - and often is - confined to a particular class. It is perfectly orthodox for a court to decide important legal questions on the basis of the situation before it, its ratio being confined to that situation. The case with which I am concerned involves whether the current interpretation of regulation 4(1)(c) gives rise to unlawful indirect discrimination against children such as L in an education context. This is the issue before me sitting in the Upper Tribunal, an appellate tribunal considering an appeal from the First-tier Tribunal

(Health, Education and Social Care Chamber) (Special Educational Needs and Disability). I believe that it would be highly inappropriate for me to consider the wider implications of regulation 4, for example in the context of employment or provision of goods and services, and I will leave open the question of the compatibility of the current interpretation of the remainder of regulation 4 with Article 14 to other cases where the issue may arise.

88. Thirdly, Ms. Hannett submitted that no Strasbourg authority requires the Secretary of State or Parliament to define disability in any particular way. I agree with Mr. Broach that this does not go to the issue of countervailing community interest and in any case it is neither here nor there, as the Strasbourg jurisprudence does not approach the matter in this way.

89. It is for me to weigh all of the above factors in determining whether a fair balance has been struck between the competing rights and interests. I am firmly of the view that regulation 4(1)(c) comes nowhere near striking a fair balance between the rights of children such as L on the one side and the interests of the community on the other. The profound severity of the consequences of the measure on the status group weigh extremely heavily and the arguments put in favour of the countervailing public interest by no means counterbalance them. Indeed, in my judgment, this is not a case in which the issues are finely poised. Rather, the requirements for the protection of the status group's fundamental rights comprehensively outweigh the arguments put forward for the protection of the interests of others.

90. In conclusion, I recognise that as a matter of domestic law the current interpretation of regulation 4(1)(c) is clear and well established. It was not questioned before me. However, I am now addressing that regulation in the context of human rights law. In that context, in my judgment the Secretary of State has failed to justify maintaining in force a provision which excludes from the ambit of the protection of the Equality Act children whose behaviour in school is a manifestation of the very condition which calls for special educational provision to be made for them. In that context, to my mind it is repugnant to define as 'criminal or anti-social' the effect of the behaviour of children whose condition (through no fault of their own) manifests itself in particular ways so as to justify treating them differently from children whose condition has other manifestations.

91. My conclusion is fortified by the belief of the officials, set out in the discussion paper of October 2017, that there would be fewer exclusions of disabled children from school if regulation 4(1)(c) applied only to free-standing conditions.

92. I should add that I have come to this decision without needing to have recourse to the UN Convention on the Rights of Persons with Disabilities or the UN Convention on the Rights of the Child. Suffice to say that I am reassured that my conclusion is in harmony with the general principles of those Conventions especially insofar as they go beyond exhortations to non-discrimination (see *Mathieson,* ante).

Conclusion on the compatibility of regulation 4(1)(c) with Article 14 read with A2P1 in this case

93. For the reasons set out above I conclude that, in the context of education, regulation 4(1)(c) of the 2010 Regulations violates the Convention right of children with a recognised condition that is more likely to result in a 'tendency to physical abuse' not to be discriminated against under Article 14 read in conjunction with A2P1.

Remedy

94. Section 3(1) of the Human Rights Act 1998 provides that:

> 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

95. It was common ground that, if I were to reach the conclusion that I have, it would be permissible for me to read and give effect to regulation 4(1)(c) in a way that makes it Convention compliant without disturbing a fundamental feature of the regulation (*Ghaidan v Godin-Mendoza* [2004] UKHL 30*;* [2004] 2 AC 557). Whilst a number of suggestions were mooted, my preferred option is - by analogy with the approach adopted in *Wandsworth LBC v Vining* [2017] EWCA Civ 1092; [2018] ICR 499 - for me to say that, when construed in accordance with section 3 of the Human Rights Act 1998, regulation 4(1)(c) does not apply to children in education who have a recognised condition that is more likely to result in a tendency to physical abuse.

96. Mr. Broach's secondary submission was that if regulation 4(1)(c) could not be read down in accordance with section 3, then it should be disapplied in this case. In this regard I was referred to *Secretary of State for Work and Pensions v Carmichael and Sefton Council* [2018] EWCA Civ 548. That case concerned a breach of the claimant's Convention rights caused by the cap on housing benefit imposed by regulation B13 of the Housing Benefit Regulations 2006 (S.I. 2006/213). Following *Mathieson* (ante)*,* a Three Judge Panel of the Upper Tribunal had determined and directed that, in the individual circumstances of the particular case before it, the offending parts of the regulation should not be given effect to or should be otherwise disapplied. However, the majority of the Court of Appeal held that the First-tier Tribunal and Upper Tribunal had no power to disapply the regulation in the way that it did.

97. Ms. Hannett relied heavily upon *Carmichael* to suggest that, equally, I had no jurisdiction to disapply regulation 4(1)(c) in L's case. Mr. Broach's attempts to argue that I should not follow *Carmichael* because the majority decision of the Court of Appeal was obviously wrong fell on stony ground, even though I must confess to preferring the reasoning of the minority judgment of Leggatt LJ. On the other hand, Mr. Broach's submission that I could and should treat *Carmichael* as having been decided on its own facts proved more fertile. Mr. Broach's submission was bolstered by *JT v First-tier Tribunal, Criminal Injuries Compensation Authority and Equality and Human Rights Commission* [2018] EWCA Civ 1735, a unanimous decision of the Court of Appeal which was issued between the conclusion of the hearing and my decision, and which Mr. Broach drew to my attention by way of a written submission. In the leading judgment Leggatt LJ discussed whether *Carmichael* precluded the disapplication of secondary legislation which contravenes incorporated Convention rights. In essence, he concluded that the prohibition on disapplication identified in *Carmichael* related only to situations where it was not possible to identify a particular offending provision in the relevant secondary legislation. Had the case been factually analogous to *Carmichael* he would have felt bound, with reluctance, to follow the majority approach. However, as the circumstances were not analogous, and as there was no difficulty in identifying the provision in *JT* which had discriminatory effect*,* the prohibition from *Carmichael* did not apply.

98. In those circumstances, Leggatt LJ considered that the Court was free to disapply the regulation. Indeed, he went further, declaring:

> '… section 6(1) of the Human Rights Act makes it unlawful to do otherwise. As Lady Hale explained in *In Re P and others* [2008] UKHL 38; [2009] 1 AC 173, para 116:
>
> > "… this cannot be a matter for discretion. Section 6(1) requires the court to act compatibly with Convention rights if it is free to do so."'

99. By parity of reasoning Mr. Broach submitted that in this case it is possible to identify the offending provision of secondary legislation, namely regulation 4(1)(c). Thus, I can and must disapply it. Having been given the opportunity to respond to Mr. Broach's submission, neither Ms. Hannett nor Dr. Armstrong sought to make any observations.

100. I accept Mr. Broach's submission. Identifying the subordinate legislation which has a discriminatory effect (namely regulation 4(1)(c) of the 2010 Regulations) is a perfectly straightforward task in this case. It follows that, under the provisions of section 6(1) of the Human Rights Act, it would be unlawful for me to do anything other than to decide that that regulation should be disapplied in the circumstances of this case.

101. Accordingly, whether regulation 4(1)(c) is read down under section 3 of the Human Rights Act or whether it is disapplied, given the tribunal's findings of fact, L meets the definition of a disabled person for the purposes of section 6 of the Equality Act.

Conclusion

102. For the reasons set out above, the tribunal's decision that, as he fell within the provisions of regulation 4(1)(c) of the 2010 Regulations, L was not to be treated as falling within the definition of 'disability' in section 6(1) of the Equality Act, involved the making of a material error on a point of law. In the exercise my discretion I set it aside, pursuant to the provisions of section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Disposal

103. In terms of disposal of the case, Mr. Broach and Ms. Paxman have very sensibly agreed a consent order. I consider it appropriate to make an order in the agreed terms. Therefore, pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, regulation 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and regulation 29 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 I re-make the decision in those terms. It should be noted that the agreement is a confidential one and, whilst it is attached to this decision which is sent out to the parties, it is not published with it for wider purposes.

Further matters

104. For completeness, I should add that I have not overlooked the submissions which were made on '*Thlimmenos* discrimination' (*Thlimmenos v Greece* (2000) 31 EHRR 411 at [44]) or Dr. Armstrong's interesting submissions on legality. Given my findings above it is not necessary for me to complicate or lengthen this judgment any further by consideration of those issues.

(signed on the original)

A. Rowley
Judge of the Upper Tribunal

8 August 2018