

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

DECISION AND REASONS

Decision

1. This decision is made following the Tribunal's earlier Ruling on a Preliminary Question (dated 13 March 2009) and the subsequent final hearing which took place on 13 May 2009. It constitutes the formal notification of the Tribunal's decision in the above appeal, pursuant to rule 32(1)(a) of the Charity Tribunal Rules 2008 ("the Rules").
2. This matter was listed for a directions hearing on 17 April 2009. At that hearing, Father Hudson's Society applied for permission to withdraw its appeal and that application was granted by the Tribunal, so that the appeal of Catholic Care (Diocese of Leeds) (now "the Appellant") continued alone.
3. The unanimous decision of the Tribunal is to dismiss the Appellant's appeal. Our reasons for doing so, which should be read in conjunction with the Preliminary Ruling, are set out below.¹

Reasons

4. The relevant background to this appeal is set out at paragraphs 4 to 17 of the Preliminary Ruling. The jurisdiction exercised by the Tribunal is described at paragraphs 18 to 27 of the Preliminary Ruling.

1. The Preliminary Ruling is available on www.charity.tribunals.gov.uk/decisions.htm.

5. In paragraph 79 of the Preliminary Ruling, the Tribunal suggested a number of procedural options to the parties, in the interests of limiting their costs if at all possible. The Tribunal suggested that either the Respondent could agree that the original decision should now be quashed and remitted for a fresh determination in accordance with the Preliminary Ruling, or alternatively, that the Appellants could withdraw their appeals (or adjourn them generally) while they presented a fresh s. 64(2) application to the Respondent, which would comply with the Preliminary Ruling. The Appellants would in those circumstances retain the right to restore an adjourned application, or make a fresh appeal to the Tribunal if the Respondent's consent to the fresh application was refused.
6. At the 17 April directions hearing, the Appellant (represented by Matthew Smith of Counsel) and the Respondent (represented by Robert Pearce QC) informed the Tribunal that informal discussions between the parties had not resolved the issues between them. The Appellant was unable at that stage to confirm whether it wished to go forward to a full hearing, although it also did not wish to vacate the final hearing date which had by then been provisionally listed for 13 May. The Tribunal was informed that the details of the Appellant's future activities were being discussed with OFSTED² and could not yet be finalised. In the circumstances, the Tribunal directed that the Appellant should file with the Tribunal and serve on the Respondent by 5 May the witness evidence on which it sought to rely at a final hearing, together with a skeleton argument outlining the basis upon which the Appellant proposed to operate in future, so as to comply with (a) the Tribunal's Preliminary Ruling and (b) the Proposed Objects. The Respondent was given permission to file a skeleton argument in reply, and the matter was further listed for a telephone directions hearing on 8 May so that a decision could be made as to whether the 13 May hearing date would be effective.
7. The Appellant's position following the filing of the documents mentioned above may be summarised as follows. The Appellant wished to proceed to a final hearing and proposed that Mr. Wiggin (the Appellant's Chief Executive) should give evidence as to how the Appellant intended to operate in accordance with the Proposed Objects and how the achievement of its charitable purpose would be facilitated by adopting the Proposed Objects. The Appellant filed a second witness statement from Mr Wiggin in this regard.
8. The skeleton argument filed on behalf of the Appellant indicated that its legal arguments were now as follows. Firstly, that the Tribunal should now take account of the wording of the charitable exemption in the Equality Bill 2009, which had recently had its second reading in the House of Commons. Secondly, that the Tribunal's inclusion in its Preliminary Ruling of a reference to "pure charitable activity" was not an issue upon which the Appellant had had an adequate opportunity to address the Tribunal, so it now wished to do so. Thirdly, that the Appellant's proposed activities in relation to the Proposed Objects were lawful so that the appeal should be allowed. At the telephone directions hearing on 8 May, the Tribunal explained to Mr. Smith that it could not properly have regard to draft legislation as an aid to the interpretation of

² OFSTED inspects and regulates voluntary adoption agencies.

existing legislation. However, that particular argument was finally withdrawn only at the 13 May hearing, when Mr Smith accepted it was a “red herring”. The Tribunal notes with regret that despite having the continuous benefit of legal advice, the Appellant’s argument on this point was abandoned only after the Tribunal had indicated a strong view as to its lack of merit and after the Respondent had been put to the time and trouble of filing a skeleton argument in reply to it.

9. In relation to the second argument, the Tribunal reminded Mr. Smith at the telephone directions hearing that it had heard at length from Counsel for both parties at the preliminary hearing as to the meaning of regulation 18 of the Equality Act (Sexual Orientation) Regulations 2007 (“the Regulations”) and its relationship to the other regulations. It was in this context that the phrase “pure charitable activity” had been used in the Preliminary Ruling (paragraphs 53 and 58), as a means of describing the limited scope of regulation 18 and illustrating why it had not been necessary for the draughtsperson of the Regulations to cross-refer between regulation 18 and the other regulations, despite (as the Tribunal found) intending them to be mutually exclusive. At the telephone directions hearing, the Tribunal expressed considerable doubt as to whether the Appellant could at this stage in the proceedings properly ask the Tribunal to “go behind” its earlier ruling on this point, as the skeleton argument apparently invited it to do. Mr. Smith indicated that the Appellant wished to pursue the point as one of “procedural fairness”, although he did not then advance any legal argument or provide authority as to what power the Tribunal might have to re-open a matter on which it had previously ruled. In the circumstances, the Respondent was required to address the point in its skeleton argument and to provide the Tribunal with relevant authorities. At the final hearing, the Tribunal expressed the view that, having considered the authorities which had by then been provided by both parties, it’s provisional view was that it had no power to re-open the issues addressed in the Preliminary Ruling (which could only be considered further on appeal) but that it would be happy to clarify its earlier ruling if Mr. Smith wished to address it on the matters which he said were unclear to the Appellant. This approach was agreed to by both counsel, and the final hearing therefore proceeded to hear the witness evidence, followed by legal submissions.
10. The Tribunal’s conclusion in its Preliminary Ruling had been that the Appellants could only operate in a manner which was lawful, taking account of the relationship between regulation 18 and the other regulations, so that much depended upon their prospective means of operation in reliance upon the Proposed Objects. The Tribunal was concerned that the term “*adoption services*” which was used in the Proposed Objects was not defined therein. The precise meaning of that term and its application to anyone other than a local authority was also not clear from the primary or secondary legislation that the Tribunal had been referred to by the parties. It was therefore necessary for the term used in the Proposed Objects to be clarified in evidence. The Tribunal was also concerned that, as the drafting of the Proposed Objects allowed the Appellant to provide services to children and young people without families in ways that “*included but were not limited to*” the provision of “*adoption services*”, the Appellant would clearly enjoy considerable discretion as to how it

would operate. The Tribunal also therefore wished to hear evidence to clarify how the Appellant intended to operate in furtherance of the Proposed Objects, in order to determine this appeal.

11. The Tribunal had concluded in its Preliminary Ruling that a charity which steps outside the arena of charitable operation to which regulation 18 refers could not then operate in reliance upon that exemption. In other words, the Tribunal had concluded that it should view as mutually exclusive each separate regulation which permits an exemption from the general rule against discrimination. On this basis, the Tribunal had reasoned that the Appellants would not be able to continue to operate precisely as they had in the past. Nevertheless, the Tribunal took the view that there was scope for the Appellant to consider operating a form of adoption-related activity pursuant to the Proposed Objects. It was made clear in the Preliminary Ruling that any such activity would have to further the Appellant's charitable purpose, but not constitute activity which would infringe the other regulations, including regulations 8 and 14(8)) by being public in character.
12. In paragraph 78 of the Preliminary Ruling, the Tribunal invited the Appellants to provide it with evidence directed in particular to the following issues:
 - (i) What was the precise meaning and scope of the term "*adoption services*" as used in the Proposed Objects?
 - (ii) How did the Appellant intend to operate so as to further the Proposed Objects?
 - (iii) Could the Appellant continue to operate its proposed services without infringing regulations 8 and 14(8) and, in particular, could it operate on the basis of donated income alone (given that it seemed likely to the Tribunal that local authorities would themselves be prohibited by regulation 8 of the Regulations from continuing with the previous funding arrangements);
 - (iv) Could the Appellant limit its activities to adoption-related counselling, without formally approving the potential adopters for the local authority or receiving payment from public funds? This seemed to the Tribunal to be a pastoral activity of the kind permitted by regulations 14 (3) and (5) of the Regulations which would not cause the Appellant to infringe regulations 8 and 14(8);
 - (v) In relation to any other proposed activity by the Appellant, could it be shown to fall within the realm of charitable activity covered only by regulation 18, and be pursued so as to permit the Appellant lawfully to discriminate on grounds of sexual orientation?
13. The Tribunal had previously directed that witness statements should stand as evidence in chief. The Respondent required Mr Wiggin to attend for cross examination at the final hearing on 13 May. Mr Wiggin's second witness statement was accompanied by several exhibits, including an "Outline Business Case and Development Plan" for the Appellant. The evidence given by Mr

Wiggin on the above points (both in his statement and orally before the Tribunal) was as follows.

14. In relation to the first question, Mr. Wiggin's evidence was that "*adoption services*" is a term clearly understood by voluntary adoption agencies. It includes the provision of preparation and training for adoptive parents; the approval of adoptive parents; supporting potential adoptive parents through the adoption process; and thereafter supporting adopted children and adults and the families of such children and adults. Mr Wiggin referred the Tribunal to the Adoption Support Services Regulations 2005 and explained that the Proposed Objects were intended to cover the activities described therein. The Tribunal observed that the 2005 Regulations do not actually use or define the term that the Appellant had used in the Proposed Objects. In closing, Mr. Smith accepted on behalf of the Appellant that the term "*adoption services*" had not been adequately defined in the Proposed Objects, but submitted that the Tribunal had heard a clear exposition of the term from Mr Wiggin himself on which it should now rely.
15. On the second question of how the Appellant intended to further the Proposed Objects, the Outline Business Plan produced by Mr Wiggin, which he said had been approved by the charity trustees, stated "*the proposal is that Catholic Care continues its current adoption provision and grows it to meet future needs that are congruent with our charity objects and that use our traditional strengths as a children's service provider, our capital resources of property and the expertise of our staff. The key proposal is to retain the adoption service, developing expertise in hard to place children*". In his evidence to the Tribunal, Mr Wiggin helpfully explained the Appellant's past (and proposed) means of operation as follows. The Appellant's social worker assesses and prepares a couple to be put forward to the Appellant's adoption panel. The adoption panel considers the evidence and if appropriate recommends approval of the potential adopters. Mr Wiggin, as the formal decision-maker for these purposes, then decides whether to accept that recommendation. The local authority then relies on his formal decision to undertake the process of matching a child to the recommended couple. Mr Wiggin clarified that the Appellant effectively subsidises around 20% of the costs of the entire process, because it undertakes the assessment and preparation stage at its own financial risk. The Tribunal had already heard that the charity receives funding from the local authority only after a placement is made and that it may thereafter receive some limited additional funding to support the family post-adoption.
16. In relation to the third question, Mr Wiggin's evidence was that it would not be possible for the Appellant to provide adoption services without the benefit of local authority funding. The Outline Business Plan confirms that "*the charity has examined its finances and has been able to confirm that it cannot afford to fully fund its adoption services if it were not permitted to accept reimbursement of its costs from a local authority*". Mr Wiggin did not agree with the Tribunal's suggestion, set out in paragraph 78 (iii) of the Preliminary Ruling, that local authorities might themselves be prohibited by regulation 8 from entering into a contract with a charitable voluntary adoption agency which discriminated against same sex couples wishing to adopt. The Tribunal does not

in any event need to reach a final view on that issue in order to determine this appeal because it must decide what activities it would be lawful for the Appellant, rather than any local authority, to undertake. Mr. Wiggin explained in his evidence that the voluntary income received through the Catholic Church supplements, but could not realistically replace, the funding available from local authorities for the charity's work and so the Appellant intended to continue to receive public funding for its services.

17. On the fourth question, the Outline Business Plan produced by Mr Wiggin states that the Appellant must be registered with OFSTED in order to act as a voluntary adoption agency, and that OFSTED will only continue its registration as a voluntary adoption agency if it provides a full adoption service or a specifically limited post-adoption counselling service. The Appellant did not regard it as possible to offer a limited service of the type suggested by the Tribunal.
18. Finally, in relation to the fifth question, it was clear from the Outline Business Plan and from Mr Wiggin's evidence that the Appellant wished to provide the same services as previously and to discriminate against same sex couples seeking to adopt, notwithstanding the Tribunal's Preliminary Ruling. Mr Wiggin told the Tribunal that *"the trustees' perspective on this matter is that we provide an adoption service, which we have done since the 1940's for over 60 years now, and it's essential that you provide the full range of adoption services in order to be an adoption agency. So essentially we would like to be able to recruit, assess, prepare, support and put before our panel suitable parents for adoption, which is the core activity of adoption work"*. Mr Wiggin told the Tribunal that the ability of the Appellant charity to discriminate against same sex couples *"is a principle...that we would like to stand on, and it is that principle that, if we cannot get confidence in the change of our charitable objects around that principle, then we will close our adoption agency"* and later *"it is essentially a principle that we are arguing and wishing to defend here, a principle of a Catholic organisation. The funding aspects of it and other aspects are very secondary to our position here today"*.
19. On the question of the expediency test under regulation 18(2), Mr Smith argued in his closing submissions that permitting the Appellant to discriminate against same sex couples in a limited area of its work could be seen as proportionate to the public good it would achieve thereby, because the discrimination would allow it to (i) continue to access voluntary funding from the Catholic Church; (ii) retain its trustees who are drawn from the Catholic faith; and (iii) gain access to potential adopters who sympathise with the Appellant's ethos. If the Appellant did not discriminate, it was submitted, it would lose these vital elements of support. Mr. Smith argued on behalf of the Appellant that religious motivations were a legitimate reason for a third party to require a charity to discriminate in order to receive continued support. He submitted that, in considering the question of expediency, the Tribunal could legitimately draw a distinction between the position of a bigoted donor or supporter, who sought to influence a charity for malign reasons, and that of a religious supporter who sought to influence a charity for reasons of conscience.

Conclusion

20. The Preliminary Issue for the Tribunal was whether, if the Appellant adopted the Proposed Objects, it would be lawful for it to decline to provide adoption services to a person on the grounds of their sexual orientation. The Tribunal needed to hear further evidence to answer that question, in particular to clarify the Proposed Objects and to understand the Appellant's proposed means of operation. The Tribunal acknowledges (as did the Respondent) that the Appellant is a well-respected voluntary adoption agency which has made a significant contribution to the provision of adoption services in this country and facilitated many successful adoption placements. In its Preliminary Ruling, the Tribunal was concerned to communicate to the parties that, in its opinion, steps could even now be taken to preserve at least some of the Appellant's work and expertise whilst complying with the Regulations. The Tribunal had envisaged that the Appellant could produce to the final hearing an outline of its future activities which would comply with the Regulations as the Tribunal had ruled them applicable to its work. The Appellant has clearly decided against this approach as a matter of principle, and in the event Mr. Wiggin's evidence to the Tribunal was that the Appellant proposed to adopt the Proposed Objects in order to operate in a manner which the Tribunal had already ruled would be unlawful.
21. This was a difficult case, which required the Tribunal to make sense of a set of Regulations which apparently referred separately to charities, voluntary adoption agencies and religious organisations. The Appellant falls into all three of these categories and sought to move between the different exemption regimes contained within the Regulations. The Tribunal's Preliminary Ruling was that regulation 18 could not be relied upon by the Appellant to permit activity which was no longer permitted, or which was made unlawful, by another regulation. As the Preliminary Ruling made clear, this was because the Tribunal understood regulation 18 to permit discrimination by charities only when their activities did not stray into the areas covered by the other regulations. In taking this view the Tribunal adopted an interpretation of the Regulations as a coherent whole, being mindful of the "mischief" which the extraneous material presented to the Tribunal clearly indicated it was Parliament's intention to avert.
22. The Tribunal now concludes on the basis of Mr. Wiggin's evidence that the Appellant's proposed activities, in furtherance of the Proposed Objects as defined in his evidence, would be unlawful and so it must dismiss this appeal. The activities described by Mr. Wiggin were initially permitted by regulation 15, but the Tribunal has concluded they are now unlawful following the expiry of the regulation 15 time limit in December 2008. The Tribunal has concluded that Parliament's purpose in enacting regulation 15 would be negated if the Appellant were permitted simply to continue with identical activities under regulation 18 once the time limit in regulation 15 expired. The Tribunal, having heard Mr. Wiggin's evidence, also now concludes that the nature of the activities he described, taken together with the proposed receipt of public funding for them, also makes them unlawful by virtue of regulation 8 and (in the case of religious organisations such as the Appellant) by virtue of regulation 14(8), because of the public character with which they are imbued. As the

Tribunal has now concluded that the proposed activities would be unlawful, it was not necessary for it to go on to conclude finally whether there was a public benefit justification for permitting discrimination under regulation 18 (as referred to in paragraph 74 of the Preliminary Ruling). However, the Tribunal doubts from Mr. Wiggin's evidence that the requisite public benefit could have been demonstrated, given that his evidence was that the proposed alteration of the Appellant's objects arose substantially out of a desire to maintain a principled stance, rather than being specifically designed to advance the Appellant's charitable purpose of the support, relief and care of children and young people without families to care for them.

23. The Tribunal notes that its interpretation of the Regulations differs fundamentally from that of the Respondent in taking its original decision. The Tribunal nevertheless concluded, in considering the matter "afresh", as it is required to do, that it would not itself grant the Appellant's application to adopt the Proposed Objects for the reasons set out above. In the circumstances, it was unnecessary for the Tribunal to go on to consider whether, and if so how, the "expediency test" referred to in the Preliminary Ruling might be satisfied.
24. The Tribunal now turns its attention to a number of outstanding procedural issues.

Procedural Issues

(i) Notice of Appeal

25. Following receipt of the Preliminary Ruling, the Respondent issued a Notice of Appeal in the High Court. At the 17 April directions hearing, the Tribunal expressed its unhappiness at this development for the following reasons. Firstly, it is by no means clear that a right of appeal arises from the determination of a preliminary question rather than a final decision of the Tribunal. Secondly, even if the Tribunal's Preliminary Ruling were capable of appeal, the Respondent had not first obtained the Tribunal's permission to appeal, which is in any event required by rule 35 of the Rules. Thirdly, it was clear from correspondence seen by the Tribunal that the issuing of the Appeal Notice had come as a complete surprise to the Appellants. The Tribunal was concerned that the Respondent's action in issuing proceedings in the High Court in relation to un concluded Tribunal proceedings was capable of being seen as a tactical manoeuvre, inevitably raising in the mind of any Appellant the spectre of unaffordable parallel proceedings and thus likely to lead to the discontinuation of proceedings before the Tribunal. Mr Pearce explained that the issue of the Appeal Notice had been intended to be merely protective of the Respondent's position, so that any such appeal would not be time-barred following the final decision. He emphasised that it had not been intended as an intimidatory gesture by the Respondent. The Respondent had, after issuing the High Court proceedings, filed with the Tribunal an application for permission to appeal the Preliminary Ruling. At the directions hearing, the Respondent then applied for its application for permission to appeal to be adjourned generally, which application was granted. The High Court has since stayed the Respondent's application for a period of two months in any event.

26. The Tribunal pointed out to the Respondent that under CPR 52.4 the Tribunal itself may give directions so as to determine the relevant time limit for an appeal to the High Court. The Tribunal referred the parties to the Upper Tribunal's recent decision in Dorset Healthcare NHS Foundation Trust v M H [2009] UKUT 4 (AAC)³ and in particular paragraph 13, with regard to the "overriding objective". The Tribunal reminded the parties that from September 2009 the overriding objective would apply to the Charity jurisdiction in the First-tier Tribunal and that the Tribunal expected the parties even now to co-operate with each other and with the Tribunal. Accordingly, the Tribunal advised the Respondent that the appropriate course would have been to discuss with the Appellant its intention to appeal and its concerns about the time limit and to have applied to the Tribunal for a direction setting the relevant time limit for appealing to the High Court.
27. At the final hearing, the Tribunal directed by consent that the adjournment of the Respondent's application for permission to appeal the Preliminary Ruling should continue, and that the Respondent should have permission to restore it up to 28 days after receipt of the final decision. This would then mean that the Tribunal could consider the existing application for permission to appeal the Preliminary Ruling alongside any application for permission to appeal the Tribunal's final decision in this matter.
28. Following the withdrawal of the appeal by Father Hudson's Society at the directions hearing on 17 April, the Respondent agreed to remove that charity as a Respondent to the High Court proceedings in the event that they were ultimately proceeded with. The Tribunal noted that it could not itself direct this as it was within the power of the High Court only, however the Tribunal indicated that it endorsed this approach so that Father Hudson's Society should not be caused any unnecessary costs in relation to that matter.

(ii) The Outstanding Applications

29. The Respondent had applied, at an early stage, for parts of the Appellant's written application to the Tribunal to be struck out, on the basis that it asked the Tribunal to take steps which were outside its jurisdiction. These applications were (a) to remit the original decision to the Respondent without first determining the appeal and (b) to direct the Respondent to consider a revised set of Proposed Objects which the Respondent had not previously considered. The Respondent argued that the Appellant's application also inappropriately invited the Tribunal to rule upon the procedure by which the Respondent had reached its original decision. The Tribunal agreed that it had no power to take these actions, but dealt with the issue by giving the Appellants permission to apply to amend their applications. Unfortunately, the documents then submitted continued to seek relief that the Tribunal could not grant and the Respondent then renewed its application for those parts of the appeal to be struck out. Having adjourned the Respondent's application in its 7 January⁴ ruling and the

³ : <http://www.bailii.org/uk/cases/UKUT/AAC/2009/4.html>

⁴ Available on www.charity.tribunals.gov.uk/decisions.htm

Respondent having renewed it at the directions hearing in April, the Tribunal suggested that the parties should try to resolve this issue between them and only approach the Tribunal for an order if there was a fundamental difference of opinion that they could not resolve. The Tribunal was concerned not to put the Appellant to the cost of re-drafting its original application, especially as the issues in dispute between the parties had been more narrowly defined by that stage in any event. By the time of the final hearing, the Tribunal was pleased to note that the Appellant had agreed in correspondence with the Respondent not to pursue the disputed parts of its initial application and the Respondent therefore did not pursue its application for strike out. The Tribunal commends the parties' approach in this regard.

30. Finally, the Appellant had indicated at an early stage that it would seek costs against the Respondent, but confirmed at the final hearing that it did not seek to pursue this application.

(iii) Information required by rule 32(2) of the Charity Tribunal Rules 2008

31. The Tribunal is required to notify the parties that there is a right of appeal to the High Court against this decision. Pursuant to rule 35 of the Rules it is necessary to file with the Tribunal a written request for permission to appeal to the High Court. The request must be filed no later than 28 days after the date on which the person making the application receives notification of this decision, and must include (a) the name and address of the applicant and any representative; (b) identification of the decision of the Tribunal to which the request relates; and (c) the grounds on which the applicant intends to rely before the High Court.

Dated: 1 June 2009

Alison McKenna
President of the Charity Tribunal

Jonathan Holbrook
Legal Member

Peter Hinchliffe
Legal Member