

Scottish
charity
appeals panel

APP 02/13

St Margaret's Children and Family Care Society SC028551
Appellant

Office of the Scottish Charity Regulator
Respondent

Equality and Human Rights Commission
Intervener

Members of The Panel: John Walker (Chair); Neil Dickson; Patricia Paton

Appellant: Aidan O'Neill QC, Laura van der Westhuizen
instructed by McSparran McCormick Solicitors, Glasgow

Respondent: James Wolffe QC, Christine O'Neill Solicitor Advocate
instructed by Brodies LLP Edinburgh

Intervener: Written intervention

Edinburgh, 31st January 2014

DECISION

In terms of s76 (5) (b) of the Charities and Trustee Investment (Scotland) Act 2005:

The Panel has decided to quash the decision appealed against and directs The Respondent to remove the s33 Report from the Charity Register.

The Panel has decided not to award expenses as being due to or by either of the Parties or the Intervener.

This is the unanimous decision of The Panel.

A note of reasons is appended.



John Walker
Chair, Scottish Charity Appeals Panel

Note of Reasons:

10 This is an appeal raised at the instance of St Margaret's Children and Family Care Society ("The Appellant") who is a Scottish Charity (Number SC028551) and a Company registered in Scotland and Limited by Guarantee (Number SC192794), under section 76 of the Charities and Trustee Investment (Scotland) Act 2005 ("The Act") against a decision of the Office of the Scottish Charity Regulator ("The Respondent") dated 4 March 2013 which confirmed its decision of 22 January 2013 to issue a direction under section 30(1) The Act ("The Direction").

The Direction requires The Appellant to take certain steps which The Respondent considers to be necessary for the purposes of The Appellant's requirement to meet the "charity test" under Section 7 The Act viz:-

20 "The charity should ... amend its external statements, internal guidance and procedures and practice so as to ensure that the criteria applied to decide whether those enquiring about assessment as adoptive parents will be accepted for full assessment:

- are clear and transparent
- comply fully with the requirements of The Equality Act 2010 ("The Equality Act") – in particular to ensure that the charity does not discriminate unlawfully in the ways set out in the accompanying section 33 report in respect of the protected characteristics of religion or belief and sexual orientation"

The decision to issue The Direction was taken by The Respondent's Board and issued on 22 January 2013 and that decision was reviewed in terms of The Act by The Respondent by its Board and confirmed on 4 March 2013.

The Appellant appealed to this Panel and The Panel met on eight days to hear the Appeal. The first day related to an application for Directions and The Panel has separately issued its decision, likewise The Panel has previously issued its decision on the second day's proceedings where an application for an intervention by the Commission for Equality and Human Rights ("the Intervener") was allowed by The Panel. This allowed the Intervener to submit a written intervention to the proceedings and this was duly and timeously lodged.

The substantive hearing of the appeal was heard over a period of four days in September 2013. Aidan O'Neill QC with Laura van der Westhuizen (instructed by McSparran McCormick Solicitors, Glasgow) appeared for The Appellant and James Wolffe QC with Christine O'Neill Solicitor Advocate (instructed by Brodies LLP Edinburgh) appeared for The Respondent.

Preliminary Matters

A Joint Minute of Evidence was agreed and lodged with The Panel.

On the Thursday before the Hearing The Appellant sought to lodge Affidavit evidence to spare The Panel time in hearing oral evidence. A Telephone Conference Case Management Discussion was convened among The Panel Chairman and Senior Counsel for The Appellant and The Respondent. The outcome of which was that Affidavit evidence

would be allowed to be received from Monsignor Peter Smith (as he was by then in New York on Church Business) on the basis that The Respondent maintained its right not to accept the evidence simply because of the lack of cross examination of the witness. Arrangements were made that Mgr. Smith would be available should either The Respondent's Counsel and / or The Panel need any point to be clarified. This was arranged although was not in the end found to be necessary.

It was agreed that Oral Evidence would be led from the remainder of the witnesses on The Respondent's witness list.

On the first day of the substantive hearing The Appellant made a motion to the effect that The Respondent should be required to lodge an Affidavit regarding its witness's evidence to enable them to be put on notice. The Respondent did not consider that either necessary or proper and in any event was not able to say if it would actually call the witness (Laura Anderson). The Panel took the view that there was no requirement within its rules to exchange witness statements and the principles of fairness were not compromised. The motion was refused. The Panel noted that Laura Anderson was the only official of The Respondent who appeared on The Respondent's witness list. The Panel considered that it was entirely relevant and indeed necessary for The Respondent to bring a witness to speak to the decision appealed against and accordingly The Panel directed that Ms Anderson be called as a witness.

Oral Evidence was then heard from: Monsignor Peter Magee and Brian McGuigan for The Appellant and Laura Anderson for The Respondent. Both Mgr. Magee and Mr McGuigan spoke to their affidavits which contributed substantially to their Evidence in Chief.

There had been another witness on The Appellant's witness list, Father Thomas White; The Appellant's Counsel chose not to call the witness. The Respondent's Counsel sought to call Father White on the basis that he had questions to ask which he had not asked the previous witness. The Appellant objected on the basis that Father White did not appear on The Respondent's witness list. Having heard argument from Counsel The Panel directed that in the interests of fairness and notice Father White could not be called by The Respondent.

Findings in Fact:

The Panel makes the following findings in fact:

1. The Appellant was founded in 1955 by the Catholic Church as a Catholic response to the need for adoption in West Central Scotland. From the perspective of Catholic Canon Law The Appellant constitutes an agency of the Catholic Church.

2. The Appellant was originally constituted in 1955 as "St Margaret of Scotland Adoption Society - a benevolent society registered under the Friendly Societies Acts 1896-1948". It was reconstituted in 1982 as "St Margaret of Scotland Adoption Society" a company limited by guarantee incorporated under the Companies Acts 1948 to 1981. This company was dissolved in July 2002 by which time The Appellant had been reconstituted under its present name of St. Margaret's Children and Family Care Society which was incorporated on 22 January 1999 and was recognised as a charity by HMRC in that year. The Appellant is a company incorporated under the Companies Acts and limited by guarantee, a charity entered on the Scottish Charity Register in terms

of the Act, an adoption agency within the meaning of the Adoption and Children (Scotland) Act 2007 and a professional social work agency registered with the Care Inspectorate .

3. The Appellant has an Executive Committee, whose members are its directors and charity trustees. The Chairman is Fr Thomas White, a priest. The Vice-Chairman is Brian McGuigan, a retired accountant. The Treasurer is Frank Walker, a practising accountant. It has four other members, three of whom are lay members and the other is Sister Eileen Mearns.

4. According to Article 3(a) of The Appellant's Articles of Association, the Catholic Archbishop of Glasgow and the Catholic Bishops of Motherwell, Paisley and Galloway are entitled to be Members of The Appellant. The minimum and maximum number of members of The Appellant is twelve. Article 28(a) gives each of these Catholic dioceses rights to appoint (and remove) specified numbers of members of the Council (who must also be members of The Appellant). There is a significant overlap between the membership of the Executive Committee and the Council of Management. The Executive Committee may co-opt members (who need not be Catholic) but in practice any nominations are run past the dioceses for their approval.

5. According to The Appellant's Report of the Trustees and Audited Financial Statements for the year ended 31 March 2012 the Members of Council at the year end were the Archbishop of Glasgow, the Bishop of Motherwell, the Bishop of Galloway and the Bishop of Paisley and the members of the Executive Committee, who were the members of The Company.

6. The objects of The Appellant, set out in its Memorandum of Association, are as follows:

"The Society is established to promote (irrespective of creed) the welfare of children, whose interests are paramount, to foster the stability of family relationships and to assess the suitability of applicants as adoptive parents all in accordance with the teachings of the Catholic Church ..."

7. These objects were adopted on 23 October 2008 following consent by The Respondent given on 9 October 2008. In its application to The Respondent for approval of this change in its objects The Appellant identified the advancement of religion as one of its charitable objects.

8. The Appellant's policies and procedures document 2011 sets out the following among the aims and objectives of The Appellant:

- "to provide a Catholic, comprehensive, independent adoption service to birth parents, babies and children, and adoptive parents under the Adoption and Children (Scotland) Act 2007, especially those who wish to do so within the framework of their faith"; and
- "to offer an adoption service which has a concern for the spiritual care of the service users, rooted in the Catholic tradition"; and
- "to prepare and assess prospective adoptive parents and to make decisions on their suitability as prospective adopters, with an emphasis on providing Catholics and others adoption and family support services within the framework of the Catholic faith."

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9. There is an immense amount of Catholic teaching regarding marriage, children and family life which in order to be a Catholic agency The Appellant is required to follow. The Catholic Church's view of a family is a man and woman in a monogamous relationship and a child is seen as the fruit of married love. It is also a tenet of the Catholic faith that the family unit is strengthened by the sacramental grace of marriage.

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10. The Respondent's decision to issue its Section 30 Direction proceeded on its express acceptance that The Appellant's preferred criteria are in accordance with the doctrine of the Catholic Church.

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11. The Congregation for the Doctrine of the Faith, which has the specific role of protecting the doctrine on faith and morals throughout the Catholic world, has expressed concerns regarding the legal recognition of same sex union and/or allowing children to be adopted by persons living in same sex unions. (see Congregation for the Doctrine of the Faith "Considerations regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons" (2003). A mother and father are viewed as essential for fully developed maturation and a child adopted by a same sex couple would be seen as being deprived of either a mother or a father.

12. Although the main activity of The Appellant is assessing and approving potential adoptive parents, its activities are not limited to adoption and it also provides other forms of support for families. It recently engaged in a project to expand its premises in order to provide further complementary family-related services, which it would not have been able to do without Church funding.

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13. The Appellant employs its own staff, including five or six social workers, not all of whom are Catholic. In relation to assessing and approving potential adoptive parents, The Appellant operates within the statutory framework of the Adoption and Children (Scotland) Act 2007. There is a rigorous process of assessment for adoptive parents that lasts six to nine months and involves an assessment of all aspects of the applicant's lifestyle and suitability to adopt, with the needs of the child being the primary concern.

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14. Prospective adoptive parents are approved by The Appellant's Adoption Panel, which is made up of a wide range of people with different skills. When approved the prospective adoptive parents are presented to adoption agencies (usually Scottish local authorities) for matching with potential adoptees. Both The Appellant and the local authority are involved in the matching process, which is a collaborative process. The parents come through the society and the children come through the local authority.

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15. There are no service agreements between The Appellant and the local authorities. An "inter-agency fee" is paid to The Appellant when a placement occurs. The financial arrangements for the payment of an inter-agency fee in the event of a successful placement are made in terms of a financial Form H1. The Appellant also provides post-adoption support for adoptive parents. The inter-agency fee covers inter alia finding, preparing and approving the family as well as 12 months post-adoption support. The Appellant continues to provide support beyond the 12 months covered by the inter-agency fee, sometimes for years, which is neither required nor paid for by the local authority.

240 16. The Appellant receives some funding from the Archdiocese of Glasgow and the Dioceses of Motherwell, Paisley and Galloway. This is contributed on a regular basis to keep The Appellant going. The Appellant also receives income in the form of crib donations, being donations made by members of the Church in the four Dioceses at Christmas time. It also receives voluntary income from adopters and their families. In addition The Appellant receives inter-agency fees from other adoption agencies for successful placements.

250 17. If The Appellant were able to operate independently of the funding that it receives from the Catholic Church then it would, so that Church money could be be used elsewhere in other charitable projects, but The Appellant cannot afford to do so. The Appellant operates on a reserves policy of six month's running costs and it cannot afford to have cash flow problems. In the year ending 31 March 2012 the inter-agency fees received by The Appellant (£570,771) exceeded its total resources expended (£396,237). The Appellant receives income from:

(a) local authorities (which income is described in The Appellant's annual Statements of Financial Activities as 'incoming resources from charitable activities');

260 (b) the Catholic Church (comprised of (i) income described in The Appellant's annual Statements of Financial Activities as 'Core funding' and (ii) donations made by individuals to collection boxes in churches ('crib collections'))

(c) donors,

(d) societies, parishes and schools;

(e) grants and trust income;

(f) sundry income; and

(g) investment income

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18. (a) In the year ending 31 March 2008 The Appellant's income from inter-agency fees was £256,598 and the total resources expended was £330,272;

(b) In the year ending 31 March 2009 The Appellant's income from inter-agency fees was £348,842 and the total resources expended was £358,567;

(c) in the year ending 31 March 2010 The Appellant's income from inter-agency fees was £284,624 and the total resources expended was £359,571; and

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(d) in the year ending 31 March 2011 The Appellant's income from inter-agency fees was £301,035 and the total resources expended was £400,671.

19. The Appellant's policy and procedure document states:

"We will give preference to:

(1) Catholic couples who wish to adopt within the framework of their faith.

(2) Couples, where one of the Parties is Catholic and they wish to adopt within the framework of the Catholic faith.

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(3) Other couples who wish to adopt within the framework of the Catholic faith.

(4) An individual who may wish to adopt within the framework of the Catholic faith.

...

The following criteria provide guidance for staff in dealing with enquiries and should determine whether enquirers are offered an initial visit and later invited to preparation groups. ...

...

Status

Applicants should be couples within a stable loving relationship and have been married for at least two years.

..."

20. The Respondent determined in its original Section 33 Report, and issued its Direction under Section 30(1) CTISA - which they confirmed on review - on the basis that The Appellant

"operates 'preferred criteria' in assessing whether or not enquirers can go forward for full assessment. These criteria give greater priority to prospective adoptive parents who are:

- (i) members of a couple;
- (ii) are Roman Catholic;
- (iii) have been married for at least two years;
- (iv) or to others who wish to adopt within the framework of the Roman Catholic faith.

Lower priority is accorded to:

- (i) enquirers who have been married for less than two years;
- (ii) couples in civil partnerships;
- (iii) single people;
- (iv) married couples who do not wish to adopt within the Roman Catholic faith".

21. Should an enquiry be made which is difficult in nature this is referred to Sister Eileen Mearns rather than any comment be made by someone who is not properly qualified to make the decision.

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22. As at the date of the decision under appeal The Appellant's website stated that it "will accept applications from married couples". The Appellant's website has not recently been updated but is currently under review.

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23. People who make enquiries with The Appellant about the possibility of becoming adoptive parents are usually either Catholics who know about The Appellant, or non-Catholics who approach the applicant because of its ethos. The Appellant has not received an enquiry from or on behalf of a same sex couple. In principle, though, The Appellant would consider an application to be considered as adoptive parents from a couple in a civil partnership.

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24. The preferred criteria are a general set of criteria expressed, from The Appellant's religious perspective, that the ideal situation would be adoptive parents who were a Catholic married couple in a stable and established relationship wishing to bring up a Catholic child in the Catholic faith. The Appellant's preference is for a couple to be married because that is part of the Catholic faith. Nevertheless, each case is considered on its merits with reference to what is in the best interests of the child, which is paramount, and no fixed rule is laid down in light of the nature of the procedure. The idea is to get the right parents for the right child. Every enquirer is offered a meeting and no enquirer is ever turned away.

25. After the initial meeting an enquirer is allocated to a social worker who takes a professional decision regarding whether or not an applicant should go forward to the next stage of the process, being the preparation group. Most enquirers end up in the preparation group. The

360 focus of the preparation group is to inform and educate prospective adopters and to provide them with input about the family experience. At that stage they will decide whether or not to apply to be assessed as prospective adoptive parents.

370 26. After an application is made a number of checks are undertaken, followed by a process of more rigorous assessment known as a home study, which may take 6 months. The home study involves assessment of the suitability of the family and home, with the needs of the child being the primary concern. The home study concludes with a home study report, which includes a formal recommendation by the assessing social worker. The report goes to The Appellant's adoption Panel, which is made up of volunteers with a wide range of experience, who know something about adoption. The adoption Panel makes a recommendation on the suitability of prospective adopters.

27. The Respondent received a letter of complaint about The Appellant, dated 27 May 2011, on behalf of the National Secular Society, following which it commenced an inquiry with regard to The Appellant.

380 29. The focus of The Respondent's correspondence and meetings with The Appellant in the course of its inquiry was inter alia to try to determine how The Appellant's preferred criteria applied in practice and what the impacts are of The Appellant's preferred criteria in practice, in order to determine the ability of The Appellant to meet the charity test.

30. The inquiry initially proceeded by way of correspondence, but on 14 February 2012 a meeting took place between representatives of The Respondent and The Appellant with a view to clarifying how the preferred criteria operate in practice. At that meeting those

390 representing The Appellant emphasised both the importance of the best interests of the child and the relevance of The Appellant's links to the Catholic Church. Following that meeting The Respondent remained unclear as to whether or not and/or how the preferred criteria were being used, and drew the inference that The Appellant gives preference to heterosexual couples in a married relationship.

400 31. At the conclusion of that meeting The Appellant undertook to consider in more detail whether or not the charity and religious exceptions under the Equalities Act 2010 apply and to come back to The Respondent with details on any restrictions and what exceptions apply and why. The Appellant replied by way of a letter dated 23 April 2012 which stated:

"It is clear that as our policy and procedures stand at present St Margaret's Children and Family Care Society (St Margaret's) does not operate any restrictions concerning persons who have a protected characteristic under equality legislation. Every case is considered in view of its own merits, and any decision taken by the Society is in conformity with our charitable instrument as approved by the Office of the Scottish Charities Regulator. As our policy and procedures demonstrate, the society operates a preferred criteria in the prioritisation of applications."

410 32. The Respondent and The Appellant engaged in further correspondence and a further meeting took place between representatives of The Appellant and The Respondent on 21 September 2012. Thereafter The Appellant provided The Respondent with a full response dated 28 September 2012 which noted inter alia, that:

"[The Respondent] should be aware that the policies and procedures that these alleged restrictions are presented as preferred criteria. There

420 is a facility within the policy and procedures that every case presented to St. Margaret's is given due consideration and judged upon its individual merits, with the benefit of the child always a priority"

to which letter The Appellant received neither an acknowledgement nor a reply from The Respondent.

430 33. By way of a letter dated 11 December 2012 , prompted by a query from The Appellant dated 20 November 2012, The Respondent advised The Appellant that its inquiries were ongoing and on 22 January 2013 it proceeded to issue a direction under section 30(1)(a) and a report under section 33 of the Act in which it concluded that The Appellant is in breach of The Equality Act in that it applies preferred criteria that discriminate unlawfully against same sex couples by prioritising couples who have been married for two years, and that it therefore does not meet the charity test.

440 34. The Direction issued by The Respondent requires The Appellant to amend its external statements, internal guidance and procedures and practice so as to ensure that the criteria it applies in deciding whether those enquiring about assessment as adoptive parents will be accepted for full assessment:

- are clear and transparent;
- comply fully with the requirements of The Equality Act, in particular to ensure that The Appellant does not discriminate unlawfully in respect of religion or belief and sexual orientation.

35. The Appellant applied for a review of The Respondent's decision.

450 36. On review The Respondent held that The Appellant failed the charity test because the disbenefit arising from unlawful discrimination outweighs the benefit provided by The Appellant, and confirmed its direction.

460 37. In assessing benefit The Respondent took into account only the numbers of adoptions made by The Appellant with reference to its annual reports and accounts, and on that basis accepted that The Appellant, through its main activity of assessing and approving adoptive parents, provides a significant benefit in achieving completed and enduring placements for children requiring adoption. The Respondent did not take into account other factors such as religion, the benefit of bringing children up in the Catholic faith, the benefit to children of being part of an adoption service such as that provided by The Appellant or the contribution that The Appellant makes to the community more generally.

38. The Respondent has received no complaint about The Appellant from any same sex couple or homosexual individual and has never inquired of the Commission for Equality and Human Rights whether it has received such a complaint.

470 39. The Catholic Church understands charity as a fundamental aspect of the life of the Church. It is not something that the Church does, but something that the Church is, and which defines the Church's nature. Charitable activity within and for the wider community is seen to be an

essential part of the religious mission, witness and outreach of the Catholic Church (Benedict XVI Encyclical Deus Caritas Est (2005)).¹

480 40. Catholic laity have the right under Canon Law (Canon 1030 of the Code of Canon Law) to form charitable agencies under the auspice of the Catholic church. Such Catholic charities are required as a matter of Catholic Canon Law to follow Catholic principles in their activity and they may not accept commitments which could in any way affect the observance of those principles. It is the responsibility of the diocesan Bishop to ensure that in the activities and management of these agencies the norms of the Canon Law are respected. It is the duty of the diocesan Bishop and the respective parish priests to see that in this area the faithful are not led into error or misunderstanding; hence they are to prevent publicity being given through parish or diocesan structures to initiatives which, while presenting themselves as charitable, propose choices or methods at odds with the Church's teaching. (Benedict XVI Apostolic Letter "On the Service of Charity" 490 (2010)).²

41. As a charitable organization that is linked to the action of the Catholic Church in Scotland which separately uses money contributed by members of the Church, that is collected through the Church and which

¹ "Those who work for the Church's charitable organisations must be distinguished by the fact that they do not merely meet the needs of the moment, but they dedicated themselves to others with heartfelt concern, enabling them to experience the richness of their humanity....Christian charitable activityis a way of making present here and now the love which man always needs...We contribute to a better world today by personally doing good now, with full commitment and wherever we have the opportunity.." Deus Caritas Est at para 31 (a) and (b).

² Art 7 (2) To ensure an evangelical witness in the service of charity, the diocesan Bishop is to take care that those who work in the Church's charitable apostolate, along with due professional competence, give an example of Christian life and witness to a formation of heart which testifies to a faith working through charity..." Apostolic Letter "On the Service of Charity"

has been established by the Bishops of the Catholic Church, The Appellant is subject to the Canon Law of the Catholic Church.

500 42. Were The Appellant to comply with The Direction from The Respondent as a condition of its retaining its charitable status it could no longer, as a matter of Canon Law, operate as a Catholic Charity. It would be required to sever its links with the Catholic Church and would no longer have access to Catholic Church funds. Given the significant contribution that such funds make in the running of The Appellant, without those funds it would no longer be financially viable for The Appellant to continue to operate. This would result in its closure with the consequent loss of its experience and expertise in adoption placement and the other charitable public benefits that it provides.

510 43. There are 36 adoption agencies in Scotland, 32 of which are local authorities. Until recently The Appellant was the only voluntary adoption agency operating in the West of Scotland. During the year to March 2011 The Appellant achieved 16 completed adoption placements out of a total of 218 in Scotland as a whole. In 2011-2012 The Appellant achieved 22 completed adoption placements. The Appellant has a good record of placing children with complex needs.

The Appellant in its Grounds of Appeal to The Panel states:

520 "(1) fundamental procedural unfairness in the manner in which the review decision was taken (in that the review decision was taken by the same body of persons as the original decision);

(2) no proper factual or legal basis for OSCR's finding that disbenefit has been incurred or is likely to be incurred by the public, in consequence of The Appellant exercising its functions;

(3) error in law as to the constitutional basis on which OSCR, as a creation of the Scottish Parliament, is bound absolutely as a matter of *vires* to respect The Appellant's Convention rights

(4) error in law in OSCR purporting to give precedence to The Equality Act over and against The Appellant's Convention rights;

(5) unlawful fettering of discretion in OSCR creating and applying without statutory warrant a blanket policy to the effect the "charity test" can never be met in cases of (alleged) incompatibility with the requirements of The Equality Act;

(6) OSCR decision disproportionate (and hence Convention incompatible and so *ultra vires* OSCR) as it would entail the closure of The Appellant

(7) error in law by OSCR in its failure to take into account and/or give appropriate weight to the issue of the preservation of the religious tradition of an adoptive child and hence the relevance of specific religious observance of prospective adoptive parents;

(8) error in fact/law in OSCR holding that The Appellant imposed conditions or restrictions on access to "a charitable benefit".

(9) Error in law in OSCR's construction and application of the relevant statutory tests contained in The Equality Act in particular (i) in its misunderstanding and misapplying the "charity exemption" contained in

Section 193 EA and (ii) secondly, in failing to afford to The Appellant the benefit of the "religious exemption" contained in paragraph 2 of Schedule 23 EA

560 (10) Error in law in OSCR's construction and application of the relevant statutory tests contained in the Charities and Trustees Investment (Scotland) Act 2005, in particular in OSCR's failure properly to understand and apply Section 8(2) CTISA in (i) giving no due consideration to the issue of "benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public)" as required by Section 8(2)(a)(i) CTISA and (ii) secondly, wrong by equating, under reference to Section 8(2)(b) CTISA, the provision of (adoption) services with the provision of "public benefit".

DISCUSSION

570 The Panel has considered all of the points of appeal as narrated by The Appellant and seeks to deal with these in turn.

(1) Fundamental Procedural Unfairness

580 It was clear from the evidence that the initial decision as issued in the s. 33 Report was issued as a result of a discussion and decision which occurred at The Respondent's full board meeting held on 22 January 2013. The Appellant sought a review in terms of The Act and that review was undertaken at the full board meeting on 27th February 2013. The Appellant's position was that this amounted to a procedural unfairness – that the same body or person should not in terms of The Act review its own decision. This was contrary to the laws of natural justice. The Panel notes that in other proceedings before it the initial

decision had been taken at OSCR by an officer and that the review process was carried out by a more senior officer.

590 In his submission Mr Wolffe suggested that The Act referred to OSCR making the decision and OSCR carrying out the review and he submitted that procedural fairness was secured by the fact that reasons were given for the decision and the availability of an Appeal to The Panel on matters of fact and law.

600 He took the view that the decision and review were taken within The Respondent's Statutory Review Procedures and following those procedures the method by which The Respondent made its decision and review was procedurally correct. In his submission if The Panel were of the view that the procedure was of itself wrong the fact that there was an appeal allowed The Panel to look at the whole circumstances again and the procedural error was not sufficient to enable The Panel to allow the Appeal.

In the course of the hearing Counsel for both parties suggested that The Panel rather than allowing the Appeal on this point may prefer to consider the whole argument presented before it in connection with the Appeal.

610 The Panel having considered the submissions of both The Appellant and The Respondent is of the view that the proceedings before it allow The Panel to look at the whole circumstances *of new*, and in this regard agrees with The Respondent that the procedural irregularity of itself is not sufficient to allow the Appeal to be allowed and the decision appealed against quashed.

620 However, The Panel is of the view that the procedure as stated in the OSCR Statutory Review Procedures dated 2nd September 2010 is flawed. It is not reasonable, fair, or correct that a body with the resources of OSCR has a decision taken by one body of persons (in this case the board) and then the same body of persons reviews that decision. The purpose of a review is to take a fresh look at the whole facts circumstances and law surrounding the decision, in this instance the decision was taken based on a presentation by an officer to the board – the board took the decision and at review the board sought to justify the decision taken by it earlier albeit following different reasoning.

630 The Panel recommends that OSCR immediately review its procedures in the taking of such decisions to ensure that reviews are carried out by a different person or persons other than those who took the original decision and their review to ensure a fair open and transparent process.

630 **(2) The Public Benefit Test**

The discussion in this part of the reasons for The Decision covers points 2, 5 and 10 of The Appellant's grounds of appeal

In terms of s. 8 of The Act in order to be admitted to the Scottish Charity Register and to remain on it charities require to fulfil one or more of the Charitable Purposes and to meet the Public Benefit Test. In its grounds of appeal The Appellant stated

640 "(2) no proper factual or legal basis for OSCR's finding that disbenefit has been incurred or is likely to be incurred by the public, in consequence of The Appellant exercising its functions;"

Section 8 of The Act states :

"8 Public Benefit

(1) No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.

(2) In determining whether a body provides or intends to provide public benefit, regard must be had to—

(a) how any—

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public,

in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive."

When it applied for consent to amend its objects clause in its Memorandum of Association on 9 October 2008 The Appellant's application would have been subject to the Public Benefit Test. The Appellant on the face of it had met the Test and consent was granted. While there was no evidence led as to the extent of The Respondent's Enquiry at that time it was apparent that there had been no significant change in how The Respondent had carried on its activities since that date.

During the course of her evidence Ms Anderson was asked what circumstances she had taken into account to determine whether the Public Benefit Test had been met. She explained that she had taken the

view that the Public Benefit Test had not been met and looked at The Appellant's Accounts and the Number of Adoptions and that the discrimination of itself was a breach of equality law and so high that the Public Benefit Test could not be met. This was further emphasised in the decision letter upon review dated 4 March 2013 where The Respondent made it clear that it considered that "the society benefits the children being placed for adoption, the adoptive parents being assessed, and society as a whole in the achievement of adoptions".

Several factors for example that The Appellant was a Religious Organisation, any benefit of propagation of religion to society, the benefit of The Appellant's contribution to community, volunteering and the other activities of The Appellant which fall outwith the adoption side of its activity were not taken into account.

Mr Wolffe in his submission majored on the fact that The Respondent had found that The Appellant had breached the terms of The Equality Act – and had as a result failed the Public Benefit Test on the grounds that the failure to comply with The Equality Act was such that there was a wider disbenefit to society arising out of the act of discrimination undermining the principle of non-discrimination which had been established by Parliament. In *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales*³, Briggs J held that there would require to a weighty and considerable justification to shift the element of public disbenefit.

Mr O'Neill in his submission to The Panel took the point further arguing that The Respondent had not considered any of the Public Benefit

³ [2010] P.T.S.R. 1074

contributed by The Appellant and had acted as judge and jury in considering this alleged breach of Equality Law when that had not been established by any other authority.

710 He suggested that this would be akin to The Respondent deciding a charity failed the Public Benefit Test if it had breached a Health and Safety Rule for which the charity had not been prosecuted by the Health and Safety Executive. In his submission this type of enforcement was not OSCR's job and it had stepped outside its statutory remit.

The Appellant's Counsel referred The Panel to Moscow Branch of the Salvation Army v. Russia (2007)⁴ he submitted that The Respondent had failed to provide "particularly weighty and compelling" evidence to the effect that any disbenefit associated with the preferred criteria outweighed the Public Benefit.

720 The Panel is of the view that in considering whether there is a public disbenefit it is arguable that The Respondent should not be putting itself in the place of another regulatory body but instead to react to the decision of such a body e.g. where a Charity is subject to the direction of a court or other regulator and to consider that offence, when considering the Public Benefit. The Panel would expect The Respondent in the first instance to refer a difficulty to the appropriate regulator. In this instance had there been a complaint by a same sex couple then the correct response would be to direct the complaint to the Commission for Equality and Human Rights with whom The Respondent has a Memorandum of Understanding.

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⁴ 44 EHRR 46 at paragraph 96

The Panel is of the view that when assessing the Public Benefit The Respondent should have considered all of the activities of the Charity including those which were outwith the scope of Adoption and then weigh the benefit with the disbenefit before coming to a conclusion. There should be evidence of an objective test in so far as that is possible. Ms Anderson's evidence together with the review letter suggested that elements of that weighing and consideration were missing.

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Mr Wolffe in his submission said that it was not in contention that The Appellant contributed substantially to the Public Benefit yet the evidence did not suggest any objective weighing of the Public Benefit Test. It appears to The Panel, which was confirmed by Mr Wolffe's argument to The Panel later in the discussion, that The Respondent simply took the view at an early stage that any type of discrimination which breached The Equality Act amounted to a disbenefit sufficient to fail The Public Benefit Test.

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This approach was in The Panel's view erroneous and the Public Benefit Test was incorrectly applied.

If the Panel had found there had been a breach of The Equality Act then it would have not agreed with The Respondent that the Public Benefit Test had not been met.

In order to pass the test charities must show that they have a charitable purpose or purposes and that the Public Benefit is not outweighed by any Private Benefit or Public Disbenefit.

760

There was no evidence of any Private Benefit or of public harm, same sex couples if not accepted as adoptive parents by The Appellant's organisation for whatever reason are still able to avail themselves of other charitable activities of The Appellant and such couples are not prevented from using any of the other 35 Scottish adoption agencies, no-one in a same sex relationship has complained of the Society to any regulator or regulatory agency.

770

The Respondent accepts that the discrimination issue aside The Appellant does provide "substantial" Public Benefit and it has accepted at the time of the alteration of the Objects Clause it was providing Public Benefit in its activities. From Ms. Anderson's evidence The Respondent had not considered any benefit of propagation of religion to society, the benefit of The Appellant's contribution to community, volunteering and the other activities of The Appellant which fall outwith the adoption side of its activity.

The other part of the test is for The Respondent to consider whether any condition of the provision of the benefit is unduly restrictive.

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The Respondent's guidelines "Meeting The Charity Test" state:

"Finally, we need to consider whether any condition on obtaining the benefit (including the charging of any fee) is unduly restrictive – that is, whether it is excessively restrictive, or restrictive in contradiction of general moral or legal standards, or is unreasonable, or is not justifiable."

The Respondent argues that the operation of the preferred criteria creates an unduly restrictive condition. The guidance goes on to say

"Where a restriction is justifiable or reasonable given the nature of the charitable purpose(s) being pursued then a restriction is unlikely to be undue. Where the restriction has no relevance to the charitable purpose, and is not otherwise justifiable, it may constitute an undue restriction".

The guidance has to be applied in all of the circumstances given The Panel's decision that the application of the preferred criteria is not unlawful discrimination the restriction would not amount to an undue restriction of the benefit. If the operation of the preferred criteria had been direct discrimination then the test would require to be applied objectively.

The Panel is of the view that it is not as simple to say that if The Equality Act is breached then the Public Benefit Test is not met and any guidelines contrary to that view should be revised by The Respondent. The Respondent requires to look at each case dependent on the facts and circumstances of that case and accordingly such a "blanket" policy is not effective. The contribution to society of an adoption service is part of the activities of The Appellant which does provide a Public Benefit in the charity law sense of that phrase and had the test been properly applied The Respondent would have quite correctly considered there to have been Public Benefit in those activities.

There should be objective test which as applied in The Panel's view would be to weigh the public disbenefit of failing to comply with The Equality Act (in the way in which The Appellant would have failed) against these other factors affecting the public benefit. In The Panel's

view the public disbenefit would not have outweighed the public benefit and the Public Benefit Test would have been met.

(3) The Respondent's Regard for The Appellant's Convention Rights

It was not in contention that The Respondent and The Panel both as creations of The Scottish Parliament have a duty to respect The Appellant's Convention Rights.

What is in contention between the parties is whether having that responsibility The Respondent properly applied The Appellant's Convention Rights to the decision and at review.

The Respondent agrees that it is required to apply The Human Rights Act 1998 ("The Human Rights Act") and to give effect to the relevant legislation in a Convention compatible way.

The Respondent took the view that Article 9 of the Convention was not engaged in this case and even if it was the decision was justifiably imposed in the protection of rights and freedoms of others. The Direction was in The Respondent's view a proportionate response.

The Panel is of the view that The Respondent erred in not properly applying The Appellant's Convention Rights – In her evidence Ms Anderson was clear and in the notes of meetings taken at the time that The Respondent had not in its discussions with The Appellant taken due and proper consideration of the fact that The Appellant had as one of its objects the advancement of religion.

850 Father White in his long letter to The Respondent of 23 April 2012 tried to make it clear that he was "carrying out his function as Chairperson of The Appellant as an ordained minister of religion on behalf of an agency of the [Catholic] church".

The Respondent however appears to The Panel to have treated The Appellant purely as an Adoption Agency and not as a religious organisation and as a result did not find Article 9 to have engaged.

860 The Panel for the reasons set out below does find that Article 9 engages and then requires to consider the conflict between Article 9 (Freedom of thought, conscience and religion) and Article 14 (Prohibition of Discrimination).

(4) Human Rights Issues

870 In Mr O'Neill's submission there is 'clear blue water' between the Parties – as to which Convention rights are engaged. In his submission The Appellant is entitled to rely on Article 9 of the Convention – The Respondent has specifically stated that it does not consider Article 9 has been engaged.

Mr Wolffe argues that

"Neither Article 9 nor Article 12 applies [to The Appellant]. In effect, the relevant Convention rights, in the present circumstances, are the rights of prospective adopters under Article 14 taken with Article 8."

880 In the circumstances The Panel has considered whether and if so which Convention rights apply to The Appellant, the Prospective Adopters and The Child being adopted.

In The Appellant's submission The Appellant is entitled to rely on Article 9 which it says engages. Its position is that The Respondent has gone "completely off track" from the outset in misdirecting itself on this point.

890 The Appellant argues that not being a Public Authority it is not bound by the Human Rights Act. Its submission is that The Appellant is a Non-Governmental Organisation and in terms of Article 34 it may claim victim status and rely on its own Convention rights in any legal proceedings.

The Respondent has consistently taken the view that it is only Article 14 which applies.

That being the case it seems to The Panel only right and proper to first consider which Convention⁵ rights apply and whether any are specifically engaged.

The Appellant – Does Article 9 Engage?

900 Article 9¹ – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or

⁵ European Convention on Human Rights

private, and to manifest his religion or belief, in worship, teaching, practice and observance.

910 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The Respondent argues that The Appellant is not a church or a religious community but an adoption agency. It may be motivated by religious belief, but its activity is providing an adoption service.

920 The Respondent does not regard this as a manifestation of belief such as to bring the activities of the charity within Article 9.

930 It was suggested by Counsel for The Respondent that the Charity is not per se a Religious Charity at all – it is an Adoption Agency. At the same time however he conceded that when the Charity changed its objects in 2008 it was accepted as a Charity under s. 16 (c) of The Act. At that time The Appellant in its application, inter alia, marked the box which states that it was established for the advancement of religion. The Appellant was carrying out the function of an adoption agency and not as a religious organisation at all, his view was that the "advancement of Religion" might be the objects of a church within a parish or the propagation of Christian knowledge. He submitted that the objects did not say the advancement of the Christian Religion or the advancement of the Roman Catholic Faith

The Panel is of the view that the words:

“all in accordance with the teachings of the Catholic Church”

940 within the Objects clause of The Appellant’s Memorandum of Association, taking into account the activities of the Charity one of whose main objectives in fact is the placing of children of the Catholic Faith who are to be adopted into homes where the Catholic Faith is taught and upheld, are sufficient to indicate that part of the establishment of the Charity is the advancement of religion.

950 Mr Wollfe also suggested that being a corporate body it was not capable of thought and that it was consequently not able to have a religion. He referred The Panel to Lester and Pannick⁶ who in the Second edition said Religious Organisations did not have Article 9 rights but updated their view in The Third Edition when referring to a number of cases including one which involved The Salvation Army and accepted that Religious Organisations could have Article 9 rights as well as natural persons.

960 In The Panel’s view charities in Scotland take on various legal personae. Some are incorporated under the Companies Acts and others have incorporated as Scottish Charitable Organisations under The Act – on the other hand many are Trusts and Unincorporated Associations. Churches and Religious Organisations can be found within each type but the type of body does not prevent them, all else being equal, from registering as charities under The Act and meeting the Charity Test. All of these types of body are capable of being established for the advancement of religion in terms of the Act.

⁶ Human Rights Law and Practice – Lester and Pannick Third Edition at paragraph 4.9.5

Counsel for The Appellant has argued that in the Criminal Law corporate bodies could face criminal prosecution there required not only to be an actus reus but also a mens rea – if an organisation was capable of having mens rea then it was capable of thought as an organisation⁷.

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Taking Mr Wolffe's argument to a conclusion no Church or Church Agency would be capable of thought because of the nature of its legal persona and therefore none would be entitled to the benefit of charitable status. Each of these charities has been accepted onto the Scottish Charity Register and continue to be on the register and The Act provides that the advancement of Religion is a charitable purpose.

Mr Wolffe in his submission was of the view that the body was only as good as its members or directors but could not of itself (as a legal persona) express thought.

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While The Panel disagrees with him, if Mr Wolffe is correct then then the test in The Panel's view would be to determine if the organisation would be reflective of the ethos and thinking of its members. The Appellant would therefore require to show that the exercise of the advancement of religion reflects the position of its members.

Mr Wolffe sought to argue that because the services of The Appellant were open to all irrespective of creed that meant The Appellant's objectives were wider than the Catholic community and as a result The

⁷ Tesco Supermarkets Ltd v Nattrass [1972] AC 153 it was recognised that the intention of a statute may be to impose upon an corporate body criminal liability even where this is not explicitly provided for in a situation, notably where an offence proscribed by statute was committed by a natural person who is the "directing mind or will" of the organization.

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Appellant was unable to claim it was a religious charity. Mr O'Neill on the other hand took the opposite view that The Appellant as part of the manifestation of its religion had to reach out beyond its own constituency. He suggested The Appellant would on another day have been open to criticism had it not offered its services irrespective of creed.

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Mr McGuigan, a member and Director of The Appellant, gave strong evidence that what the organisation did was the manifestation of (certainly his as a follower of The Catholic Faith) religion, he spoke to the carrying out of the activities of an adoption agency in addition to other activities but was clear that the Catholic Faith was a lifestyle more than the mechanics of attending a church and part of that lifestyle was the importance of stable family relationships found within married couples. He referred to Matthew 25⁸ from the New Testament as his pointer and this is what he considered The Appellant's organisation was all about.

1010

In the case of The Appellant there are 12 members and directors all of whom are appointed by the Catholic Church and many of them, indeed the vast majority of them, are members of the Catholic Church. There was evidence to say that they were not exclusively Catholic and that of itself was to show the diversity of The Appellant in not restricting the organisation wholly to Catholics.

⁸ 37 "Then those who are righteous will reply to him, 'Lord, when did we see you hungry and feed you, or thirsty and give you a drink? 38 When did we see you as a stranger and welcome you, or naked and give you clothes to wear? 39 When did we see you sick or in prison and visit you?'

40 "Then the king will reply to them, 'I assure you that when you have done it for one of the least of these brothers and sisters of mine, you have done it for me.'

The majority are bound by the Canon Law of the Catholic Church and the Corporate Body is required to adhere to the teachings of the Catholic Church in both Canon and Civil Law. A Charity is bound in carrying out its Charitable objectives to take cognisance of and work within the vires of its founding deed – in this instance the Memorandum and Articles of Association.

The objects of The Appellant are:

"The Society is established to promote (irrespective of creed) the welfare of children, whose interests are paramount, to foster the stability of family relationships and to assess the suitability of applicants as adoptive parents all in accordance with the teachings of the Catholic Church ..."

The Panel is of the view that any corporate body whether for itself (as a legal persona) or for its members is in the business of expressing the view and understanding of its members. It is also bound to act within the powers and ethos of its founding deed.

The Appellant's founding deed requires its activities to be in accordance with the teachings of the Catholic Church – those teachings are well defined and the Body is capable of manifesting religion and expressing religious thought which is made up not only of rules and interpretation of sacred writings but also of history, tradition, mores, and the Magisterium of the Catholic Church.

The Panel was referred to ARM Chappell and the Secular Order of Druids v United Kingdom⁹

"The Commission recalls with regard to the second applicant [the Secular Order of Druids] that a church body, or an association with religious and philosophical objects, is capable of possessing and exercising the rights contained in Article 9"

1050 The Panel is of a mind that The Appellant is an association with religious and philosophical objects and it works out those objects through the medium of the Company which is entitled to rely on Article 9.

In so far as The Appellant is concerned The Panel is persuaded by The Appellant's Counsel's argument that The Appellant is capable of possessing and exercising its Article 9 rights on its own behalf and on behalf of its members.

1060 The evidence reflects that the criterion which prefers married couples as adopters is consistent with Catholic Teaching and the nature of Catholic family life. Mgr. Magee's evidence highlighted that adoption of Children by homosexuals is not consistent with Catholic Teaching.

The Appellant is subject to the control of the Catholic Church and operates within the tenets of the Church. It is well able to demonstrate this through the Canonical and Encyclical letters¹⁰ issued by the

⁹ App. No. 12587/86, 53 Eur. Comm'n H.R. Dec. & Rep. 241 (1987)

¹⁰ "In carrying out their charitable activity, therefore, the various Catholic organisations should not limit themselves merely to collecting and distributing funds, but should show special concern for individual in need and exercise a valuable educational function within the Christian community, helping people to

Supreme Pontiff of the Church and those letters themselves are subject to the reasoned and thought-out input of the Committee of the Doctrine of the Faith. Mr O'Neill's submission, with which The Panel agrees, was that what the Charity was seeking to achieve was part of the manifestation of its religion.

Mr O'Neill's submission with which The Panel agrees is that it is neither for The Panel nor for The Respondent to opine on whether these religious and philosophical objects are compatible with modern day Scottish life.

It is for The Panel to consider whether the criteria and manifestation are consistent with the teachings of the Catholic Church and on the basis of the evidence The Panel accepts that the position taken by The Appellant is consistent with those teachings and the manifestation of the Catholic faith.

The Panel does not agree with The Respondent that The Appellant is merely an Adoption Agency or a non-religious charity simply because its main purpose appears not to be to conduct worship services. There are other religious charities for example who do not worship a deity but are entitled to be charities and The Act does not define religion and belief as exclusively for worship, hymn singing, services and sacraments. Differing religions and differing charities whose principal purpose is the advancement of religion carry out these activities to a greater or lesser extent.

appreciate the importance of sharing, respect and love in the spirit of the Gospel of Christ." Apostolic Letter, "On the Service of Charity", p.2

The Panel is of the view that The Appellant is a Religious Charity and there are the essential characteristics to make it so. As a Religious Charity it is able to rely on Article 9 on its own behalf and on behalf of its members.

Article 9 allows The Appellant to express its religion either alone or in community with others and to manifest its belief in teaching, practice and observance.

The Appellant does express its religion, it does act alone and with others. In particular its objects clause is clear that it is open to all Creeds, the evidence was clear that it manifests its religion in its approach to family and also in the way in which it carries out its adoption service.

The objects prohibit it from doing anything other than in accordance with Catholic Teaching.

Even without the preferred criteria as stated in the Adoption Guidance Document the way it conducts itself and goes about its activities is to be in accordance with Catholic teaching. It is not therefore surprising that the preferred criteria focus on the words "within the framework of the Catholic Faith".

Article 9 of the Convention having engaged then The Panel must consider the conflict between Articles 9 and 14 and the second part of Article 9 –

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a

democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The right of The Appellant to manifest its religion or belief in its activities is limited as prescribed by law in The Equality Act. This limitation is discussed later in this note and The Adoption and Children Scotland Act 2007 also requires to be taken into account.

In this appeal the Human Rights issue is wider than the Rights of The Appellant which require to be addressed.

The Human Rights of the Prospective Adopter

If the application of the preferred criteria is discriminatory the rights of the Prospective Adopter require to be considered and in particular in relation to Non-Catholics and Homosexuals either as individuals or as same sex couples.

Article 9 applies to the Non-Catholics - they have the right not to be discriminated against on the ground of their religion.

Article 14 of the Convention applies to homosexuals and same sex couples – they have the right not to be discriminated against because of their sexual orientation.

ARTICLE 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground

such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

If they have a protected characteristic the Prospective Adopters do have a right not to be unlawfully discriminated against.

In the case of the non-Catholics Mr McGuigan's evidence was clear that The Appellant does allow non-Catholics to adopt. It would allow the non-Catholic to adopt in the case of a non-Catholic Child. The non-Catholic's Convention rights would in The Panel's view be preserved.

Mr McGuigan also made it clear in his evidence that a couple in a civil partnership would also be allowed to adopt. That couple would be treated in the same way as a married couple.

As far as homosexuals and same sex couples who are not in a civil partnership The Respondent submits that their Convention rights under Article 14 engage.

Mr O'Neill on the other hand contends that Article 14 does not engage as far as the prospective adopters are concerned. His view is that the case law does not consider hypothetical questions and referred to the *Holy Monasteries v Greece* case¹¹

¹¹ (1994) 20 EHRR 1 at para 86-8

"[T]he applicant has complained that the proposal to place him in the State school is in breach of his right to respect for family life, ensured by Article 8 (Art. 8) of the Convention, as it would lead to the deterioration of his mental condition and his ability to be educated. However, the Commission finds that this complaint is hypothetical at the present stage because it is by no means certain that the applicant's attendance at the school in question, which has certain special educational facilities, will lead to the deterioration he fears. In these circumstances the Commission concludes that the complaint is unsubstantiated.

1180 The Panel considers that the prospective adopters have Convention rights and agrees with The Respondent in this regard that Article 14 applies.

The Rights of The Child

In T, Petitioner¹² the First Division of the Court of Session said:

1190 "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."

In this section The Panel also addresses ground of appeal (7)

The Child who will be adopted ("The Child") also has rights and if The Panel is to act in a manner which is not incompatible with the Convention¹³ then The Child's rights must figure in The Panel's decision.

1200 Parliament has decided in the Adoption and Children Scotland Act 2007 in Section 14 that the following matters require to be taken into account:

"Considerations applying to the exercise of powers

¹² 1997 SLT 724, 732

¹³ supra

(1) Subsections (2) to (4) apply where a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The court or adoption agency must have regard to all the circumstances of the case.

(3) The court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.

(4) The court or adoption agency must, so far as is reasonably practicable, have regard in particular to

(a) the value of a stable family unit in the child's development,

(b) the child's ascertainable views regarding the decision (taking account of the child's age and maturity)

(c) the child's religious persuasion, racial origin and cultural and linguistic background, and

(d) the likely effect on the child, throughout the child's life, of the making of an adoption order.

(5) Where an adoption agency is placing a child for adoption it must have regard, so far as is reasonably practicable, to the views of the parents, guardians and other relatives of the child."

If the adoption agency is to take into account s. 14 (4) (c) then it must follow that Parliament intended that The Child's religious persuasion was to be taken into account indeed Article 9 would engage in as far as The Child is concerned. The Child is entitled to exercise its religion in this case the Catholic faith.

The decision of The Panel must therefore take into account the Human Rights of The Child and of The Appellant together with those of the Prospective Adopter.

The Preferred Criteria

It is in exercising its freedom to manifest its religion that The Appellant is in dispute with The Respondent.

The Respondent is of the view that the "preferred criteria" which The Appellant applies to its activities are in themselves discriminatory and contrary to the terms of The Equality Act. ("The Equality Act").

The "preferred criteria" emanate from The Appellant's requirement in relation to that part of The Appellant's activities as an Adoption Agency.

The Appellant is governed by the statutory rules relating to its adoption activities namely The Adoption Scotland Act 2007 and The Adoption Agencies (Scotland) Regulations 2009 ("the Adoption Regulations").

In terms of the Adoption Regulations The Appellant is required to

7.—(1) publish a statement of the general criteria applied by it for the purpose of determining whether any person may be accepted for assessment as an adoptive parent.

(2) from time to time review the general criteria prepared by it under paragraph (1).

(3) In considering any application by a person to be assessed by the adoption agency as an adoptive parent the adoption agency must—

(a) apply the general criteria under paragraph (1); and

(b) undertake any further steps which it considers necessary to consider and make a determination on the application.

(4) Where the adoption agency determines that a person should not be accepted for assessment as an adoptive parent it must give notice in writing of its determination to that person.¹⁴

The criteria are not published at the notion of The Appellant but as required by the Adoption Regulations to reflect its practice. As such it will have been well considered. It does not appear to The Panel to be anything other than transparent.

In order to comply with The Regulations The Appellant has published a statement of general criteria:-

"We will give preference to:

(1) Catholic couples who wish to adopt within the framework of their faith.

(2) Couples, where one of the Parties is Catholic and they wish to adopt within the framework of the Catholic faith.

(3) Other couples who wish to adopt within the framework of the Catholic faith.

(4) An individual who may wish to adopt within the framework of the Catholic faith.

...

¹⁴ Regulation 7 The Adoption Agencies (Scotland) Regulations 2009 SSI 2008/154

The following criteria provide guidance for staff in dealing with enquiries and should determine whether enquirers are offered an initial visit and later invited to preparation groups. ...

...

Status

Applicants should be couples within a stable loving relationship and have been married for at least two years.¹⁵

These criteria have been compiled to comply with The Regulations and The Regulations and criteria will be the benchmark when the Adoption Agency is inspected by the Care Inspectorate.

Mr McGuigan's evidence was clear that the criteria per se, are in so far as being preferences, applied only in exceptional circumstances. Each application is treated on its merits and the application form which applicants complete at an early stage of the process is not written in such a way to define into which criteria the candidates can be measured. The process is one of discovery and understanding.

There are two categories of prospective adoptive parents one which would be suitable to adopt a non-Catholic Child and one which would be for those who may adopt any Child including a Catholic. This allows The Appellant to fulfil its obligations under the Adoption Act.

Mr McGuigan's evidence was that The Appellant adheres strictly to the rules and framework of Adoption. The Appellant is open to explore adoption with many enquirers and he was able to cite people of other

¹⁵ Joint Minute No. 9

denominations who they were able to help – including a Church of Scotland Minister.

He also gave a very clear picture of the proceedings at the Adoption Committee where a match is recommended between the Adopter and a Child – he indicated that while Sister Eileen who is a Board Member appointed by The Appellant as the Decision Maker (The Appellant being required to appoint a Decision Maker in terms of the Adoption Regulations) sat on that committee she did not have a vote but simply was The Appellant's representative.

In his evidence Mr McGuigan indicated that when an initial enquiry is made that was simply a telephone conversation and if there were any questions which staff found difficult these were passed to Sister Eileen. This was to avoid any confusion at the outset.

The Respondent sought to argue that the criteria are applied at the point of Enquiry and that therefore amounts to Direct Discrimination. The fact that Mr McGuigan, in confirming that difficult cases were immediately passed to Sister Eileen who was the person within the Board who was trusted as The Appellant's Decision Maker, he was effectively saying that the preferred criteria were being used at the very outset of the enquiry. It was important to The Respondent's argument that it had been established that the criteria were applied at the point of enquiry. This was not however what Mr McGuigan said in his evidence in chief or under cross examination. The joint minute which the parties had lodged said :

"The Appellant operates preferred criteria in deciding whether or not enquirers should go forward to full assessment"¹⁶

1350 There had been a discussion that between the parties that Mr McGuigan's evidence conflicted with the joint minute however on checking the Panels notes and the joint minute The Panel is of the view that strictly speaking there is no conflict as the joint minute did not mention the criteria being applied at the point of enquiry but rather is as stated above.

1360 Evidence was led from Mr McGuigan that that The Appellant in assessing prospective adopters looked at each case on its merits. He described the process from enquiry to adoption and it became clear that the decision whether someone would go forward for full assessment did not take place at the enquiry stage. The full assessment stage took place much further down the timeline and it was at this stage each case was looked at on its merits. His evidence was not that the application of the preferred criteria was made at enquiry stage but the process was one of discovery and understanding. Very seldom was there a situation where there was a competition of preference. The general criteria were simply that, they were not a system of hierarchical points and were all looked at together. If the criteria were applied it was towards end of the journey of discovery and would only be strictly applied looking at a Catholic Adoption. The criteria when applied were taken into account
1370 only when there were two prospective adopters being considered at the same time and for the same child

¹⁶ Joint Minute of Evidence paragraph 9

Non Catholic Adoption was dealt with differently and Mr McGuigan in his evidence gave an example of a Church of Scotland Minister who clearly not agreeing with all of the tenets of the Roman Catholic Faith was able to adopt a non-Catholic child through the services of The Appellant.

1380 Mr McGuigan's evidence was that The Appellant had not received any enquiry from a homosexual or homosexual couple to whom the criteria could have been applied – The Panel is led to the conclusion that either homosexual couples are led not to apply because the position of the Catholic Church is so widely known or that homosexual Couples who wish to adopt use one of the other 35 agencies in Scotland who operate different criteria.

Likewise it would not be too difficult to reach the conclusion that many Catholics would prefer to adopt through The Appellant's Agency.

1390 The Panel is of the view that The Appellant is open and transparent regarding the criteria. The Appellant makes no secret of the fact that the criteria exist and it complies with the Adoption Regulations. There has been no complaint made known to The Panel from the Care Inspectorate who will have assessed The Appellant regarding the criteria and The Appellant's compliance with the Adoption Regulations.

The Human Rights Act does not bind The Appellant as The Panel, for the reasons discussed below, does not consider it to fall within the definition of "Public Body" within the Act.

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The Human Rights Act and The Equality Act each have a mechanism for those who have the protected characteristics to make a complaint or raise a court action.

The Respondent's investigation did not arise out of such a complaint or court decision or any finding by the Equalities and Human Rights Commission, nor did any arise as a result of the Memorandum of Understanding that The Respondent has with the Commission.

1410 There are strict time-limits for bringing a complaint under the Equality Act, such a complaint is within the jurisdiction of the Sheriff and outwith the jurisdiction of The Panel.

The Panel notes however that no such complaint has been made against The Appellant nor has The Respondent received any complaint from any person or persons to whom the services of The Appellant have been refused.

1420 The Panel is surprised that at an early stage The Respondent did not recognise or appreciate that there would be a religious argument, upon which The Appellant might seek to rely, not only given that one of its objects which had been recognised by The Respondent was the advancement of religion and the fact that the Charity Trustees and members were substantially Senior Catholic Clergy.

Article 9 allows The Appellant to discuss the religious perspective and its ethos in relation to it. The Respondent should not have been surprised by this. The Convention right allows the freedom of expression of religion and it might have been appropriate for The Respondent to seek

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out what The Appellant's religious understanding and teaching in relation to this actually was.

Direct or Indirect Discrimination

There was discussion on both the cases of *Preddy v Bull*¹⁷ and *Black v Wilkinson*¹⁸ where the differences of direct and indirect discrimination were examined. The subsequent Supreme Court Case of *Bull v Hall*¹⁹ which The Panel later considered and is referenced in the note at the end of this decision was helpful in clarifying the position for The Panel

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The Equality Act Defines Direct Discrimination as follows:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim. .

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner. .

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¹⁷ (CA) [2012] 1 WLR 2154

¹⁸ (CA) [2013] 1WLR 2490

¹⁹ *infra*

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others. .

(6) If the protected characteristic is sex

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding; .

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth. .

(7) Subsection (6) (a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7). .

The Appellant argues that if there is discrimination it is not direct. There is no discrimination as a result of the application of the preferred criteria and therefore no question that A is discriminating against B because of a protected characteristic. The characteristic where the discrimination is found is that of marriage and marriage of itself is not a protected characteristic.

If there was discrimination between same sex couples in a civil partnership and heterosexual married couples that would be direct discrimination following Bull v Hall but where the discrimination is between married and unmarried there is no direct discrimination owing to the absence of a protected characteristic. In Bull v Hall the discrimination under consideration was where a couple who ran a Bed and Breakfast refused to allow a same sex couple in a civil partnership a double room where at the same time they would have allowed a heterosexual married couple a double room. The refusal was found by the majority of the Justices to be direct discrimination.

1490 In the Appeal before The Panel the discrimination contained within the preferred criteria is that same sex couples are unable to have been married for two years and therefore would not meet one of the criteria.

This can be distinguished from the Bull v Hall²⁰ case as the criterion is not aimed at directly discriminating against homosexuals and those in same sex relationships. The Appellant has not banned and does not have an absolute ban against those of same sex orientation it would e.g. allow a same sex couple in a civil partnership to adopt on the same basis as any other married couple.

1500 In The Appellant's submission the Father Hudson's Society and Catholic Care case²¹ could be distinguished as in that case the charity had applied to The Charity Commission to have a complete ban on homosexuals using their services. That was Direct Discrimination and that is not what is applicable here. The Catholic Care case was referred to at various stages of the Hearing and has been considered in detail by The Panel. The Respondent relies heavily on that case, however The Panel agrees with Mr O'Neil that the case can be distinguished in its view as follows:

1510 As the Catholic Care case found Direct Discrimination the court was right to hold that the charity could not then claim the religious exemption, which is open only where the organisation is required to show that discrimination is to be a proportionate means of achieving a legitimate aim.

²⁰ *infra*

²¹ [2009] PTSR 1125

The Catholic Care case is not binding precedent on The Panel and The Panel has considered the whole facts and circumstances of this appeal. The charity's Human Rights position was not argued in that case and therefore not addressed in the court's judgment.

1520 In response to a question from The Panel Mr O'Neill suggested that a straightforward definition of discrimination might be:

Direct discrimination is where you have taken into account in the unlawful act the fact that you might not serve someone because he is a homosexual.

On the other hand Indirect discrimination would be where a general rule applies to everyone which then affects those who have a protected characteristic e.g. a height restriction in the police may be discriminatory against women.

1530 Mr Wolffe did not disagree with these examples.

The Equality Act at s. 19 defines Indirect Discrimination:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. .

1540 (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if— .

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, .

(c) it puts, or would put, B at that disadvantage, and .

(d) A cannot show it to be a proportionate means of achieving a legitimate aim. .

(3) The relevant protected characteristics are— .

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation."

In The Panel's view the evidence showed that the preferred criteria were not applied at the point of enquiry as The Respondent had suggested but that the prospective adopters are able to go much further down the road of the journey of discovery before they were applied if at all.

It was not the evidence that the preferred criteria were applied at all but on the contrary it was The Appellant's position that there was a possibility to apply the preferred criteria right up and until the last part of the process. In The Panel's view wherever in the process the criteria were actually applied the fact that The Appellant has a preferred criterion that couples who have been married for more than 2 years does discriminate against same sex couples and homosexuals each of whom has protected characteristics in The Equality Act.

Mr Wollfe submitted that it did not matter when the criteria were applied or if they were applied at all. What was of relevance is that this is published criteria.

The Panel has concluded that this is Indirect Discrimination.

Given that The Panel consider the discrimination to be indirect it then considered the exceptions within The Equality Act and whether The Appellant has shown that the discrimination is a proportionate means of achieving a legitimate aim.

The Panel accepts Mr Wollfe's explanation that The Respondent did not go on to consider whether the discrimination was justified because The Respondent considered that the discrimination was direct.

The Charities Exception

s193 of The Equality Act states

(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.

The exemption is allowed if The Appellant is acting in pursuance of its charitable instrument – in this appeal that is the Memorandum and Articles of Association of the Company and in particular the Objects Clause.

In the Objects Clause The Appellant is required to act in accordance with the teachings of The Catholic Church therefore ss. (1) is passed. In The Appellant's submission the preferred criteria are within the teaching of the Catholic Church.

Having passed on ss. (1) then the test at ss. (2) requires consideration. Is the provision "a proportionate means of achieving a legitimate aim"? The Appellant's aim is to be a faith based organisation and to manifest that faith inter alia in an adoption service and to ensure that Catholic Adoption is available to Catholic Children all of which were accepted by The Panel. Consequently the aim is legitimate; it is also proportionate in that if The Appellant was not carrying out the adoption service then there would be no Catholic Adoption Agency providing an adoption service for Catholic Children who in terms of The Adoption Act are entitled to be brought up in the Catholic faith.

The Panel is of the view that the charity exemption applies.

Schedule 23

There is an exception which applies to Religious Organisations at Schedule 23 of The Equality Act.

Organisations relating to religion or belief

2 (1) This paragraph applies to an organisation the purpose of which is

(a) to practise a religion or belief,.

(b) to advance a religion or belief,.

(c) to teach the practice or principles of a religion or belief,.

(d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief, or.

(e) to foster or maintain good relations between persons of different religions or beliefs..

(2) This paragraph does not apply to an organisation whose sole or main purpose is commercial..

(3) The organisation does not contravene Part 3, 4 or 7, so far as relating to religion or belief or sexual orientation, only by restricting

(a) membership of the organisation;.

(b) participation in activities undertaken by the organisation or on its behalf or under its auspices;.

(c) the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices;.

(d) the use or disposal of premises owned or controlled by the organisation..

(4) A person does not contravene Part 3, 4 or 7, so far as relating to religion or belief or sexual orientation, only by doing anything mentioned in sub-paragraph (3) on behalf of or under the auspices of the organisation.

The Appellant argues that the provision of the service of adoption is part of the manifestation of its religion or belief and therefore the activities fall within the exception.

The Panel has discussed the fact that The Appellant is a Religious Charity, Article 9 applies and Schedule 23 (2) (1) (a), (b), (c) and (d) all apply.

1670

Section (3) (c) of Schedule 23 allows The Appellant to discriminate where it provides goods or services under its auspices – an adoption service would apply here.

The Panel is of the view that The Appellant does not therefore contravene Parts 3, (which relates to the provision of a service) 4 or 7 of The Equality Act by discriminating against same sex couples and homosexuals.

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Having come to that view The Panel now considers the exception from Schedule 23:

The exception from Schedule 23

Subsection 10 of Schedule 23 reads:-

“(10) This paragraph does not permit anything which is prohibited by section 29, so far as relating to sexual orientation, if it is done—

(a) on behalf of a public authority, and.

(b) under the terms of a contract between the organisation and the public authority”

1690

It was argued by The Respondent that The Appellant was a Public Body – the adoption service was mainly carried out for Local Authorities and

on behalf of local authorities and that The Appellant had a contract with a Local Authority.

1700 The Appellant submits that it is part of the adoption process where it is providing its services to enquirers and it is part of the process where local authorities introduce children to The Appellant and then at a meeting it is agreed which child is matched with which adopter(s). In this arrangement each organisation is responsible for a different and discrete part of the process. The Appellant is not contracted to take so many children for adoption.

1710 It is The Panel's view The Appellant is neither a public authority nor does it carry out its service on behalf of a public authority. When in this instance local authorities wish to enter into contracts with charities and voluntary organisations they normally enter into service level agreements or service contracts. There needs to be a contract between the public authority and the agency – to have such a contract given all of the procurement rules affecting local authorities The Panel would have expected to see that in writing.

The Respondent argues that that in his evidence Mr McGuigan said that the Appellant acts on behalf of local authorities.

1720 There was produced a Form H 1 which was entitled "Financial Arrangements Inter-agency placement". It states the fee and some obligations on the Family's Agency but it lacks in specification. In The Panel's view it is a receipt for money being passed by the local authority as agent for the Child to The Appellant as agent for The Family – if it is a contract, which The Panel doubts, it would be a contract between agents for disclosed principals, namely the Child and The Family. The

Form in The Panel's view was not sufficient to create a contract between the local authority and The Appellant and it referred to the local authority as the Child's Agency and The Appellant as The Family's Agency. The appellant is to provide the family with support for a period of 12 months after the adoption.

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Mr Wolffe stated that the term agency was not an art. The Panel would tend to the view that the law of agency is reasonably clear and in this instance The Appellant is an agent for The Family and has in turn obligations to support The Family.

The Panel is of the view that this exception from Schedule 23 would not therefore apply.

THE INTERVENTION

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The Intervener lodged its written intervention restricted to sections 8 and 9(4) of the Equality Act 2006.

The intervention discussed the differences between direct and indirect discrimination and at the same time referred The Panel to various parts of its Codes of Practice in applying the various rules and exceptions which were helpful in The Panel's consideration of The Appeal.

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The Panel specifically noted that The Commission considers that where services are being provided to the public, there must be strong and compelling reasons to justify providing those services in a discriminatory fashion.

The Commission raised two points in its submission: "Firstly, s.23(3) of The Equality Act provides that where the protected characteristic at play is sexual orientation, the fact that one person is a civil partner and the other is married is not a material difference between the circumstances relating to how each person has been treated. This means that "a civil partner treated less favourably than a married person can bring a claim for sexual orientation discrimination"

In the Appeal the evidence pointed to the fact that there was not any difference in the treatment of married against civil partnership couples and the complaint amounted in The Panel's view to indirect discrimination.

It discussed the cases of *Preddy v Bull* and *Black v Wilkinson* which were referred to earlier and have now been considered in the light of The Supreme Court decision of *Bull v Hall* and referred The Panel to a number of other cases many of which were also referred to by the respective Counsel for the parties. Reference is made to the written intervention and the authorities referred to.

Both The Appellant's and The Respondent's respective Counsel addressed The Panel on a number of the points raised within the intervention in their own submissions.

Ultimately the Intervener suggested that the balance to be struck would depend on the facts which are established at the hearing, along with the application of the principles to those facts which The Panel has sought to do in considering The Appeal.

6) Proportionality of The Decision

1790 In its ground of appeal 6 The Appellant states that The Respondent acted in a Convention incompatible way because the decision was disproportionate as it would effectively entail the closure of The Appellant. The test of proportionality in respect of Convention rights would only have arisen had The Respondent considered Article 9 to engage. Given that The Panel has decided that Article 9 does engage then it is for The Panel to consider whether in the light of that The Respondent's decision is disproportionate.

1800 In Mr O'Neill's submission The Panel requires to consider whether consistent with the requirements of proportionality the rights of The Appellant to manifest its beliefs in its provision of adoption services may be legitimately restricted in the manner in which The Respondent seeks.

The Respondent argued that its actions were not disproportionate and that the requirement in the decision would not require The Appellant to close. The Appellant could continue as an adoption agency independent of the Catholic Church.

1810 On an examination of the accounts lodged The Panel considers that over the past five years the income from fees from the placing of children ("fees") has fluctuated considerably – the fees depend very much on when children are placed with the adopter. The fees have fallen considerably short of the costs of providing the charity's adoption and fostering services. (In 3 out of the 5 years there was a shortfall of

£70,000 or more, and the exceptionally large income in 2011-12 did not even get near to wiping out the total shortfall over the five years.)

The building from which The Appellant operates was donated by the Catholic Church and there is therefore no allowance required for rent in the accounts which of itself would if rent had to have been paid contribute further to the shortfall.

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The Appellant depends on voluntary income for much of its overheads and its activities which is mainly provided by the Catholic Church through diocesan donation ("Core Funding") and a general crib appeal among Catholic Churches in Glasgow and the West of Scotland.

1830

The Respondent made mention of The St Andrews Adoption Society which had disassociated itself from the Catholic Church some time ago. St Andrews had service contracts with local authorities – and this was explained to The Respondent and contained in a handwritten note of a meeting between The Appellant and the Respondent²². The basis of its operation was different to that of The Respondent and no evidence was led as to its financial viability or the basis of that it now having disassociated.

It is for The Panel to consider the relevance of the proportionality test in so far as The Appellant and its operation is concerned and makes its conclusion on the evidence presented by The Appellant in that regard.

The Appellant has been successful in arguing before The Panel that if it was required to follow The Respondent's direction the support of the

²² Note of Meeting dated 21 September 2012

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Catholic Church would be withdrawn and it would then not have sufficient income to operate its adoption service.

In addition The Panel considers that in failing to comply with The Direction The Appellant would have to disassociate itself from the Catholic Church which would be contrary to its objects clause and in so doing would require to wind up given that those who are its Company Members are also bound by the teachings of the Catholic Church at Canon Law and could therefore not continue as a Catholic Charity.

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That would have left The Appellant to consider whether as an agency of the Catholic Church it would have been able to continue its work. The Panel tends to the view that without the association with the Catholic Church The Appellant would cease its activities.

The Panel is of the view that taking all of the evidence into account the decision appealed against is not proportionate in the circumstances.. The decision was disproportionate and therefore it could not have been taken in a Convention compatible way.

1860

The Respondent's Investigation

In terms of s1 (5) and (9) of The Act

5) OSCR's general functions are

- (a) to determine whether bodies are charities,
- (b) to keep a public register of charities,
- (c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act,

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(d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct, and

(e) to give information or advice, or to make proposals, to the Scottish Ministers on matters relating to OSCR's functions.

(9) In performing its functions OSCR must, so far as relevant, have regard to

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(a) the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed, and .

(b) any other principle appearing to OSCR to represent best regulatory practice.

Counsel for The Appellant suggested that The Respondent was not acting within its powers in issuing The Direction. The Direction was predicated from a letter of complaint by The National Secular Society. The Appellant had in counsel's view set a hare running and resulting in The Direction being issued in a disproportionate manner.

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The Respondent on the other hand is of the view that the investigation was within OSCR's statutory duties.

The Panel is of the view that the one of OSCR's functions is to investigate apparent misconduct among charities and it has the appropriate resources to do so. That action however requires in terms of The Act to be "proportionate ... and targeted only at cases where action is needed".

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In The Respondent's Inquiry and Intervention Policy at 7.2 it states:

"When we receive a complaint about a charity we consider the information provided to us, take a view as to whether the matter falls within our regulatory remit and, using a risk-based approach, determine the most appropriate action in the circumstances. There may be instances where we will not take the matter forward."

1910

Nothing had changed in The Appellant's practices since the new Objects Clause was approved by The Respondent. Other than the letter received on behalf of The National Secular Society which had been sent to The Respondent, there was no evidence to support the contention and that the approach adopted by The Respondent was a targeted or a risk based approach as a response to a complaint.

There was no overt misconduct of The Appellant in its actions nor was there any other matter which highlighted that The Appellant was not compliant and therefore at a risk to the Scottish Charity Register.

1920

In the evidence of The Respondent it is not clear to The Panel that The Respondent acted in a way which either was proportionate to the scale of the Complaint or was the investigation carried out in a way which was targeted at a case only where action was needed.

The Respondent referred The Panel to ss. (8) of s. 1 of The Act
(8) OSCR must perform its functions in a manner that encourages equal opportunities and in particular the observance of the equal opportunity requirements.

1930 There was a discussion as to whether this required The Respondent to investigate breaches of The Equality Act. On the other hand The Appellant argued that this subsection was directed at The Respondent in the way in which it conducted itself in the carrying out of its duties.

The Panel is of the view that ss. (8) of s. (1) applies to how The Respondent carries out its functions and duties of itself.

The Respondent also has the protection of s. 193 (8) of The Equality Act which allows The Respondent to take a view on the Charity Exemption.

1940 193 (8) A charity regulator does not contravene this Act only by exercising a function in relation to a charity in a manner which the regulator thinks is expedient in the interests of the charity, having regard to the charitable instrument

SUMMARY

The Panel in reaching its decision has carefully considered all of the arguments argued before it by both Respondent's and Appellant's counsel in what was a complex and well argued appeal.

1950 In coming to its decision The Respondent at a very early stage in the process discounted the fact that The Appellant's objects and the carrying out of its activities whether adoption or otherwise was the advancement of religion as set out in The Act despite having considered the objects clause on those grounds at the time consent was sought to alter it.

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The Respondent took the view that this was an adoption agency and a public body. In The Respondent's view the "discrimination" complained of was contrary to The Respondent's guidelines to charities and drew a conclusion that The Appellant in discriminating did not continue to pass the Public Benefit Test.

In this Appeal The Appellant has successfully shown that it is more than an Adoption Agency per se and that the whole purpose of what it is about is the manifestation of its religion and the religion of its members and supporters.

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The Appellant's objects clause is clear in that its activities have to be in accordance with the teachings of the Catholic Church, it is supported in the main by way of personnel who are clergy or laity of the Catholic Church.

The Appellant seeks however to be wider in its approach to society providing that the ethos of the Catholic Church is maintained by allowing non-Catholics to use its activities and to take part in its decision making process. The Appellant has non-Catholics in its adoption panel and employs a number of non-Catholic social workers on its staff.

1980

This Appeal hinges on the application of Article 9 of The Convention. The Respondent took the view that it did not engage and reached the conclusion it did in issuing the decision appealed against.

The Panel takes the view that Article 9 engages in as far as The Appellant and the Child are concerned and in coming to that view the other parts of The Panel's reasoning flow.

The Panel has decided that there is indirect discrimination but that that indirect discrimination is allowed in terms of The Equality Act because it is a proportionate means of achieving a legitimate aim.

The Panel found both the charities exception and the religious exception as contained in The Equality Act to apply and that the Appellant was not carrying on a service for which it was contracted to a public authority.

The Panel has considered the application of The Public Benefit Test which should be an objective test and considers that The Respondent erred in its application of the Public Benefit Test. The blanket application of a rule is not the correct approach but each time the Public Benefit Test is applied it should be specific to the facts before The Respondent.

The Panel has also considered The Respondent's decision making process at review and has made recommendations to The Respondent that it reconsiders its statutory guidelines in that regard.

The Panel considered that in following The Direction The Appellant would have had a serious difficulty with their members and supporters in The Catholic Church which would ultimately result in its closure this would result in a loss to the community served by The Appellant and when compared with the discrimination complained of The Decision is a disproportionate regulatory measure.

The Panel is of the view that in considering The Respondent's functions in terms of s. 1 of The Act that subsection 8 applies to how The Respondent of itself carries out its functions.

The Panel allows The Appeal and quashes The Decision appealed against.

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CONTINUED HEARING

The Panel indicated that at the Continued Hearing on 1st November 2013 it would be in a position to announce its decision in accordance with Rule 18 of The Panel's Rules and the reasons for the decision would be published at a later date. This indication was circulated to Parties prior to the Continued Hearing.

Decisions of The Panel

18. (1) A decision of The Panel may be taken by a majority and the decision must record whether it was unanimous or taken by a majority.

(2) Where The Panel is constituted by two members, the Chair shall have a second vote.

(3) A decision of The Panel may be given at the end of the hearing or within 21 days of the hearing.

(4) Whether there has been a hearing at which the parties have attended or not, the decision must—

(a) be recorded as soon as possible in a decision document which must also contain a statement of the reasons in full form for the decision; and

(b) be signed by the Chair and dated.

.....

At the Continued Hearing Counsel for The Respondent – Mr Wolffe raised an objection to this course of action. His submission was that the Rule when read with Rule 19

19. (1) The Panel must make arrangements for the public pronouncement of its decisions, whether by giving its decisions orally at a public hearing or by publishing its decisions in writing.

....

meant that the reasons for the decision were to be published at the same time the decision was given and that arrangements were then to

be made for the publication of the decision. His rationale was that the decision on its own without the reasons rendered the decision difficult to interpret and that parties may then go on to make arrangements and provisions based on the decision without the benefits of the reasons. He also submitted that it was not beneficial to The Panel as a whole to issue a decision without reasons given the complexity of the issues in the Appeal.

Ms van der Westhuizen for The Appellant argued that The Appellant was entitled to the decision if it was available and that the reasons could surely follow in due course. She considered that there was no prejudice to either party in the decision being given. The Appellant would be put to further expense if the Hearing was to be continued for the giving down of the decision.

After discussion both Parties agreed that in the event of The Panel deciding not to give its decision at the Hearing then they would consent to a further continuation of the Hearing to allow The Panel to give its decisions with reasons.

The Panel's interpretation of Rule 18 (3) is that the decision is required to be given at the end of the Hearing or within 21 days of the hearing. The Panel's view is that the rule does not require the reasons for the decision to be given at the same time and that the reasons can follow in ordinary course.

With the complexities of the issues which arise before The Panel in this particular Appeal The Panel was persuaded by The Respondent's argument that it would not be in either the Parties' or The Panel's interests to issue its decision without reasons especially given the significant public attention which may be drawn. However this does not

change The Panel's interpretation of its Rules which would have allowed The Panel to proceed in the way in which it had intended.

The Panel unanimously agreed of consent to continue the Hearing at the end of this Hearing on Expenses.

Ms van der Westhuizen enquired of The Panel if Counsel would be required to attend and The Panel indicated that there was no requirement for Counsel's attendance at the Further Continued Hearing and that there was nothing in The Panel's rules which required parties to be represented.

EXPENSES

In terms of The Panel's Rules, Rule 21 states that the question of expenses arises in very limited circumstances. There was a Continued Hearing on 1st November 2013 when the question of expenses was argued by the Parties and considered by The Panel.

Orders for expenses

21. (1) Subject to paragraph (2), The Panel may make an order awarding expenses (including outlays)–

(a) Against The Appellant (including an appellant who has withdrawn an appeal) if it is of the opinion that The Appellant has acted vexatiously or that the conduct of The Appellant in making or pursuing an appeal was unreasonable;

(b) Against OSCRC where it considers that the decision against which the appeal is made was unreasonable;

....

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(4) Counsel's fees and the fees for instruction of Counsel shall be allowed as an item of a party's expenses only where The Panel has sanctioned the employment of Counsel.

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The Respondent made it clear to The Panel at the Hearing on Expenses that if in the event of the outcome of the Appeal being in The Respondent's favour then it did not seek an award of expenses against The Appellant. The Respondent's position was clear that there were issues involved which did not make The Appellant's bringing the appeal to be vexatious in its conduct nor did the bringing or conduct of the Appeal by The Appellant amount to unreasonable conduct.

In the event that The Appellant was successful in the Appeal Ms van der Westhuizen for The Appellant submitted that if successful the expenses of the Appeal should follow that success. She also sought that The Panel would in terms of Rule 21 (4) sanction the employment of both Senior and Junior Counsel.

The basis of The Appellant's Counsel's submission was as follows:-

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1. The Decision appealed against was unreasonable – in Ms van der Westhuizen's submission the word unreasonable was to be considered in its ordinary common sense usage; it was not to be considered on the basis of unreasonable in Judicial Review proceedings. In Judicial Review Proceedings the test of unreasonableness was a high one²³ and difficult to substantiate but Judicial Review Proceedings were just that, the proceedings before The Panel were not Judicial Review nor were

²³ Judicial Review – Clyde and Edwards (2000) at 21.04 and 21.05

they akin to Judicial Review – the test of whether something was unreasonable was set lower

a. Unreasonableness was according to the dictionary “beyond the limits of acceptability”

b. By reason of The Appellant’s success before The Panel that in itself would be enough to show that the decision was unreasonable.

c. The decision which was based on a finding and conclusion that The Respondent had been in breach of The Equality Act which had been an unreasonable assumption.

d. The Respondent had been confused as to how the criteria had operated in practice;

e. The Respondent had failed to take properly into account Article 9 of the Convention and as a result the decision was unreasonable.

f. The Respondent failed to set its mind to the Public Benefit Test and had applied a wrong set of assumptions – should The Panel agree then the test of unreasonableness has been met.

2. The nature of the proceedings before The Panel is adversarial so expenses should follow success.

3. In considering the question of expenses The Panel should take into account the nature and extent of the proceedings before it with Senior and Junior Counsel required to act for both parties.

4. The Panel should consider the nature of the Parties:

a. OSCR is a publicly funded body

b. The Appellant on the other hand is a relatively small charity.

5. The Panel should take into account the length of the Hearing having met on 7 days. These are expenses a small charity shouldn't be required to bear.

2170 6. The Appellant was required to defend its position in order to continue its charitable work.

7. Ms van der Westhuizen submitted that given the nature of the Appeal, the extensive argument, technical legal issues and the volume of case law the Appeal required justified the employment of both Junior and Senior counsel. She made a motion that in the event of expenses being awarded the appropriate sanction would be given in terms of The Panel's Rules.

2180 8. In her summing up Counsel later went on to argue that it was a question of whether the Public Benefit Test was met and if it had been met then the decision of The Respondent was unreasonable.

In opposing The Appellant's motion for expenses Counsel for The Respondent was of the view that The Respondent had not acted unreasonably in respect of making the decision. Mr Wolffe's position was that OSCR was acting within the background of a decision of a High Court judge Briggs J (albeit outwith the jurisdiction) in the case of Catholic Care (Diocese of Leeds) v The Charity Commission For England and Wales.²⁴ He in particular cited Briggs J at Paragraph 99 saying that the reference to Public Benefit and from where it flowed meant that the decision was not unreasonable. s. 8 of The Act placed obligations on

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²⁴ [2010] P.T.S.R. 1074

OSCR to consider and determine whether a Charity fulfilled the Charity Test and that was what OSCR sought to do in its decision. The rationale behind the decision was sufficient not to have made the decision unreasonable in itself. The Direction (Decision) was a targeted one which OSCR had found established. In his submission it was not relevant whether OSCR was a publicly funded body or not nor the financial stability of The Appellant, rather the issue was one of whether the decision was not unreasonable.

Mr Wolffe conceded that the complexity of the nature and substance of the Appeal was such however that The Panel might in the case of expenses being awarded sanction the employment of both Senior and Junior Counsel.

The Panel has not been persuaded that The Respondent's decision was unreasonable in all the facts and circumstances and accordingly has decided not to make an order for an award of expenses.

The circumstances in which The Panel can make an award against The Respondent are very limited in The Panel's Rules and while the issues raised by Counsel for The Appellant may have been relevant in a Court Action the only test is whether the decision against which the Appeal was made was unreasonable.

The Panel agrees with The Respondent that given the decisions in England and Wales in the Father Hudson and Catholic Care Cases (which are persuasive precedent in this Jurisdiction) and the backdrop against which The Respondent made the decision was of itself not unreasonable even although The Panel has ultimately found in favour of

The Appellant by allowing the Appeal and quashing The Respondent's decision.

2230 The test of whether the decision is unreasonable has to take account of all of the circumstances of the decision appealed against. There are occasions when applying the Public Benefit Test a Regulator may come to a conclusion which is later not upheld on appeal. That of itself would not make the decision unreasonable and The Panel disagrees with The Appellant's argument while agreeing that the threshold of unreasonableness is not the threshold which is required to be successful at Judicial Review but to adopt a straightforward approach when considering the unreasonableness test in The Panel's Rules.

Given that The Respondent was of the view that the Public Benefit Test had not been met and that there was a risk to the Scottish Charity Register and that following legal advice - the fact alone that the Regulator has been unsuccessful in this appeal does not mean that the decision when given was unreasonable.

2240 The Rule does not entitle The Appellant to expenses against The Respondent if The Respondent had been vexatious in defending the appeal or unreasonable in its conduct of the Appeal. However had that been open to The Panel such conduct was neither vexatious nor unreasonable and the conclusion on expenses would have been the same.

CONCLUSION – EXPENSES

The Panel makes no award of expenses due to or by either party and in relation to the Intervener confirms its earlier decision that there are no expenses due to or by the Intervener.

THE EFFECT OF THE CASE OF BULL v HALL

The decision in Bull v Hall²⁵ was issued by the UK Supreme Court on 27th November 2013.

The Panel agreed on 9th December 2013²⁶ that the proceedings before it in the appeal were not functus officio and allowed parties the opportunity to make arguments before The Panel regarding the judgement in that case which had been referred to in the arguments presented before the hearing albeit at the appeal court stage.

Given the importance of this case and the fact that it was referred to in the substantive Hearing (where the case of Preddy v Hall was cited at the court of Appeal stage along with the case of Black v Wilkinson – both cases where the issues of Direct Discrimination and Indirect Discrimination were discussed) .

Having given due consideration to the Supreme Court Decision and also to the written submissions The Panel makes the following comment pertinent to the facts of the Appeal before The Panel.

Precedent

In so far as the UK Supreme Court is concerned only cases decided by the UK Supreme Court where the appeal has originated from Scotland are binding precedent on The Panel. (This is referred to in The

²⁵ [2013] UKSC 73

²⁶ Decision of The Panel dated 9/12/13

Appellant's submission who refer The Panel to Constitutional Reform Act 2005 s 41).

2290 The result of this is that while The Panel may consider the decision in Hall and the arguments which surround it to be persuasive it is not bound by the Supreme Court Decision as the case emanates from proceedings raised in England and Wales.

The Panel agrees with The Appellant's submission in this regard.

The Legal Issue

2300 Preddy v Bull said that the refusal of a Bed and Breakfast owner to allow a gay couple who were in a civil partnership to hire a double room was direct discrimination – at the Court of Appeal Stage the court upheld this decision.

In Black v Wilkinson the recorder (judge) took the view that following Preddy v Bull (the decision was binding precedent on her). A similar couple who were likewise refused a double room in a bed and breakfast establishment albeit they were not in a civil partnership were the subject of direct discrimination. Dyson LJ however opines that had it not been for Preddy he would have found unjustifiable indirect discrimination.

2310 As part of The Panel's decision in this Appeal The Panel has discussed above whether the application of "the preferred criteria" if applied is direct or indirect discrimination.

The Decision of the Supreme Court

2320 The issue of Direct Discrimination in this case was addressed by Lady Hale in her judgement. There was a majority of three to two that this was Direct Discrimination and the other two judges were of the view that it was unjustifiable Indirect Discrimination. In paragraph 24 of her judgment Lady Hale indicated that it would have been different if the couple were unmarried. The argument in paragraph 24 could apply in this appeal given that the restriction applied to anyone who is not a married couple was indirect discrimination. In paragraph 25 Lady Hale accepts that a Civil Partnership is akin to marriage and discrimination against Mr Preddy and Mr Bull who were in a Civil Partnership amounted to direct discrimination. Her ladyship goes on to deal with the issue of discrimination between Civil Partners and Married Couples and says that would be direct discrimination. Her view is that where the distinction is between Married Couples and Civil Partnership Couples that's where the Discrimination becomes Direct.

2330 Lady Hale also opined that it is not unlawful discrimination to discriminate between married and unmarried.

In this appeal Mr McGuigan's evidence was that The Appellant would allow civil partners to adopt which brings the distinction back to married couples and unmarried.

Conclusion

2340 The Supreme Court Decision is helpful in outlining and discussing the relevant law and the differences between Direct and Indirect discrimination in a lucid manner. However it does not alter The Panel's decision in this appeal.

The Panel's decision is based on the facts and circumstances as presented to it. The Panel has unanimously come to the conclusion that in this Appeal the discrimination is indirect and it therefore fell to The Panel to decide given the whole basket of rights to consider whether the indirect discrimination is justifiable in the circumstances.

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