# CASE NOTE

Francesca Quint[1]

***Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales***
***Decision dated 26 April 2011, First-tier Tribunal (Charity) CA/2010/0007***

The vexed question of 'gay adoption' came before the First-tier Tribunal (Charity) in March 2011. The series of proceedings, which has involved a number of hearings, originally included Father Hudson's Society as an appellant as well as Catholic Care. It was the first appeal to be heard by the Charity Tribunal (the predecessor to the First-tier Tribunal (Charity)), in 2009, and attracted significant professional and media attention.

The initial appeal was against a decision made by the Charity Commission on 18 November 2008, refusing consent under section 64 of the Charities Act 1993 to an amendment to the charities' objects to permit them to restrict their adoption services to heterosexual couples. It was fundamental to the charities' traditions that they should comply with the teachings of the Roman Catholic Church, which regards homosexual couples as unsuitable parents on religious grounds. The amendment was also said to be essential to the continuation of voluntary donations from Catholic supporters for the charities' adoption services. The Commission's decision was based on an interpretation of Regulation 18 of the Equality Act (Sexual Orientation) Regulations 2007 ('Regulation 18'), which provided a limited exception from the rule against discrimination on grounds of sexual orientation by charities in relation to the restriction of '*benefits'* provided by a charity. The Commission considered that the amendment would be nugatory because it interpreted '*benefits'* as charitable benefits to a charity's beneficial class, i.e. in these cases the children in need of adoption, rather than incidental benefits such as those received from an adoption agency by adoptive parents.

The Equality and Human Rights Commission ('EHRC') intervened in the initial appeal. After a ruling[2] on a vital preliminary issue, Father Hudson's Society

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2 [2009] PTSR 1125.

abandoned its appeal and hived off its own adoption services to a separate entity. The Charity Tribunal went on to dismiss the appeal, with its own interpretation of Regulation 18.[3] Catholic Care appealed to the High Court. Briggs J[4] disagreed with both the Commission's and the Charity Tribunal's interpretations of Regulation 18. He also refused to accept the argument put forward by the EHRC, analysed the combined effect of equality law (including the Equality Bill then before Parliament), human rights law and charity law, and on 17 March 2010 remitted the matter to the Charity Commission to reconsider its 2008 decision on the basis that '*benefits'* in Regulation 18 included the benefits offered to prospective adopters. Catholic Care had also argued that it provided much-needed assistance for 'hard to place' children, and that the interests of such children would suffer if its adoption service were withdrawn. Briggs J referred to this as a potentially decisive point.

The Charity Commission decided on 21 July 2010 that, on the evidence it had obtained from local authorities (and which Catholic Care was not able to challenge by cross-examination in the course of the Commission's decision-making process), the number of children placed by Catholic Care (about ten per year), and the effect on hard to place children of withdrawing its adoption service altogether, were insufficient to justify the restriction and therefore that it still could not properly give its consent to the proposed change in the objects. Catholic Care appealed to the First-tier Tribunal (Charity) (referred to below as 'the Tribunal'), which by then had taken over the jurisdiction of the Charity Tribunal.[5]

By the time of the hearing, which took place on 10 and 11 March 2011, the Equality Act 2010 ('the 2010 Act') had been passed[6] and the relevant provisions had come into immediate effect. Regulation 18 was replaced by section 193 of the 2010 Act, which was expressed in different terms. It was agreed that, since appeals to the Tribunal take the form of a rehearing, it was appropriate that the Tribunal should apply the law in force at the hearing date - especially as the question for consideration was essentially the same as that considered by the Charity Commission the previous July: whether the restriction on the provision of benefits to prospective adopters on grounds of sexual orientation was '*a proportionate means of achieving a legitimate aim*'.[7]

Oral and written evidence was advanced by both the appellant, which was represented by Christopher McCall QC and Matthew Smith[8] (who had both acted for

3 [2009] UKFTT 376 (GRC).

4 [2010] PTSR 1074; [2010] EWHC 520 (Ch).

5 On 1 September 2009.

6 On 1 October 2010.

7 Equality Act 2010 s 193(2)(a). See too s 193(8).

8 Instructed by Bircham Dyson Bell.

Catholic Care throughout the proceedings) and the respondent (i.e. the Charity Commission), which was represented by Emma Dixon[9] (who had not previously been instructed by the Commission).

The Tribunal[10] unanimously dismissed Catholic Care's appeal. Its Decision and Reasons were published on 26 April 2011. After reviewing the history of the proceedings,[11] recording Catholic Care's acceptance that, on the basis of existing case-law, religious conviction on its own was not sufficient to justify the denial of its adoption services to same sex couples[12] and after summarising the evidence,[13] which was conflicting, the Tribunal set out the arguments put forward on each side[14] before coming to its findings and conclusions.[15]

It first observed that both it and the Commission accepted that Catholic Care was seeking to pursue the '*legitimate aim*' which had originally been identified by Briggs J, namely that of '*providing suitable adoptive parents for a significant number of children who would otherwise go unprovided for*'. Catholic Care had changed its approach at the hearing, however, and identified the aim in question as '*the prospect of increasing the number of children (especially hard to place children) placed for adoption*'. The Tribunal regarded that change as material but accepted[16] that, in principle, it was a legitimate aim within the meaning of the 2010 Act.

The Tribunal resolved the conflict in the oral evidence in favour of the evidence put forward by an academic expert on behalf of the Commission, finding[17] that it could not be *assumed* that an increase in the capacity of a charity by enlarging the pool of prospective adopters would in itself lead to an increase in the number of actual placements. Nor, in the Tribunal's view, did the evidence put forward by Catholic Care support its case that the increase in voluntary funding which would flow from the proposed modification of its objects would actually lead to the *prospect* of an

9 Instructed by Stephen Roberts of the Commission.

10 The members being Alison McKenna as Principal Judge, Helen Carter and Margaret Hyde OBE.

11 Paras 1-13.

12 Para 14.

13 Both documentary and oral: paras 17- 34.

14 Paras 35-41 and 42-46 respectively.

15 Paras 47-61.

16 Para 50.

17 Para 49.

increased number of placements. The Tribunal also found on the evidence, and with reference to *Re G (Adoption: Unmarried Couple)*,[18] that Catholic Care's approach was likely in practice to lead to a *reduction* in the pool of potential adopters, not an increase.

Thirdly, the Tribunal declined to accept Catholic Care's argument that the restriction represented a '*proportionate means*' of achieving the legitimate aim it had identified. Instead, it accepted the Commission's argument that the proposed refusal of services to homosexual couples was a significant detriment to them and that it was not open to Catholic Care to rely on the availability of adoption services by other voluntary agencies as adequately fulfilling the parental aspirations of such couples. Further, the Tribunal rejected Catholic Care's argument that its adoption services would have to close because donors would see that their donations were not being used for adoption work. This was on the ground that, according to Catholic Care's published accounts, voluntary donations were shown as unrestricted funds and therefore applicable for any of its charitable purposes, not only for the provision of adoption services. On that evidence, there would be no failure to keep faith with the donors. In addition, no evidence other than the opinion of the Diocesan Bishop, had been given to support the proposition that, *inevitably*, donors would no longer support the adoption work if it were opened up to homosexual couples. The Tribunal found that there was a wide range of opinion amongst Catholic donors on this point and that it was consequentially impossible to draw a conclusion on the matter. Insofar as it might be true that some support would fall away, on the other hand, the Tribunal accepted the Commission's argument, on the authority of *Smith and Grady v UK*,[19] that the '*negative views of third parties*', as such, could not justify discrimination on grounds of sexual orientation.

The Tribunal's conclusion was that it could not be satisfied that, if discrimination were not permitted, Catholic Care's adoption services would have to close permanently, on financial grounds: on the contrary, the evidence showed that Catholic Care had not yet explored all the alternatives and that other Catholic charities had in fact found alternative ways to ensure that their adoption services continued.

Whilst the Tribunal accepted that there would be a loss to society if the work of Catholic Care's skilled adoption staff were to cease, this had to be balanced against the detriment to individual couples and to society in general which would arise from the proposed discrimination. Harking back to a previous passage[20] citing Lord

18 [2009] 1 AC 173 (HL) p 194G in which it was held that the '*interests of a child require that this door* [i.e. to prospective adopters] *be opened as wide as reasonably possible*'.

19 (2000) (29) EHRR 493.

20 Para 43.

Walker of Gestingthorpe's analysis in *R (Carson) v Work and Pensions Secretary*,[21] in which he stated that, in a number of ECHR judgments, it had been held that discrimination on the basis of sensitive personal characteristics, including sexual orientation, could be justified only on the basis of '*particularly weighty reasons*', the Tribunal concluded that Catholic Care's reasons were insufficiently weighty to tip the balance in their favour.

The Tribunal's final conclusion,[22] therefore, was that Catholic Care had failed to prove its case. The Tribunal went on to express the view (without deciding anything) that in any event it was likely that the Public Sector Equality duty, to be imposed under section 149(1) of the 2010 Act later in the year, would be likely to inhibit local authorities from supporting charities which engaged in the kind of discrimination Catholic Care was proposing, even if lawful.

The Tribunal subsequently refused Catholic Care permission to appeal to the Upper Tribunal,[23] but permission was granted by the Upper Tribunal itself on 29 July 2011. It is clearly quite difficult to judge the likely outcome, but clearly the Upper Tribunal considers that Catholic Care has 'a real prospect of success' (the principal test for granting permission to appeal) and doubtless considers the issues to be of public importance.

There is as yet very little authoritative judicial guidance to the interpretation of the Equality Act 2010, so any further illumination of the section which provides an exception for charities will be valuable. In addition, it would be helpful for the finding that '*negative attitudes of third parties*' should be ignored, based on the decision of the ECHR in *Smith and Grady v UK*, to be further explored. In that case the Government sought to justify the exclusion of homosexuals from the armed services on the basis of the risk of an adverse effect on morale and discipline which was thought likely to arise from unjustifiable prejudice on the part of some servicemen and women towards their homosexual colleagues, and the court ruled against the legitimacy of such reliance (as well as casting doubt on the credibility of the evidence in support). One major difference in this case is that the so-called '*negative attitude*' is due, not to a regrettable lack of tolerance or lack of respect for homosexuals which could (and should) be stamped out by those in authority, but to a conscientious religious belief rooted in doctrines taught by the very church from which those in charge of Catholic Care's adoption service draw their inspiration, and which touches on the very essence of the adoptive parenthood to which prospective adopters aspire. Nor need it necessarily be the case that in restricting its adoption services to heterosexuals, or indeed married heterosexuals, Catholic Care actually

21 [2006] 1AC 173 (HL) pp 191F, 192E.

22 Paras 61-62.

23 I.e. on a point of law only.

interferes in any way with the private or family life of those who do not qualify for them, let alone that the exclusion involves the painful rejection of any person.

A further argument which may be open to Catholic Care is that in a healthy democratic society, diversity should be encouraged not only within specific institutions and activities but also between differing providers, and that the totality of the available provision can be relied on to justify the kind of selective or partial service which organisations loyal to different religions may be constrained to offer. It might be observed that this is one of the intended benefits of 'The Big Society', and that it could undermine the Charity Commission's argument, which the Tribunal accepted, that it is illegitimate to place any reliance on the services or facilities provided by others which are not subject to the same constraints.

On the other hand the Supreme Court's decision in *R (E) v Governing Body of JFS*[24] tends to indicate that English law gives a higher priority to the requirements of equality than to the freedom to observe obligations deriving from religion, and accordingly it may be that the conflicting arguments in the Catholic Care case will only be finally resolved by the ECHR.

24 [2010] 2 AC 728, a decision under the Race Relations Act 1976.