IN THE MATTER OF AN APPEAL TO THE CHARITY TRIBUNAL

BETWEEN

FATHER HUDSON'S SOCIETY

and

CATHOLIC CARE (DIOCESE OF LEEDS)

Appellants

and

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

and

THE EQUALITY AND HUMAN RIGHTS COMMISSION

Intervener

R U L I N G O N P R E L I M I N A R Y Q U E S T I O N

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1 This ruling determines a preliminary question concerning appeals brought by Father Hudson's Society and Catholic Care (Diocese of Leeds) (together referred to as "the Appellants"). The preliminary hearing, pursuant to rule 14(1) of the Charity Tribunal Rules 2008 ("the Rules") took place on 12 and 13 February 2009.

2 This ruling does not finally dispose of the appeals for the reasons set out at paragraphs 73 to 78 below. A further hearing will be required to do so. As the Charity Tribunal does not have the power to substitute its own decision for that of the Respondent in these cases (see paragraphs 18 to 27 below) the parties may wish to consider one of the alternative procedural options considered at paragraph 79 below.

3 The Tribunal will arrange a further directions hearing to determine the future conduct of these appeals as provided at paragraph 80 below.

Background

4 The Appellants are both charities of long standing with good reputations, particularly in the field of adoption, where they have achieved significant success in identifying and supporting adoptive families for "hard to place" children. The Appellants say they have never provided adoption services to homosexuals, for religious reasons. The authenticity of the religious objection was not at issue in these proceedings. Prior

to the coming into force of the Equality Act (Sexual Orientation) Regulations 2007 ("the Regulations"), their practice was not unlawful. The Appellants had sought the Respondent's consent to replace the objects clause in their Memoranda of Association with a new objects clause ("the Proposed Objects"- see paragraphs 6 to 9 below) with the aim of bringing themselves within the exemption regime provided for charities under regulation 18 of the Regulations.

5 The Appellants both appealed to the Charity Tribunal against the Respondent's refusal to give them consent. The Appellants cannot adopt the Proposed Objects without the consent of the Respondent, as an amendment to (including the replacement of) the objects clause of a charitable company is a "regulated alteration" under s.64(2) and (2A) of the Charities Act 1993.

6 The current Objects of Catholic Care (Diocese of Leeds) are:

- *To promote, in the Roman Catholic Diocese of Leeds the relief of poverty and distress among children and all those who through economic or family circumstances or physical or mental affliction are in need of such relief.*

- *To promote and organise co-operation among Roman Catholics and others in the achievement of the above object.*

7 The Proposed Objects of Catholic Care (Diocese of Leeds) are:

"3 Objects

3.1 Subject to the restriction in Paragraph 3.2 below, the Charity's objects (the Objects) are:

3.1.1 the advancement of the Christian religion in accordance with the tenets of the Roman Catholic Church (the Church);

3.1.2 the prevention and relief of poverty and suffering by the provision of such grants, goods, service or facilities as the Charity shall from time to time determine;

3.1.3 the relief of sickness and preservation of health;

3.1.4 the advancement of:

3.1.4.1 education; and

3.1.4.2 social justice,

only insofar as they further the Christian religion in accordance with the tenets of the Church;

3.1.5 the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;

3.1.6 the advancement and promotion of the support, relief and care of:

3.1.6.1 children and young people without families to care for them, including, but not limited to, adoption and fostering services;

3.1.6.2 children and young people in trouble or at risk;

3.1.6.3 elderly people and their carers;

3.1.6.4 people with disabilities; and

3.1.6.5 individuals, families, communities and groups who are in need;

3.1.7 to provide or assist in the provision of facilities in the interest of social welfare for recreational or other leisure time occupation of individuals who have need of such facilities by reason of their youth, age, infirmity or disability, financial hardship or social circumstances with the object of improving their conditions of life; and

3.1.8 any activity which is charitable under the laws of England, save that if any activity is undertaken in Scotland or Northern Ireland, such activity shall also be charitable under the laws of the jurisdiction in which such activity is undertaken.

3.2 The Charity shall only provide adoption services to heterosexuals and such services to heterosexuals shall only be provided in accordance with the tenets of the Church. For the avoidance of doubt the Roman Catholic Bishop of Leeds from time to time shall be the arbiter of whether such services and the manner of their provision fall within the tenets of the Church.

3.3 For the avoidance of doubt the restriction at Paragraph 3.2 above shall apply only to adoption services and shall not apply to any other services that the Charity may provide."

8 The current Objects of Father Hudson's Society are:

"The Objects are:

3.1 the furtherance of the Christian religion in accordance with the tenets of the Roman Catholic Church ("the Church");

3.2 the relief of financial hardship and suffering by the provision of such grants, goods, services or facilities as the Charity shall from time to time determine;

3.3 the relief of sickness and preservation of health;

3.4 the advancement of education through the powers set out in sub-clauses 4.7 to 4.13 (inclusive) below and only insofar as it furthers the Christian religion in accordance with the tenets of the Roman Catholic Church;

3.5 the advancement and promotion of the support, relief and care of children and young people without families to care for them, children and young people in trouble or at risk, elderly people and their carers, people with disabilities and individuals, families, communities and groups who are in need;

3.6 to provide or assist in the provision of facilities in the interest of social welfare for recreational or other leisure time occupation of individuals who have need of such facilities by reason of their youth, age, infirmity or disability, financial hardship or social circumstances with the object of improving their conditions of life.

9 The Proposed Objects of Father Hudson's Society are:

"3.1 Subject to the restriction in Paragraph 3.2 below, the Charity's objects (the Objects) are:

3.1.1 the advancement of the Christian religion in accordance with the tenets of the Roman Catholic Church (the Church);

3.1.2 the relief of financial hardship and suffering by the provision of such grants, goods, service or facilities as the Charity shall from time to time determine;

3.1.3 the relief of sickness and preservation of health;

3.1.4 the advancement of:

3.1.4.1 education, through the powers set out in sub-clauses 4.7 to 4.13 (inclusive) below; and

3.1.4.2 social justice,

only insofar as they further the Christian religion in accordance with the tenets of the Church;

3.1.5 the support, relief and care and, the promotion thereof, of:

3.1.5.1 children and young people without families to care for them, including, but not limited to, adoption and fostering services;

3.1.5.2 children and young people;

3.1.5.3 those in need by reason of age, ill-health, disability or other disadvantage;

3.1.5.4 the carers of those individuals and groups specified in Paragraphs 3.1.5.1, 3.1.5.2 and 3.1.5.3 above;

3.1.5.5 individuals, families, communities and groups who are in need; and

3.1.5.6 those in need by reason of financial hardship;

3.1.6 to provide or assist in the provision of facilities in the interest of social welfare for recreational or other leisure time occupation of individuals who have need of such facilities by reason of their youth, age, ill-health, infirmity or disability, financial hardship or social circumstances with the object of improving their conditions of life; and

3.1.7 any activity which is charitable under the laws of England, save that if any activity is undertaken in Scotland or Northern Ireland, such activity shall also be charitable under the laws of the jurisdiction in which such activity is undertaken.

3.2 The Charity shall only provide the adoption services that may be offered in accordance with the powers set out in Paragraphs 4.1 and 4.2 or otherwise to heterosexuals and such services to heterosexuals shall only be provided in accordance with the tenets of the Church. For the avoidance of doubt the Roman Catholic Archbishop of Birmingham from time to time shall be the arbiter of whether such services and the manner of their provision fall within the tenets of the Church.

3.3 For the avoidance of doubt the restriction at Paragraph 3.2 above shall apply only to adoption services and shall not apply to any other services that the Charity may provide, including, but not limited to, fostering services."

The Equality Act (Sexual Orientation) Regulations 2007

10 The Regulations came into force on 30 April 2007. The Regulations were made by the Secretary of State for Communities and Local Government in the exercise of powers conferred by s. 81(1) of the Equality Act 2006, and were approved by Parliament. The legislative regime, comprising the Act and the Regulations taken as a whole, imposes a general rule against discrimination on grounds of sexual orientation in specified circumstances; it also provides a number of different exemption regimes for activities which would, unless they fell within a specified exemption, be unlawful.

11 Immediately following the coming into force of the Regulations, the Appellants were able to rely upon the time-limited exemption regime in regulation 15 of the

Regulations, which is headed "*Adoption and Fostering Agencies*". As the regulation 15 exemption expired on 31 December 2008, the Appellants had sought the Respondent's permission to change their objects to the Proposed Objects, with the aim of bringing themselves within the exemption regime under regulation 18 of the Regulations, which is headed "C*harities*".

12 Regulation 18 of the Regulations reads as follows:

> *"Charities*
>
> *18. (1) Nothing in these Regulations shall make it unlawful for a person to provide benefits only to persons of a particular sexual orientation, if -*
>
> *(a) he acts in pursuance of a charitable instrument, and*
>
> *(b) the restriction of benefits to persons of that sexual orientation is imposed by reason of or on the grounds of the provisions of the charitable instrument.*
>
> *(2) Nothing in these Regulations shall make it unlawful for the Charity Commission for England and Wales or the holder of the office of the Scottish Charity Regulator to exercise a function in relation to a charity in a manner which appears to the Commission or to the holder to be expedient in the interests of the charity, having regard to the provisions of the charitable instrument.*
>
> *(3) In this regulation -*
>
> *"charitable instrument" -*
>
> *(a) means an instrument establishing or governing a charity, and*
>
> *(b) includes a charitable instrument made before these Regulations come into force; and*
>
> *"charity" -*
>
> *(a) in relation to England and Wales, has the meaning given by the Charities Act 2006,*
>
> *(b) in relation to Scotland, means a body entered in the Scottish Charity Register."*

The Decision Appealed Against

13 The decision appealed against, dated 18 November 2008, refused the Appellants permission to adopt the Proposed Objects. The decision was taken by two members

of the Charity Commission board, under delegated powers, following a meeting with the Chief Executive of each charity and their solicitor.

14 The Respondent's full decision is published on its website. Its own published summary of the reasons for its decisions is as follows:

> *"The Commission considered the case, including the charities' oral representations. It considered that the word "benefits" in regulation 18(1) means benefits of a charitable nature provided to the charity's beneficiaries. It concluded that the beneficiaries of the adoption services were the children and not the prospective parents. It was not satisfied that the proposed amendments would permit the charities to fall within the scope of the exemption in 18(1) of the regulations. It therefore concluded that the amendments could not be in the best interests of the charity. As a result, the Commission was also not satisfied that it would be entitled to the protection of regulation 18(2) were it to agree to the proposed amendments.*
>
> *Accordingly the Commission concluded that it should not give the necessary consent to the proposed amendments to the objects".*

Procedural History of the Appeals

15 These Appeals were made to the Tribunal on 1 December 2008, with a request that they be heard at the Tribunal's earliest convenience and preferably before 31 December 2008. The Appellants explained the reason for the urgency was that they would have to suspend all their adoption services after 31 December 2008, as they could not lawfully continue to restrict their services to heterosexual potential adopters unless these appeals were determined in their favour.

16 With the consent of the parties, the Tribunal arranged a short notice telephone directions hearing for 15 December 2008, at which it was directed, by agreement, that these two Appeals should be "heard together" pursuant to rule 12(iii) of the Rules, as they involved "the same or similar issues". The Tribunal issued directions aimed at preparing for the hearing of a preliminary question, pursuant to rule 14(1) of the Rules, as soon as possible after 1 February 2009. (It was subsequently fixed for hearing on 12 and 13 February 2009). This was the earliest date by which it was agreed to be practicable for both sides to file with the Tribunal and serve on each other any witness statements, to formulate and exchange their respective skeleton arguments, and for them to agree a bundle of documents for the hearing in accordance with directions given by the Tribunal for this purpose.

17 The Tribunal made a further directions Order of its own motion on 23 December 2008 and issued a written ruling dated 7 January 2009, by which the Tribunal determined the preliminary questions to be considered at the rule 14 hearing.

The Tribunal's Jurisdiction

18 It is helpful at this point to explain the nature of the Charity Tribunal's jurisdiction in respect of appeals falling under s.64(2) of the Charities Act 1993. In many of the cases it will hear, the Charity Tribunal will have the power effectively to substitute its

own decision for that of the Respondent, however that course of action is not open to the Tribunal in respect of these appeals, for the reasons set out below.

19 Section 2A of the Charities Act 1993 provides that

> *"(4) The Tribunal shall have jurisdiction to hear and determine -*
>
> *(a) such appeals and applications as may be made to the Tribunal in accordance with Schedule 1C to this Act, or any other enactment, in respect of decisions, orders or directions of the Commission."*

20 A table in Schedule 1C provides a specified right of appeal to the Charity Tribunal in respect of "*a decision of the Commission to give or withhold consent under s.64(2) … of this Act in relation to a body corporate which is a charity*".

21 Schedule 1C paragraph 1 sub-paragraphs (4) and (5) set out the relevant approach and the powers of the Tribunal in determining such an appeal:

> *"(4) In determining such an appeal the Tribunal -*
>
> *(a) shall consider afresh the decision, direction or order appealed against, and*
>
> *(b) may take into account evidence which was not available to the Commission.*
>
> *(5) The Tribunal may -*
>
> *(a) dismiss the appeal, or*
>
> *(b) if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of the Table".*

22 The "*corresponding entry in column 3 of the Table*" for an appeal relating to s.64(2) of the 1993 Act is the "*power to quash the decision and (if appropriate) remit the matter to the Commission*".

23 Schedule 1C paragraph 5 provides that:

> *"References in column 3 of the Table to the power to remit a matter to the Commission are to the power to remit the matter either -*
>
> *(a) generally, or*
>
> *(b) for determination in accordance with a finding made or direction given by the Tribunal".*

24 It follows that, when finally determining these appeals, the Tribunal's task is to decide "*afresh*" whether consent to the Proposed Objects should be given. The appeal is by way of a substantive re-hearing rather than a procedural review of the original decision. The Tribunal was assisted by the Respondent's counsel, who referred us to

the case of E.I. Du Pont Nemours & Co v S.T. Du Pont [2006] 1 WLR 2793. In considering the nature of an appeal by way of rehearing, May LJ said at paragraph 96:

> *"…the scope of a rehearing …will normally approximate to that of a rehearing "in the fullest sense of the word" such as Brooke LJ referred to in Tanfern's case [2000] 1 WLR 1311 , para 31. On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves".*

The Tribunal concluded that it should follow this approach in considering these appeals, albeit without the power to substitute its own decision for that of the Respondent if it reached a different conclusion. The Tribunal must decide if it would itself permit or refuse permission to adopt the Proposed Objects. In so doing, it may have regard to, but is not bound by, the Respondent's guidance as to the exercise of its discretion in considering applications under s.64(2) of the Charities Act 1993 (published as Operational Guidance OG 47).

25 It follows that, if the Tribunal's own final decision is that it would refuse permission for the regulated alteration under s.64(2) of the 1993 Act, the appeal must be dismissed, even if the Tribunal disagrees with the grounds on which the Commission reached its original decision. On the other hand, if the Tribunal concludes that it would give permission to adopt the Proposed Objects, the Respondent's decision must be quashed.

26 If the decision is quashed, the Tribunal must go on to consider whether it is "appropriate" for the decision to be remitted to the Commission, either generally or for a fresh determination in accordance with a finding or direction of the Tribunal. The Tribunal notes that it is only if the Tribunal first concludes that the decision should be quashed i.e. that the appeals should be allowed, that the power to remit the matter to the Respondent for a fresh determination arises. It follows that the Tribunal has no power to remit following the determination of the preliminary question only, unless it is in a position to treat the preliminary hearing as a final determination pursuant to rule 14(3) of the Rules.

27 Finally, in describing the Tribunal's jurisdiction in relation to these Appeals, the Tribunal notes that the Tribunal is itself a public authority under s.6(3) of the Human Rights Act 1998 ("the HRA"). Section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. S.2 of the HRA requires the Tribunal to take into account relevant European law in determining a question that has arisen in connection with a Convention right, so far as it is relevant in the opinion of the Tribunal to the proceedings before it. S.13 of the HRA provides that, so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with a Convention right. S.13 of the HRA provides that where a court or tribunal's determination of any question arising under the HRA might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

The Preliminary Question

28 The Respondent provided the Tribunal with a skeleton argument dated 12 December 2008, in which it was submitted that two questions should be decided at a preliminary hearing. These were:

(1) *Whether* the *term "to provide benefits" in regulation 18 (1) of the 2007 Regulations means to provide benefits which it is a purpose of the charity to provide.*

(2) *Whether on the true construction of the Proposed Objects it would be a purpose of the charities to provide benefits to potential adopters.*

The Respondent submitted that, if the determination of those questions was in favour of the Appellants, arrangements could then be made for a final hearing of the appeals. If the determination of those issues was in favour of the Respondent, then (the Respondent argued) that would effectively dispose of the appeals so that they should be dismissed.

29 The Appellants' solicitor did not, at that stage, disagree with the Respondent's formulation of the questions, but argued that additional questions should be considered at the preliminary hearing. Having taken all the submissions into account, the Tribunal ruled on 7 January 2009 that questions (1) and (2) above were the appropriate issues to be considered at the preliminary hearing.

30 Immediately prior to the preliminary hearing, and in view of the Appellants' somewhat revised position in relation to the two questions, counsel for the Respondent submitted in a further skeleton argument that the two questions originally posed might helpfully be reduced to a single question, namely:

> *"If the charities adopted the proposed objects, would it be lawful for them to decline to provide adoption services to a person on the grounds of sexual orientation?"*

31 Counsel for the Appellants were content to adopt this new formulation of the question for the preliminary hearing, as was the Tribunal. This was therefore the single question addressed by the parties and the Tribunal at the preliminary hearing.

The Intervention Application

32 At the directions hearing on 15 December 2008, counsel for the Respondent mentioned the possibility that the Equality and Human Rights Commission ("the EHRC") might seek to intervene in these appeals. The EHRC wrote to the Tribunal some six weeks later on 28 January 2009, seeking the permission of the Tribunal to intervene in order to make submissions on matters concerning the charitable exception to the Regulations. The Tribunal noted that neither the Charities Act 1993 nor the Rules provided expressly for intervention by any person other than the Attorney General. The Tribunal asked the EHRC to provide it with full legal argument as to why it said the Tribunal had power to permit the intervention sought.

33 The EHRC responded by way of written submissions dated 1 February 2009, prepared by Ms. Mountfield of counsel. She argued in summary that s.30 of the Equality Act

2006, which refers to the EHRC's "capacity" to litigate, gave the EHRC power to intervene in the Tribunal's proceedings, and further that rules 3(1)(b) and (c) of the Rules gave the Tribunal power to issue directions to assist in determining the issues before it and to ensure the just, expeditious and economical determination of an appeal. She submitted that that these rules could be relied upon to permit the intervention. Ms Mountfield's submissions were disclosed to the parties, who were invited to comment on them albeit within a very short time-frame, so as to ensure that the preliminary hearing dates were effective. The Tribunal appreciated the parties' swift response to this invitation.

34 In their written submissions, leading and junior counsel for the Appellants argued that the Tribunal did not have the power to permit the intervention because it was not expressly permitted by the Charities Act 1993 or by the Rules. In the alternative, they submitted that if the Tribunal did have the power, it ought not to exercise its discretion to permit the intervention, as this might involve delay and increase costs for the Appellants. In his written submissions, counsel for the Respondent argued that the Tribunal did have the power to permit the intervention and generally supported the EHRC's arguments.

35 The Tribunal regarded this as an important jurisdictional question in respect of which there was no clear authority, but in relation to which it was desirable that the Tribunal reached a settled view in the interests of clarity not only for these but also for future appeals. Accordingly, the Tribunal asked the Attorney General to "assist" it, pursuant to s.2 D(4)(b) of the Charities Act 1993, with the question of whether the Tribunal had the power to permit the EHRC's intervention.

36 The Attorney General agreed to assist the Tribunal and helpfully waived her entitlement to the notice period provided by rule 23(4) of the Rules, in order not to jeopardise the hearing date already set. On 9 February 2009 the Tribunal gave directions of its own motion, to the effect that the intervention application would be heard on the morning of 12 February, and that the Attorney General's counsel had permission to file and serve a skeleton argument and attend to make oral submissions. The Tribunal further directed that the parties had permission to call witness evidence from the EHRC in the event that the EHRC's intervention application was refused.

37 On 12 February, William Henderson appeared before the Tribunal as counsel for the Attorney General, having provided the Tribunal with a helpful skeleton argument in advance. He did not support Ms. Mountfield's argument that reliance could be placed upon the reference to the EHRC's "capacity" to litigate in s.30 of the Equality Act 2006 as a discrete basis for intervention. In the event she did not pursue that line of argument before the Tribunal.

38 Mr Henderson submitted on behalf of the Attorney General that the Tribunal did have the power to permit the EHRC's intervention in the limited sense of allowing the EHRC to make written submissions and address the Tribunal. He relied on a number of authorities in support of this position. The Tribunal was particularly assisted by his reliance upon the decision in R v Secretary of State for the Home Department ex parte Tarrant [1985] QB 251, in which Webster J. commented that "… *subject to any overriding or inconsistent statutory provisions, a board, like any other tribunal, is master of its own procedure*." He submitted that the Tribunal, having the power to

regulate its own procedure, could decide to receive written and oral submissions from non-parties.

39 Robert Pearce QC, on behalf of the Respondent, supported the arguments put forward on behalf of the Attorney General. Christopher McCall QC, leading Matthew Smith of counsel, continued to oppose the intervention on behalf of the Appellants. Ms. Mountfield, on behalf of the EHRC, argued for a broad and purposive interpretation of the Tribunal's powers under rule 3 of the Rules. She described the form that the EHRC's intervention would take as "short and focussed submissions on the proper interpretation of regulation 18". The Tribunal noted that the EHRC did not seek to become a party to the appeals.

40 The Tribunal concluded that it had the power to permit the EHRC's intervention on the basis that the written and oral representations would be likely to assist the Tribunal and so ensure the just, expeditious and economical determination of these particular proceedings. The Tribunal further noted that its power to regulate its own procedure is reflected in rules 3 and 29 of the Rule.

41 Having concluded that it had the power to permit the intervention, the Tribunal went on to consider whether it should exercise its discretion to permit it. The Tribunal considered carefully the points made by counsel for the Appellants regarding the risk that interventions in general could hamper the Tribunal's ability to provide swift, low-cost hearings for charities, and further that allowing this intervention could increase the Appellants' costs and delay the determination of the appeals. The Tribunal considered that the EHRC's intervention would be of assistance to it, given its statutory remit, inter alia, to "*promote awareness and understanding of rights under the equality enactments*", however the Tribunal on this occasion had to weigh the advantages of it receiving this assistance against the risks that counsel for the Appellants had identified.

42 The Tribunal concluded that, in the context of these appeals, a proportionate intervention should be permitted, so that the Tribunal would give the EHRC permission to provide its written arguments to the Tribunal (which had previously been disclosed only to the parties) and to remain to make an oral submission limited (at Ms. Mountfield's suggestion) to one hour's duration only. In this way the intervention could be accommodated within the time already allocated to the preliminary hearing and additional expense and delay to the parties minimised. The Attorney General took no further part in these appeals.

The Preliminary Question

43 Having determined the intervention application, the Tribunal turned to the preliminary question before it, namely: "*If the charities adopted the proposed objects, would it be lawful for them to decline to provide adoption services to a person on the grounds of sexual orientation?*"

44 In attempting to answer this question, the Tribunal had pre-read some 1500 pages of material provided by the parties in their agreed bundle, skeleton arguments and supporting materials. Following its intervention, the Tribunal also received a skeleton argument and supporting materials from the EHRC. The hearing bundle contained a number of witness statements, which the Tribunal had previously directed to stand as

evidence in chief. The Chief Executive of each charity attended the preliminary hearing for cross examination at the request of the Respondent and each was then re-examined by their own counsel. The Tribunal also heard extensive oral submissions from counsel. The Tribunal has considered all the evidence and arguments put to it most carefully although they are not all specifically referred to in his ruling.

45 The EHRC's intervention comprised a number of submissions. In summary, these were:

(a) that regulation 18 does not permit any discrimination by a charity which has been prohibited by the other regulations;

(b) that the scope for lawful discrimination by a charity under regulation 18 is limited to situations where there is a need to promote equality for minority sexual orientation groups;

(c) that a charity which discriminates on grounds of sexual orientation other than in the sense of (b) above would fail the public benefit test and so not be charitable; and

(d) that the Respondent, as a public authority for the purposes of s.6 of the Human Rights Act 1998 could not, consistent with its own obligations under that Act, satisfy itself of the expediency test under regulation 18(2) unless the discrimination fell within the sense of (b) above.

These arguments are considered at the relevant points below.

(i) <u>The Meaning of Regulation 18(1)</u>

46 Regulations 18 (1) and (2) of the Regulations are set out in full at paragraph 12 above. Counsel for the Respondent submitted that the term "to provide benefits" in regulation 18 (1) should be read to mean to provide benefits to persons, the relief of whose needs makes the charity charitable. He submitted that this cannot therefore include incidental or private benefits arising to others from the activities of the charity. The purpose of the charities, even if they were permitted to adopt the Proposed Objects, was the support relief and care of children without families, and not the provision of benefits to prospective adopters. Any benefits to potential adopters arising from the charities' activities should therefore be regarded as incidental and not within the meaning of benefits in regulation 18 (1). This analysis was of course consistent with the approach taken by the Respondent in the decision appealed against.

47 Counsel for the Appellants characterised the Respondent's argument as requiring regulation 18 (1) to be read as "providing benefits of such a nature that the provision of those benefits makes the persons in question the beneficiaries of the charity whose benefit comprises the public benefit of the charity". He submitted that in interpreting the Regulations, the Tribunal should give ordinary words their ordinary meaning and not be tempted to write words into the regulation which are not there. He submitted that the Respondent's reading-in of words to the regulation had lead to the original decision being erroneous.

48 Counsel for the Respondent had provided the Tribunal with extracts from proceedings in Parliament and other documents (including the Explanatory Note attached to the

Regulations) as an aid to the interpretation of regulation 18. He argued that the Tribunal should interpret regulation 18 in a purposive manner, giving effect to the intention of Parliament in enacting the Equality Act and Regulations as a whole. He submitted that the intention of Parliament in regulation 18 was to allow lawful discrimination only where it was inherent to the charity's purpose, for example the carrying out of charitable activities aimed at relieving need arising from a particular sexual orientation. He submitted that the meaning of regulation 18 was sufficiently ambiguous, when read in the context of the Regulations as a whole, to require the Tribunal to construe it in this manner, having regard to relevant extraneous material in so doing. In particular, he directed the Tribunal to statements made by the Prime Minister and others which referred to the "mischief" the Regulations in general were designed to avert. He placed particular reliance on the Explanatory Note to the Regulations, which is considered later in this ruling.

49 Counsel for the Appellants submitted in response that, following the rule in Pepper (Inspector of Taxes) v Hart [1993] AC 593, the Tribunal should have no regard to extraneous materials in construing the statutory provision unless it was satisfied that regulation 18 (1) itself was "ambiguous, obscure or led to absurdity". He further submitted that, even if satisfied that the Regulations were ambiguous etc, the Tribunal, in seeking to construe the Regulations, could only consider those materials falling within the strict conditions set out in Pepper v Hart, namely a clear statement, directed to the ambiguity in question, made by or on behalf of the Minister promoting the Bill, and which discloses the otherwise ambiguous legislative intention.

50 The Tribunal notes that, even if regulation 18 were ambiguous etc, as submitted by counsel for the Respondent, it was common ground between the parties that there was no clear Ministerial statement which referred specifically and expressly to regulation 18(1), as opposed to the legislative scheme as a whole or to the principle enacted in regulation 15 in particular. The Tribunal concluded that there was no Pepper v Hart reason why it should not have regard to the Regulations as a whole and the Explanatory Notes in considering the effect of regulation 18. The Tribunal concluded that it may also have regard to the statements made by the Prime Minister and others as to the general legislative intention of the Regulations as a whole. In any event, the Tribunal notes that the Rules allow the Tribunal to consider evidence which would not be admissible in a civil trial (rule 29(3)(a)).

51 Counsel for the Appellants also submitted that it is a well-accepted principle of charity law that a charity may operate in a way that confers benefits on persons who do not themselves fall into the category of the charity's beneficiary class as a means of achieving the charity's ultimate charitable purpose. He gave a number of examples of this principle, including the provision of a home of rest for nurses as a means of relieving the sick in Re White's Will Trusts [1951] 1 All ER 528; and the publication of law reports benefiting lawyers but serving as a means of educating the public and promoting the administration of justice in Incorporated Council of Law Reporting for England and Wales v Attorney General [1972] 1 Ch 73. He pointed out that some charities do not have an identifiable recipient group in any event, for example those which conserve the environment and so benefit humankind as a whole. His argument was that the benefits offered to the nurses in Re White were permitted by the Court as the necessary means to a charitable end. In the context of these appeals, he argued that the provision of benefits to potential adopters serves a similar function, because, although the ultimate beneficiaries of the charity were indeed children without

families, a charity providing adoption services can only ever support and counsel potential adopters, and provide post-adoption support for adoptive families. It is only a local authority which can, in reliance on its statutory powers, undertake the task of placing the children in need of adoption with an adoptive family. The provision of "benefits" to potential adopters is, therefore, an integral part of the overall charitable scheme.

52 The word "benefit" is defined in the Oxford English Dictionary as "*1. A thing well done; a good or noble deed; 2. A kind deed, a kindness; a favour, gift.*" This definition seems to the Tribunal to constitute the ordinary or natural meaning of the word "benefits" in regulation 18, being a reference to the beneficence of charities, or the good works they do. It does not seem to the Tribunal that regulation 18(1) is ambiguous, obscure or leads to absurdity. Reading the Regulations as a whole, the Tribunal concludes that the reference to "benefits" in regulation 18 denotes a distinction between pure charitable activity on the one hand and the diverse range of activities referred to elsewhere in the regulations on the other. (The use of the word "benefit" in regulation 14 refers to the right of a person to receive a benefit from a religious organisation rather than the provision of benefits by that organisation, being different from the provision of services in a wider sense). The relationship between regulation 18 and the other regulations and the consequent position of charities which carry out activities ostensibly covered by more than one regulation is considered further below.

53 Having concluded that it is not necessary to read into regulation 18(1) the words suggested by the Respondent, the Tribunal finds that, if the governing document of a charity permits it to provide benefits to one class of persons as a means of achieving an ultimate charitable purpose (the "knight's move", as Mr McCall memorably described it) then such activity would constitute "acting in pursuance of a charitable instrument", as referred to in regulation 18(1)(a) of the Regulations. It would of course be different if a charity were not permitted to operate by way of the "knight's move" under the terms of its governing document. The Appellants are permitted to operate in this manner by their present and their Proposed Objects. For these reasons, the Tribunal concludes that the proper approach to regulation 18 is that both the benefits provided to the children without families and the benefits provided to their potential adopters *en route* are benefits provided in pursuance of a charitable instrument and within the meaning of "benefits" in regulation 18 of the Regulations.

(ii) <u>The Inter-relationship between the Different Exemption Regimes in the Regulations</u>

54 As stated previously, the Regulations provide a number of different exemption regimes. These provide for the situations in which discrimination on the grounds of sexual orientation would not be unlawful. The Tribunal describes these provisions as "regimes" in the sense that there is a system of checks and balances inherent to each. For example, regulation 14 of the Regulations provides an exemption for "*Organisations relating to religion or belief*". This provides that such organisations may lawfully discriminate on grounds of sexual orientation if they do so (a) because it is necessary to comply with a doctrine of the organisation or (b) so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers (regulation 14(5)). The "checks and balances" of this exemption regime are provided in regulation 14(8) which expressly cross-refers to regulations 4

and 8, so that a religious organisation may not rely on the regulation 14 exemption if it provides goods, facilities and services of the type referred to in regulation 4, or undertakes the functions of a public authority as referred to in regulation 8. In this way, the legislative regime approved by Parliament balances human rights considerations by allowing lawful discrimination on grounds of sexual orientation by religious groups in their private but not their public activities.

55 Regulation 15 provides an exemption regime for "*Adoption and Fostering Agencies*". The "checks and balances" in that regime are that the ability to discriminate on grounds of sexual orientation is time-limited (until 31 December 2008) and that, in the interim, an agency applying criteria which discriminates on grounds of sexual orientation must refer those discriminated against to agencies not operating such a restriction. Once again, the discrimination is permitted only where the restriction is necessary to comply with the religious doctrine of the organisation or the strongly held religious convictions of a significant number of the religion's followers. Regulation 15 expressly cross-refers to regulation 14 in that regard.

56 The inter-relationship between regulation 18 and the other regulations was a key issue for the Tribunal. Counsel for the Respondent and counsel for the EHRC argued that the Regulations should be read as a coherent whole, so that the Appellants could not rely on regulation 18(1) to permit discrimination which was prohibited by the other regulations. Counsel for the Appellants argued, on the other hand, that regulation 18 should rather be viewed rather as a "sweeping up" power for the public good, so that the inherent value of charitable activity could permit lawful discrimination in any arena of activity by a charity, whether or not prohibited by other regulations, but subject to the expediency test in regulation 18(2). He relied upon the fact that regulation 18 does not cross-refer to the other regulations but stands alone in relation to charities, whereas the draftsman could easily have provided that regulation 18 was subject to the other regulations if this were the intention of Parliament.

57 The Tribunal accepts that the exemption regime for "charities" under regulation 18 does not cross-refer to any of the other regulations and is indeed self-contained. However, the Tribunal concludes that in its distinctive use of language in relation to charities, Parliament intended to refer in regulation 18 to a discrete area of pure charitable activity. In these circumstances, no cross-referencing is required because regulation 18 refers to an activity which is not covered by the activities described in the other regulations. It does not therefore seem to the Tribunal that the regulations permit a charity to rely upon the regulation 18 exemption as a means of undertaking activities which would otherwise be unlawful. The Tribunal concludes that if a charity steps into a different arena by undertaking activity which is expressly regulated by another regulation, it would not be operating solely within regulation 18 and so must abide by the applicable regime. It follows that, regulation 18 describes only such pure charitable activity as is (a) only undertaken by charities, (b) is permitted by the charity's own charitable instrument and (c) is not prohibited by the other regulations.

58 The "checks and balances" of the regulation 18 regime involve the application of a test of expediency by the Charity Commission in the exercise of its functions. This provision further suggests that Parliament conceived of a discrete field of charitable activity, not otherwise prohibited by the Regulations, within which charities alone could lawfully discriminate on the grounds of sexual orientation. The Tribunal takes

the view that Parliament could not have intended the Respondent to be the appropriate body to authorise discriminatory activity by charities in the wider fields of activity provided for outside regulation 18, but that it would have considered the Respondent to be the suitable body to form a judgement in the field of charitable activity only.

59 Ms. Mountfield, on behalf of the EHRC, supported this interpretation of regulation 18, albeit on different grounds. She submitted that the adoption services undertaken by the Appellants were of an inherently public nature so that, following the expiry of regulation 15, either regulation 8 or regulation 14(8) prohibited the Appellants from discriminating on grounds of sexual orientation in the provision of adoption services. Regulation 18 could not therefore be relied upon to permit them. The public nature or otherwise of the adoption services is considered later in this ruling.

60 Ms. Mountfield went on to submit that regulation 18 should be interpreted even more narrowly, as permitting discrimination by charities only when aimed at providing benefits to those in special need because of their sexual orientation. In making this submission she referred the Tribunal particularly to Thlimmenos v Greece [2001] 31 EHRR 15 in which the European Court of Human Rights commented at paragraph 44 that "*the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different*". In considering the application of this principle in domestic law, Ms. Mountfield referred the Tribunal to s.35 of the Race Relations Act 1976, which permits the provision of facilities or services to meet the "special needs" of a particular racial group. S. 35 of the Race Relations Act was considered by the Administrative Court in R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 in which Moses L J commented at paragraph 52 "*The importance of s.35 is that it recognises that the elimination of discrimination and the promotion of equality requires indirect discrimination to be eliminated and equality for those who are the victims of indirect discrimination may require their special needs to be met*". Ms Mountfield submitted that regulation 18 is "obviously" intended to operate in the same way as s.35, however the Tribunal notes that it would have been open to the draftsman to phrase regulation 18 in the same terms as s.35, but that it is not so phrased. Accordingly the Tribunal rejects the EHRC's submission that regulation 18 must be read in the "special needs" sense.

61 Ms Mountfield also referred the Tribunal to the recent case of Ladele v London Borough of Islington (10 December 2008, EAT) in which the Employment Appeal Tribunal held that a local authority had not discriminated unlawfully on grounds of religious belief by dismissing a Registrar who refused to undertake duties in respect of civil partnerships. As the then-President of the EAT (now Elias LJ) observed at paragraph 121 "*the limitations imposed on freedom of religion are particularly strong where a person has to carry out state functions*". A similar approach was taken to the responsibilities of a magistrate in McClintock v DCA [2008] IRLR 29. Ms Mountfield submitted that the Regulations, if interpreted as she suggested they should be, provide a carefully crafted, proportionate and justified balance between the rights of gay men and lesbians not to suffer discrimination on grounds of the inherent characteristic of their sexuality, and the rights of religious organisations to manifest their faith. The Tribunal agrees that this is the balance the Regulations are designed to achieve, but takes the view that the balance is struck slightly differently. The Tribunal regards the arena of the carrying out of state functions as inherently different from the

carrying out of private charitable activities, in which some scope for legitimate discrimination has apparently been provided for in enacting regulation 18 in the terms in which it was approved by Parliament.

62 Finally, in contending for this narrow interpretation of the scope for lawful discrimination under regulation 18, Ms. Mountfield and Mr Pearce referred the Tribunal to the Explanatory Note to the Regulations, which states "*Charities are exempt from the regulations as provided in regulation 18 insofar as they are established to confer a benefit on a particular group by virtue of sexual orientation and act in accordance with a charitable instrument*". The argument was that the Explanatory Note made clear the interpretation to be given to regulation 18 i.e. that discrimination would only be permitted in the "*special needs*" sense. Mr McCall also referred to the Explanatory Note, but contended that its effect was neutral.

63 The Tribunal can see the force of the case for saying that the Explanatory Note lends itself to the "special needs" interpretation. The Tribunal notes that the Explanatory Note does not differentiate between minority sexual orientations or the majority orientation. The Tribunal has concluded, firstly, that the Explanatory Note should only be relied upon as an aid to construction if the meaning of regulation 18 itself is unclear. For the reasons set out above, the Tribunal found that the ordinary and natural meaning of regulation 18 was clear. Secondly, it does not seem to the Tribunal that, in the course of interpreting a statutory instrument, it is permissible for it effectively to replace the regulation with the Explanatory Note, as this analysis would require it to do, especially as the Explanatory Note is prefaced with the caveat that "*This note is not part of the Regulations*".

64 In rejecting the narrow interpretation of regulation 18 proposed by the EHRC , the Tribunal notes that the arguments in support rely upon the Tribunal reading into regulation 18 a very specific intention of Parliament which is simply not explicit in the regulation itself. This is in contrast to the other statutory provisions the Tribunal was referred to as examples of this approach, including s.35 of the Race Relations Act. The Tribunal also has regard to the fact that the case law referred to by Ms Mountfield does not consider the distinctive role that charitable organisations play in the UK, and the historical system of charity law which underpins them. It seems to the Tribunal that Parliament intended to safeguard the valuable contribution of charities in enacting regulation 18, by providing for circumstances in which legitimate charitable activity could tip the balance in favour of a justified interference with the enjoyment of Convention rights. The Tribunal considers that the European Court of Human Rights would also be likely to view the operation of our distinctive system of charity law as capable of providing *" an objective and reasonable justification"* for permitting different treatment of people or for failing to permit different treatment of people whose situations are significantly different, in view of the overriding need for a public benefit to arise from charitable endeavour and the measures taken by the State to encourage and support the charitable sector.

65 In conclusion on this point, the Tribunal finds that regulation 18 does not permit a charity to act in a manner which is prohibited by the other regulations. However, if a charity limits itself to operating within the sphere of pure charitable activity permitted by regulation 18, the Tribunal takes the view that this could, subject to the expediency test in regulation 18(2), form the basis of a justified interference with the enjoyment of Convention rights in view of the benefit to society provided by such a charity.

(iii) The Relationship between Regulation 18(2) and s.6 of the HRA 1998

66 Regulation 18(2) provides that nothing in the Regulations makes it unlawful for the Charity Commission to exercise a function in relation to a charity which the Charity Commission itself considers to be expedient in the interests of the charity, having regard to the provisions of the charitable instrument. Regulation 18(3) makes it clear that (a) the charitable instrument in question may be one made before the coming into force of the Regulations and (b) that "charity" has the meaning given by the Charities Act 2006. The Tribunal concludes that regulation 18 (3)(a) should be understood as including the exercise of the Respondent's function under s.64(2) of the Charities Act 1993, thus allowing it to approve a regulated alteration to an existing charitable memorandum of association to permit discrimination on grounds of sexual orientation, provided it appears to the Respondent to be expedient in the interests of the charity.

67 In adopting this approach to the exemption regime provided by regulation 18, the Tribunal has regard to the fact that Respondent is itself a public authority for the purposes of s.6(1) of the HRA and consequently it must not act incompatibly with a Convention right. It must have regard to the right to family and private life under Article 8 . It must also have regard to the right to religious freedom under Article 9 and the right to non-discrimination in the enjoyment of both Convention rights under Article 14 of the Convention. The Tribunal notes that Articles 8 and 9 are not absolute rights in that the Convention itself provides for justified interference with those rights by a public authority where this is in accordance with the law and is necessary (inter alia) for the protection of the rights and freedoms of others. The Tribunal is aware that Article 8 has been given a wide margin of appreciation in the European jurisprudence in respect of the "delicate" or "sensitive" question of Article 8 rights for homosexuals seeking to adopt children (the Tribunal notes the recent review of the European case law by the House of Lords in Re G (Adoption: Unmarried Couple) [2008] UKHL 38). The Tribunal further notes that the European cases reviewed in Re G consider the issue of justification in the context of actions by state authorities rather than by charitable groups operating in the voluntary sector.

68 As the Respondent noted in the original decision, it will itself infringe the Regulations unless it can rely upon regulation 18(2). Ms Mountfield submitted on behalf of the EHRC that because s.6 of the HRA makes it unlawful for the Respondent, as a public authority, to act in a way which is incompatible with a Convention right, it could never satisfy itself of the expediency of a discriminatory provision (unless in the "special needs" sense). The Tribunal notes that although the Respondent must comply with s.6 HRA it is not itself required to apply a proportionality, but rather an expediency test, in meeting its obligations under the Regulations. The Tribunal has regard to the House of Lord's judgment in Regina (SB) v Governors of Denbigh High School [2006] UKHL 15 and in particular the judgement of Lord Bingham of Cornhill, who commented at paragraph 29 "*The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning*". Because it is the outcome, rather than the process, which could lead the Respondent to infringe s.6 HRA, the Tribunal rejects the EHRC's argument that the Respondent could not comply with its HRA obligations in applying the expediency test under the Regulations. It would ultimately be a matter for the courts to determine whether the Respondent's final decision as to expediency

infringed s.6 of the HRA, but this is not a reason for the Respondent not to apply the test set out in the Regulations.

69 The Tribunal concludes that the EHRC's argument on this point would serve to emasculate regulation 18(2). For the reasons set out above, it seems to the Tribunal that the Respondent is uniquely positioned to assess the question of expediency under regulation 18(2), 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. The Tribunal concludes that Parliament had the Respondent's particular expertise in mind when giving it this role under the Regulations, and could not have intended the exercise to be nugatory.

70 The Tribunal notes that regulation 18(3)(b) makes clear that the charitable instrument in question would still have to satisfy the test for charitable status under s. 2 and s.3 of the Charities Act 2006. Ms Mountfield submitted that a charity which discriminated on grounds of sexual orientation, unless in the "special needs" sense, would not pass the public benefit test and so could not be a charity at all. It is not necessary for the Tribunal finally to determine that point in the context of this preliminary ruling. However, the Tribunal notes that charities as a class are not bodies to which the HRA applies, unless they fall to be regarded as a public authority under s.6 of that Act. The Tribunal would be concerned if Ms. Mountfield's argument was that the Respondent must impose HRA obligations on charities as a class in order to meet its own HRA obligations, when the vast majority of charities are not themselves public authorities. It seems to the Tribunal that this approach to regulation 18 would serve to impose "by the back door" HRA obligations on charities through subordinate legislation which were not so imposed by primary legislation in the form of the HRA itself.

71 For the reasons set out above, the Tribunal rejects the argument that the Respondent could never, without itself breaching s.6 of the HRA, lawfully conclude that the expediency test was met by the Appellants in adopting any objects that permit discrimination on the ground of sexual orientation.

Conclusion

72 In conclusion, the Tribunal finds, firstly, that if the governing document of a charity permits it to provide benefits to one class of persons as a means of achieving an ultimate charitable purpose then such activity would constitute "acting in pursuance of a charitable instrument", as referred to in regulation 18(1)(a) of the Regulations. The Tribunal concludes that this system of carrying out charitable objects is both permitted by the Proposed Objects and within the meaning of regulation 18. The Tribunal finds, secondly, that regulation 18 permits charities to discriminate on grounds of sexual orientation if this is within the realm of pure charitable activity, is permitted by the charitable instrument, is not otherwise unlawful, and the expediency test under regulation 18(2) is satisfied.

73 In order to answer the preliminary question at paragraph 43 above, however, the Tribunal would have to consider further evidence about the Appellants' proposed means of operation under the Proposed Objects. The evidence previously provided to the Respondent (recorded in its full published decision) and also presented to the Tribunal, was that the Appellants have a higher-than-usual success rate in facilitating

and supporting the successful adoption of children who are otherwise regarded as "hard to place". This is in the context of the Appellants usually being the "last port of call" for such children. The Tribunal is mindful of the human rights of these children and the desirability of enabling a successful adoptive placement. The Tribunal would have to be satisfied that the public benefit arising from the Appellants' activities was sufficiently linked to their ability to discriminate on grounds of sexual orientation that it would satisfy the expediency test.

74 The Appellants can only operate in a manner which is lawful, so much depends upon the proposed means of operation of the Appellants in reliance upon the Proposed Objects. The Tribunal's earlier conclusion that charities which step outside the arena of regulation 18 fall to be regulated by the applicable regime means that regulations 15 and 18 are mutually exclusive. The Appellants would not, in the opinion of the Tribunal, be able to continue to operate precisely as they have in the past. That conclusion is not, however, fatal to these appeals for the following reasons.

75 As stated above, the "mischief" referred to by the Prime Minister and others in public statements about the Regulations was that of discriminatory practices in the provision by voluntary agencies of publicly-funded adoption services, provided under contract with a local authority. The Tribunal has not, thus far, been able to satisfy itself that the activities of the Appellants must necessarily fall foul of this principle.

76 The Tribunal has already heard some evidence as to the nature of the Appellants' past activities. The Tribunal notes that much of their work is carried out through their own financial resources, without the benefit of a contract with a local authority. It may be that some, if not all, of the Appellants' activities could continue to be undertaken and voluntarily funded within the scope of the Proposed Objects and without infringing the Regulations. In order finally to answer this question, the Tribunal would need to hear evidence as to how the Appellants propose to operate in the future.

77 In order to determine these appeals, the Tribunal now requires to hear evidence directed in particular to the following issues:

(i) The Tribunal notes that "adoption services" is not defined in the Proposed Objects. Counsel for the Respondent suggested that it is a term of art under the Adoption and Children Act 2002, however, the Tribunal notes that the definition in s. 2(1) of the 2002 Act is of the "adoption service" run by a local authority, not the "adoption services" provided to the local authority by a voluntary agency. The term "adoption services" is also not defined in the Regulations;

(ii) The Tribunal notes that the Proposed Objects permit the relief of need amongst children "*including but not limited to*" the provision of adoption services. It follows that the Appellants enjoy some discretion under the Proposed Objects as to how they should operate to further their objects (although the Tribunal notes that the clause in the Proposed Objects which permits discrimination on grounds of sexual orientation itself appears to be limited to activities falling within the term "adoption services");

(iii) It seems likely to the Tribunal that local authorities will take the view that they are themselves prohibited by regulation 8 of the Regulations from continuing

with the current funding arrangements whereby payment is made to the Appellants following a successful placement with a family introduced by them to the local authority. If this is so, then the Appellants would presumably have to consider whether they could continue to operate (in such ways as they are able) on the basis of donated income alone;

(iv) It seems to the Tribunal that, if the Appellants were to undertake some form of adoption-related counselling without formally approving the potential adopters for the local authority or receiving payment from public funds, this could be viewed as pastoral activity permitted by regulations 14 (3) and (5) in any event, being private activities undertaken by a religious organisation;

(v) In view of the analysis contained in this ruling, it is possible, in the opinion of the Tribunal, that the scope for some form of adoption-related activity by the Appellants may in fact be greater than the purely pastoral activity permitted under the auspices of regulations 14 (3) and (5). This activity would have to fall short of activity which would be public in character in order not to infringe regulations 8 or 14(8). The Tribunal would need to be satisfied as to the scope of such activity, but it could, in the opinion of the Tribunal, fall within the realm of regulation 18 so as to permit the Appellants lawfully to discriminate on grounds of sexual orientation.

(vi) If the Tribunal were so satisfied, then it would be able finally to consider whether the test of expediency were satisfied and to decide whether the Appellants should be permitted to adopt the Proposed Objects.

Next Steps

78 Although counsel for the Appellants and the Respondent each submitted that the Tribunal should attempt to make a final determination of the appeals when answering the preliminary question, as permitted by rule 14 (3) of the Rules, it has not proved possible to do so in view of the need for further evidence. As is noted earlier in this ruling, there is no power for the Tribunal to remit these appeals to the Respondent for a fresh determination unless the Tribunal first quashes the original decisions.

79 It follows, in the interests of limiting the parties' costs if at all possible, that there are some procedural options for them to consider at this stage. The Tribunal is willing to hear submissions from the parties as to these options (or any others which they may identify):

- Option 1 is for the Tribunal to go on to consider the evidence required to address the issues set out above. This would require a further directions hearing and the subsequent listing of the appeals for a final hearing;

- Option 2 is for the parties to agree that the original decision should now be quashed and remitted for fresh determination by the Respondent but in accordance with a direction from the Tribunal as to the issues the Respondent should address, as above. (It seems to the Tribunal that the Respondent could not simply agree to reconsider the Proposed Objects in the light of this Ruling unless the original decision is quashed by the Tribunal, because the

Commission, having made its decision, is presumably *functus officio* i.e. it has already exhausted its legal powers in this matter.) ;

- Option 3 is for these appeals either to be withdrawn or adjourned generally so that the Appellants may present a fresh s.64(2) application to the Respondent. Both parties would then be able to explore the fresh application in the light of the issues the Tribunal has found to be relevant, as above, but without the formal constraints of a remittal and/or direction from the Tribunal. The Appellants would of course have the right to restore an adjourned application (or make a fresh appeal to the Tribunal in respect of a new decision if consent is again refused).

80 The Tribunal will convene an oral directions hearing on not less than 14 days' notice from the date appearing below, to consider submissions in respect of these options, to give appropriate directions in respect of any further hearing, and to hear any other applications.

Dated: 13 March 2009

Signed:

Alison McKenna, President of the Charity Tribunal

Peter Hinchliffe, Legal Member

Jonathan Holbrook, Legal Member