

**IN THE MATTER OF AN APPEAL TO THE CHARITY TRIBUNAL  
BETWEEN**

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

**And**

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

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**RULING ON APPELLANT’S REQUEST FOR PERMISSION TO APPEAL**

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1. This ruling constitutes the Tribunal’s determination of an application for permission to appeal to the High Court, pursuant to rule 36(1) of the Charity Tribunal Rules 2008. There are no special circumstances which make an oral hearing of this application desirable and the Tribunal has therefore determined it on the papers. S. 2C (1) of the Charities Act 1993 provides that a party to proceedings before the Charity Tribunal may appeal to the High Court against a decision of the Tribunal. Such an appeal may be brought only on a point of law and with the permission of the Tribunal.

**Background**

2. The Appellant is a Catholic charity operating (inter alia) in the field of adoption services. The Appellant has never provided adoption services to homosexual couples, for religious reasons. Prior to the coming into force of the Equality Act (Sexual Orientation) Regulations 2007 (“the Regulations”), this discrimination was not unlawful.
3. The Appellant appealed to the Charity Tribunal (together with another charity which subsequently withdrew its appeal) in respect of the Respondent’s decision of 18 November 2008 refusing the Appellant consent to adopt objects (the “Proposed Objects”) which the Appellant contended would allow it to rely upon the exemption for charities contained within regulation 18 of the Regulations.
4. The Tribunal directed (by consent) that it should determine a preliminary issue, pursuant to rule 14(1) of the Charity Tribunal Rules 2008, namely “*If the charity adopted the proposed objects, would it be lawful for it to decline to provide adoption services to a person on the grounds of sexual orientation?*”
5. The Tribunal’s determination of the preliminary issue was dated 13 March 2009. Following a further hearing, the Tribunal made a final decision dated 1 June 2009, in which it unanimously rejected the Appellant’s appeal. The Tribunal decided that it would be unlawful for the Appellant to discriminate in

the manner proposed because the exemption in regulation 18 would not be available to it.

### **The Application for Permission to Appeal**

6. The Appellant now requests permission to appeal to the High Court in respect of the Tribunal's final decision. Its request for permission to appeal was made on 29 June 2009, pursuant to rule 35(1) (b) and (2) of the Charity Tribunal Rules 2008. The Appellant's grounds numbered 1 to 14 are set out in a document which was appended to the relevant Charity Tribunal form.
7. On 26 June 2009 the Tribunal issued directions to the effect that, for the purposes of CPR 52.4 (2)(a), the relevant date for the filing of an Appellant's notice in the High Court will be fourteen days after its receipt of this determination. The Respondent's previously adjourned application for permission to appeal against the Tribunal's determination of the preliminary issue was also directed to run until fourteen days after receipt of this determination. Although the Tribunal was content to grant the Respondent's request for an adjournment in this regard, the Tribunal emphasises that it has not formally ruled on the question of whether the determination of a preliminary issue is itself capable of appeal. It will do so if the Respondent restores its application within the relevant period.

### **Decision**

8. Pursuant to rule 36 (2) and (3) of the Charity Tribunal Rules 2008, the Tribunal now notifies the parties that it gives permission to the Appellant to appeal to the High Court in respect of the Appellant's grounds 1 to 7 and refuses permission to appeal to the High Court in respect of the Appellant's grounds 8 to 14.
9. Where the Tribunal refuses a request for permission to appeal, it is required by rule 36 (4) of the Charity Tribunal Rules 2008 to inform the applicant of its right to request permission to appeal from the High Court itself. In this case, permission has now been granted, albeit in relation to some of the Appellant's grounds only.

### **Reasons**

10. The Appellant's grounds 1 to 7 collectively raise the same point of law, namely that the Tribunal erred in its interpretation of the Equality Act (Sexual Orientation) Regulations 2007 and its interpretation of regulation 18 in particular. This case is believed to have been the first in which a Court or Tribunal was asked to consider the correct interpretation of regulation 18 of the Regulations. The Tribunal considers that this case raises a point of law of public importance which it would be appropriate for the High Court to consider on appeal.
11. Permission for the Appellant to appeal to the High Court is refused in respect of grounds 8 to 14 for the following reasons.

12. The Tribunal considers that ground 8 is misconceived in alleging that the Tribunal applied an interpretation of regulation 18 which effectively discriminated against religious bodies. The Tribunal found that the Appellant intended to discriminate whilst performing functions of a public nature. The Tribunal found that the regulation 18 exemption was not available to the Appellant because that discrimination would be unlawful by virtue of regulation 8 and regulation 14(8). Whilst the second of these provisions applies to religious organisations only, the two provisions have an identical effect so it cannot be demonstrated that a religious body is subjected to a more onerous regime than is a secular one. The Tribunal accordingly rules that there is no arguable point of law which justifies the giving of permission to appeal in respect of this ground.
13. The Tribunal also concludes that ground 9 is misconceived in elevating the Tribunal's reference to "pure charitable activity" to the status of a discrete and free-standing concept. As explained in paragraph 9 of the final decision, this phrase was used by the Tribunal as a means of illustrating the limited scope of the regulation 18 exemption, in view of the distinctive language used in that regulation. If the suggestion that this approach was irrational is an argument that the Tribunal misinterpreted the regulation, then this point is covered in grounds 1 to 7 in respect of which permission to appeal has been given.
14. The Tribunal finds it difficult to discern the precise point of law relied upon in ground 10. The Tribunal did not "conflate" the issues of the religious conviction of the charity and the proportionality of any "necessary" discrimination. The Tribunal made clear at paragraph 22 of its final decision that it did not need to consider whether there was a public benefit justification for permitting discrimination, having concluded on the basis of the Regulations alone that the proposed discrimination would be unlawful. The Tribunal accordingly rules that there is no arguable point of law which justifies the giving of permission to appeal in respect of this ground.
15. The Tribunal also finds it difficult to discern the precise point of law relied upon in ground 11. It refers again to the alleged proportionality of the proposed discriminatory practice, however the Tribunal did not need to rule on that question, having concluded on the basis of the Regulations alone that the proposed discrimination would be unlawful. If the Tribunal misinterpreted the Regulations, then this point is covered in grounds 1 to 7 in respect of which permission to appeal has been given. This ground also refers to the Tribunal's power of remittal and argues that the Tribunal should have used that power to direct the Respondent to make a specific decision. The Tribunal's power to remit a matter to the Respondent (Schedule 1C, paragraph 5 to the Charities Act 1993) could not, in the opinion of the Tribunal, properly be exercised so as to substitute its own decision for that of the Respondent. It is clear from the wording of the legislation that the Respondent must make a "determination" on remittal, notwithstanding the power of the Tribunal to direct the Respondent to do so in accordance with a particular finding made or direction given by the Tribunal. The Tribunal accordingly rules that there is no

arguable point of law so as to justify the grant of permission to appeal in relation to this ground.

16. The Tribunal concludes that ground 12 (pleaded in the alternative to ground 11) is also misconceived. Given that the Tribunal dismissed the Appellant's case on the basis of its interpretation of the Regulations alone and so did not need to consider the expediency test in regulation 18(2), it cannot now properly be argued that the Tribunal should have remitted the question of expediency to the Respondent. The issue of whether the Tribunal's interpretation of the Regulations was in fact correct is the subject of grounds 1 to 7, in respect of which permission to appeal has been granted. The Tribunal accordingly rules that there is no arguable point of law so as to justify the grant of permission to appeal in respect of this ground.
17. The Tribunal concludes that ground 13 is also misconceived. The suggestion that the Appellant might in future limit its activities so that it would only discriminate in the provision of services whilst finding adoptive placements for the hardest to place children was raised for the first time at the final hearing. The Tribunal had understood this proposal to be a possibility only and that it had been raised as one of the Appellant's arguments as to proportionality, presumably aimed at demonstrating expediency or public benefit. However, this ground now appears to suggest that the Tribunal should have ruled on the question of whether a specific proposed means of operation by the Appellant would have permitted it lawfully to discriminate in reliance upon regulation 18. The Tribunal has quoted from Mr. Wiggin's evidence in paragraphs 15 to 18 of its final ruling, in which he made clear that the Appellant in fact intended to continue to provide the "full range of adoption services" which allowed it to keep its OFSTED registration, and that it also intended to receive public funding for those services as it could not survive without that source of income. On the basis of that evidence, the Tribunal accordingly rules that there is no arguable point of law so as to justify the grant of permission to appeal in respect of this ground.
18. The Tribunal concludes, finally, that ground 14 is misconceived. There are a number of separate points subsumed into this ground, as follows:
  - (i) it is correct to say that the Tribunal had regard to a press release issued by the then Prime Minister on 29 January 2007. This was considered in order to determine the "mischief" which Parliament had sought to avert in passing the Regulations (see paragraphs 48 to 50 of the preliminary ruling). The Tribunal did not rely on the Prime Minister's statement alone in considering the question of "mischief", but had also considered the written statement of the Secretary of State for Communities and Local Government dated 7 March 2007 and an extract from Hansard reporting proceedings in the House of Lords on 21 March 2007. As the Tribunal explained at paragraph 50 of its preliminary ruling, it did not find that the drafting of regulation 18 was ambiguous or obscure so as to rely on extraneous evidence for the purpose of statutory interpretation in the Pepper v Hart sense. The Tribunal was however entitled to take into account relevant extraneous evidence in considering the "mischief" which

Parliament sought to avert in passing the Regulations and so relied on such evidence in seeking to understand the Regulations as a coherent whole.

- (ii) This ground secondly resurrects the argument that the Tribunal should have had regard to the as yet un-finalised drafting of the Equality Bill 2009 in interpreting the Regulations which were passed in 2007. This line of argument had originally been raised by the Appellant's Counsel in a skeleton argument but was subsequently abandoned by him (on the ground that it was a "red herring") at the final hearing. It cannot now properly be argued that the Tribunal erred in law in failing to take into account an argument expressly abandoned by Counsel.
- (iii) Finally, this ground argues that the Tribunal should have reconsidered its preliminary ruling on the basis of argument and evidence presented to the final hearing. For the reasons explained to the Appellant at the final hearing, the Tribunal had no legal power to take this course. The Appellant's Counsel did not seek, at the final hearing, to distinguish the weight of legal authority against him on this point but agreed that the Tribunal should hear him only with a view to clarifying its earlier ruling, if necessary. In the circumstances the Appellant cannot now properly rely on the argument that the Tribunal erred in taking this approach.

The Tribunal accordingly rules that there is no arguable point of law so as to justify the grant of permission to appeal in respect of this ground.

Dated: 6 July 2009

Alison McKenna  
President of the Charity Tribunal

Jonathan Holbrook  
Legal Member

Peter Hinchliffe  
Legal Member