IN THE FIRST-TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER

Appellant: **CATHOLIC CARE (DIOCESE OF LEEDS)**

Respondent: **THE CHARITY COMMISSION FOR ENGLAND AND WALES**

DECISION AND REASONS

Heard in public in London on 10 & 11 March 2011
by:

Alison McKenna, Principal Judge
Helen Carter, Member
Margaret Hyde OBE, Member

For the Appellant: Christopher McCall QC and Matthew Smith, instructed by Bircham Dyson Bell.

For the Respondent: Emma Dixon, instructed by Stephen Roberts, In-House Solicitor, Charity Commission.

Date of Decision: 26 April 2011

Subject matter: **Appeal to Tribunal against refusal of consent to amend objects of charitable company under s.64 Charities Act 1993;**

Whether discrimination by the charity on grounds of sexual orientation is permitted by s.193 Equality Act 2010.

DECISION

The appeal is hereby dismissed

REASONS

1. Catholic Care (Diocese of Leeds) ("the Charity") appeals to the Tribunal against a decision of the Charity Commission ("the Commission"), dated 21 July 2010. The decision appealed against is the Commission's refusal of its consent, as required by s.64 of the Charities Act 1993 ("the Act"), for the Charity to amend the objects clause in its Memorandum of Association. The Charity had sought permission to make the amendment so as to permit it to refuse to offer its adoption services to same sex couples.

Background to the Appeal

2. This matter has a complex history. The Charity first appealed against a decision of the Commission dated 18 November 2008 refusing the Charity consent to amend its objects. That appeal was dismissed by the Charity Tribunal (as it then was) on 1 June 2009[1]. The Charity then appealed to the High Court[2] against the Tribunal's decision. Mr Justice Briggs allowed the appeal and on 17 March 2010 remitted the matter to the Commission to make a fresh decision in accordance with the law as he had found it[3]. The current appeal is against the Commission's subsequent decision.

3. The Charity's appeals have taken place in the context of an evolving statutory framework for equality law. The first decision of the Commission, the first appeal to the Tribunal and the appeal heard by Briggs J all concerned the possible application of regulation 18(2) of the Equality Act (Sexual Orientation) Regulations 2007 ("the Regulations"). The Regulations had a built-in transitional period so that, if the Charity sought to bring itself within the exception available to charities under regulation 18(2), it needed to do so before 1 January 2009. As the Charity was still involved in litigation concerning its wish to amend its objects at the relevant date, it had to suspend the operation of its adoption services with effect from 31 December 2008. The Charity's adoption services remained suspended as at the date of this appeal hearing.

4. The Commission's July 2010 decision (now under appeal) was also made in respect of the Regulations. However, the law changed with effect from

[1]Reported at [2009] UKFTT 376 (GRC).
[2] The charity's previous appeal was conducted under the pre Tribunals Courts and Enforcement Act 2007 regime whereby appeals against decisions of the then Charity Tribunal were to the Chancery Division of the High Court. On 1 September 2009, the Charity Tribunal's jurisdiction transferred to the First-tier Tribunal (Charity) and appeals against decisions of the First-tier Tribunal (Charity) are now heard by the Upper Tribunal (Tax and Chancery Chamber).
[3] Reported at [2010] EWHC 520 (Ch).

1 October 2010[4] so that the applicable law is now the Equality Act 2010 and specifically s.193 of that Act, which provides charities in certain specified circumstances with an exemption from the equality obligations otherwise imposed by the Act. This appeal was heard in March 2011 and it was agreed between the parties and the Tribunal that, as the appeal to the Tribunal takes the form of a re-hearing whereby the Tribunal must consider the decision appealed against "afresh",[5] the Tribunal should make its decision by applying the law as it stood at the date of the appeal hearing. The Tribunal may nevertheless attach to the Commission's decision "such weight as it deserves"[6].

5. The exemption for charities under s.193 of the Equality Act 2010 is formulated slightly differently than was the test under the Regulations. However, the test applied by the Commission in its most recent decision was essentially the same as the test which must now be applied by the Tribunal, because the test that Briggs J implied into the Regulations in construing them has now been made explicit in s.193 of the Equality Act 2010. The Equality Act 2010 has not yet been fully implemented and the Tribunal heard that further provisions (which could possibly affect the Charity) will be commenced later in 2011. We return to this point later.

The Appeal

6. In its Grounds of Appeal dated 28 September 2010, the Charity argued that the Commission had misdirected itself as to the law and evidence in making its July 2010 decision. It argued that the Commission had failed to have adequate regard "to the logically indisputable fact that by reducing the funding available for adoption activities (in circumstances where it is known that voluntary support is required for such activities owing to the inadequacy of the fees payable) the closure of the Appellant's adoption services must *ipso facto* reduce the capacity for finding homes for children requiring such homes, including in particular children of the category likely to be helped by the Appellant (being those for whom it is hardest to find homes)". The Charity had opted to undertake the Commission's internal review process before applying to the Tribunal. Its Grounds of Appeal argued, *inter alia*, that the Commission had given undue weight to evidence which the Charity had been unable to challenge by cross examination in that forum.

7. In applying to the Tribunal, the Charity asked for its appeal to be transferred to the Upper Tribunal (Tax and Chancery Chamber) for a hearing at first instance, pursuant to rule 19 of the Tribunal's rules of procedure,[7] on the basis that it involved a novel point of law. After the exchange of pre-hearing

[4] The relevant provisions were brought into force by the Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010.
[5] See paragraph 1(4) of Schedule 1C to the Charities Act 1993.
[6] See E.I. Du Pont Nemours & Co v S.T. Du Pont [2006] 1 WLR 2793, applied in Seevaratnam v Charity Commission [2009] UKFTT 378 (GRC).
[7] The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

documentation required by the Tribunal's rules, the Tribunal took the provisional view that there was an evidential dispute between the parties, which would be most appropriately heard in the First-tier Tribunal where evidence could be tested by cross examination and findings of fact could be made by a panel involving the Tribunal's lay members. In responding on behalf of the Charity, Mr McCall submitted that "*If none of the contentions set out in … the Notice of Appeal are in dispute… this appeal raises a short question (essentially of law) …..…If so the appeal should be transferred to the Upper Tribunal…"*. And later: "*If, on the other hand, the Respondent intends to challenge any of the statements of fact in paragraph 2.5…..…the Appellant accepts that it would be appropriate for the oral evidence to be given before the First-tier Tribunal in order that the facts can be found by that Tribunal"*. The Commission responded to this by clarifying its case and sending the Charity and the Tribunal a list of the issues in the Charity's Notice of Appeal which were either denied or not admitted (so that the Charity was "put to proof" of them). In the circumstances, the Principal Judge declined to recommend to the President of the General Regulatory Chamber that there be a transfer to the Upper Tribunal and listed this matter for hearing in the First-tier Tribunal.

The Powers of the Tribunal

8. The powers of the Tribunal in relation to this appeal are derived from the relevant entry in the table in Schedule 1C to the Act. The Tribunal has the power to dismiss the appeal or, if it allows the appeal, it may quash the Commission's decision and (if appropriate) remit the matter to the Commission for a fresh determination. Paragraph 5 of Schedule 1C to the Act provides that the Tribunal's power to remit a matter to the Commission includes the power to remit it generally or to remit it for determination in accordance with a finding made or a direction given by the Tribunal. The particular orders sought by the parties in this appeal are described at paragraphs 15 and 16 below.

The Question for the Tribunal

9. The question which Briggs J formulated for the Commission to answer in applying the Regulations was whether the less favourable treatment contemplated by the proposed amendment to the Charity's objects clause would constitute a proportionate means of achieving a legitimate aim, so that the less favourable treatment would be justified for the purposes of Article 14 of the European Convention on Human Rights ("ECHR").

10. As mentioned above, the law has changed since the Commission's decision, so that the Tribunal must now consider the Charity's application in relation to s.193 of the Equality Act 2010. This provides as follows:

> *"(1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic[8] if –*

[8] Section 4 of the Equality Act 2010 provides that a person's sexual orientation is a "protected

(a) the person acts in pursuance of a charitable instrument, and
(b) the provision of benefits is within subsection (2).

(2) The provision of benefits is within this subsection if it is –
(a) a proportionate means of achieving a legitimate aim, or
(b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

[(3) – (7)]

(8) A charity regulator does not contravene this Act only by exercising a function in relation to a charity in a manner which the regulator thinks is expedient in the interests of the charity, having regard to the charitable instrument".

11. The Charity asked the Tribunal to find that the less favourable treatment it proposed to offer to same sex couples would constitute a proportionate means of achieving a legitimate aim, as required by s.193 of the Equality Act 2010. The Charity's case before Briggs J had been that the legitimate aim it pursued was that of providing suitable adoptive parents for a significant number of children who would otherwise go un-provided for. Briggs J accepted that this aim could, in principle, amount to a legitimate aim for the purposes of Article 14 ECHR and therefore remitted the matter to the Commission for it to consider whether the evidence supported the Charity's case.

12. At the Tribunal hearing, the Charity put its case in a slightly different way: the legitimate aim was described as *the prospect of* increasing the number of children (particularly "hard to place" children) placed with adoptive families. The Charity argued that the discrimination proposed was proportionate to the achievement of this legitimate aim because the discrimination would take the form of the denial of services which would not be available to same sex couples from the Charity, but would be available to them via other voluntary adoption agencies and local authorities. The Charity argued that unless it were permitted to discriminate as proposed, it would no longer be able to raise the voluntary income from its supporters on which it relied to run the adoption service, and it would therefore have to close its adoption service permanently on financial grounds. This would result, the Charity argued, in a consequent loss in the overall provision of services by the adoption agency sector and a lost opportunity to increase the number of children placed with adoptive families.

13. The Commission asked the Tribunal to dismiss the appeal and relied upon the evidence and argument which had supported its own refusal of consent to the proposed objects. Its reasons for refusal were, in summary, that (i) the proposed discrimination was not justified under Article 14 ECHR; (ii) a

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characteristic" for the purposes of the Act.

charity which discriminated on grounds of sexual orientation which were not justified under Article 14 ECHR could not meet the public benefit requirement imposed by the Charities Act 2006; and (iii) on the evidence, there was no rational connection between the aim relied upon by the Charity and its proposed means of achieving that aim.

14. It is important to record here that Mr McCall, on behalf of the Charity, accepted that religious conviction alone could not in law provide a justification for the denial of its adoption services to same sex couples. Religious belief is of course protected by ECHR and by the Equality Act 2010 in certain private circumstances; however, it was agreed between the parties that the Commission and the Tribunal were bound by case law to the effect that religious belief cannot provide a lawful justification for discrimination on grounds of sexual orientation in the delivery of a public-facing service such as the operation of a voluntary adoption agency. The Tribunal was grateful for the parties' agreement on this point and concurred with their analysis of the law[9].

The Orders Sought

15. The Charity asked the Tribunal to allow its appeal and remit to the Commission the question of whether the Charity should be permitted to amend its objects, such decision to be taken in accordance with the Tribunal's ruling on the principle of the Charity's ability to discriminate pursuant to s.193 of the Equality Act 2010. The Tribunal was asked to rule on the principle but not asked to approve specific objects because the draft objects which the Charity had presented to the Commission were agreed to be incapable of approval for a variety of reasons. It was agreed between the parties that there would need to be a further discussion between them as to the final format of the objects clause once the issue of principle had been resolved by the Tribunal. The Tribunal was content with this approach.

16. The Commission asked the Tribunal to dismiss the Charity's appeal on the issue of principle.

The Evidence

17. The Tribunal was provided with an agreed hearing bundle running to some 1500 pages. This included witness statements; an agreed note of the Charity's case as presented to the Commission's internal review panel's meeting; published research and reports on the question of the relationship between local authorities and voluntary adoption agencies; transcripts of the evidence presented to the previous Charity Tribunal hearing; and correspondence between the Commission and various third parties, including local authorities to which the Charity had in the past provided adoption services. At the hearing, the Charity asked for only one of the Commission's witnesses and the

[9] For the case law on this issue see Islington London Borough Council v Ladele [2009] EWCA Civ 1357; McFarlane v Relate Avon Ltd [2010] EWCA Civ 880; R (Eunice and Owen Johns) v Derby City Council [2011] EWHC 375.

Commission for two of the Charity's witnesses to attend for cross-examination.

18. Although the Charity's adoption service remained suspended at the time of the Tribunal hearing, it has throughout the period of this litigation continued to undertake its other charitable work. This includes children's residential services, schools services, social and community services, learning disability and mental health services and services for older people. There is no application by the Charity for permission to amend its objects so as to discriminate on grounds of sexual orientation in relation to its non-adoption related activities. The Charity told the Tribunal that it had applied approximately 10 % of its income on its adoption services in the last year in which it had operated the full service. There had, on average, been 10 successful placements of children per year with the Charity's own approved adopters. This required the Charity to raise approximately £130,000 of voluntary income per year because there is a short-fall of approximately £13,000 per child in respect of the "inter-agency fee" payable to voluntary agencies by local authorities when there is a successful placement. Taking into account the additional work (such as the preparation of couples) that does not attract statutory funding at all, the Charity estimated for the Tribunal that it had spent £100-200,000 of voluntary income on its adoption work in the last year in which it had operated a full adoption service. The Tribunal notes that its accounts for the financial year ending 31 March 2009 showed that it had spent £193,715 of its unrestricted income on adoption services.

19. The documentary evidence presented to the Tribunal included the correspondence between the Commission and the local authorities with which the Charity had worked. Of the thirteen local authorities to which the Commission had written after this matter was remitted to it by Briggs J, only six had replied. None of the local authorities who responded had supported the Charity's contention before Briggs J that if the Charity closed its adoption service then children would be left un-adopted.

20. The documentary evidence before the Tribunal also included the Charity's accounts for the period ending 31 March 2009. The accounts (which had been audited and filed with the Commission) showed that the Charity had received, in addition to its other (earned) income, voluntary income (comprising donations and legacies) of £154, 940 during the period. The Charity's entire voluntary income for the period is shown as "unrestricted" in the accounts, as were its investment, rental and Christmas card sales income. The only "designated" income was shown to be for property and property maintenance. The Charity's income from its primary purpose trading activities was the only income described as "restricted". The Tribunal understood this to mean that all of the Charity's voluntary income was capable of being applied for the full range of the Charity's activities referred to at paragraph 18 above. The accounts showed that the Charity's voluntary income had in fact been applied during this accounting period to support those activities which were making an operating loss; these included the schools' services and the residential children's service, in addition to the adoption service. It is important to note here that the Charity's accounts did not show it to have raised voluntary

income which was restricted to the subsidy of its adoption services alone. We return to this point later.

21. The Tribunal heard oral evidence from Mr. James Richards, who was called by the Charity. He told the Tribunal that he had spent 19 years as the Chief Executive of the Catholic Children's Society (Westminster). He explained to the Tribunal, with reference to published research,[10] that approximately 3,000 children are placed for adoption each year but that there are currently approximately 4,000 children awaiting adoption. He explained that these figures are approximate and there is generally thought to have been a decline in the number of children for whom adoption has been sought in recent years. He told the Tribunal that local authorities sometimes re-designate children as suitable for long-term fostering rather than adoption, so that the statistics concerning the number of children awaiting placement may not reflect the full picture. Mr Richards told the Tribunal that it was difficult to quantify the effect of any voluntary adoption agency being taken out of the system through closure of its service. He thought the likelihood was that some potential adopters would not come forward if their agency of choice had closed, although he accepted that this theory was based on anecdotal evidence only.

22. Mr Richards said that, from his own experience, voluntary adoption agencies do not carry spare capacity and were very careful in the management of their resources. He explained to the Tribunal that voluntary adoption agencies are under-used by local authorities and that a recent report[11] had concluded that the "spot-purchase" arrangements for the procurement of services from voluntary agencies did not generally allow those agencies to invest in their services or to expand their capacity because they never knew how much work would be coming their way from local authorities. He acknowledged that there had been a decrease in the take up of services provided by voluntary adoption agencies recently, which he attributed to an increase in expertise within local authorities and reluctance on the part of local authorities to incur the inter-agency fee. He considered that local authorities would sometimes "hang on" to a child, or delay a child's placement until the following financial year, hoping that by so doing they would either find an adopter from their own pool and avoid paying the inter-agency fee, or defer the expenditure. On the question of the significance of the number of voluntary agency-approved adopters on the waiting list, he commented that whilst it was good to have a large pool of potential adopters, he would not like to see a pool so large that those on the list would have to wait a long time for a child. He thought that most of the approved potential adopters on the list now would eventually have a child placed with them, but acknowledged that some do drop off the waiting list for a variety of reasons. He regarded a bigger pool of potential adopters as translating into a higher chance that a child would be found a suitable family, although he recognised that there were a variety of factors at play which could affect that conclusion. He gave the examples of geography, ethnicity, the desirability of placing sibling groups together and children with

[10] He exhibited to his statement *Statistical First Release*: DCSF, 2009 and 2010; *No Place like Home:* Policy Exchange, 2010; *Adoption and the Inter-Agency Fee:* Selwyn, Sempik, Thurston and Wijedasa, 2009.

[11] The Policy Exchange report, referred to at footnote 10 above.

special needs as factors which influence the chances of a successful match between a particular child and a potential adopter on the waiting list, apart from the funding issues.

23. Mr Richards agreed that other voluntary agencies experience the same "funding-gap" as had been identified by the Charity. This was because most of the work undertaken, e.g. the preparation of potential adopters, is not funded by the local authority. The inter-agency fee is paid by local authorities only in respect of a successful placement, although it is intended also to fund some post-adoption support work. He recognised that other charities have had to fund-raise to subsidise their adoption work and to meet the short-fall. He noted that charities have their own loyal supporter base to whom they can turn for these funds.

24. The Tribunal also heard oral evidence from the Right Reverend Arthur Roche, the Roman Catholic Bishop of Leeds, who was called by the Charity. He is the ex-officio Chairman of the Charity and in his witness statement he explained that, as the Bishop of the Diocese in which the Charity is based, he is responsible for ensuring that its activities are within the tenets of the Church: "*in effect I am the arbiter of faith in respect of the activities of the Charity*". The Bishop told the Tribunal that the Church's teaching is that a full sexual union without marriage is unacceptable, so that adoption services could not be offered by the Charity to unmarried heterosexual couples or to same sex couples. He did not think it generally acceptable for a single person to adopt, although he was aware that the Charity had in the past placed a child for adoption with a single adopter. He said he could not explain why the Charity's website apparently suggested that single adopters were able to use the Charity's services and said that whilst he was involved in setting the Charity's policies, he did not necessarily know what went onto its website.

25. The Charity's proposed objects (as currently drafted) did not seek to discriminate against same sex foster carers. The Commission had been informed by the Charity during the internal review process that the Charity did not object to placing children with same sex foster carers because this did not involve the creation of a family. When asked about this, the Bishop disagreed with this statement of the Charity's policies and said he did not know why the proposed objects had been drafted in that way. He did not think the Charity had ever placed a child for fostering with a same sex couple and did not think it should. He thought that if a same sex couple who were already fostering a child applied to the Charity for assistance to adopt it, they would be referred to another voluntary adoption agency.

26. The Bishop explained that, as he had taken the view that adoption services could not, consistently with the tenets of the Church, be offered to same sex couples then (unless permission were to be given to amend the objects to allow discrimination) the Charity would close its adoption service completely. He said there was no "Plan B" in this regard, although he told the Tribunal he was aware of various re-structuring arrangements which had been adopted by other Catholic adoption agencies. These included instances of de-merger with the Church or making a gift of their assets to another agency on a restricted

basis. He did not think that the Charity could re-structure so as to be able to continue its adoption work because he said the necessary financial backing from its supporters would not be available. He said that "*the people who provide us with funds have clear views on these matters*". The Bishop told the Tribunal that he did not know how many Catholics supported same sex adoptions, he just knew that the stance the Charity had adopted in this matter had attracted much support. When asked if a change of stance might not in fact attract new supporters who did not oppose same sex adoptions, he responded that this was untested water. He told the Tribunal that since the suspension of the Charity's adoption service it had received over 100 enquiries from potential adopters. These people had been referred to Barnardo's and the NSPCC, which both operate voluntary adoption services in the same geographic region as the Charity.

27. The Bishop explained that the Charity had provided a service of real benefit to the community and enjoyed a high reputation for its adoption work, especially its post-adoption support services. He considered that this accounted for the low number of the Charity's placements which had subsequently broken down (5%, as against a figure of 6% for voluntary adoption agencies generally and about 20% for local authority adoption placements). When asked to describe how the ability to discriminate on grounds of sexual orientation would assist the Charity in its work, he explained that charities want their income to be applied to their own vision of what is in the best interests of the child. He thought that voluntary income had dropped off in areas such as Birmingham and Cardiff when there had been de-mergers of voluntary adoption agencies from the Church. The Bishop told the Tribunal that he agreed with the principle that a child should have the widest possible pool of potential adopters. He said he had heard that same sex couples rarely adopt hard to place children, although when directed to the evidence before the Tribunal which contradicted that view (see paragraph 51) he was prepared to accept that he might be mistaken on that point. (Mr McCall helpfully conceded on behalf of his client that the suggestion that same sex couples did not adopt hard to place children was no part of the Charity's case).

28. The Bishop described the Charity's approach to fund-raising, which he said was often conducted through appeals at Masses and in schools. The Bishop was asked how he knew that the Charity's donors would end their financial support for the Charity if it offered adoption services to same sex adopters. He explained that the Charity has always been very clear about the family structure it promoted (the "Nazarene family") and that this gives people confidence in the Charity. He said that he had written pastoral letters to the Diocese about this case and was surprised by the many letters of support he had received. He told the Tribunal he did not consider that the Charity's adoption services would be viable without funding from members of the Catholic Church. He thought that the receipt of donations and the promotion of a Nazarene family structure went hand in hand. He commented that the law does not require the Catholic Church to bless civil partnerships and he thought that the law should allow the Church to act in accordance with its conscience in relation to same sex adoptions also.

29. The final witness the Tribunal heard from in person was Dr Julie Selwyn of the School for Policy Studies at the University of Bristol. She is the Reader and Director of the Hadley Centre for Adoption and Foster Care Studies and has since 1992 completed 10 major studies on adoption and fostering, mainly funded by Government. She was called as a witness by the Commission. Dr Selwyn had led the study on the relationship between local authorities and voluntary adoption agencies[12] which the Tribunal had received in evidence.

30. Dr Selwyn's evidence to the Tribunal was that there are 27 voluntary adoption agencies in England and 150 local authority adoption agencies. She said that the small voluntary adoption agencies were struggling under the existing spot-funding arrangements because they find it hard to compensate for the deficit in statutory funding. The larger charities were more likely in her view to have surpluses of income which could be used to subsidise their adoption services. Since she had written her report in 2009, she was aware that one voluntary adoption agency had closed, two have merged and some others have entered into different types of arrangements with local authorities. She explained to the Tribunal that there is currently a group of voluntary adoption agencies which is looking at all the possible ways of working with local authorities and has funded some research on the issue.

31. Dr Selwyn told the Tribunal that local authorities would in her view benefit from using voluntary adoption agencies more frequently, but that the present funding model pushed them in the opposite direction. Local authorities were working from an annual budget allocated only to the payment of the inter-agency fee, so they could not take a financial overview of adoption which incorporated the cost to the public purse of accommodating a child in care in the long term. She thought that voluntary adoption agencies should be entitled to secure full cost recovery, especially in view of the benefits to society of arranging and supporting a successful adoption.

32. In contrast to James Richards' evidence, Dr Selwyn did not take the view that voluntary adoption agencies were at "full stretch". She thought that their services were not being fully used, with the result that some of them were now discontinuing staff contracts, and generally "pulling in their horns" to survive. She agreed that there were about 4,000 children presently approved for adoption but also said that prospective adopters were being turned away in some areas because there were sufficient numbers on the lists. She said that some prospective adopters sit on a waiting list for so long that they give up. Dr Selwyn's evidence was that local authorities can generally place a child who has fewer problems from within their own resources and that they tend to use the voluntary adoption agencies for the children who are harder to place. She also said that local authorities may sometimes use voluntary adoption agencies to place a child at a geographical distance from its birth family, as sometimes a child's safety requires this.

33. When asked about the impact of a voluntary adoption agency closing, Dr Selwyn stated that local authorities tend to look to their own resources first in

[12] *Adoption and the Inter-Agency Fee*, referred to at footnote 10 above.

this situation. They might look to a consortium of other local authorities and then to voluntary agencies in their own area. If these approaches failed they might advertise and/or approach voluntary agencies outside their geographic area. There were a number of options open to them. The published research had made it clear that commissioning by local authorities of voluntary adoption agencies was virtually non-existent. She told the Tribunal that in some local authority areas they have plenty of prospective adopters but not many children available for adoption. She thought that the likelihood of any child being placed with an adoptive family depended on its own needs, the willingness of the local authority to explore all the options and, if unable to find suitable adoptive parents from within its own resources, on its willingness to pay the inter-agency fee. In the studies she had conducted, she had found that the child's social worker's own attitude to the likelihood of a successful adoption placement for that child was an important factor, because if the social worker was not hopeful that it could be achieved, they did not then take all the possible steps to find that child an adoptive family. Dr Selwyn commented that voluntary adoption agencies had an important role to play but that it was local authorities which had ultimate control over whether - and where - a placement was made.

34. Dr Selwyn was asked to comment on Mr McCall's assertion that it was unthinkable that if the resources of a voluntary adoption agency were increased, it would not have a positive effect on the number of adoptions that were made. In other words, was it correct that increasing the funding available would lead to an increased number of adoptions? Dr Selwyn told the Tribunal that she did not agree with this proposition, because if local authorities would not pay the inter-agency fee it would not matter if a voluntary agency had twice the number of potential adopters, the result would still not be more adoption placements. She gave an example of one voluntary adoption agency which had put resources into increasing the number of ethnic minority adopters, but they had not been used by the local authorities so it had not increased the number of adoptions. She concluded from this that it is the financial arrangements between the local authorities and the adoption agencies which is the determining factor in the number of adoption placements made, rather than the resources of the voluntary agencies. She also commented that many professionals working in the adoption field feel that it is unfair to keep increasing the pool of potential adopters when there is no hope of a child for some people on the waiting list. Some voluntary agencies have potential adopters knocking at their doors, but she thought it may not be ethical to keep expanding the pool by accepting them.

The Charity's Case

35. Mr McCall put the Charity's case succinctly as follows:

(i) the Charity had in the past placed approximately 10 children a year into adoptive families. If the Charity could not operate its adoption service then those children would be left in care;
(ii) this is a legitimate aim for the purposes of s.193 of the Equality Act 2010;

(iii) in order to make it possible to achieve that aim, the Charity must receive funds to subsidise its adoption work and it cannot hope to find this funding otherwise than through members of the Catholic Church;
(iv) the Charity must therefore pursue adoption work which commands the support of the Catholic Church.

36. He argued that the discrimination proposed by the Charity would be of limited impact only, because same sex couples could still receive a service through other voluntary adoption agencies. In any event, as the Tribunal had heard, local authorities place children with adopters from their own and other local authority approved lists (which include same sex couples) before even considering those approved by voluntary adoption agencies. The Charity (in common with other voluntary adoption agencies) tends to work with "hard to place" children. This provides public benefit, including for the reason that it saves costs otherwise falling on the public purse.

37. Mr McCall's criticisms of the Commission's decision of 21 July 2010 were these:

(i) whilst it is accepted that the European authorities require there to be "weighty reasons" to justify discrimination on grounds of sexual orientation, the Commission had erred in failing to find that the Charity's reasons for seeking to discriminate were sufficiently "weighty";
(ii) the Commission had asked the Charity to prove that children would not be placed with adopters if the Charity could not discriminate, whereas the question the Commission should have addressed was whether there was a "material probability" that the number of children placed in adoptive families would be increased by the Charity's work. The Commission should have considered that if the Charity closed its adoption services and child X, whom the Charity might have placed, was placed by another agency, then child Y might not be adopted because the other agency's resources would not be available to it;
(iii) the Commission had not considered the benefit of enlarging the resources available to the voluntary adoption sector generally through the Charity's donated income;
(iv) the Commission had taken insufficient account of the fact that, in certain circumstances, discrimination was permitted by the law: the Charity had advanced a classic case of proportionate discrimination in order to achieve a legitimate aim;
(v) the Commission had identified in its decision a dis-benefit to same sex couples which was in fact illusory because the service would not be available to anyone in any event if the charity had to close its adoption service.

38. In addressing the legal authorities, Mr McCall submitted that a helpful summary of the law could be found in the Court of Appeal's decision in *Elias*[13] in which in which Mummery LJ had adopted a three stage approach to the question of proportionality as follows: "*First, is the objective sufficiently*

[13] R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293.

important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?" Mr McCall submitted that this approach had been praised (if not expressly approved) by the Supreme Court in the *Jewish Free Schools*[14] case and that the Tribunal should adopt this approach to the question of proportionality before it.

39. Mr McCall also directed the Tribunal's attention to the House of Lords' decision in *Re G (Adoption: Unmarried Couple)*[15] in which Lord Hope of Craighead had commented at page 194G that "*The aim sought to be realised in regulating eligibility for adoption is how best to safeguard the interests of the child. Eligibility simply opens the door to the careful and exacting process that must follow before a recommendation is made. The interests of the child require that this door be opened as wide as reasonably possible. Otherwise there will be a risk of excluding from assessment couples whose personal qualities and aptitude for child rearing are beyond question".* The Charity's case was that its proposed mode of operation would "open the door as wide as reasonably possible" because it would be able to bring into the pool of potential adopters couples who approached the Charity because they preferred its approach and who might otherwise not approach or be approved by other agencies.

40. In his closing, Mr McCall commented on the evidence of the Charity's accounts and specifically on the evidence that the Charity's donated income was unrestricted. This had been the subject of questions from the Tribunal itself during the Bishop's evidence and to Mr McCall in his submissions. He stated that the Charity had a "moral obligation" to apply the funds raised for the purpose of its adoption work because the funds are "collected for a purpose and ear-marked in that way" and that it was these donors whose support would be lost if the Charity could not operate as it proposed. He accepted that for accounting purposes the funds were unrestricted. However, he did not consider that this affected the Charity's argument that its funding for adoption work would be lost if the Charity's supporters disapproved of its activities.

41. Following the end of the Tribunal hearing, Mr McCall wrote to the Principal Judge saying that he wished to clarify certain points on the Charity's behalf. The Principal Judge responded to both parties that she did not consider it appropriate to enter into correspondence with them or to consider additional argument after the Tribunal hearing had closed.

The Commission's Case

42. Ms Dixon opened the Commission's case with reference to the earlier decision of Mr Justice Briggs and in particular to paragraph 108 of his judgement, in which he had commented that: *"Even if the factual analysis was indisputable, the question whether it would constitute the particularly clear and weighty*

[14] R (E) v JFS Governing Body [2010] 2 AC 728.
[15] [2009] 1 AC 173.

reasons required for justification under Article 14 is by no means straightforward". Ms Dixon observed that Briggs J had left the application of the justification test to the Commission and further that the Charity Tribunal had in its first decision in this case commented that the Commission "*is uniquely positioned to assess the question…taking into account the distinctive features of charitable activity and the need to balance the desirability of avoiding discrimination on the one hand against the justification put forward on the other for allowing some discrimination in order to achieve the charitable end result*[16]*"* .

43. Ms Dixon argued that the Commission had properly applied the test set for it by Briggs J, and in so doing had been guided by the European jurisprudence to the effect that there must be particularly convincing and weighty reasons to justify discrimination on the proposed grounds, because sexual orientation is not something that one can change at will. In support of this argument, she referred the Tribunal to the House of Lords' decision in *Carson*[17] in which Lord Walker of Gestingthorpe had commented at page 191F that "*The proposition that not all possible grounds of discrimination are equally potent is not very clearly spelled out in the jurisprudence of the Strasbourg court. It appears much more clearly in the jurisprudence of the United States Supreme Court, which in applying the equal protection clause of the Fourteenth Amendment has developed a doctrine of "suspect" grounds of discrimination which the court will subject to particularly severe scrutiny. They are personal characteristics (including sex, race and sexual orientation) which an individual cannot change …and which, if used as a ground for discrimination, are recognised as particularly demeaning for the victim"*. And further at page 192E, "*In its judgements the European Court of Human Rights often refers to "very weighty reasons" being required to justify discrimination on these particularly sensitive grounds"*. The Tribunal notes that it is this reasoning which no doubt led to the inclusion of sexual orientation along with sex and race as a "protected characteristic" in the Equality Act 2010 so that this approach is now enshrined in domestic legislation.

44. Ms Dixon asked the Tribunal to consider the particular context within which the Charity's proposed discrimination would take place and the risk that the discrimination proposed, arising in the context of a wish to be considered as adoptive parents, would be "particularly demeaning" for same sex couples. She asked the Tribunal to find that the denial of services from the Charity to a same sex couple represented the loss to that couple of a high quality specialist service, with a higher success rate than local authority placements and better post-adoption support, so that the Charity's proposal to discriminate would consign that same sex couple to a "second class" service. In terms of the legal test to be applied by the Tribunal, she argued that what had to be justified here was the "less favourable treatment" which the Charity proposed to offer to same sex couples. She accepted that the "less favourable treatment" needed to be weighed against the legitimate aim pursued by the Charity but in so doing, she argued, it was important for the Tribunal to identify the likely effects of the proposed discrimination. In her submission these were (i) the

[16] Cited at footnote 1 above.
[17] R (Carson) v Work and Pensions Secretary [2006] 1 AC 173

direct effect on any same sex couple wishing to use the charity's adoption services and the "particularly demeaning" effect of being turned away; (ii) the potential for other voluntary adoption agencies to copy the Charity's proposed approach if it were permitted by the Tribunal in this case; and (iii) the effect on society as a whole of the negative impact such discrimination would have on the dignity of all lesbians and gay men. She submitted that because it was the less favourable treatment proposed by the Charity itself which had to be justified, it was irrelevant that (as Mr McCall had argued) the same sex couple could approach other service providers when turned away by the Charity. In other words, the justification required by law had to be made out in relation to the Charity's own service provision rather than by reference to the plurality of service provision available.

45. Ms Dixon also referred the Tribunal to *Re G*[18] and to the acknowledged need to "open the door" as wide as reasonably possible. She argued that the Charity's proposed approach would have the effect of "closing the door" to many same sex couples who had the potential to be good adoptive parents and that this would run counter to the Court's approach to the interests of the child in *Re G*. She made clear on behalf of the Commission that it accepted that the Charity provided a valuable service and that it would be a matter of regret if that service were lost to society by the Charity closing its adoption service. However, the Commission did not accept that the potential closure of its adoption service by the Charity amounted to a sufficient justification for the proposed discrimination on its own. The argument advanced by the Charity was that it would lose the support of its donors if it were not permitted to discriminate. However, Ms Dixon submitted that the proposed discrimination could not, as a matter of law, be justified by the Charity on the basis of the discriminatory views of third parties. She referred the Tribunal in this regard to the decision in *Smith and Grady v UK*[19] in which the European Court of Human Rights had considered whether the reported negative attitude of heterosexual service personnel towards their homosexual counterparts constituted justification for discrimination against homosexuals in the UK armed forces. The European Court had found that there was no justification for the discriminatory policy and commented at page 533 that "*To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour*".

46. Ms Dixon submitted that the Commission had made the right decision for the right reasons in this case and that its conclusions on the evidence should be accorded due weight by the Tribunal. The Commission had first considered the European jurisprudence and noted the stringency of the "weighty reasons" test to be applied in cases of discrimination on grounds of an immutable characteristic such as sexual orientation. Secondly, it had considered the Charity's case for justification and the consequences of the threatened closure

[18] Cited at footnote 14 above
[19] (1999) 29 EHRR 493

of its adoption service. In this regard it had written to a number of local authorities which had in the past placed children with the Charity's approved adopters. Having considered the responses, it had reasonably concluded on the basis of evidence that the closure of the Charity's service would not have the effect which the Charity had claimed it would have i.e. that children would in consequence lose the opportunity to be adopted and remain in care. Thirdly, the Commission had considered the best interests of children and the need to "open the door" wide to potential adopters and concluded that the exclusion of same sex couples from the pool was inconsistent with the best interests of the child; fourthly, it had considered the serious effects of the proposed discrimination on lesbians and gay men and on society generally. The Commission was respectful of the Charity's wish to promote a Nazarene family as part of its religious practice. However, in reaching its decision, the Commission had applied the settled law that religious conviction did not provide sufficient justification for the proposed discrimination in the context of a public activity such as adoption. The Commission had also noted that, as the Charity had in the past placed a child with a single adopter, this suggested that the Charity had in fact more flexibility than it now claimed in relation to the family model it promoted.

The Tribunal's Findings and Conclusions

47. The Commission told the Tribunal that it was content to accept that the Charity intended to pursue the legitimate aim which had been identified by Briggs J and to consider the question of justification against that aim. The aim was stated in Briggs J's judgement to be that of "providing suitable adoptive parents for a significant number of children who would otherwise go un-provided for". Briggs J had accepted that this aim could, in principle, amount to a legitimate aim for the purposes of Article 14 ECHR and that was why he had remitted the matter for the Commission to consider the evidence. The Tribunal noted, however, that the Charity's case in relation to the legitimate aim it pursued had shifted by the time of the Tribunal hearing so that it was said in the Grounds of Appeal and by Mr McCall to be "*the prospect of* increasing the number of children (particularly "hard to place" children) placed with adoptive families" rather than the aim of actually achieving the placements. The Tribunal wondered whether the reason for the Charity's change in stance was the documentary evidence relied on by the Commission in the form of letters from local authorities which contradicted the Charity's original case. In any event, the Tribunal finds that the legitimate aim identified in this case was a materially different aim from the one identified by Briggs J as being, in principle, capable of justifying the proposed discrimination.

48. The Tribunal must consider the Charity's case "afresh" on a re-hearing, so it has directed its considerations to the questions of, firstly, whether the Charity's aim of increasing the prospect of a placement (as opposed to actually making a placement) was in principle a legitimate aim for these purposes; secondly whether, on the evidence presented to the Tribunal, it was an aim that could be achieved by the method the Charity proposed to adopt; and thirdly, whether the discrimination on grounds of sexual orientation proposed

by the Charity would constitute a proportionate means of achieving the legitimate aim it had identified.

49. In relation to the first and second of these issues, Mr McCall had argued on behalf of the Charity that it was "inconceivable" that if the resources of a voluntary adoption agency were increased, it would not have a positive effect on the number of adoptions that were made. In other words, he had argued that increased funding for the Charity would lead to an increased number of adoptions. However, the Tribunal had heard conflicting evidence on the question of whether simply increasing the capacity of the Charity, e.g. by increasing the pool of potential adopters, would result in an increased number of adoption placements being made. Whilst Mr Richards had agreed with the Charity's submissions on this point, he had accepted that this was based on his personal view only and also that there were a number of other factors which could operate to influence the number of placements. Dr Selwyn, on the other hand, had told the Tribunal that increasing the pool of potential adopters would not inevitably lead to an increase in the number of adoption placements, because it was the financial arrangements between local authorities and adoption agencies which determined the number of adoption placements made, rather than the resources of any voluntary adoption agency. She had given the Tribunal the example of a voluntary agency which had deliberately swelled its pool of potential adopters but found they had not been used to place more children. Having considered the conflicting evidence carefully, the Tribunal preferred the evidence of Dr Selwyn on this point, noting that she is a leading academic expert on adoption and that Mr Richards was relying on his (admittedly considerable) experience only. Dr Selwyn's evidence was supported by the weight of evidence before the Tribunal, and in particular the academic reports, which amply demonstrated the negative impact of spot-funding arrangements on voluntary adoption services generally. The Tribunal accepted Dr Selwyn's conclusion that there is in practice little a voluntary adoption agency can do to counteract the impact of the local authority funding arrangements.

50. The Tribunal had to decide whether the Charity's revised aim of "the prospect of increasing the number of children (particularly "hard to place" children) placed with adoptive families" should be viewed as a legitimate aim for the purposes of s.193 of the Equality Act 2010. The Tribunal concluded that the Charity's stated aim was in principle a legitimate aim for the purposes of the Act, taking into account the importance to society generally (and to the children concerned in particular) of any realistic prospect of increasing adoption placements - even if the Charity itself were not in practice able to achieve those placements. That is not to say, however, that the legitimate aim identified by the Charity was capable of being achieved by the Charity's proposed approach. The Tribunal concluded that the evidence presented to it did not make out the Charity's case that the continued and/or increased voluntary funding of its adoption work would inevitably lead to the prospect of an increased number of adoptions. The Charity's case was, in this respect, contradicted by evidence presented to the Tribunal of the dominant influence that local authority funding arrangements have on the work of the voluntary adoption agencies and the inability of the voluntary adoption agency sector to

overcome the problems created by that system through its own practice. The Tribunal finds, therefore, that the legitimate aim identified by the Charity was not in fact one that would be achieved by its proposed method.

51. The Tribunal also considered whether the Charity's proposed approach to the approval of potential adopters (namely the recruitment and approval of married heterosexual couples only) was consistent with the authority of *Re G,* which had confirmed that the interests of the child required the door to be opened "as wide as reasonably possible" to find suitable adoptive parents for that child. This is relevant to the question of proportionality and whether, to adopt the formula used in the *Elias*[20] decision, the measure which the Charity proposed to adopt was rationally connected to its objective. Whilst the Tribunal accepted Mr Richards' evidence that some potential adopters might not come forward if the Charity were to close its adoption service, the Tribunal had to consider whether this risk outweighed (as it was put in *Re G),* the "*risk of excluding from assessment couples whose personal qualities and aptitude for child rearing are beyond question"*. The Tribunal had before it the evidence which the Commission had received from six local authorities, in response to its enquiries (see paragraph 19 above). The letters were positive about the making of adoption placements of "hard to place" children with both individual lesbian and gay adopters and with same sex couples. More than one local authority had observed that gay and lesbian adopters' own experiences had given them an understanding of the complexity of the children's needs. The Tribunal also had before it evidence which the Commission had received from the British Association for Adoption and Fostering. It had explained that it was unaware of any specific research studies having been conducted yet (as the law in relation to adoption by lesbians and gay men had only changed in 2005), but that its own assessment of the information available from the Adoption Register was that, relative to all potential adopters on the Register, same sex couples appeared to be more willing to consider the harder to place children (such as those over five years of age and sibling groups) than their heterosexual counterparts.

52. The Tribunal's conclusions from this evidence are that the Charity's proposed approach is inconsistent with the authority of *Re G* and that it is not therefore rationally connected to the Charity's stated objective. The Tribunal finds that the Charity's proposed means of operation would be likely to reduce the pool of potential adopters by (a) excluding same sex couples from assessment by the Charity itself and also by (b) risking the loss of suitable same sex couples to the adoption system as a whole by subjecting them to the "particularly demeaning" experience of discrimination on the grounds of their sexual orientation. The Tribunal's conclusions on this point also mean that it must reject the Charity's argument that it could potentially increase the number of adoptions by increasing the number of potential adopters who approached the Charity but would not approach other agencies. On the evidence before it, the Tribunal finds that the Charity's proposed method of achieving its aim would not have the effect the Charity intends.

[20] Cited at footnote 13 above.

53. The Tribunal went on to consider the third point identified at paragraph 48 above, namely the Charity's argument that the proposed discrimination was a proportionate means of achieving its legitimate aim or, in other words, that it was justified for the purposes of Article 14 ECHR. The Tribunal in so doing had in mind the "weighty reasons" required by the European jurisprudence in this regard. The Charity had argued that the discrimination proposed was proportionate to the achievement of its legitimate aim because the discrimination would take the form of the denial of services which would not be available to same sex couples from the Charity, but would be available to them via other voluntary adoption agencies and local authorities. The Tribunal accepted Ms Dixon's submissions in relation to this point: firstly, that the inability of a same sex couple to take advantage of the Charity's own high quality adoption service represented a significant detriment in itself and, secondly, that the justification required to be established for the less favourable treatment must be made out in relation to the Charity's own service provision, so that the services available from others could not be relied upon to justify the Charity's own less favourable treatment. The Tribunal therefore rejects the Charity's argument that the availability of services to same sex couples from local authorities and/or other adoption agencies could be relied upon by the Charity as justification for the discrimination it proposed in respect of its own services.

54. The Charity had also argued that unless it were permitted to discriminate as proposed, it would no longer be able to raise the voluntary income from its supporters on which it relied to run the adoption service, and that it would therefore have to close its adoption service permanently with a consequent loss in the overall provision of services by the voluntary adoption agency sector. The Charity's argument was that such a serious consequence would make the proposed discrimination proportionate. As mentioned above, the Charity's accounts show that its voluntary income is "unrestricted". The Bishop told the Tribunal that in practice the money collected in schools has always been applied for the Charity's adoption services. Mr McCall referred the Tribunal to a "moral" requirement to apply the funds so raised for adoption services. However, the Tribunal does not recognise this concept in the context of donated income, which must be restricted, unrestricted or designated for particular purposes and there is of course a requirement for charities to account accurately for their income and expenditure. The Charity's accounts show that its donated income is not restricted to its adoption work and the Tribunal must reach its conclusions on the basis of the evidence before it.

55. The Tribunal noted that, although this was a main plank of the Charity's case, it did not adduce any independent evidence as to the alleged impact on voluntary income of the Charity being required to operate an open adoption service. The Tribunal received evidence on this point only in the form of the Bishop's own opinion that the Charity's donors would no longer support its adoption work if the Charity were to provide services to same sex couples. It was not at all clear to the Tribunal how the Bishop could identify with sufficient precision those donors whose financial support would be lost given the evidence that the Charity's donated income can be and has been applied for the wider range of its activities. The Bishop told the Tribunal that he had

received letters of support in relation to this case, but he did not link the letters of support to the Charity's donors. In the absence of cogent evidence that any of the Charity's supporters had intended to support the adoption service in particular, it follows that the Tribunal could not be satisfied that there exists an identifiable sub-set of donors who take a particular view of the adoption service that the Charity should provide and who would withdraw their financial support for its adoption work if the Charity offered an open adoption service.

56. The Bishop accepted in his evidence to the Tribunal that he did not know if there were Catholics who might offer financial support to an open adoption service and the Charity did not present any evidence on this point one way or the other. The Tribunal had before it a letter which had been sent unsolicited to the Commission by the Roman Catholic Caucus of the Lesbian and Gay Christian Movement and which stated that other Catholic adoption agencies which had been required to change their way of operating in order to comply with equality legislation had continued to attract support from "*Catholics (including Bishops), showing that intransigent opposition to adoption by same sex couples is not an essential element to a Catholic ethos"*. The Tribunal does not of course have to decide whether Catholics are required by their faith to support the Charity's stance or not. The Tribunal does, however, conclude from the evidence before it that there is a wide range of opinion amongst donating Catholics and that it is in consequence impossible for the Tribunal to conclude, as it was being asked to do, that the Charity's voluntary income would inevitably be lost were it to operate an open adoption service. There was evidence before the Tribunal that some Catholics do offer financial support to adoption agencies which provide services to same sex adopters but no evidence from the Charity that it had considered how it might attract alternative financial supporters if it did not discriminate.

57. If, however, the Charity is correct in its assessment that the consequence of not being permitted to discriminate against same sex couples is that it would lose its voluntary income then, to the extent that this is based upon views attributed to its supporters, the Tribunal accepts Ms Dixon's argument that, following *Smith and Grady v UK*[21] the negative attitudes of third parties cannot, of itself, provide justification for discrimination on grounds of sexual orientation.

58. The Charity argued that if it were not permitted to discriminate as proposed, it would have to close its adoption service permanently on financial grounds, with a consequent loss in the overall provision of services by the voluntary adoption agency sector. The Tribunal was not, however, satisfied on the evidence before it that permanent closure of the Charity's adoption service on financial grounds was the inevitable consequence of the Charity's inability to discriminate. As noted above, other sources of voluntary income might be available to the Charity, and the Bishop had told the Tribunal that the Charity's trustees have not yet considered a "Plan B" (although the Tribunal noted that the Trustees' Report filed with the 2009 accounts stated that the

[21] Cited at footnote 19 above.

Charity was then preparing contingency plans to transfer its adoption work to another charity). The Tribunal notes that other Catholic adoption agencies have found new ways to continue their work since the change in the law and concludes that there are as yet options open for the Charity to consider as alternatives to closure.

59. Mr McCall submitted that as the Charity's adoption service would not exist at all unless the discrimination were permitted, this would represent a detriment to society as a whole and so the discrimination proposed must be justified. The Tribunal agrees that there would be a loss to society if the Charity's skilled staff were no longer engaged in the task of preparing potential adopters to offer families to children awaiting an adoption placement. However, the Tribunal must consider the risk of closure of the Charity's adoption service (which is by no means certain, as noted above) against the detriment to same sex couples and the detriment to society generally of permitting the discrimination proposed. The Commission's decision took into account, appropriately in the Tribunal's view, the European authorities as to the dis-benefit to society arising from discrimination on grounds of sexual orientation and the consequent requirement for particularly weighty reasons to permit it. The Tribunal agrees with the Commission's approach to this issue and with its conclusion that the Charity's case was of insufficient weight to tip the balance in its favour – for all the reasons above.

60. The Tribunal noted that, whilst Briggs J had expressed the view that a justification made on religious grounds alone would fail (see paragraphs 105 – 106 of his judgement[22]) and this point had been conceded by the Charity's legal team, the Bishop in his evidence to the Tribunal advanced the view that the Charity's views on same sex adoption should be equated in law with its views on civil partnerships. The Church is not required by equality law to bless civil partnerships, he argued, and so it should not have to provide adoption services to same sex couples. As noted above, religious conviction in the sphere of personal belief is protected in both domestic and European equality law, so that acts of devotion, worship, and prayer (including ceremonies) are exempt from equality obligations. However, with the greatest of respect to the Bishop, his argument overlooked the essential distinction between private acts of worship such as blessings and the provision of a public service such as an adoption agency. In other words, in advancing this argument, the Bishop did not take account of the law by which the Tribunal is bound.

61. In all the circumstances and having considered the evidence carefully, the Tribunal has unanimously decided to dismiss the Charity's appeal. The Tribunal has concluded that the evidence put forward to it did not support the Charity's case in a number of important areas, as identified above. The Tribunal concludes that the Charity has failed to meet the statutory test imposed by s.193 of the Equality Act 2010 so that the proposed changes to its objects may not be permitted.

[22] Cited at footnote 3 above.

62. Finally, the Tribunal notes that the Public Sector Equality duty imposed by s.149 (1) of the Equality Act 2010 imposes a duty on public bodies to pay due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity. This provision is intended to come into force later this year. Whilst forming no part of the Tribunal's decision in this appeal, it appears to the Tribunal that, even if the Charity were permitted to discriminate in reliance upon s.193 of the 2010 Act, the Public Sector Equality Duty is likely in due course to impact upon the willingness of local authorities to work with a charity which discriminated on grounds of sexual orientation in respect of adoption placements.

Signed: Dated: 26 April 2011.

Alison McKenna
Margaret Hyde
Helen Carter