A Multi Academy Trust v RR
[2024] UKUT 9 (AAC)

IN THE UPPER TRIBUNAL **Appeal No.** UA-2023-000315-HS
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Between:

A Multi Academy Trust

Appellant

- v –

RR

Respondent

Before: Upper Tribunal Judge Ward

Hearing date: 1 September 2023 (with subsequent written submissions)

Representation:
Appellant: Andrew Cullen, barrister, Browne Jacobson
Respondent: In person

The Upper Tribunal, acting under rule 14, orders that, save as hereafter provided, a person may not disclose or publish any matter likely to lead members of the public to identify the pupil who is the subject of the present case ("SR") without the permission of a judge of the Upper Tribunal. Breach of the order may constitute contempt of court, punishable by a fine or imprisonment. The order does not apply to any disclosure or publication made by SR's father in the reasonable exercise of parental responsibility nor to any disclosure by SR's school which is reasonably necessary for the performance of their duties towards him.

DECISION

The decision of the Upper Tribunal is to allow the appeal to the following extent. The decision of the First-tier Tribunal made on 21 November 2022 under number EH935/22/00027 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside that part of the decision as relates to the finding that was made against the Responsible Body and remit that part of the case to be reconsidered by the First-tier Tribunal ("FtT") in accordance with this Decision. Such reconsideration should be by the same panel if

this can be achieved without undue delay, or otherwise by a wholly different panel. The case is to be referred to a salaried judge of the FtT for case management directions.

REASONS FOR DECISION

The issues

1. The appeal considers potentially significant issues around the application of the test in s.20(3) of the Equality Act 2010 ("the Act" or "the 2010 Act"), as modified by schedule 13, particularly in its application to special schools.

The procedure

2. The Respondent, Mr R, is the father of SR (these are not the true initials of either), who in September 2021 was to be a pupil in Year 10. He had brought claims under the Act against the Appellant, who is the "Responsible Body", being the proprietor of the relevant school, a special school. The First-tier Tribunal ("FtT") dismissed all of the claims, except one. The claim which was upheld was that the Responsible Body had discriminated against SR in its approach to school year transition. This was held to constitute a failure to make a reasonable adjustment, contrary to s.20(3) of the Act. The remedy ordered was (a) a letter of apology and (b) training for the senior management team at the school on the implementation of effective transition planning.

3. On 21 March 2023 I gave the Responsible Body permission to appeal and directed that the effect of the FtT's order be suspended.

4. An oral hearing of the appeal was directed for 1 September. A previous hearing date had been vacated as it had fallen on a day when there was a rail strike and the parties indicated they could only attend with great difficulty, if at all. A further rail strike was then declared for 1 September, to which the same observations applied. The hearing was converted to one by CVP, with the parties' agreement. At 0912 on the day of the hearing, an email was received from Mr R indicating that he was unwell and unable to attend. He further indicated that he had no objection to the hearing proceeding in his absence and referring the Upper Tribunal to his written response, which he considered sufficient to state his position.

5. I was satisfied that Mr R had been notified of the hearing. In concluding that the interests of justice favoured proceeding with the hearing I took into account Mr R's own wishes; that he was content to rely on his written submission, which I considered to be a carefully-prepared document; that the case had already been once postponed; that court resources and those of the Responsible Body had been devoted to preparing for and holding the hearing; and that it was desirable to provide clarification of the points at issue in the case for the benefit of litigants and the FtT in other cases sooner rather than later. However, one consequence of Mr R's absence was that the Upper Tribunal was unable to ascertain his views on questions of anonymisation or on whether he would wish to apply for the case to be the subject of an order under rule 14. I indicated that I would circulate my decision as a draft before it was promulgated to allow the parties to do so if they wished. Mr Cullen on behalf of the Responsible Body took up that opportunity. Mr R did not, but notwithstanding that, I consider that SR's personal history and the nature of his disabilities as set out in para 9 are such that anonymisation and an order under rule

14 are appropriate. I also accept Mr Cullen's submission that in order to minimise the risk of jigsaw identification of SR, the names of the school and the Appellant should be anonymised, as should those of the pupil and his father, who should be referred to otherwise than by their true initials.

6. The remote hearing proceeded without any technical difficulty and Mr Cullen confirmed at the end that he had been able to hear the judge throughout and that there were no further points he wished to add.

7. My own researches while preparing this decision led me to a relevant-seeming point (concerning the predecessor legislation) which had not been raised at the hearing. Accordingly, the parties were given the opportunity to make submissions on it. Mr Cullen on behalf of the Responsible Body did so; Mr R elected not to.

Relevant facts

8. The FtT recorded that, as stated by the Responsible Body, the school was a special school catering for around 200 pupils between the ages of 5 and 19 which supports pupils with moderate learning difficulties and additional complex needs with a wide range of need profiles.

9. SR, who is adopted, has a diagnosis of Foetal Alcohol Spectrum Disorder, resulting in impaired executive function, language deficits and poor adaptive and social functioning. It is not in dispute that he meets the definition of a disabled person under the Act.

10. SR has an EHC Plan. The FtT found that at the material time Section F contained the following relevant special educational provision:

> "• A carefully planned and documented transition programme with the aim of integrating [SR] into the school classes
> • [SR] needs 1:1 support at all times (structured and unstructured)…..
> • [SR] needs a Key Adult and a small team (Team Pupil) of adults in school who will take time to get to know [SR] and build a positive trusting relationship with him …."
> • Provide a structured programme that will address issues of disengagement and inattention, due to the identified symptoms of FASD ….."
> • The delivery of a structured programme to address his lack of emotional resilience and optimism and mood management ….."

11. The FtT went on to set out its findings that, though during the Summer Term 2021 there had been some planning for SR's transition to Year 10 that September, there was no single document containing a transition plan for SR and in consequence there was a lack of clarity and difficulties of communication which impaired the school's ability to prepare SR for the transition. When in mid-September a written "Provision Plan" was produced, it was largely a lesson timetable, lacking information as to the amount and type of support, something which the FtT regarded as particularly important given that when in Year 10 SR would be working with his peers to a greater extent than previously, rather than on an individual basis.

12. The FtT further found that the school had sent an email on 7 July 2021 to the parents/carers of all pupils at the school, containing the following:

> "……To help prepare further for the new academic year your child will be taking part in Transition Week from Monday where they will move to their new tutor group to help get to know the staff, the classroom, the playground and the new routines that the changes bring. Over the last few weeks your child has taken part in discussions about moving on, many have already visited new rooms and spaces where they will be working and playing. From Monday your child will be in their new tutor group - details below- and will remain with this group through to the start of the Summer holidays….."

The FtT's conclusion

13. The FtT noted that there was no mention in the email of the individual needs of pupils in respect of transitioning or that a specific transition plan will be drawn up for them. Having directed itself that the reasonable adjustments duty is triggered only where there is a need to avoid "substantial disadvantage", it concluded as follows:

> "99. Whilst the Responsible Body clearly carries out some transitional planning in respect of pupils moving from one year to another, no evidence was presented to us to demonstrate that an individual documented plan was prepared, we consider that this places disabled pupils generally at a substantial disadvantage compared with non-disabled pupils. The lack of a documented transition plan referring to a pupil's particular needs, means there is a lack of certainty and clarity as to the support which will be in place during transition and how that support will be organised.
>
> 100. In terms of the reasonable adjustments to be put in place to avoid the substantial disadvantage to which we have referred, this should have been the use of a planned and documented transition plan. The failure to do so leads us to conclude that the Responsible Body were in breach of Section 20(3)."

Relevant legal provisions

14. Section 85 of the Act provides:

> "(2) 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 the school;
> (f) by subjecting the pupil to any other detriment.
>
> (6) A duty to make reasonable adjustments applies to the responsible body of such a school.
>
> (7) In relation to England and Wales, this section applies to—

> …;
> (c) a special school (not maintained by a local authority)."

15. The duty to make reasonable adjustments is explained in general terms in section 20, but section 20(3), the provision which this case concerns, is modified in its application to schools by Sch 13, para 2 of the Act. So modified, where the relevant matter is provision of education or access to a benefit, facility or service, section 20(3) as modified reads:

> "The first requirement is a requirement, where a provision, criterion or practice applied by or on behalf of the responsible body puts disabled pupils generally at a substantial disadvantage in relation to provision of education or access to a benefit, facility or service in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".

In this Decision, a "provision, criterion or practice" is referred to as a "PCP".

16. By section 21:

> "(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

17. Section 136 of the Act, headed "Burden of Proof", provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

18. Disability is defined in s.6, which so far as material provides:

> "(1) 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.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.
>
> (3) In relation to the protected characteristic of disability—

> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability."
> …"

19. The Equality and Human Rights Commission has power under s.13 of Equality Act 2006 to issue guidance and under s.14 to issue codes of practice. In relation to the latter, by s.15(4):

> "A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code–
> (a) shall be admissible in evidence in criminal or civil proceedings, and
> (b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant."

Special schools and inclusive education

20. A "special school" is defined by Education Act 1996 s.35:

> "(1) A school in England is a special school if it is specially organised to make special educational provision for pupils with special educational needs, and it is—
> (a) maintained by a local authority,
> (b) an Academy school, or
> (c) a non-maintained special school."

21. By Children and Families Act 2014, s.20(1):

> "(1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her."

22. Section 33 of the 2014 Act creates a duty on local authorities to secure that a pupil's EHC plan provides for him or her to be educated in mainstream provision (i.e. not in a special school), unless that is incompatible either with the wishes of the child's parent or the young person or with the provision of efficient education for others.

23. Being a pupil in a special school is therefore not a route to meeting the test of being "disabled" for the purposes of the 2010 Act. Nonetheless there will often be a very substantial overlap between the categories. It may indeed be that in a school such as the one in this case the overlap may be near-total.

The overall purpose of the Act (in its relation to disability discrimination)

24. As regards the overall purpose of the Act, I begin with what was said in *SSWP v MM and DM* [2013] EWCA Civ 1565:

> "35.The laws regulating disability discrimination are designed to enable the disabled to enter as fully as possible into everyday life. This requires not merely outlawing discrimination against the disabled; it also needs those who make decisions affecting the disabled to take positive steps to remove or ameliorate, so far as is reasonable, the difficulties which place them at a disadvantage compared with the able bodied. Baroness Hale identified the reason for this in *Archibald v Fife Council* [2004] ICR 954. After noting that traditional anti-discrimination law requires treating the relevant characteristic, for example, race or sex as irrelevant, she explained why this approach does not suffice with respect to the disabled:
>
> > "The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment…..It is common ground that the 1995 Act entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others."
>
> And the purpose of this is, as Sedley LJ noted in *Roads v Central Trains Ltd* [2004] EWCA Civ 1541 at para 30:
>
> > "so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public."

Sources of relevant caselaw

25. There are relatively few decisions providing an interpretation of the Act in relation to disability discrimination in schools. Where other parts of the Act use the same language, it is appropriate to consider cases examining the same language in those other parts. Particularly relevant to one of the grounds of appeal is Schedule 2 of the Act, which makes a similar modification to s.20(3) by providing that the substantial disadvantage has to arise in relation to "disabled persons generally", in the context of reasonable adjustments required in the provision of services and exercise of public functions. Additionally, some assistance may be derived from the consideration of "reasonable adjustments" in the employment context, where the topic is more frequently considered by courts and tribunals, provided due allowance is made for the fact that in such cases the wording of s.20(3) is not modified in the same way.

Appellant's submissions

26. Distilling Mr Cullen's submissions to their barest for the purposes of introduction, they were that:

> a. the FtT misapplied the requirement in the modified s.20(3) test for the substantial disadvantage to have been experienced by "disabled pupils generally"; and
> b. the FtT did not identify the comparator group by reference to which it held that FtT had experienced "substantial disadvantage";

c. on both points, the decision was inadequate in its reasoning; and, whatever one takes the FtT as deciding on them, there was no evidence to support it.

He emphasises that if his client's appeal is upheld, no blame should attach to the FtT, which he acknowledges did not have the range of cases before it which have been provided to the Upper Tribunal.

27. In passing, he submits (and I agree) that the provision of a transition plan in the school context does fall within the "provision of education" for the purposes of para 2(4)(b) of schedule 12, thus bringing into play the modifications to s.20(3) previously described.

"Disabled pupils generally"

28. By adding in the schools context the words "disabled pupils generally", the legislator was making clear that in that context it is the impact of the PCP on a group of pupils, rather than on a particular individual pupil, which falls to be examined. On the authorities, it is not referring to all disabled pupils, unsurprisingly given the wide range of disabling conditions. The decision in *C and C v the Governing Body of a School* [2018] UKUT 61 (AAC) at [73(h)] repeated the statutory formulation without comment, but on examination with the benefit of more recent authority the legal position appears more nuanced. The issues were examined by Fordham J in *R (Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Admin) (a case concerning the provision of services, to which schedule 2 accordingly applied) in the terms below, with which I am in respectful agreement as to the principles involved:

> "24. The trigger test of comparative substantial disadvantage (s.20(5)) … involves comparing the position of "disabled persons generally" (Schedule 2 §2(2)) (with "persons who are not disabled"). By replacing "a disabled person" (s.20(5)) with "disabled people generally" (Schedule 2 §2(2)) in the test of comparative substantial disadvantage, Parliament ensured that the test is not individualised but class-based. As the Code puts it (§7.19): "It is not simply a duty that is weighed in relation to each individual disabled person who wants to access a service provider's services or who is affected by the exercise of a public function". It is therefore an error to consider the reasonable adjustments duty by reference to the needs of the individual claimant, rather than by reference to the needs of the relevant class: [*Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191] §31. The focus is on barriers which "impede persons with one or more kinds of disability", and "with particular kinds of disability" (*Roads* §11; *Finnigan* §31). This class-based comparison is a suitable trigger for what is 'an anticipatory duty' …: "Service providers are not expected to anticipate the needs of every individual who may use their service, but what they are required to think about and take are reasonable steps to overcome barriers that may impede people with different kinds of disability" (Code 7.24); "the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service …" (Code §7.20); the service-provider "has to anticipate the reasonable steps necessary to ensure that disabled persons generally, or of a particular class, will not be substantially disadvantaged"

(*MM* §43). It is thus "important … to keep in mind the distinction between (anticipatory) changes … which are applicable to a category or sub- category of disabled persons and changes which are applied to individual disabled persons on an ad hoc basis", and to focus on the former (*Finnigan* §36). But what is the relevant 'class'? I much prefer – and adopt – Ms Casserley's formulation: Deaf BSL users ("people who are Deaf and use BSL"). That is a sub-class of Ms Leventhal's wider formulation ("people who are hearing-impaired"). Having said that, I cannot see that the answers in this case turn on that choice. In the Code, where reference is made to "people with different kinds of disability" (§7.24), examples given include: "people with dementia"; "people with… mental health conditions"; "people with … mobility impairments"; but also "visually impaired people who use guide dogs"; and "visually impaired people who use white canes" (§§7.24 and 7.25). If "visually impaired people who use guide dogs", or "visually impaired people who use white canes", can be the relevant class, then I cannot see what excludes "hearing impaired people who use BSL". A reference point can be found in EqA2010 when it speaks (s.6(3)(b)) of persons who share the protected characteristic of disability as referable to persons who "have the same disability". In *Finnigan*, the Court of Appeal had spoken of the relevant group as being "deaf persons" and "deaf persons as a class" (§§31, 33 and 39). In *MM* the Court focused on "mental health patients" (§66). In [*R(VC) v Secretary of State for the Home Department* [2018] EWCA Civ 57] the Court focused on "mentally ill detainees" (§153). In my judgment, the most reliable and authoritative guide is the idea of "people disabled in the same way", derived by the Court of Appeal in *VC* at §153 from Supreme Court authority (citing *Paulley v FirstGroup plc* [2017] UKSC 4 [2017] 1 WLR 423 §25). That approach identified "wheelchair users" – not 'people who are mobility-impaired' – as the relevant group. That, again, like "visually impaired people who use guide dogs", or "visually impaired people who use white canes", shows that the relevant group may be a sub-group. It fits alongside *Roads*, where the Court took as the relevant group "those whose disability makes them dependent on a wheelchair" (§11), from which it derived "wheelchair users as a class" (§§14, 25, 26 and 28). I cannot accept Ms Leventhal's submission that that key contextual feature of the case, the unprecedented circumstances of the pandemic (§11 above) – although plainly highly relevant to questions of reasonable steps and reasonable adjustments – can, or should, have the consequence of narrowing down the relevant class or subclass of "disabled persons generally" for the trigger test of comparative substantial disadvantage. At times in the argument Ms Leventhal's focus went in the opposite direction, focusing on a sub-sub-group of BSL users 'who would tune into the Briefings'. The same focus was to be found in her skeleton argument where she described *Roads* as being a case where the relevant group was "wheelchair users using [the Thetford] train station". I cannot accept that. In *Roads*, the relevant group was "wheelchair users as a class". In *Finnigan* the Court did not take 'deaf persons whose properties may be searched by the police', a group which it recognised was likely to be small (*Finnigan* §40). In [*Royal Bank of Scotland Group plc v Allen* [2009] EWCA Civ 1213] the focus was not on 'wheelchair users wishing to use services at the main Sheffield branch of the bank', but on wheelchair users."

29. Given the multitude and potential combinations of causes of disability, defining the group for this purpose will, I accept, often be difficult. Further, it may not always be easy for those pursuing a claim to amass sufficient evidence about the impact on others, but, as Mr R's submissions reminds us, s.136 may help. There may be cases (*MM* provides an example) where voluntary organisations dedicated to assisting those with a particular condition can help.

"Persons who are not disabled"

30. A comparison is then required of the effects of the PCP on pupils who are disabled with the effects on "persons who are not disabled". In a special school, there will be few, or even no, suitable comparators. Yet, submits Mr Cullen, the FtT and Upper Tribunal are constrained by authority to accept that a PCP must be capable of being applied to the comparator, which he interprets as meaning that the comparator must be in the same institution.

31. For his part, Mr R refers to s.6(3)(b) of the Act (see [17]), submitting that from that provision it would be lawful to conclude that the comparator group would be those who were not disabled in the same way (his emphasis).

32. There are several reasons why in my view Mr R's submission on this point is unlikely to represent the legislative intention. The first is that the provisions with which we are concerned make no reference to those who "share a protected characteristic". The second is that it is inconsistent with the purpose of the Act in terms of removing barriers adversely affecting disabled people in comparison with able-bodied people. The third is the difficulty of making an effective comparison with others who are disabled, but in differing ways, in view of the widely varying causes of disability. The relevance of s.6(3)(b) is that it assists in interpreting "disabled persons generally" (see *Rowley*, above).

33. I once again gratefully borrow from and adopt the views of Fordham J in *Rowley.* At [25] he said:

> "The next step is to identify who are the "persons who are not disabled", with whom the "disabled persons generally" are to be compared in applying the trigger test of comparative disadvantage. It is tempting – logically and analytically – to take 'everybody else' having identified the relevant class for "disabled people generally". The Code says (§7.13): "The disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled person in question did not have a disability" (the word is "a" not "the"). In MM, the Court of the Appeal spoke of a comparison between mental health patients and "those not so disabled" (§59) (the word is "so": meaning "in the same way"). My own preference would be to compare the relevant group – or sub-group – of disabled people with people who are not disabled. That reflects the statutory language (s.20(5)) and fits with the Code. It avoids the risk of introducing invidious comparisons with those who may have other disabilities, disadvantages and needs (for which different reasonable adjustments may also be necessitated). Having said that, I am quite satisfied that the outcome could not, in the circumstances of the present case, turn on which is chosen."

34. Prompted by the above remarks, I looked again at *MM.* It concerned the procedures involved in claiming Employment and Support Allowance (ESA). The claim was that those procedures adversely affected mental health patients (MHPs), defined for the purposes of that case as people with impaired mental, cognitive or intellectual difficulties. There are places in the judgment of Elias LJ, with whom the other members of the Court agreed, which refer to comparison "with claimants suffering from other disabilities." However, it was not necessary to be disabled for Equality Act purposes to claim ESA: it was, for instance, the appropriate benefit to be claimed by (among others) a person not in employment who was unwell – possibly only for a short time but to an extent that the ensuing limitations meant they had "Limited Capability for Work" (as defined), as the Court of Appeal evidently realised. When the judgment is read as a whole, it is apparent, notwithstanding the quotation above in this paragraph and that highlighted by Fordham J in *Rowley* (above), that the comparison being effected was of the experience of MHPs compared with the experience of others seeking to claim ESA (who by definition were likely to have an illness or disability). That in my view was a subset of the general public, rather than a set defined by being disabled but in a different way to MHPs. I therefore do not consider that it provides binding authority that the comparison must, or even may, be with disabled persons with a different disability. I respectfully consider it is unlikely Fordham J would have expressed himself as he did had he considered *MM* provided binding authority and I respectfully share the view, that, for the reasons he gives, in general terms comparison is to be with persons who are not disabled.

35. The high point of Mr Cullen's submission is *Ishola v Transport for London* [2020] EWCA Civ 112 at [36] where Simler LJ said:

> "36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. … . To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course… that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply."

36. The passage on which Mr Cullen relies is in the context of discussing whether a PCP was involved at all and specifically in the context of rebutting a submission from counsel for the claimant that "*all* one-off acts and decisions necessarily qualify as PCPs" (at [34], emphasis in the original). Its significance is that a PCP must be capable of being applied to a comparator, but it does not in my respectful view consider what the limits, if any, are on who may constitute that comparator.

37. *Smith v Churchill's Stairlifts plc* [2006] IRLR 41 at [39] applies *Archibald v Fife Council* [2004] ICR 954 to conclude that "the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements". Cases such as those and *R(VC) v Secretary of State for the Home Department* [2018] EWCA Civ 57 in my view illustrate a context-specific approach, applying such a test.

38. This view of the authorities is consistent with the approach to them which Mr R invites me to adopt in paras 1.1.3 and 1.1.4 of his written submission.

39. Mr Cullen also submits that the interpretation he invites me to adopt is supported by the wording of the modifying provision to s.20. In his submission the requirement imposed by the added words that a PCP be "applied by or on behalf of the responsible body" carries with it an implication that the comparator must be someone to whom the responsible body could apply the PCP. He does not shy away from the consequence that for a large number of special school pupils, his interpretation would mean that they would be denied the possibility of bringing reasonable adjustment claims. He notes, though, that that does not remove all claims under the Act from special school pupils; claims for direct discrimination, victimisation and harassment would still be open to them.

40. I do not accept that interpretation. Whilst I accept that the Act does withhold its protection from certain characteristics in certain limited circumstances, such as those in s.85(10), it would be an extraordinary interpretation, and one wholly inconsistent with the overall purpose of the legislation as summarised at [23] above, which denied pupils at a special school who are disabled the right to bring a reasonable adjustments claim, purely because they were attending a special school rather than a mainstream one. I am unable to draw the implications from the words "applied by or on behalf of the responsible body" which Mr Cullen suggests. In my view those words exist so as to ensure that a responsible body only has to make reasonable adjustments in respect of a PCP, the imposition of which it controls. It says nothing about the comparator.

41. What in my view does provide a pointer is the fact that the legislation stipulates that the comparison is to be with "persons who are not disabled" rather than "pupils who are not disabled". Further, the previous legislation (s.28C of Disability Discrimination Act 1995) was in the following terms:

> "(1) The responsible body for a school must take such steps as it is reasonable for it to have to take to ensure that–
> (a) in relation to the arrangements it makes for determining the admission of pupils to the school, disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled; and
> (b) in relation to education and associated services provided for, or offered to, pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled."

42. The scheme of that legislation suggests that "pupil" referred to a pupil at the school concerned, while "person" referred to someone who was on the outside, as it were – in the case of s.28C(1)(a) a person seeking admission. On that view, s.28C(1)(b) at that time was concerned with making a comparison between disabled and non-disabled pupils at the school, the very issue which Mr Cullen suggests is difficult to make in the case of special schools with few or no non-disabled pupils. However, when the 2010 Act was passed, there was a change from referring to "pupils" as the appropriate comparator to "persons" in schools cases other than those relating to admission. Accordingly, I invited submissions addressing the impact of this change.

43. In response, Mr Cullen invites me to conclude that the failure to refer to "non-disabled pupils" rather than "non-disabled persons" is more likely to have ben an oversight rather than a deliberate act and that the legislative intention was that the comparison should be made with the non-disabled pupils of the school concerned. He prays in aid (a) the Explanatory Notes to the 2010 Act and the explanations given when it was still a Bill; and (b) the current and previous versions of the Technical Guidance published by the Equality and Human Rights Commission.

44. I approach this material on the footing that the Explanatory Notes are relevant "insofar as the material casts light on the objective setting and the contextual scene of the statute, and the mischief at which it is aimed": *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103. The EHRC Technical Guidance is authorised by statute and is issued by a body with specialist experience and expertise in the field, but the Guidance (unlike the Code) does not have any special status under statute.

45. The gist of the material relied on by Mr Cullen is that it refers, in a variety of contexts, to comparison with "non-disabled pupils". However, given that the context of sch.13, para 2 is the provision of education in schools, "pupil" is a natural word to use for those with whom comparison is to be made as to the effects of a PCP, whether they be in a school whose Responsible Body is the subject of the duty or in another school altogether.

46. Further, the paradigm situation is of a disabled pupil (or, more accurately, a group of disabled pupils) in a mainstream school who, by virtue of their disability, may be placed at a substantial disadvantage in comparison with others at the school who are not disabled. The Explanatory Note and the EHRC Technical Guidance seek to explain the legislation, provide examples and so on, and it is helpful that they do so in the situation which will most commonly be encountered, but in my view they simply do not address whether the "pupils" to which they refer for comparison purposes may be found elsewhere.

47. The purposes of the 2010 Act as stated in its long title include "to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics." The references to "reform" and to restating (only) "the greater part of the enactments" leave open the possibility that in the process of codification which the 2010 Act represents Parliament was indeed making a change to the previous law, as does the process of "harmonis[ing]", bringing the structure for schools cases nearer to that of s.20(3)generally by adopting "non-disabled persons" as the comparator.

48. Effectively, the interpretation Mr Cullen invites me to adopt, by reliance on the non-statutory materials and more generally, requires me, even without taking into account the change between the 1995 Act and the 2010 Act, to adopt an unnatural reading of the latter, involving using two different terms to refer to the same group of people (pupils of the school concerned) within the same statutory provision. I am doubtful that given the limitations of the non-statutory material discussed above it could possibly lead to an informed reading of the statute as having the meaning for which he contends. When, as in my view is legitimate given the stated purposes of the 2010 Act, regard is had to the predecessor legislation and to the departure made

from it, it is in my view clear that the legislative intention is not to confine the comparison to being made with non-disabled pupils at the same school. There was, and is, a carefully crafted distinction in the use of the descriptors "pupil" and "person". The chosen descriptor for the comparator is the same as that applicable to admissions cases where, by definition, the comparator will not be an existing pupil. In my view, the likely reason why "pupils" was not used to identify the comparator was to negate any possible inference that the comparators did have to be a pupil at the same school.

49. Even were I to be wrong on my interpretation of the authorities on other parts of the Act, to look in education cases beyond pupils at the school concerned for the comparator is in my view clearly permitted by the statute.

50. It is accepted that a comparator may be hypothetical (see *Ishola*). The nature of PCPs imposed in a school context is that they are likely only to be applicable to those attending school and in my view the comparison to be made under the Act in a case such as this is with a non-disabled child about to move to a new school year with new demands. In a mainstream school, there may be a comparator within the school. In a special school that is less likely, but "person" is wider than "pupil" and so a hypothetical comparator is permissible. Comparison with such a child would be consistent with *Smith* and *Archibald*, as the PCP leading to moving to a school year without a clearly-defined Transition Plan is the claimed disadvantage experienced by SR.

51. This interpretation in my view flows from the wording of the Act and its legislative history and avoids the startling consequence of excluding, substantially or in some cases totally, pupils at a special school from bringing reasonable adjustment claims.

52. In the present case, I do consider that the FtT has erred in law. It said it had reached a conclusion by reference to "disabled pupils generally", but it is unclear whether it meant any and all disabled pupils, or some sub-set of them and if so, what. That is the answer to Mr R's point that it was reasonable for the FtT to infer that the PCP in operation across the school would place "similarly disabled children" at a substantial disadvantage. Whether or not it would have been reasonable, that is not what the FtT said it was doing – see its para 99, quoted at [13] above. If it meant what it appeared to say, there is no evidence of the impact on anyone who is disabled other than SR and, in the absence of definition of "disabled pupils generally", I agree with Mr Cullen that the threshold for s.136 to bite was not reached.

53. I further consider that the FtT erred in law by providing inadequate reasons by making a comparison with non-disabled "pupils" without indicating what it meant. The fact that the Responsible Body's school may have few or none leaves open comparison with hypothetical non-disabled pupils elsewhere but it is not evident that that was the comparison the FtT was making.

54. Further, nor is there any evidence about the effect of a lack of a documented transition plan on a hypothetical non-disabled pupil moving to a new stage in their education even if the content might well be different.

55. I accordingly set the FtT's decision aside, but only insofar as it relates to the ground on which it found against the Responsible Body. Issues which will need to be addressed before a decision can be reached on that ground will include defining who constitutes "disabled pupils generally" for the purpose of the modified s.20, given SR's various conditions; establishing an evidential base not only for the impact of the claimed PCP on him but on others in that group; and considering how to approach the evidential aspects regarding the impact on the (very possibly hypothetical) non-disabled comparators as "persons who are not disabled". Those matters make it inappropriate for the Upper Tribunal to remake the decision itself as Mr Cullen invites me to do. It is accordingly remitted to the FtT, who have plentiful experience in ensuring that parties before them formulate their claim adequately and in applying s.136 of the Act.

C.G. Ward
Judge of the Upper Tribunal
Authorised for issue on 29 December 2023