Appeal number: FTC/52/2011

Provision of adoption services by a charity – discrimination against homosexuals and same sex couples who are potential adoptive parents – whether objectively justified under section 193 of the Equality Act 2010 – analogy with approach under Article 14 of the European Convention on Human Rights – whether permission should be granted for amendment of the charity's Memorandum of Association

IN AN APPEAL TO THE UPPER TRIBUNAL (TAX AND CHANCERY)

ON APPEAL FROM THE FIRST-TIER TRIBUNAL (GENERAL REGULATORY CHAMBER) (CHARITY) Reference Number: CA/2010/0007

BETWEEN

CATHOLIC CARE (DIOCESE OF LEEDS)

Appellant

- and -

CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

TRIBUNAL: THE HON. MR JUSTICE SALES

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane EC4A 1NL on 12/13 September

Monica Carss-Frisk QC & Matthew Smith, instructed by Wallace LLP, for the Appellant

Emma Dixon, instructed by Legal Services London, Charity Commission, for the Respondents

DECISION

Introduction

1. The appellant ("the Charity") is a Roman Catholic charity which has previously been involved in the provision of adoption services, i.e. identifying and screening potential parents willing to adopt children, placing children for adoption and providing some support for the parents after adoption. This is an appeal from a decision of the General Regulatory Chamber of the First Tier Tribunal dealing with Charity matters ("the FTT") dated 26 April 2011: [2011] UKFTT B1 (GRC). In its decision the FTT dismissed an appeal by the Charity against a decision of the Charity Commission ("the Commission") dated 21 July 2010, whereby the Commission refused its consent, as required by section 64 of the Charities Act 1993, for the Charity to amend the objects clause in its Memorandum of Association. The Charity had sought permission to make the amendment so as to permit it to continue its previous practice to refuse to offer its adoption services to same sex couples. The Charity now appeals to the Upper Tribunal.

2. In providing adoption services in the past, in the period to the end of 2008, the Charity operated a practice of only screening potential adoptive parents and placing children with adoptive parents who were heterosexual and would constitute what was in argument termed a "Nazarene family" of mother, father and child. Potential adoptive same sex parents were excluded from consideration under this practice. The practice is said to be required for reasons of Roman Catholic religious doctrine. Homosexual couples have to be excluded from any adoption services provided under the auspices of the Roman Catholic church. The Charity has been willing in the past to consider adoptive parents from other denominations and other faiths, provided they would constitute a Nazarene family.

3. Changes in the law relating to charities mean that in order to continue that practice, which was lawful until the end of 2008, the Charity needs to make changes to its Memorandum of Association to make explicit that it will only provide its adoption services to heterosexual adoptive parents, and not to homosexuals. The lawfulness of continuing its practice turns on the operation of a limited exemption for charities from the general law prohibiting discrimination on grounds of, *inter alia*, sexual orientation. The exemption is contained in section 193 of the Equality Act 2010, which provides in relevant part as follows:

> **"193 Charities**
> (1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if—
> (a) the person acts in pursuance of a charitable instrument, and
> (b) the provision of the benefits is within subsection (2).
> (2) The provision of benefits is within this subsection if it is—
> (a) a proportionate means of achieving a legitimate aim, or

(b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic. …"

4. Section 193(2)(a) is in wide terms and is clearly not confined to legitimate aims in the form of acting to help persons who suffer disadvantages as a result of having a protected characteristic, since that is expressly covered by section 193(2)(b). If the Charity is permitted under section 64 of the Charities Act to change its Memorandum of Association to make it explicit in that document that it will only provide its adoption services to heterosexuals and not to homosexuals, the Charity will be able to say that when it acts to follow its previous practice it "acts in pursuance of a charitable instrument" as required by section 193(1)(a). It would then be open to the Charity to seek to justify the continuation of its previous practice as "a proportionate means of achieving a legitimate aim" in accordance with section 193(1)(b) and (2)(a), and hence to establish its lawfulness under the new legal regime now in place.

5. The Charity's application is for permission to amend the relevant part of its Memorandum of Association to read:

"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."

6. This provision would make it explicit that the Charity is required by its Memorandum of Association to exclude homosexuals from its adoption services. Although there is no mention of the concept of the Nazarene family, the Roman Catholic Bishop of Leeds ("the Bishop") has made it clear that in his view the tenets of the Church require that (at any rate in the usual case) potential adoptive parents should, if they adopt, form a Nazarene family.

7. Although section 193(1) sets out two conditions which might in theory be addressed separately, the reason put forward by the Charity for wishing to amend its Memorandum of Association is that it wishes to continue with its previous practice of excluding homosexuals from its adoption services, and in light of that the FTT, the Charity and the Commission have sensibly treated the question of permission to amend as turning on whether the practice can be objectively justified under section 193(1)(b) and (2)(a). If it cannot be, there is no good purpose to be served in allowing the amendment.

8. On an appeal from the Commission to the FTT, the FTT has power to hear evidence and to consider the matter afresh and make its own judgment whether permission for an amendment should be made: paragraph 1(4) of Schedule 1C to the Charities Act 1993 (see now Schedule 6 to the Charities Act 2011). An appeal lies from the FTT to the Upper Tribunal only on a point of law: section 11 of the Tribunal, Courts and Enforcement Act 2007. The question for me, therefore, is whether the

FTT has misdirected itself as to the law, has made any findings of fact which are irrational or lacking proper support in the evidence available to it or has reached a conclusion which is irrational. If there has been a material error by the FTT, a further question would arise whether the matter should be remitted to the FTT or the Commission or whether the Upper Tribunal is in a position to resolve the question on the material available before it: see section 12 of the 2007 Act.

9. The matter has a complex procedural and legal history, as set out by the FTT at paras. [2]-[5] of its decision. The Charity's previous practice to exclude homosexuals from its adoption services became unlawful under the Equality Act (Sexual Orientation) Regulations 2007 ("the 2007 Regulations"), after expiry on 31 December 2008 of transitional provisions which had allowed the Charity to continue to discriminate against homosexuals for a period. Regulation 18 of the 2007 Regulations provided a continuing limited exemption for a charity from the general law then in place which made it unlawful for a person to discriminate in the provision of services on grounds of sexual orientation, when the charity was acting as required by a charitable instrument. It was in order to take advantage of the exemption in Regulation 18 that the Charity applied to the Commission to amend its Memorandum of Association in the terms set out above. The Commission refused permission for the amendment and what was then the Charity Tribunal dismissed the Charity's appeal on a particular basis. Since this was in the period before the introduction of the new unified Tribunal, the Charity appealed to the High Court. Briggs J allowed the appeal in March 2010 and remitted for fresh consideration by the Commission the question whether the Charity should be permitted to amend its Memorandum of Association: [2010] EWHC 520 (Ch); [2010] PTSR 1074.

10. The Commission reconsidered the matter, still under the 2007 Regulations, in light of the guidance given by Briggs J. It again came to the conclusion in its decision of 21 July 2010 that it should refuse permission for the Charity to amend its Memorandum of Association. This time, by reason of changes to the tribunal system, an appeal lay to the FTT. By the time the appeal was heard by the FTT in March 2011 a new legal regime as set out in the Equalities Act 2010 had come into effect, and it was agreed that the FTT should address the question of permission to amend by reference to section 193 of that Act.

11. In his judgment, Briggs J interpreted Regulation 18 as a provision which implemented Article 14 of the European Convention on Human Rights (prohibition of discrimination), so as to permit justification of differential treatment of heterosexuals and homosexuals if undertaken for a legitimate aim and in a manner where the means employed are proportionate to the aim sought to be realised: see in particular paras. [72]-[74], [78], [84] and [104]. On the position arrived at by that stage, Briggs J considered that the Charity had made out a prima facie case of justification which required further detailed examination and consideration by the Commission (paras. [107]-[111]). He sketched out a possible basis on which the Charity might be able to establish a good case of justification in relation to the proposed amendment of its Memorandum of Association to enable it to continue with its practice of excluding homosexuals from its adoption services: "… the very unusual predicament of [the

Charity], its status as an adoption agency of last resort for 'hard to place' children and the arguably pre-eminent needs of those children who will otherwise be left unadopted may constitute a very special and unusual case for recognition under Article 14 …" (para. [109]).

12. Section 29 of the Equality Act 2010 provides that a person providing a service to the public (as the Charity seeks to provide its adoption services) must not discriminate against a person requiring the service by not providing the person with that service. Section 13 defines direct discrimination for the purposes of the Act as including a case where the service provider treats a person seeking to use the service less favourably than he would treat others "because of a protected characteristic". Section 4 of the Act sets out the list of relevant "protected characteristics", which include "sexual orientation". Absent a defence of objective justification being made out under section 193, therefore, the Charity may not lawfully offer adoption services to heterosexuals while refusing to provide them to homosexuals.

13. In the proceedings before the Commission, the FTT and now this Tribunal which have followed on from Briggs J's judgment, it has been common ground between the Commission and the Charity that section 193 of the Equality Act should be interpreted in similar fashion to the way in which Briggs J had interpreted Regulation 18, as allowing for a charity to seek to establish that a defence of objective justification is made out by reference to the principles applied for the purposes of Article 14 of the ECHR. In the light of the position adopted by the parties, it is unnecessary to examine further the precise basis on which Article 14 principles come to infuse the interpretation of section 193. Leaving aside technical and potentially difficult questions such as whether the Charity is to be regarded as a public authority for the purposes of application of Article 14 under the Human Rights Act 1998 or whether Article 14 might be regarded as imposing a positive obligation on the Commission and FTT to decide the Charity's application in a particular way, on any view Article 14 provides a powerful analogy for the operation of section 193 and I think it is right to proceed on the established common approach adopted by the parties in these proceedings.

The FTT's Decision

14. The hearing before the FTT took the form of a detailed examination, with evidence called on both sides, whether something along the lines of the possible objective justification case identified in Briggs J's judgment could be made out by the Charity.

15. As summarised by the FTT (para. [12]), the Charity's case is that the legitimate aim to be served by the amendment to its Memorandum of Association and consequent resumption of its provision of adoption services limited to heterosexuals is the prospect of increasing the number of children (particularly "hard to place" children) placed with adoptive families. This is a somewhat wider formulation of the aim than was set out at the time of the hearing before Briggs J, referring as it does to a prospect or chance of achieving a particular desirable outcome rather than necessarily

bringing it about in fact (as Mr McCall QC, who appeared for the Charity at the hearing before the FTT put it, the question is whether there is a "material probability" that the number of children placed in adoptive families would be increased by the Charity's work: para. [37(ii)]). The Charity accepts that religious conviction alone could not in law provide a justification for the denial of its adoption services to same sex couples. Rather, the Charity argues that the discrimination proposed is proportionate to the achievement of the legitimate aim it identifies because the discrimination would take the form of the denial of services which would not be available to same sex couples from the Charity, but would be available to them via other voluntary adoption agencies and local authorities, and unless the Charity were permitted to discriminate as proposed, it would no longer be able to raise the voluntary income from its supporters on which it needs to rely to run the adoption service, and it would therefore have to close its adoption service permanently on financial grounds. This would result, it argues, in a consequent loss in the overall provision of services by the adoption agency sector and a lost opportunity to increase the number of children placed with adoptive families.

16. The Charity undertakes a range of charitable work, of which the adoption services (when they were undertaken up to the end of 2008) were only a part. The Charity's other charitable work is unaffected by the change in equality law. Before its adoption service had to be suspended at the end of 2008, the FTT found that the Charity had achieved about 10 successful placements of children with adoptive parents approved by the Charity each year. This required the Charity to raise about £130,000 of voluntary income per year to support these activities, because there is a short-fall of about £13,000 per child in respect of the "inter-agency fee" payable to voluntary agencies by local authorities when there is a successful placement (para. [18]). Children seeking adoption are drawn from the lists of looked after children in the care of local authorities. Local authorities may arrange adoptions themselves, or may use voluntary adoption agencies which find and vet potential adoptive parents. The inter-agency fee is a fee paid by a local authority (about £24,000) when it uses the services of a voluntary adoption agency to enter into an adoption placement. This fee would not cover the costs of the Charity, and therefore would have to be supplemented at the rate of about £13,000 per placement by charitable fundraising by the Charity relying on its links with the Roman Catholic Church, which (if the adoption services were restricted to heterosexuals and in accordance with the tenets of the Roman Catholic Church) would be prepared to promote fundraising activities through Catholic churches and organisations.

17. After the judgment of Briggs J, the Commission wrote to the thirteen local authorities with which the Charity had worked to ask about the case put forward by the Charity. Of these, only six replied. None of them supported the Charity's contention that if the Charity closed its adoption service then children would be left un-adopted (para. [19]). The responses and other research indicated that same sex couples could themselves provide a good source of adopters of "hard to place" children (para. [51]).

18. The FTT heard evidence about the operation of the system for matching children with potential adoptive parents and had regard to recent reports about this, in particular *No Place Like Home* (2010) by Policy Exchange and Selwyn, Sempik, Thurston and Wijedasa, *Adoption and the Inter-Agency Fee* (2009) (paras. [21]-[23] and [29]-[34]). Evidence given by James Richards, for the Charity, who had for 19 years been Chief Executive of the Catholic Children's Society (Westminster), by reference to published research, was to the effect that about 3,000 children are placed for adoption each year but that there are approximately 4,000 children awaiting adoption. He sought to support the Charity's case that if its adoption service closed, fewer children available for and needing adoption would be adopted. This was disputed by Dr Julie Selwyn of the School for Policy Studies at the University of Bristol and Director of the Hadley Centre for Adoption and Foster Care Studies, who was called as a witness by the Commission. Her evidence was to the effect that the operation of the system for matching children and parents was affected by the inter-agency fee arrangements, which made local authorities wary about using voluntary adoption agencies for placements. This resulted in there being a surplus of potential adoptive parents on the books of voluntary adoption agencies, because local authorities did not seek to tap into and use their full capacity. Therefore, Dr Selwyn did not agree with the proposition advanced by the Charity that if its resources were increased (by being able to engage in fundraising under the auspices of the Roman Catholic Church) that would increase the number of adoption placements which would take place. Put shortly, because of the operation of the matching system and the inter-agency fee arrangements, there is an over-supply of potential adoptive parents available through voluntary adoption agencies so the presence or absence of the Charity as an additional source of potential adoptive parents would be unlikely to result in more children in need of adoption in fact being adopted.

19. The FTT preferred the evidence of Dr Selwyn on this issue: para. [49]. It noted that she is a leading academic expert on adoption and that her evidence was supported by the weight of evidence before the FTT, including in particular the academic reports before it. I also observe that the outcome of the inquiries of local authorities made by the Commission, noted by the FTT, provided strong corroboration for Dr Selwyn's view and for the conclusion of the FTT. A lengthy period had elapsed since the end of 2008 with the Charity unable to provide adoption services, but no evidence was forthcoming from the local authorities with which the Charity had worked to show that in practice there had been any significant problem in placing children for adoption as a result. The FTT was plainly entitled to come to the conclusion it did on the facts, on the evidence before it.

20. The FTT heard evidence from the Bishop about the requirements of Roman Catholic doctrine (paras. [24]-[25]); the way in which the Charity raised funds from donors under the auspices of the Roman Catholic Church; and how that stream of funding would be lost and the adoption service closed if the Roman Catholic Church felt obliged to withdraw its support for the Charity's fundraising efforts, as it would do if the Charity were not permitted to restrict its adoption services to heterosexuals: paras. [26]-[28].

21. The FTT correctly identified the questions it needed to address at para. [48] as (i) whether the Charity's aim of increasing the prospect of a placement of a child into adoption was a legitimate aim for the purposes of section 193; (ii) whether, on the evidence, it was an aim that could be achieved by the method which the Charity proposed to adopt; and (iii) whether the discrimination on ground of sexual orientation proposed by the Charity would constitute a proportionate means of achieving the legitimate aim it had identified.

22. The FTT held that the Charity's stated aim is a legitimate aim, "taking into account the importance to society generally (and to the children concerned in particular) of any realistic prospect of increasing adoption placements" (para. [50]). It is relevant to note that the strength or otherwise of the prospect of achieving an increase in adoption placements is relevant to the question whether the Charity can show that there are serious and weighty grounds as are required to justify a decision or practice to discriminate against persons on grounds of their sexual orientation: see para. [54] below.

23. As regards issue (ii), the FTT concluded "that the evidence presented to it did not make out the Charity's case that the continued and/or increased voluntary funding of its adoption work [i.e. on the basis of the Charity being able to continue fundraising under the auspices of the Roman Catholic Church, as a result of being permitted to restrict its adoption services to heterosexuals] would inevitably lead to the prospect of an increased number of adoptions" (para. [50]). On the appeal to the Upper Tribunal, Ms Carss-Frisk QC for the Charity (who did not appear below) criticised the FTT for its use of the word "inevitably" here: she argued that it showed that the FTT had misdirected itself in law by applying an unduly stringent test of causation adverse to the Charity at this point in its analysis, whereas it should simply have asked itself whether it was more likely than not that permitting the Charity to restrict its adoption services to heterosexuals and hence to secure a stream of funding to keep them going would create a prospect of an increased number of adoptions.

24. I do not agree with this criticism of the FTT's decision. In my view, on a fair reading of the decision it is clear that the FTT used the word "inevitably" in para. [50] because it was there setting out – in order to make clear that it rejected it - the formulation of the Charity's case which Mr McCall QC had forcefully presented to the FTT. Mr McCall had argued "that it was 'inconceivable' that if the resources of a voluntary adoption agency were increased, it would not have a positive effect on the number of adoptions that were made" (para. [49]). In this sentence in para. [50] of the decision, the FTT was making clear its view that this was not "inconceivable" or inevitable, as Mr McCall had contended.

25. On a proper reading of the decision as a whole and para. [50] in particular, the FTT did address the correct question in relation to the facts, namely whether, if the Charity were permitted to amend its Memorandum of Association so as to resume its previous practice of providing adoption services to heterosexuals but not homosexuals, there was "any realistic prospect of increasing adoption placements" (see the FTT's formulation in the opening part of para. [50] of the legitimate aim

relied upon). In the latter part of para. [50] the FTT was concerned to determine whether that legitimate aim "was capable of being achieved by the Charity's proposed approach." The FTT found that the Charity's case was "contradicted" by the evidence the FTT accepted about the operation of the system for matching children and adoptive parents (see paras. [18]-[19] above). That is to say, the FTT found that by reason of the way in which that system operated in practice there was no realistic prospect of increasing adoption placements if the Charity were permitted to do as it wished. In the light of that evidence, the Tribunal reached the conclusion, at the end of para. [50], "that the legitimate aim identified by the Charity was not in fact one that would be achieved by its proposed method."

26. As a distinct point, at paras. [51] and [52] of the decision the FTT considered whether the Charity's proposed approach to the approval of potential adopters was consistent with the authority of *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173. The FTT accepted Mr Richards' evidence that some potential adopters might not come forward if the Charity were to close its adoption service, but found that this risk did not outweigh (as it was put in *In re G*) the "risk of excluding from assessment couples whose personal qualities and aptitude for child-rearing are beyond question". The evidence showed that same sex couples and individual lesbian and gay adopters could make good adoptive parents for hard to place children. At para. [52] the FTT said:

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

27. The FTT then turned to issue (iii) (whether the discrimination on ground of sexual orientation proposed by the Charity would constitute a proportionate means of achieving the legitimate aim it had identified) at paras. [53]ff. The FTT correctly observed that the Charity needed to show "weighty reasons" in order to justify discrimination against homosexuals in relation to the provision of its adoption services (para. [53]). The FTT rejected the Charity's argument that the availability of adoption services to same sex couples from local authorities or other voluntary adoption agencies could be relied upon as justification for the discrimination it proposed in respect of its own adoption services (para. [53]).

28. In that regard I would observe that whilst the availability of adoption services to same sex couples from other sources could not (as the FTT said) of itself justify a practice of discrimination on the part of the Charity in providing its own adoption services, it is something which could in some circumstances be relevant to the question of objective justification, bearing in mind the nature of the case being presented by the Charity. If the Charity could establish that by discriminating against homosexuals it could materially help children in need of adoption (as it sought to argue), I think it would be relevant to the question whether that discrimination was justified that homosexuals would have adoption services readily available to them from other sources, since that would tend to reduce the detrimental impact on them flowing from such discrimination as compared to a situation in which they might be cut out from receiving adoption services altogether.

29. At paras. [54]ff the FTT examined more closely the Charity's claim that if it were not permitted to discriminate against homosexuals it would lose the funding stream from donations necessary to keep its adoption service running. The FTT was sceptical about the Charity's claim to this effect. The FTT referred to an unsolicited letter to the Commission from the Roman Catholic Caucus of the Lesbian and Gay Christian Movement and said that it was "impossible … to conclude … that the Charity's voluntary income would inevitably be lost were it to operate an open adoption service" (para. [56]; and in para. [58] the FTT said that it was not satisfied on the evidence "that permanent closure of the Charity's adoption service on financial grounds was the inevitable consequence of the Charity's inability to discriminate"). On the appeal to the Upper Tribunal the Charity disputed that the FTT was entitled to proceed on this basis, because of an exchange between the Commission and the Charity prior to the hearing before the FTT in which the Commission accepted the Charity's case on loss of funding. In an email from the Commission to the solicitors for the Charity dated 28 June 2010, sent in response to the Charity's comments on arguments submitted in the letter from the Roman Catholic Caucus of the Lesbian and Gay Christian Movement, the Commission said, "We are not disputing the evidence of the charity with regard to the views of the Catholic bodies and individuals who support its work" (i.e. the Commission indicated that it did not dispute the Charity's evidence that if it were not permitted to discriminate against homosexuals it would indeed lose the voluntary funding necessary to keep its adoption service running). The Commission appeared to adhere to this position on the appeal to the Upper Tribunal, since in its Response to the Notice of Appeal at paragraph 5.15(b) it referred to the evidence given by the Bishop to the effect that, without the proposed change in the Charity's Memorandum of Association, the Roman Catholic Church would withdraw its support for the adoption service and that without the funding from the Church the Charity is not able to undertake adoption activities, and described this as "The true position".

30. At para. [57] the FTT considered the position on the footing that, notwithstanding what the FTT said about the possibility of funding continuing, the Charity's claim about losing its funding was correct. The FTT accepted the submission of Ms Dixon for the Commission, by reference to *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, that "the negative attitudes of third parties

cannot, of itself, provide justification for discrimination on grounds of sexual orientation."

31. At para. [59] the FTT accepted that there would be a loss to society if the Charity's skilled staff in its adoption service were no longer engaged in the task of preparing potential adopters, but considered that it had to weigh the risk of closure of the adoption service (which it did not regard as certain) against the detriment to same sex couples and to society generally of permitting the discrimination proposed. As the Commission had put it in its decision, at para. [92], "… discrimination on certain grounds such as race, sex, sexual orientation is in itself generally unacceptable to the community as well as to the individuals directly affected." The FTT endorsed the Commission's approach to this issue, which – applying judgments of the ECtHR in *EB v France* (2008) 47 EHRR 21, para. 91; *Karner v Austria* (2004) 38 EHRR 24, para. 37; *Kozak v Poland* (2010) 51 EHRR 16, para. 92 – required that the Charity should show that particularly weighty reasons existed to justify the discrimination, and endorsed the Commission's conclusion that the Charity's case was of insufficient weight to satisfy this requirement. Accordingly, the Charity could not show that it had good grounds of sufficient strength to provide objective justification for the proposed discrimination as required by section 193 of the Equality Act, with the result that permission to amend its Memorandum of Association should be refused.

The Grounds of Appeal and the Commission's Response

32. As it developed its case at the hearing before me, the Charity submitted that the FTT had erred in law in the following principal ways:

(1) The reasoning of the FTT in para. [52] of the decision (set out at para. [26] above) in finding that the Charity's proposed mode of operation would be likely to reduce the pool of potential adopters by reason of each of points (a) and (b) identified by the FTT and hence that the Charity's case was inconsistent with *In re G* was flawed because neither point was properly sustainable, and still more importantly because the FTT had failed properly to take into account the evidence that without being able to adopt that mode of operation the Charity's adoption service would lose a critical funding stream and would have to close. On the evidence, the FTT should have made the opposite finding, namely that the pool of potential adopters would be likely to be increased if the Charity were permitted to adopt its proposed mode of operation, and therefore should have concluded that *In re G* meant that the Charity's proposal was properly justified, since it would help children in need, which is to be regarded as a particularly weighty, indeed paramount, consideration;

(2) In connection with (1), the FTT had erred in its reasoning and findings regarding the availability of voluntary funding for the Charity in paras. [54]-[56]. The FTT was wrong to apply a test of whether it was "inevitable" that the Charity would lose funding to such an extent that

its adoption service would have to close; it had also erred in failing to consider and take into account the evidence about the importance of fundraising under the auspices of the Roman Catholic Church, whose support would be withdrawn if the Charity were not permitted to discriminate against homosexuals in the provision of its adoption services; and it had erred in its rejection of the evidence of the Bishop that individual donors would be deterred from supporting those services if the Charity were not so permitted;

(3) In para. [53] of the decision, the FTT misunderstood the Charity's argument about the significance of the availability of adoption services to same sex couples from sources other than the Charity. Contrary to the FTT's understanding, this was not offered as a justification in itself for the Charity's proposal, but was submitted to be a material consideration when conducting the weighing exercise required under the proportionality analysis. The FTT had erred in law by treating the availability of adoption services elsewhere as an irrelevant factor;

(4) In para. [57] of the decision, the FTT had misunderstood and misapplied the reasoning of the ECtHR in *Smith and Grady v United Kingdom*. In the present case, the negative attitudes of third parties (voluntary donors acting under the guidance of the Roman Catholic Church) towards homosexuals was not said to be, in itself, the justification for the proposed discrimination. Instead, the justification put forward is that there will be a detrimental impact on the interests of children in need if the proposed discrimination is disallowed. Furthermore, a desire to promote traditional families and traditional family life is recognised by the ECtHR to be a legitimate and acceptable point of view, and the FTT had failed to recognise this;

(5) In para. [50] of the decision, the FTT had erred by applying a test that the Charity had to show that it was "inevitable" that there would be a prospect of an increased number of adoptions if it were allowed to discriminate against homosexuals as proposed; it should have been sufficient if that were a likely outcome. The FTT had also been wrong on the evidence before it to find in paras. [49]-[50] that the legitimate aim identified by the Charity would not be achieved by its proposed method.

33. As a result of these errors individually or in combination, Ms Carss-Frisk for the Charity submitted that the FTT's conclusion in paras. [59] and [61] was flawed. She submitted that the Upper Tribunal could itself be confident on the material available that the Charity's proposed mode of operation was proportionate to a legitimate aim and hence was objectively justified; therefore, the Upper Tribunal should allow the appeal and itself decide that permission should be granted for the Charity to amend its Memorandum of Association as it proposed. She submitted in the alternative that even if the Upper Tribunal could not be so confident about the proper

ultimate resolution of that issue, the FTT's decision was flawed and the case should be remitted to the FTT for reconsideration on a proper basis.

34. Ms Dixon for the Commission defended the reasoning of the FTT. In support of the FTT's ultimate conclusion that the appeal should be dismissed she also developed two submissions which were not reflected (or fully reflected) in the FTT's reasons: (i) that private prejudice of charitable donors cannot be an adequate justification for discrimination, as it is not charitable to restrict who can benefit from a service by reference to criteria which are unrelated to the charitable aims to be carried out, and (ii) that the aim identified by the Charity would not, under its proposal, be pursued in a proportionate manner, since the proposal does not provide for any flexibility in its application, such as to allow a celibate, committed, devout Catholic same sex couple to adopt a child even where to do so would plainly be in that particular child's best interests. These submissions were foreshadowed in the Commission's Response to the Notice of Appeal served under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, which served in effect as a Respondent's Notice on the appeal, and Ms Carss-Frisk did not object to them being put forward as additional answers to the appeal.

35. As to the position which the Upper Tribunal should arrive at, Ms Dixon's submission mirrored that of the Charity. Her primary contention was that the Upper Tribunal should simply dismiss the appeal, on the basis that the FTT had committed no material error of law or that the Upper Tribunal could be satisfied that the conclusion it arrived at is correct, including if necessary by reference to the additional reasons put forward by her. In the alternative, if the Upper Tribunal were not so satisfied, the case should be remitted to the FTT for reconsideration.

Analysis

Ground (1) (the Charity's proposed mode of operation would be likely to assist children in need and hence is objectively justified; the FTT misapplied In re G*)*

36. This Ground should be considered alongside additional submission (i) made by the Commission (the private prejudice of charitable donors cannot justify discrimination), for if the Commission is right about that it provides a complete answer to the Charity's case. This additional submission appears to me to be the same, in substance, as a submission made by the Equality and Human Rights Commission at the hearing before Briggs J, which he considered commanded respect and formed part of the reasons why he remitted the decision to the Charity Commission: see [2010] EWHC 520 (Ch); [2010] PTSR 1074 at [109].

37. It is perhaps not entirely clear from the FTT's decision whether the FTT accepted this submission. Para. [57] of the decision might be taken to indicate that it did, since it said that it accepted Ms Dixon's argument based on *Smith and Grady v United Kingdom* that the negative attitudes of third parties cannot provide justification for discrimination on grounds of sexual orientation, and it was by reference to *Smith and Grady* that Ms Dixon sought to advance additional submission (i) in the Upper

Tribunal. However, I think that the better reading of the FTT's decision is that it did not accept such a wide argument as is presented on this appeal under additional submission (i). In para. [57] of the decision the FTT qualified the point it did accept, by saying that such attitudes cannot "of itself" provide justification for such discrimination, and in paras. [58]-[59] of the decision it went on to consider whether the Charity's adoption service would in fact close, causing a loss to society which fell to be weighed against the detriment to same sex couples and to society generally of permitting the discrimination in judging whether the proposal was proportionate and objectively justified. This would have been unnecessary if the FTT had accepted a submission as wide as additional submission (i).

38. In my judgment, additional submission (i) should be rejected. The basic approach adopted by the FTT is correct. The mere fact that some people may feel upset if homosexuals are accorded equal treatment in some area of life cannot, of itself, provide objective justification for discrimination on grounds of sexual orientation: see *Smith and Grady v United Kingdom*, para. 97. This is the point made by the FTT at para. [57] of the decision. However, if, as a consequence of some people having prejudices about or negative attitudes towards homosexuals, some real detriment to the general public interest (of sufficient weight) might arise unless a practice discriminating against them were adopted, then in principle it is possible under Article 14 and under section 193 of the Equality Act for such a practice to be found to be proportionate to the legitimate aim of preventing that detriment or harm and hence objectively justified. The FTT was therefore right to go on in the decision to consider the question of justification as it did.

39. Ms Dixon's reliance on the judgment in *Smith and Grady* to support her wide additional submission (i) was misplaced. The reasoning of the ECtHR in that judgment is against that submission. The case concerned a complaint about disciplinary action taken pursuant to the policy of the Ministry of Defence not to allow homosexuals to serve in the British armed forces. The ECtHR set out the core argument of the Government in support of that policy as that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces, and noted the Government's reliance on a report into the issue ("the HPAT report") (para. 95). At para. 97 the ECtHR said:

> "The question for the Court is whether the above-noted negative attitudes constitute sufficient justification for the interferences at issue.
>
> The Court observes from the HPAT report that these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour."

40. The Court then went on in paras. 98-105 to examine in detail whether any change in the policy would entail substantial damage to morale and operational effectiveness. It noted that there was a lack of any concrete evidence to substantiate the Government's claim to that effect and concluded that the Government had failed to show that there were "weighty and convincing reasons" to justify the policy (para. 105; and see para. 89 where it introduced the framework for its examination of this issue). The way in which the Court expressed itself in para. 97 ("negative attitudes cannot, *of themselves*, … amount to sufficient justification") and the structure of the judgment on this issue indicate that the ECtHR considered that, in principle, a proper justification might have been available for the policy if the Government had been able to show by reference to concrete evidence that, because of negative attitudes held by some people in the armed forces, failure to implement such a policy would undermine the morale and effectiveness of the armed forces in a significant way. On the facts, the Government failed to do this.

41. Other formulations of principle by the ECtHR in a range of cases under Article 14 - see in particular the authorities referred to by the FTT: *EB v France* (2008) 47 EHRR 21, para. 91; *Karner v Austria* (2004) 38 EHRR 24, para. 37; *Kozak v Poland* (2010) 51 EHRR 16, paras. 92 and 99 - stating that differential treatment discriminating against homosexuals can be justified by particularly weighty and convincing reasons, are not qualified in the way suggested by Ms Dixon in her additional submission (i). They indicate that what is required is a practical approach, looking to see if there really would be a serious detriment to some aspect of the public interest or legitimate objective if a practice involving such differential treatment were not followed.

42. In support of her submission Ms Dixon also relied on authorities under domestic race and sex discrimination statutes. Under those statutes it was not a defence to a claim of direct discrimination that the person who engaged in differential treatment based on a particular characteristic (race or sex) did so because he was reacting to the discriminatory attitudes of customers or other pressures, rather than being motivated by racism or sexism on his part: *R v Commission for Racial Equality, ex p. Westminster City Council* [1984] QB 770, 780F per Woolf J; [1985] ICR 827, 837-838, CA; *James v Eastleigh Borough Council* [1990] 2 AC 751, 779E-F (Lord Lowry); cf *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1, [82] (Baroness Hale). In my view, Ms Dixon's reliance on these authorities is again misplaced in this context. Under the statutes referred to, there was no scope for justification of direct discrimination. The only question was whether the defendant discriminated against a person on grounds of their race or sex. By contrast, under Article 14 and section 193 of the Equality Act direct discrimination by reference to protected characteristics such as sex or sexual orientation is capable of being lawful if it is objectively justified on the facts. The domestic authorities relied on by Ms Dixon do not provide guidance as to the proper approach to the issue of objective justification.

43. Turning to the Charity's argument on its appeal, Ms Carss-Frisk submitted, first, that the motivation of third party donors for providing or not providing voluntary funding for the adoption service was irrelevant to the question of objective justification, provided that such donors would be acting lawfully in acting as they did. All that mattered was that more children in need would be likely to be helped if the Charity reacted to pressure from its donors by limiting its adoption services to heterosexuals. In the alternative, she submitted that the motivation of third party donors in this case favouring the institution of the traditional family was acceptable in a pluralistic democratic society.

44. I do not think that the first submission is right. The motivation of third party donors is capable of being relevant to the balancing exercise required under Article 14. The latitude or width of the margin of appreciation to be allowed to a body to react to third party pressures when engaging with the public may well be affected by the motivation of the third party. As Ms Dixon forcefully pointed out, it is very unlikely indeed that insistence by a donor who was a racist bigot that some benefit be conferred on children in need, but only if they are of a particular race, would be found to justify a body in providing that benefit to classes of person limited in that way. That would involve a gross intrusion upon the values which should be expected to be promoted in the public domain in accordance with the European Convention on Human Rights, which seeks to foster a democratic society marked by pluralism, tolerance and broadmindedness (see *Smith and Grady v United Kingdom* at para. 87).

45. On the other hand, where third party donors are motivated by sincerely held religious beliefs in line with a major tradition in European society such as that represented by the doctrine of the Catholic Church (and particularly where, as here, their activities do not dominate the public sphere in relation to the activity in question – provision of adoption services – which are otherwise widely available to homosexuals and same sex couples), the position is rather different. In my opinion, donors motivated by respect for Catholic doctrine to have a preference to support adoption within a traditional family structure cannot be equated with racist bigots, as Ms Dixon sought to suggest. Such views have a legitimate place in a pluralist, tolerant and broadminded society, as judgments of the ECtHR indicate:

(i) *Karner v Austria* concerned differential treatment of a homosexual partner in relation to succession to the tenancy of property previously occupied by the other member of the partnership who had died, as compared with succession by other family members. The ECtHR found a violation of Article 14 taken with Article 8. At para. 40 the Court said that it could accept "that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment," although at paras. 41 and 42 it went on to say that the government had not in fact shown that convincing and weighty reasons existed to provide objective justification of the discrimination against homosexuals in that case;

(ii) *Kozak v Poland* concerned differential treatment of homosexuals in relation to succession to the right to occupy property. At para. 98 of the judgment the Court said, following *Karner*, that it "accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in principle" and at para. 99 noted that "Striking a balance between the protection of the traditional family and the Convention rights of sexual minorities is, by the nature of things, a difficult and delicate exercise, which may require the state to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition." Although the complaint under Article 14 was upheld because the Polish Government had not shown that there were convincing or compelling reasons to justify the discrimination in question, by these statements the Court acknowledged that views in favour of protecting the traditional family are legitimate in a democratic society;

(iii) *Schalk and Kopf v Austria* (2011) 53 EHRR 20 concerned complaints under Articles 8, 12 and 14 and Article 1 of the First Protocol regarding the failure of Austria to permit a same sex couple to marry (as distinct from entering into an officially recognised same sex partnership). The ECtHR dismissed the complaints. Austria had struck a balance which fell within its margin of appreciation. At paras. 49-63 the Court made its assessment under Article 12 (right to marry). At para. 62 the Court noted "that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another", which supported the width of the margin of appreciation to be applied in favour of upholding Austria's refusal to grant same sex couples the right to marry. (I should mention that Ms Carss-Frisk also sought to derive assistance from the ECtHR's judgment in *Gas and Dubois v France*, App. No. 25951/07, judgment of 15 March 2012, in which the Court found no violation of Article 14 where a woman in a civil partnership was unable to adopt the child of her partner, though had they been a married different sex couple she could have done; but other than that the Court at para. 66 followed its own judgment in *Schalk and Kopf* to conclude that the Convention did not impose an obligation on Contracting States to allow same sex couples to marry, I do not think that this judgment provides assistance on the issue in the present case, as the judgment turned on the Court's conclusion that the applicant was not in a comparable position with married couples – paras. 67-68 – and that her treatment was the same as would be experienced by unmarried heterosexual couples – para. 69, so the question of objective justification did not arise).

46. It should be noted when looking at these judgments that they concern decisions by national authorities, whereby the considered decision of those authorities was to treat the interest of promoting traditional families as having weight and the

task for the ECtHR was to decide whether such decision fell within the margin of appreciation of the Contracting State in question. It is the national authorities which the ECtHR recognises as being able to give weight to that interest because they are "best placed to assess and respond to the needs of society" (see *Schalk and Kopf v Austria,* para. 62). Some adjustment is required when looking at these judgments to provide an analogy for analysis under section 193. The Roman Catholic Church is not a national body authorised by the democratic political process to establish public rules or laws binding the whole country. Unlike the national authorities, it is not "best placed to assess and respond to the needs of society" as a whole. It is a private institution distinct from the state, representing only the views of its adherents and incapable of setting general standards of public policy.

47. The legal context in which the Charity comes before the Tribunal is one in which the national authorities, in particular Parliament, have established a very clear framework of equality law which makes discrimination on grounds of sexual orientation unlawful. That is the basic ground rule of public policy established by the national authorities in their assessment of and responding to the needs of society. The Charity seeks to rely on section 193 and the objective justification argument it puts forward to derogate from that basic position. The interest of promoting the traditional family on which the Charity relies has not been endorsed by the national authorities. As a result, in the context of assessing whether the Charity has made out a case of objective justification, I think that the view of the Charity that the traditional family should be promoted is not entitled to be given the same degree of weight as if it had been adopted by the national authorities (as in the Strasbourg judgments referred to above).

48. Having made this point, however, I emphasise that in the circumstances of this case I do not consider that it makes a significant difference. Even if the Charity's view were entitled to be given the same weight as the view of the national authorities of a Contracting State, the outcome of the appeal would in my judgment be the same. Notwithstanding the statements in the cases about the legitimacy and acceptability of views in favour of promoting traditional family life, it is also clear from the Strasbourg authorities that even where a body acts in accordance with such views, if in doing so it discriminates against homosexuals it is still necessary for it to show that there are particularly convincing and weighty reasons justifying differential treatment: see, in particular, *Karner v Austria* at paras. 37 and 41-42; *Kozak v Poland* at paras. 92 and 98-99; and *Schalk and Kopf v Austria* at para. 97.

49. In this case, the Charity submitted that weighty reasons do exist to justify its proposed practice in restricting its adoption services to heterosexuals who would form a Nazarene family: if the Charity were permitted to proceed in this way it would be likely to help children in need who would not otherwise be helped and acting to promote the vital interests of children in need by placing them with adoptive families is a particularly strong legitimate aim for the purposes of Article 14 and section 193.

50. There can be no doubt that the interests of children in need is a very powerful consideration in the context of this analysis. Both sides sought to pray in aid the

decision of the House of Lords in *In re G* in support of their respective submissions, and in particular the statement by Lord Hope at [53] with reference to *EB v France* regarding adoption by homosexual couples that "the consequences for the child cannot be left out of account in determining whether a discriminatory measure that affects children can be objectively justified and is proportionate" and para. [54] of his speech, where he said:

> "So read, the EB case is consistent with the point made by the South African Constitutional Court in *Du Toit v Minister for Welfare and Population Development* (2002) 13 BHRC 187 referred to by Lord Hoffmann. It is consistent with authority in Scotland too. In *T, Petitioner* 1997 SLT 724, 732 the First Division of the Court of Session said:
>
> > 'There can be no more fundamental principle in adoption cases than that it is the duty of the court to safeguard and promote the welfare of the child. Issues relating to the sexual orientation, lifestyle, race, religion or other characteristics of the parties involved must of course be taken into account as part of the circumstances. But they cannot be allowed to prevail over what is in the best interests of the child.'
>
> As Mr Lavery put in his written case for the child, where children are involved in any matter their rights are almost universally recognised as paramount. The aim sought to be realised in regulating eligibility for adoption is how best to safeguard the interests of the child. Eligibility simply opens the door to the careful and exacting process that must follow before a recommendation is made. The interests of the child require that this door be opened as widely as reasonably possible. Otherwise there will be a risk of excluding from assessment couples whose personal qualities and aptitude for child rearing are beyond question. To exclude couples who are in an enduring family relationship from this process at the outset simply on the ground that they are not married to each other would be to allow considerations favouring marriage to prevail over the best interests of the child. I do not think that this can be said to be either objectively justified or proportionate. From this it must follow that the applicants' exclusion from eligibility would be incompatible with their Convention rights as it would be discriminatory."

51. In *In re G* the House of Lords held that a rule which limited the availability of state adoption services to married couples was irrational and violated Article 14. Ms Dixon submitted that the decision supports the Commission's argument, because the Charity proposes to limit its adoption services to heterosexual couples, thereby failing to open the door as widely as reasonably possible to potential adoptive parents. Ms Carss-Frisk submitted that, on the contrary, the decision supports the Charity's argument, because if it were not permitted to discriminate against homosexuals as it proposed its adoption service would close down and children in need of adoption would be the losers. The interests of children in need of adoption were so pressing that the door to potential adoptive parents should be opened as widely as reasonably possible by enabling the Charity to fund its adoption service, which required that it should discriminate against homosexuals.

52. In my judgment, there is greater force in Ms Carss-Frisk's submission on this point. If the Charity were able to show that there is a significant prospect that more children would be placed into adoption if it is allowed to discriminate against homosexuals than would otherwise be the case, then the interests of the children who would be so placed provide an argument in favour of permitting the Charity to proceed in that way. Ms Dixon's argument to the contrary did not face up to the thrust of the Charity's case that, if it is not allowed to discriminate against homosexuals, that will not mean that homosexuals can have access to its adoption services, but rather that there will be no adoption service provided by the Charity for *anyone* (homosexual or otherwise) to have access to and children in need of placement will lose out.

53. However, two points should be emphasised here. First, there is a big "if" in the Charity's case which requires careful scrutiny on the facts, to which I turn below. Secondly, there is a significant difference between the position in this case and the position addressed in *In re G*. In *In re G* the interests of children in need in being adopted were in line with and pointed to the same result as the general principle that discrimination on grounds of sexual orientation will not be objectively justified unless weighty and convincing grounds are put forward. By contrast, on the Charity's case in these proceedings there is an inherent conflict between the general interests of homosexuals and of society as a whole that there should not be discrimination on grounds of sexual orientation, on the one hand, and, on the other, the interests of children in need to be placed with good adoptive parents wherever possible. Lord Hope's observations in *In re G* were not made in this context and do not explain how such a conflict should be resolved. The burden on the Charity to make out its case is accordingly greater than was the burden on the claimants in *In re G*.

54. In my view, the extent of the benefits to children and the likelihood that such benefits might be achieved are relevant considerations to be taken into account in resolving that conflict and determining whether weighty and convincing grounds have been established to justify the proposed discrimination against homosexuals. This is in line with the judgment in *Smith and Grady v United Kingdom* at paras. 97 to 105, where the ECtHR assessed the extent to which concerns about the possible detrimental effect on the important public interest in maintaining the morale and operational effectiveness of the armed forces of departing from the policy against homosexuals could be substantiated as being "of the nature and level alleged". In this regard, the FTT was right to call attention to the way in which the Charity had somewhat watered down its case from that which was explained to Briggs J, by this stage describing its legitimate aim as "the prospect of" increasing the number of children placed with adoptive families (paras. [12] and [47]).

55. In my judgment, the analysis of the FTT at paras. [49] and [50], rejecting the claim of the Charity that discrimination against homosexuals would be likely to improve such a prospect in a significant way, cannot be faulted. It discloses no error of law: see paras. [18]-[19] above. There was evidence before the FTT which entitled it to conclude at para. [50] that, for reasons associated with the operation of the inter-agency fee arrangements, the legitimate aim identified by the Charity would not be achieved by its proposed method. There is not a "material probability" that the

number of children placed in adoptive care would be increased by the Charity's work (to use Mr McCall's phrase, set out at para. [37(ii)] of the decision). There is a surplus of potential adoptive parents available through voluntary adoption agencies and the children who might potentially have found adoptive parents via the Charity's adoption service, with the relevant local authority paying an inter-agency fee to the Charity, are likely to be placed elsewhere with the fee being paid to another voluntary adoption agency. Although the Charity claimed that its adoption service was of good quality and might find potential adoptive parents who might not put themselves forward to other adoption agencies, there was nothing to indicate that the adoptive parents found by and adoption services provided by other voluntary adoption agencies would be inadequate or that such agencies would be unable to find good numbers of suitable adoptive parents. The FTT was therefore right to conclude that the Charity could not show that there were weighty and convincing reasons why it should be permitted to change its Memorandum of Association to enable it to discriminate against homosexuals as it proposed.

56. On the appeal to the Upper Tribunal Ms Carss-Frisk also submitted that the Charity could, if permitted to discriminate against homosexuals and hence enabled to go on fund-raising for its adoption service, potentially raise money to enable the Charity to offer adoptive parents without requiring local authorities to pay an inter-agency fee. Such adoption placements would, she said, represent a net gain over those which might be available through use of the system based on payment of the inter-agency fee. She pointed to evidence given by the Bishop that "In times of economic strain in the past the Charity has agreed to facilitate an adoption without a fee" and that if the Charity were permitted to proceed as proposed "such action will again be possible in future." She criticised the FTT for failing to consider this possibility distinctly in its decision.

57. I am not persuaded that the FTT failed to take this point or the Bishop's evidence into account in reaching its conclusion in para. [50]. The Bishop's suggestion was vague and unspecific. It was not costed or worked through. It was not presented in his evidence as a stand-alone basis on which the Charity would be able to go on providing a funded adoption service. It was in fact made clear in the Charity's evidence (including in the Bishop's own evidence) that the bulk of the funding for its adoption service came from payment of the inter-agency fee. The business plan prepared by the Charity in April 2009 in support of its application to the Commission stated at para. 7.3 that the Charity had 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." I therefore do not think that the FTT can be criticised for not dealing with this point distinctly in its decision.

58. Even if I am wrong about that, and the FTT had overlooked this aspect of the Charity's case, I am satisfied that it could make no difference to the outcome of this appeal. In my judgment, the vague and speculative suggestion that there might be a possibility of children being placed with adoptive parents outside the inter-agency fee arrangements could not begin to amount to weighty and convincing reasons sufficient to discharge the heavy onus on the Charity to show that its proposed discrimination

against homosexuals on grounds of their sexual orientation would be objectively justified according to the relevant standard under Article 14 and section 193.

59. The conclusion I have come to on Ground (1) on the basis of paras. [49]-[50] of the decision leads to the conclusion, in my judgment, that the appeal must be dismissed. However, because the other grounds were argued and because I think that there are difficulties with other parts of the FTT's decision, I propose to deal with them shortly.

60. With respect to the FTT in relation to its discussion of *In re G* at para. [52] of the decision (set out at para. [26] above), I think there is force in the Charity's criticism of this. As with Ms Dixon's submissions referred to at paras. [49]-[52] above, the FTT's reasoning in para. [52] of the decision did not address the thrust of the Charity's case that unless its proposal were permitted its adoption service would close. The FTT's reference at (a) to the pool of potential adopters being reduced by excluding same sex couples from assessment by the Charity would not be correct if the alternative to giving permission was that the Charity's adoption service had to remain closed. I also consider that the FTT's conclusion at (b) that there would be a risk of loss of suitable same sex couples to the adoption system as a whole by subjecting them to the particularly demeaning experience of discrimination on the grounds of their sexual orientation is not supported by any evidence reviewed by the FTT in its decision and is unduly speculative. The strong likelihood is that same sex couples would use other freely available adoption services and would avoid the Charity's adoption service, if it pursued a declared practice of excluding homosexuals from its services, rather than proceeding to apply to the Charity and then being subjected to the demeaning experience referred to by the FTT. It is unlikely that they would be deterred altogether from entering the adoption system.

61. In consequence, I think that the FTT was in error in the reasons it gave in para. [52] for rejecting the Charity's argument that it could potentially increase the number of adoptions by increasing the number of potential adopters who approached the Charity but would not approach other agencies and was in error in the reasons it gave for concluding that *In re G* was inconsistent with the Charity's proposed approach.

62. However, in my judgment these criticisms do not affect the outcome of the appeal. I have set out above the correct approach to be adopted in applying *In re G* in the present context. The evidence given by Mr Richards as to the possibility that some potential adopters might not come forward if the Charity closed its service was vague and speculative. Further speculation was piled on top of that by the Charity's suggestion that adoptions would be lost overall because of the loss of such potential adopters. The reasoning and conclusions at paras. [49]-[50] of the decision indicate that this is not a likely outcome. This aspect of the Charity's case cannot furnish the weighty and convincing reasons required to establish objective justification for its proposed practice of discrimination.

Ground (2) (the FTT erred in its assessment of the availability of voluntary funding)

63. Again with respect to the FTT, I think that there is also force in the Charity's criticisms of paras. [54]-[56] of the decision. In my opinion, the FTT did apply too rigid a test in this part of its reasoning in requiring the Charity to show that its voluntary income "would inevitably be lost" and that permanent closure of its adoption service "was the inevitable consequence" of its inability to discriminate. For the purposes of analysis of the Charity's case on objective justification, it would in my view be relevant if the Charity could show that it is likely that its adoption service would remain closed (or even that there is a real possibility of that happening), with it being recognised that the greater the probability that that might happen the stronger the Charity's case on objective justification might become. I also consider that the FTT went too far in para. [55] in discounting the Bishop's evidence about the impact on the Charity's voluntary funding if permission were refused, in particular without careful reference to what he said about the withdrawal of the Church's endorsement and support for vital fundraising efforts by Church congregations and others. The Bishop was well-placed to give such evidence and the Commission had indicated that it would not dispute it. The fact that the Charity treated its voluntary income as unrestricted in its accounts (para. [54]) does not undermine the Bishop's evidence on this point. The Charity has many other charitable purposes to pursue and will no doubt feel a moral (if not, indeed, a legal) obligation to use donations for the purposes which have been explained to those giving the donations to persuade them to do so. It does not have practical freedom of manoeuvre to divert its voluntary income from other purposes to spend it on the adoption service, where it has not been raised for that purpose.

64. However, once more these criticisms do not affect the outcome on the appeal. The key part of the FTT's reasoning in paras. [49]-[50] of the decision was predicated on acceptance of the claim that voluntary funding would be lost and the service would have to close if the Charity were not permitted to discriminate as it proposed. It did not depend on what the FTT later said in paras. [54]-[56] about whether that would indeed happen. In the light of paras. [49]-[50] the FTT was right to conclude at para. [59] that the Charity had failed to show that there were sufficiently weighty reasons to justify the discrimination it proposed to engage in.

Ground (3) (the FTT treated the availability of adoption services elsewhere as an irrelevant factor)

65. Although the FTT could perhaps have explained its approach more clearly, I am not persuaded that the FTT in its decision, particularly at para. [53], treated the availability of services to same sex couples from local authorities or other voluntary adoption agencies as an irrelevant factor in the proportionality analysis. It said only that it rejected the contention that the availability of adoption services from other sources "could be relied upon by the Charity as justification for the discrimination it proposed in respect of its own services." Put in this way, the FTT's point is correct (see paras. [27]-[28] above) and does not involve discounting the relevance of this factor in relation to the assessment of proportionality. In my view, the better reading of the decision is that the FTT had this factor in mind when reaching its compendious conclusion on proportionality in para. [59] of the decision.

66. But again, even if I am wrong about that, it does not affect the outcome on this appeal. In my judgment, in the light of paras. [49]-[50] of the decision the FTT was right to conclude at para. [59] that the Charity had failed to show that there were sufficiently weighty reasons to justify the discrimination it proposed to engage in. The fact that same sex couples could seek to have access to adoption services offered elsewhere tended to reduce somewhat the immediate detrimental effect on them, but it did not remove the harm that would be caused to them through feeling that discrimination on grounds of sexual orientation was practised at some point in the adoption system nor would it remove the harm to the general social value of promotion of equality of treatment for heterosexuals and homosexuals – a value endorsed by Parliament in assessing and responding to the needs of society by legislating general rules to promote equality of treatment for homosexuals. It did not have the effect that the Charity could be permitted to proceed on the basis of some less demanding standard than that declared in the relevant judgments of the ECtHR, which require that particularly weighty and convincing reasons be shown in order to provide objective justification for discrimination on grounds of sexual orientation. On the evidence and the findings at paras. [49]-[50], which cannot be impugned, the Charity has failed to satisfy that test.

Ground (4) (the FTT misapplied Smith and Grady v United Kingdom *and failed to recognise that a desire to promote traditional family life is a legitimate point of view)*

67. I reject this ground of complaint. I have explained above why I consider that the FTT did not misunderstand or misapply *Smith and Grady*. Although it did not refer to the authorities on the point, I do not think that the FTT failed to recognise that a desire to promote traditional family life is a legitimate point of view in a pluralist democratic society. It did not discount the views of those who might choose to withhold funding for the adoption service if the Charity were not permitted to discriminate against homosexuals out of respect for Church doctrine, but rather sought to assess what might happen in practice.

68. Again, even if I am wrong about that, it does not affect the outcome on this appeal. In my judgment, in the light of paras. [49]-[50] of the decision the FTT was right to conclude at para. [59] that the Charity had failed to show that there were sufficiently weighty reasons to justify the discrimination it proposed to engage in.

Ground (5) (in para. [50] of the decision, the FTT erred by applying a test that the Charity had to show that it was "inevitable" that there would be a prospect of an increased number of adoptions if it were allowed to discriminate against homosexuals as proposed)

69. I reject this complaint as well. On a fair reading of this part of the decision the FTT did not apply a test of inevitability: see paras. [18]-[19] above.

Additional reason (ii) (the aim identified by the Charity would not, under its proposal, be pursued in a proportionate manner, since the proposal does not provide for any

flexibility in its application, such as to allow a celibate, committed, devout Catholic same sex couple to adopt a child even where to do so would plainly be in that particular child's best interests)

70. Finally, I turn to consider the merits of this alternative contention put forward by Ms Dixon. If I had been of the view that the appeal should otherwise be allowed, I would not have been persuaded by this additional argument raised on this appeal. The Charity's case, based on the Bishop's evidence, is that the tenets of the Catholic Church require adoption arrangements (at any rate in ordinary circumstances) to be within a Nazarene family of father, mother and child. Therefore, on that case, the proposed flexibility could not be allowed, if the tenets of the Catholic Church are to be complied with; and if they are not, then the stream of voluntary funding which would otherwise be available to the Charity for its adoption service as a result of the Church's support would be lost and the adoption service would have to close to the detriment (on the Charity's argument) of children in need. In my view, the Commission's additional reason (ii) to support the conclusion of the FTT would not meet this case, had the Charity been successful in making it out.

Conclusion

71. For the reasons set out above, and notwithstanding some criticisms that can be made about the FTT's reasoning, I am satisfied that the conclusion that it came to is correct in law and that this appeal should be dismissed.

TRIBUNAL JUDGE
RELEASE DATE: