Appeal Number: CA.2021.0013

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(CHARITY)

MERMAIDS

Appellant

and

(1) THE CHARITY COMMISSION FOR ENGLAND AND WALES
(2) THE TRUSTEES OF LGB ALLIANCE

Respondents

APPELLANT'S SKELETON ARGUMENT
for hearing on 9 – 16 September 2022

Bundle references are in the form **[bundle/page]**.

The parties will liaise with a view to agreeing (i) a reading list, (ii) a chronology, (iii) a schedule of agreed facts, (iv) a list of issues and (v) an authorities bundle by 2 September 2022. See the Tribunal's directions at **[1/30]**. *Following exchange of skeleton arguments the parties may also be able to discuss a timetable, subject to the Tribunal's approval.*

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A. Introduction

1. This is an appeal against the decision (**"the Decision"**) of the Charity Commission for England and Wales (**"the Commission"**) dated 20 April 2021 to register LGB Alliance, a company limited by guarantee, as a charity under s.30 of the Charities Act 2011 (**"the 2011 Act"**).

2. The following points as to Mermaids' case should be emphasised at the outset:

    2.1. This appeal does not require the Tribunal to take sides in discussions in wider society concerning the rights of transgender persons, or any 'gender-critical' groups or views more generally. The Tribunal is dealing with the charitable status of one specific organisation, LGB Alliance. As will be seen, LGB Alliance holds its own set of views. It takes a combative stance on transgender issues (on which it principally focuses) and is in practice (and was intended to be) a vehicle for social media activity, publications and lobbying of government in this area.

    2.2. This appeal is not about whether LGB Alliance's purposes are lawful. If the Tribunal directs LGB Alliance's removal from the register, LGB Alliance will be in the same position as countless campaigning bodies in the UK that are not registered as charities, and will enjoy the same rights and freedoms as those bodies.

    2.3. It is no part of Mermaids' case that charities cannot be properly constituted to tackle the problems facing lesbian, gay and bisexual people without a specific focus on transgender issues. Of course they can; many such charities appear on the register. On the facts, however, LGB Alliance is not actually tackling problems facing lesbian, gay and bisexual people, but rather is seeking to prevent the resolution of problems facing transgender persons (which can be characterised as an 'anti-trans' focus).

    2.4. The Tribunal is not asked (or required under s.319(4)) to find fault with the Commission. Mermaids recognises that it was doing its best in a difficult case, and acting on more limited information than is now available to the Tribunal.

    2.5. The Tribunal is not asked to find that LGB Alliance sought to mislead the Commission when drawing up its constitution and seeking registration. The question is simply whether, on full consideration of the facts, LGB Alliance meets the legal tests for charitable status.

3. Mermaids' factual case appears from the Grounds of Appeal and its witness statements. Non-controversial matters will be the subject of an Agreed Chronology, and other matters will be explored in the course of the hearing. Accordingly, and to avoid repetition, this skeleton does not recite the facts in detail.

B. Preliminary matters

(i) Note on language

4. Many issues in the case relate to transgender rights, and there are fundamental differences between the parties as to how to discuss and frame such issues. For example, Mermaids exhibits a glossary at **[2/1008]** whereas LGB Alliance sets out its preferred terminology at WS of Beverley Jackson para 3 **[1/163]**.

5. Mermaids' case is that much of LGB Alliance's language serves to obscure its fundamentally anti-trans focus. It contends that terms such as *"same-sex attraction"* and *"sex-based rights"* are effectively euphemisms for LGB Alliance's negative stance on trans issues, as set out in more detail in the WS of Paul Roberts at paras 27-30 **[1/106ff]**. A more specific example is that LGB Alliance uses *"self-diagnosis of gender dysphoria"* to include diagnosis of gender dysphoria by medical professionals using criteria that depend on a truthful account being given by the patient (see para 108 of Beverley Jackson's WS **[1/196]**). That is not *"self-diagnosis"* on any view (a diagnosis of depression, deafness or toothache is equally dependent on the patient's account and is not labelled *"self-diagnosis"*).

6. Such matters will need to be explored on the evidence, but a marker should be laid down that the language used by LGB Alliance is at times loaded (when understood in the context of its campaigning agenda).

7. During the hearing the Tribunal will wish to be sensitive to the nuances of language. For an example of a mutually respectful approach taken by a tribunal in a related sphere, see the introductory remarks of the Employment Appeal Tribunal (**"EAT"**) in *Forstater v CGD Europe* [2022] I.C.R. 1 at [1]-[4] (a decision cited by LGB Alliance and therefore, it is to be hoped, unobjectionable in this regard). The Tribunal may also wish to review Chapter 12 of the Equal Treatment Bench Book, *"Trans People"* (itself cited in the opening remarks in *Forstater*).

(ii) Identity of Second Respondent

8. The Tribunal has directed that it will determine, as a preliminary issue, whether the Second Respondent should remain 'the trustees of LGB Alliance' or instead be changed to 'LGB Alliance'. See para 14 of the directions at **[1/30]**. Pending resolution of that issue, this skeleton simply refers where appropriate to "**R2**" to mean the person(s) represented by Doyle Clayton.

9. The background to this is:

    9.1. On 6 August 2021 Doyle Clayton lodged an application to intervene on behalf of the *"trustees of LGB Alliance"* **[1/70]**. The application referred interchangeably to LGB Alliance and its individual trustees as 'the Applicant' (see e.g. para 13 at **[1/72]**).

9.2. There is no office of 'trustee' in LGB Alliance's articles of association, and no clarity has been given as to the criteria by reference to which a person is named as a 'trustee'. The Tribunal will be aware that 'charity trustee' has a specific meaning under s.177 of the 2011 Act. In the case of a charitable company it would normally mean the directors, but LGB Alliance has previously included among its 'trustees' various individuals who are not directors (see Further Reply at para 3.2 **[1/87]**).

9.3. On 23 September 2021 the Tribunal added *"the trustees of LGB Alliance"* as a fully-fledged respondent, on the basis that it was apparent from correspondence that LGB Alliance wished to make representations beyond the usual role of an intervener **[1/8]**.

9.4. There remained significant confusion as to the identity of the persons claiming to be parties: Further Reply para 3 **[1/86]**. Mermaids sought to obtain clarity in correspondence but was unable to do so. Mermaids understands that, since 6 August 2021, the make-up of LGB Alliance's board has changed on occasion, although no applications have been made to substitute new respondents.

10. Mermaids is neutral on whether LGB Alliance or its individual directors and/or other officers should be respondents provided that all parties are identified with precision. Mermaids (and the Tribunal) are entitled to have clarity about the parties to these proceedings and the client(s) of Doyle Clayton. There are understandable reasons for this including (i) LGB Alliance's separate legal personality and the possibility that its interests may diverge from those of its directors/trustees; (ii) the need to know who holds appeal rights; and (iii) the potential costs issues that may arise (including who bears liability for R2's own costs; and the parties to any costs orders if they are sought under r.10(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (**"GRC Rules"**).[1]

(iii) Evidence

11. The Tribunal will hear from six witnesses and notices of cross-examination have been served in respect of each of them:

11.1. **John Nicolson MP [1/149].** Member of Parliament for Ochil and South Perthshire and Deputy Chair of the All-Party Parliamentary Group on Global LGBT+ Rights. His evidence focuses on LGB Alliance's political campaigning.

11.2. **Dr Belinda Bell [1/123].** Chair of trustees of Mermaids. Her evidence focuses on LGB Alliance's approach towards (and impact on) trans people. She also addresses the facts

[1] Doyle Clayton has threatened to seek such orders under r.10(1)(b), e.g. by email dated 21 October 2021. Clarity will be needed on the persons seeking their costs if this is pursued. The same point applies if costs orders are sought against R2.

relevant to Mermaids' standing, including why it has felt the need to bring this appeal and the effects that the Decision has had on it.

11.3. **Paul Roberts OBE [1/100].** CEO of LGBT Consortium, an umbrella body for LGBT groups in the UK. His evidence focuses on LGB Alliance's approach towards (and impact on) lesbian, gay and bisexual people.

11.4. **Beverley Jackson [1/162].** Co-founder and trustee of LGB Alliance. She addresses LGB Alliance's philosophy, history, objectives and activities in a range of fields.

11.5. **Kate Harris [1/216].** Co-founder and trustee of LGB Alliance. Her evidence largely focuses on giving a more detailed account of LGB Alliance's history.

11.6. **Eileen Gallagher OBE [1/234].** Chair of trustees of LGB Alliance, having joined in May 2021. Her evidence focuses on LGB Alliance's current activities.

12. The Tribunal will note the significant length of the hearing and the large volume of documentary evidence before it, totalling over 4,000 pages or half a gigabyte in electronic form.

13. This is regrettably the result of the direction set by R2 and its representatives. They sought to join the appeal without prior warning in correspondence (as noted at **[1/91]** paras 1-2). They immediately generated a satellite dispute over whether standing should be heard as a preliminary issue (contrary to directions already agreed between Mermaids and the Commission) **[1/14]** and failed to cooperate on matters such as the names of the trustees (e.g. **[1/87]** para 3.2 & **[1/91]** fn.2). In general, they made clear from the tone of the submissions and correspondence that they intended to take an obstructive approach to the appeal.

14. To give an idea of what has generated the volume of material in Bundle 2:

14.1. The first c.100 pages were lodged with Mermaids' Notice of Appeal. They include the Commission Decision and LGB Alliance's articles of association.

14.2. The next c.750 pages are largely taken up by the Commission's secondary disclosure under r.29 of GRC Rules. No objection is made to this (although it includes some repetitive materials which do not need to be read individually).

14.3. 490 pages (pp.872-1362) are taken up by Mermaids' witnesses' exhibits.

14.4. The remaining 2,545 pages (pp.1363-3907, i.e. two-thirds of the bundle) are taken up by material exhibited to R2's witness statements (especially Exhibit BJ which runs to nearly 2,000 pages). Much of this material is peripheral or duplicative. To take some scattered examples, this includes: (i) ten blank pages in a row (pp.1557-1566); (ii) three judgments which properly belong in an authorities bundle (pp.1567-1627; pp.1818-1844; pp.2221-2258); (iii) the 112-page interim Cass Report into NHS gender identity services, which

appears twice in its entirety (pp.1867-1978 and pp.3752-3862); (iv) a 114-page set of medical guidelines on transgender health (pp.2377-2496); (v) an entire volume of an academic journal running to 351 pages (pp.2697-3049) from which only a 1-page article is relied on (at p.2835, itself duplicated at p.3050);[2] and (vi) a 217-page report by an employment barrister relating to cancellation of a criminology seminar at the University of Essex (pp.3421-3531).

15. Most of these 2,545 pages make no mention whatsoever of LGB Alliance, or indeed LGB rights. Their inclusion serves to strengthen the impression that LGB Alliance is near-exclusively focused on transgender issues. It is suggested that R2/LGB Alliance have decided to treat this appeal as another front in a wider political and communications campaign, and a forum to seek to determine questions reaching well beyond its charitable status.

(iv) Standing

16. Mermaids' standing is considered towards the end of this skeleton. This is not because it is unimportant, but because it is a mixed question of fact and law that must be understood against the wider factual landscape (as the Tribunal has already ruled: see (iii) at **[1/17]**.)

(v) Equality and discrimination law

17. The statements of case and evidence touch on certain issues of equality and discrimination law including:

    17.1. Is LGB Alliance's campaigning activity (and its definition of *"same-sex attraction"*) underpinned by and/or seeking to enforce the Equality Act 2010? (R2's Annex A para 13 **[1/80]**; Jackson WS para 32 **[1/172]**).

    17.2. Conversely, is LGB Alliance operating on a fundamental misreading of the Equality Act 2010, e.g. by misreading s.7 of the Equality Act 2010,[3] and/or by neglecting the position of trans people who are also LGB? (Further Reply to R2 para 2; 8-9 **[1/87]**); Roberts WS para 29(a); (d) **[1/107ff]**; Nicolson WS para 13(b) & para 19 **[1/153ff]**).

    17.3. Is the pursuit of LGB Alliance's objects contrary to any *"public policy recognised in equalities legislation"* (e.g. the policy reflected in s.7 of the Equality Act 2010)? (Notice of Appeal para 11.3, last sentence [**1/42]**).

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[2] For R2's reliance on this article, see WS of Beverley Jackson at para 154(a) **[1/208]**.

[3] S.7 has the effect that people with the protected characteristic of gender reassignment should be treated on an equal basis except where unequal treatment is a proportionate means of achieving a legitimate aim (including in the provision of single-sex services, where providers should usually "*treat transsexual people according to the gender role in which they present"* - see §13.57 of the EHRC's Services, Public functions and Associations: Statutory Code of Practice)

18. None of these are likely to be determinative of the appeal. Mermaids does not therefore propose to develop what has already been said in the passages cited above, unless (a) the Tribunal wishes to hear submissions on the topic, or (b) it becomes necessary to reply to points made by other parties. In taking this approach, Mermaids is mindful of the limited hearing time and the Tribunal's recent comments in *Afariogun v Charity Commission* (CA/2021/0001/P) at [47]:

> *"… the submissions of the parties as to the public benefit requirement were heavily influenced by a dispute between them concerning the Equality Act 2010. I have been asked to decide that issue, but this Tribunal is not the relevant forum to rule authoritatively on such matters. I note the disagreement between the parties on this point, and I agree with the Respondent that a charity which would be operating in breach of the law would not be for the public benefit. However, I am unable to determine whether the proposed CIO would be breaking the law as the Respondent suggests or complying with it as the Appellant suggests. In any event, I do not need to decide this point in order to dispose of this appeal…"*

19. In this regard a brief word should be said on the EAT's decision in *Forstater* (on which LGB Alliance relies). In that case, the EAT held that the claimant's views were capable of enjoying a degree of qualified protection under the Equality Act 2010. As explained at Further Reply para 12 **[1/89]**, the EAT was considering a very undemanding test, namely whether the relevant beliefs were *"akin to Nazism or totalitarianism"* and therefore intolerable in a democratic society (and accordingly not protected against discrimination). In areas of controversy, equality law errs in favour of recognising all competing views. In charity law, that position is reversed. There is a positive requirement to show public benefit, and (as explained below) that requirement cannot be met by relying on purposes that are fundamentally contested. In any event *Forstater* depended on specific findings of fact about the claimant's philosophical beliefs (see [14] of the EAT decision). LGB Alliance's beliefs must be determined on the evidence before the Tribunal, and it should not be assumed they are identical.

C. Relevant legislation

(i) Jurisdiction of the Tribunal

20. The appeal is brought under s.319 of the 2011 Act, which provides:

> *"(1) Except in the case of a reviewable matter (see section 322) an appeal may be brought to the Tribunal against any decision, direction or order mentioned in column 1 of Schedule 6.*
>
> *"(2) Such an appeal may be brought by—*
>
> *(a) the Attorney General, or*
>
> *(b) any person specified in the corresponding entry in column 2 of Schedule 6.*
>
> *"(3) The Commission is to be the respondent to such an appeal.*
>
> *"(4) In determining such an appeal the Tribunal—*
>
> *(a) must consider afresh the decision, direction or order appealed against, and*
>
> *(b) may take into account evidence which was not available to the Commission.*
>
> *"(5) The Tribunal may—*
>
> *(a) dismiss the appeal, or*

(b) if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of Schedule 6."

21. Schedule 6 includes, so far as material:

1 Decision, direction or order	***2 Appellants/applicants (see sections 319(2)(b) and 321(2)(b))***	***3 Tribunal powers if appeal or application allowed***
…	*…*	*…*
Decision of the Commission under section 30 or 34— *(a) to enter or not to enter an institution in the register of charities, or* *(b) to remove or not to remove an institution from the register.*	*The persons are—* *(a) the persons who are or claim to be the charity trustees of the institution,* *(b) (if a body corporate) the institution itself, and* *(c) any other person who is or may be affected by the decision.*	*Power to quash the decision and (if appropriate)—* *(a) remit the matter to the Commission;* *(b) direct the Commission to rectify the register.*
…	*…*	*…*

22. Under s.30(1) of the 2011 Act, *"[e]very charity must be registered in the register"* unless certain exceptions apply which are not relevant here. The Commission is therefore required to decide whether or not an institution is a charity. If so, it *"must"* register it, and there is no discretion.

23. The Tribunal can determine the question of charitable status afresh, and may have regard to material that was not before the Commission. It must, however, apply the same test for charitable status, which is a factual and legal exercise rather than a discretionary one.

24. In charitable status appeals, *prima facie* it is for the body claiming charitable status to prove it has such status, although the outcome of the appeal is highly unlikely to turn on who bears the burden of proof. In *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 (UT) (***"ISC"***) at [110] the Upper Tribunal stated:

> *"It is for the alleged charity to establish its status. The judge or tribunal will assess all the circumstances and decide whether or not the purposes in question are for the public benefit in both senses. It is highly unlikely that a judge or tribunal will ever have to decide an issue on the burden of proof. It is certainly not something which we need to do in the present proceedings in relation to public benefit in the first sense."*

(ii) The test for charitable status

25. The necessary elements of charitable status are set out in ss.1-4 of the 2011 Act:

> ***1 Meaning of "charity"***
>
> *(1) For the purposes of the law of England and Wales, "charity" means an institution which—*
>
> *(a) is established for charitable purposes only, and*
>
> *(b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. […]*
>
> ***2 Meaning of "charitable purpose"***
>
> *(1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—*
>
> *(a) falls within section 3(1), and*
>
> *(b) is for the public benefit (see section 4). […]*

3 Descriptions of purposes

(1) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

(a) the prevention or relief of poverty;

(b) the advancement of education;

(c) the advancement of religion;

(d) the advancement of health or the saving of lives;

(e) the advancement of citizenship or community development;

(f) the advancement of the arts, culture, heritage or science;

(g) the advancement of amateur sport;

(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

(i) the advancement of environmental protection or improvement;

(j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;

(k) the advancement of animal welfare;

(l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;

(m) any other purposes—

(i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,

(ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or

(iii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

[…]

(4) In subsection (1)(m)(i), "the old law" means the law relating to charities in England and Wales as in force immediately before 1 April 2008.

4 The public benefit requirement

(1) In this Act "the public benefit requirement" means the requirement in section 2(1)(b) that a purpose falling within section 3(1) must be for the public benefit if it is to be a charitable purpose.

(2) In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit.

(3) In this Chapter any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

(4) Subsection (3) is subject to subsection (2).

26. In *ISC* the Upper Tribunal explained at [44] that public benefit has two aspects. First, *"the nature of the purpose itself must be such as to be a benefit to the community."* This is 'public benefit in the first sense', also known as the 'benefit aspect' (a term used in the Commission's publications). Second, *"those who may benefit from the carrying out of the purpose must be sufficiently*

numerous, and identified in such manner as, to constitute what is described in the authorities as 'a section of the public'." This is 'public benefit in the second sense', or the 'public aspect'.

27. At [45] of *ISC* the Upper Tribunal emphasised that what satisfies the public benefit requirement may differ markedly between types of allegedly charitable purposes. Caution must be exercised in applying authorities from one area of charity to another. For instance, the approach towards public benefit in the context of religious charities will not necessarily apply to political or human rights charities.[4]

28. The correct approach for the Tribunal to follow is helpfully set out at [82] of *ISC*. In summary:

    28.1. It should start by identifying the purposes for which the institution has been established (within the meaning of s.1(1)(a) of the 2011 Act). In *ISC*, these were described as its *"particular purposes"*: [82]. The same expression will be used in this skeleton argument.

    28.2. Having identified the *"particular purposes"*, the Tribunal must assess whether each of them falls within the categories in s.3(1) and is for the public benefit within the meaning of s.4(1).

29. This skeleton argument follows that structure, dealing first with the law on 'particular purposes' (paras 33-39 below), then with the law on public benefit in the context of human rights and educational/research charities (paras 40-61 below), and finally applying the principles to the facts (paras 62-77 below).

30. The Commission's position (with which LGB Alliance agrees) is that an institution's purposes must be determined exclusively within the four corners of the charity's governing document unless that document is 'ambiguous' or a 'sham'. A sham is, of course, a high legal bar to surmount.

31. Mermaids contends that this approach is inconsistent with authority, and indeed with the approach taken by the Commission in previous cases before this Tribunal.[5] It cannot be right that *"established for charitable purposes"* is analysed by looking at the governing document in a vacuum. If that were the case, it would effectively become a matter of 'self-certification' rather than objective scrutiny. As noted by Scott J in *Attorney General v Ross* [1986] 1 WLR 252 at 263, the courts and tribunals are mindful that:

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[4] See *Neville Estates Ltd v Madden* [1962] Ch 832, 853 (Cross J): *"As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none… it is dangerous to reason by analogy from one head of charity to another."* At 854: *"the law of charity has been built up not logically but empirically, and there is a political background peculiar to religious trusts which may well have influenced the development of the law with regard to them."*

[5] E.g. in *Yeats v Charity Commission* (discussed below).

> *"The skill of Chancery draftsmen is well able to produce a constitution of charitable flavour intended to allow the pursuit of aims of a non-charitable or dubiously charitable flavour."*[6]

32. Extrinsic evidence is, therefore, relevant at both of the overlapping stages of the Tribunal's analysis—in identifying the institution's purposes (see paras 33-39 below) and in deciding whether those purposes are for the public benefit (see para 42 below).

D. Identifying purposes – relevant principles

33. There is no dispute that the starting-point for identifying an institution's purposes is its written constitution. This was emphasised in *ISC* at [187]-[188]. However, the authorities establish that extrinsic evidence is important both (1) as a matter of ordinary construction; and (2) when identifying the institution's purposes as a matter of charity law. These two exercises overlap.

34. As to construction, the modern approach is that the language in all legal instruments conveys meaning according to its context. While older authorities often imposed a threshold of 'ambiguity' before resorting to background material, that is now recognised to be wrong: *R (Westminster City Council) v National Asylum Support Service* [2002] 1 W.L.R. 2956 (HL) at [5]. In this case, the Tribunal is interpreting the articles of a limited company. In that context, it may legitimately have regard to material that would have been reasonably available to a reader at the time of incorporation: *Cosmetic Warriors Ltd v Gerrie* [2015] EWHC 3718 (Ch); [7]; [15] & [27] (approved on appeal at [2017] 2 BCLC 456, [23]).

35. The absence of an 'ambiguity' threshold applies to charity constitutions as it does to any other document: *Trustees of the Celestial Church of Christ, Edward Street Parish v Lawson* [2017] EWHC 97 (Ch); [2017] PTSR 790 at [20].

36. A useful example of such an approach is *Southwood v Attorney General* (unrep., Court of Appeal, 28 June 2000) (***"Southwood* (CA)"**). In that case, the trust deed was *"redolent with the flavour of charity"*; it provided for the *"advancement of the education of the public in the subject of militarism and disarmament and related fields"*: [3]-[4]. Nevertheless, it fell to be construed against its context *"like any other written instrument"*: [7]. The Court of Appeal therefore upheld the decision of the first-instance judge (Carnwath J) that, having regard to the background material, the term *"militarism"* was meant to connote *"the current policies of the Western governments"* and that the institution's particular purpose was *"to challenge those policies"*: [23].

37. In suitable cases it may also be relevant to consider the 'private dictionary' principle, whereby terms in a written document may have a special meaning within a particular community. An example is *Shore v Wilson* (1842) 8 E.R. 45 in which a trust was established to support *"godly*

[6] In saying this, Scott J was not suggesting that such drafters are engaged in a dishonest exercise. Rather, they have sought to achieve a particular legal effect, but have not succeeded in doing so (cf. the drafter of a tax scheme which turns out not to comply with legislation, or the drafter of a contract which is found to be void).

preachers of Christ's holy Gospel". The court admitted evidence to establish that somebody holding the religious beliefs of the testator would have understood *"godly preachers"* as having a specific meaning. A similar approach may be appropriate when handling expressions such as 'lesbian, gay and bisexual' in LGB Alliance's articles (see paras 64.3 and 69 below).

38. Second, pinpointing the purposes of a putative charity is not just an exercise in construction. It often requires the use of background material, especially where an institution has adopted objects that are ostensibly charitable, but are imprecise or broadly worded. Examples include:

    38.1. *McGovern v Attorney-General* [1978] 1 Ch 321: Slade J had extensive regard to policy documents published by Amnesty International (a related unincorporated organisation) when determining the purposes of the Amnesty International Trust.

    38.2. *Attorney-General v Ross* [1986] 1 W.L.R. 252: a students' union had a variety of stated objects. Scott J had regard to the wider factual background to identify which of these objects were the primary or predominant ones, and which were ancillary only.

    38.3. *Yeats v Charity Commission* (FtT, CA/2017/0007, decision of 19 March 2018): the institution's objects included *"mental and moral improvement of human rights through cultivation of opinion and sentiment… Advancement to human rights and maintained standard of human rights for children…"*: [3]. The Tribunal was prepared (on the Commission's invitation) to consider the wider factual matrix. In light of that, it concluded that the founder's *"primary motivation"* was *"to address his concern about a nationwide child trafficking operation in which the government is complicit"*: [28(ii)]. Despite the foundation's *"ostensibly charitable purposes"*, its *"main purpose"* was therefore not charitable: [34].

    38.4. In appropriate circumstances, the courts have considered the institution's post-incorporation activities (i.e. activities post-dating the governing document). This is on condition that (a) those activities are 'intra vires' i.e. they fall within the stated objects, and (b) they have probative value in determining the main purpose of the organisation. The principles were explained by Scott J in *Ross* at 263F-H and 264C-G and have been applied since, e.g. in the first-instance decision in *Southwood v Attorney General* (Carnwath J, unrep., 9 October 1998) (***"Southwood* (HC)"**).

39. Accordingly, contrary to what is assumed in the Decision at paras 5-6 and 40-42 **[2/5; 10]**, an institution's purposes do not solely depend on the governing document; it will be seen that the courts adopt a variety of justifications in these cases for looking beyond it. In *McGovern* it was

on the basis of a readiness to hold that a broadly worded objects clause was *"ambiguous"*.[7] In *Ross* extrinsic evidence was used to pick out the *"predominant"* purposes from a long list of assorted objects.[8] In *Yeats* it was similarly to identify the *"main purpose"* from broad wording. However, in none of these cases could the institutions' purposes be determined by their governing documents alone.

E. Public benefit – relevant principles

(i) Overview

40. Rather than fixing a definition of public benefit, charity law provides examples of purposes in particular contexts which have been held to be charitable: *ISC*, [80]. Public benefit should be decided on a case-by-case basis paying regard to the decided cases: *ISC*, [81]. As mentioned at para 27 above, the assessment of public benefit is likely to differ between different areas of charitable activity.

41. It is well established that extrinsic evidence is important at this stage. The court must form its own view of whether a particular purpose will operate for the public benefit. It will reach such a view on the evidence: e.g. *McGovern* at 333H; and *ISC* at [68].

42. Public benefit is not an abstract question; it depends on how the institution proposes to implement its objects in practice. The Upper Tribunal in *ISC* described this as an assessment in the *"particular context of the institution concerned"*: [84], especially [84(7)-(8)]. This is why the Commission's standard registration paperwork requires applicants to give details on how they propose to advance their objects in actuality: see e.g. **[2/131-133]** (standard questions for educational charities) and **[2/134-139]** (standard questions for all charities). See also *Southwood* (CA) at [5] (pursuit of the objects *"in the manner intended"*).

(ii) Political purposes

43. The 'political purposes' rule is that a political purpose does not meet the public benefit requirement unless it is purely ancillary to other recognised charitable purposes.

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[7] See Slade J in *McGovern* at 348H. The relevant clause was: *"Procuring the abolition of torture or inhuman or degrading treatment or punishment"*.

[8] See Scott J in *Ross* at 260C (*"If the right question is whether the union was established for the predominant purpose of furthering the educational purposes of the polytechnic an answer cannot be found by concentrating on any one individual sub-paragraph of clause 3. For the purpose of answering that question the union's constitution must, in my judgment, be read as a whole and considered in the context of its relevant factual background."*); 263E (*"The question whether under its constitution the union is or is not charitable must, in my view, be answered by reference to the content of its constitution, construed and assessed in the context of the factual background to its formation. This background may serve to elucidate the purpose for which the union was formed"*); and 264H (*"extrinsic evidence as to the real or main purpose for which the organisation was formed would, in my view, be admissible"*).

44. Many charities do engage in political activity. This is legitimate provided it is no more than ancillary, i.e. if it is a means of advancing a purpose which is for the public benefit. For instance, a charity which is established to support homeless people might properly seek to do so, in part, by influencing housing policy. By contrast, if an institution is set up primarily to change housing policy, it will not be a charity.

45. There are sound practical and constitutional reasons for this restriction. The practical reason is that the court has no means of deciding whether a political goal will benefit the community. As Lord Parker said in *Bowman v Secular Society Ltd* [1917] AC 406, 442 (cited in *McGovern* at 334D):

> *"a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore, cannot say that a gift to secure the change is a charitable gift."*

46. The constitutional reason for the 'political purposes' rule is that deciding such questions encroaches on the functions of the legislature, whilst also risking undermining the impartiality of the judiciary: *McGovern*, 336H-337D. The more controversial the issues, the greater these risks become: *McGovern*, 337F-G.

47. Slade J explained in *McGovern* at 340D that the rule is not confined to matters of party politics, but extends to:

> *"... trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country. This categorisation is not intended to be an exhaustive one..."*

48. While not listed by Slade J, the rule also extends to institutions whose main purposes involve preserving the political status quo, i.e. opposing legislative changes or maintaining an existing line of government policy. See e.g. *Re Hopkinson (decd)* [1949] 1 All ER 346 at 350 (Vaisey J).

49. As noted by Lord Parker in *Bowman* (above), an organisation may fall foul of the political purposes rule whilst nevertheless being entirely lawful. Like the Secular Society in 1917 and Amnesty International in 1981, LGB Alliance will be free to pursue its goals by any lawful means if this appeal is allowed.

(iii) Human rights and anti-discrimination

50. If LGB Alliance's main or particular purposes include the advancement of human rights and promotion of equality and diversity, then there is no doubt that such purposes fall within s.3(1)(h) of the 2011 Act. But this is only the first step in the analysis, as it does not lead to any presumption of public benefit (see s.4(2)).

51. Some human rights institutions are established for the public benefit, but others are not. Organisations in this field claiming to be charities fall to be treated with some caution for two reasons:

    51.1. They run an obvious risk of falling foul of the 'political purposes' rule as described above.

    51.2. The recognition of such institutions as charities is recent in historical terms. In the pre-2006 case-law, they fell within the residual category of trusts for *"other purposes beneficial to the community"*, also known as the 'fourth head of charity' from *Pemsel*'s case (see *ISC* at [56]). As a result, they typically require proof of objective and tangible benefits. In *McGovern*, advancing human rights was recognised as a potentially charitable object only insofar as it operated for the relief of suffering and distress: 333.

    51.3. To the extent the benefit from advancing human rights is intangible, this gives rise to further difficulty. Such benefits will only be recognised if they are supported by a broad social consensus (see para 56 below).[9] This ensures, in broad terms, that charities are not established for causes that are inherently controversial.[10]

(iv) Education

52. As with human rights, the courts recognise that education (and research) purposes can be used as a means of introducing political purposes by the back-door.

53. For instance, in *Re Hopkinson (decd)* [1949] 1 All ER 346 a trust was established to advance education by reference to the ideals of the Labour Party. Vaisey J held that this fell foul of the 'political purposes' rule. At 350 he commented: *"Political propaganda masquerading—I do not use this word in any sinister sense—as education is not education within the Statute of Elizabeth… In other words, it is not charitable."*

54. The key distinction is between genuine education of the public (which requires providing balanced information so that the public can make up their own minds) and dissemination of materials that are skewed towards a controversial point of view. In *Re Bushnell (decd)* [1975] 1 WLR 1596, the objects included *"the advancement and propagation of the teaching of socialised medicine"*. Goulding J concluded that this was not charitable because (1605F):

    > *"The testator never for a moment, as I read his language, desired to educate the public so that they could choose for themselves, starting with neutral information, to support or oppose what he called*

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[9] The placing of the *Pemsel* categories on a statutory footing in s.3(1) does not affect this. As is clear from s.4(2), public benefit must be individually proved even if the relevant purpose is expressly listed in s.3(1). See further *ISC* [64]; [72]; [104]-[105].

[10] It should be noted that this only applies to the 'fourth head' of charity (and possibly also the 'second head', i.e. education, based on the case-law discussed below). So the analogy to religious charities at paras 35(a) and 36 of the Second Respondent's Response **[1/83]** is not apt. LGB Alliance is not a religion; it deals with human rights and therefore falls under the 'fourth head'.

"socialised medicine". I think he was trying to promote his own theory of education, if you will by propaganda, but I do not attach any importance to that word."

55. Similarly, in *Southwood* (CA) the court distinguished at [29] between a number of different possible educational trusts:

    55.1. A trust which *"begins from the premise that peace is generally preferable to war"* is for the public benefit, as it is *"difficult to believe that any court would refuse to accept, as a general proposition, that it promotes public benefit for the public to be educated to an acceptance of that premise"*. But a trust which begins from *"the premise that peace at any price is always preferable to the war"* is not for the public benefit, as that proposition *"plainly is controversial"*.

    55.2. A trust *"to educate the public to an acceptance that peace is best secured by 'demilitarisation'"* is not for the public benefit. Nor is a trust *"to educate the public to an acceptance that war is best avoided by collective security through the membership of a military alliance – say, NATO"*. There are differing views on how best to secure peace; the court has *"no material on which to make that choice"* and *"to attempt to do so would be to usurp the role of government."*

(v) Weighing up benefits and disbenefits

56. In the context of purposes under the 'fourth head' in *Pemsel*'s case (i.e. outside the context of poverty, religion and education) it is normally necessary to show benefits that are tangible and objective. While intangible benefits can be recognised in principle, where they are new, there must be a broad social consensus that they are a 'good thing'. See Lord Wright in *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL) (***"Vivisection"***) at 49:

> *"I think that the whole tendency of the concept of charity in a legal sense under the fourth head is towards tangible and objective benefits and at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class…"*

57. It was held in the *Vivisection* case that the courts may weigh up the benefits and detriments caused by an institution's particular purposes. Further guidance on the correct approach in this regard was given by the Upper Tribunal in *ISC* at [94]-[110], and in particular [106]:

> *"The court, we conclude, has to balance the benefit and disadvantage in all cases where detriment is alleged and is supported by evidence. But great weight is to be given to a purpose which would, ordinarily, be charitable; before the alleged disadvantages can be given much weight, they need to be clearly demonstrated. There is, we think, a considerable burden on those seeking to change the status quo."*

(vi) Public benefit in the second sense

58. Having considered the first sense, the Tribunal must also consider whether the institution benefits the public or a sufficient section of it. In *ISC* at [145] the Upper Tribunal noted that *"what*

constitutes a sufficient section of the public cannot be considered separately from the particular nature of the charitable purpose".

59. In its decision on consequential matters in *ISC* [2011] 12 WLUK 67 at [9] the Upper Tribunal said:

> *"... it is ultimately a matter for the tribunal and the court to decide whether the class of potential beneficiaries identified in an institution's objects is a sufficient section of the public. This requires an overall assessment and is not, on the authorities, a test of reasonableness, although reasonableness may come into the picture. For instance, a wholly capricious restriction – nothing to do with an ability to pay - unrelated to the objects of the charity might not be valid even if the restricted class was numerically very large... what is a sufficient section of the public varies with the nature of the trust and... the class of potential beneficiaries and the particular nature of the trust are interdependent."*

60. In short, there must be a rational connection between the institution's purposes and the class of potential beneficiaries. This is likely to depend on the correct identification of the institution's purposes, and the benefit (if any) generated by the pursuit of those purposes.

61. Mermaids accepts that a human rights or anti-discrimination institution is likely to meet the second sense of public benefit if it is established to meet the specific unmet needs of a minority group. On the other hand, it does not meet the second sense if it confines itself to a minority group (or a sub-set of a minority group) just because they agree with its worldview. The restriction bears no rational relationship to any benefits conferred.

F. Application of the principles to LGB Alliance

(i) Identifying LGB Alliance's purposes

62. In identifying LGB Alliance's purposes, the Tribunal can legitimately take into account the background to LGB Alliance's formation as well as its post-incorporation activities for the reasons given at 33-39 above. Indeed, it would be artificial not to do so.

63. A useful cross-check for this is the point made by Kate Harris at para 64 of her WS that the objects clauses of LGB Alliance and Stonewall are framed in similar terms **[1/229]**. A table of comparison appears at **[2/3622]**. Yet, on Ms Harris' own evidence, LGB Alliance was set up out partly of a desire to resist and oppose Stonewall. It would be unreal to claim that these two institutions were established for the same purposes.

64. As will be explored in evidence and developed as appropriate in closing submissions:

    64.1. One of the main motives for LGB Alliance's foundation was its founders' intense disagreement with existing LGBT organisations, and the founders' desire to undermine them and their work in support of trans people.

    64.2. The centre of gravity of LGB Alliance's activities has always been essentially 'anti-trans', and not 'pro-LGB'. Since its foundation, it has carried out eight campaigns and

each has focused on trans issues. To that end, it has allied with a range of gender-critical organisations that have nothing to do with supporting those who are LGB.

64.3. LGB Alliance gives specific meanings to terms such as 'sexual orientation', 'sex-based rights' and 'lesbian, gay and bisexual people' which are used to signal a particular position on trans rights in a way that is not obvious to the casual reader. See Paul Roberts' WS at paras 27-30 **[1/106ff]**.

64.4. One of LGB Alliance's core beliefs is that transgender persons (and organisations advocating for them) pose a threat to society and are engaged in a campaign that endangers women, children, lesbians and gay people. The alleged tools in this campaign include (among other things) (a) self-ID laws, (b) trans people using public facilities according to their identified gender, (c) medical support provided to trans children, and (d) education on gender identity in schools. All these, according to LGB Alliance, are part of a deliberate concerted effort to erase LGB people by means of *"gender ideology"*. Paul Roberts describes such claims as *"conspiracy theories"* (Roberts WS, para 34 **[1/113]**). Many of the factual claims are demonstrably false. To take one example, as Belinda Bell explains at paras 29-31 **[1/131]**, Mermaids does not push transition on gay and lesbian children (or any children). The suggestion that it does so is, in her view, *"absurd and offensive"*.

65. With these principles in mind, Mermaids invites the Tribunal to consider the text of article 2 of LGB Alliance's articles of association **[2/26]**. It contains three main purposes, set out in articles 2.1, 2.2 and 2.3. The first two are divided into various sub-headings.

66. The whole of art.2 is couched in terms that are redolent of recognised concepts in charity law (as in the cases discussed at para 38 above). Much of the wording is directly lifted from s.3(1) of the 2011 Act. The length of art.2 suggests that the Tribunal ought (as in *Ross* and *Yeats*, discussed above) to stand back and identify the overarching 'main' purpose, or purposes, for which LGB Alliance was formed.

67. Despite its length, the striking thing about art.2 is what is missing from it. It makes no mention of the words *"gender-critical"*, *"biological sex"* or *"same-sex attraction"* even though (on LGB Alliance's own case) those concepts are at the core of its philosophy. The fact that these concepts have not been included strongly suggests that one needs to look beyond the four corners of this document to understand what LGB Alliance's purposes actually are.

68. The most useful secondary source is probably the Mission Statement published on LGB Alliance's website shortly after its foundation, which may be found at **[2/1021]**.[11] It indicates that the primary reason for LGB Alliance's existence is to counter a perceived *"threat [to LGB people] from concerted attempts to introduce confusion between biological sex and the notion of gender"*. It adds: *"we believe these ideologies are confusing and dangerous to children"*. A variety of similar material will be explored at the hearing.

69. The language of art.2 must be understood against that highly specific worldview. As in *Yeats*, the founders of LGB Alliance hold a genuine belief that they are combatting a veiled global threat to human rights (as they perceive them). Hence, on a proper understanding of art.2 in its context:

    69.1. The references to *"lesbian, gay and bisexual people"* and *"sexual orientation"* should be interpreted as referring exclusively to *"same-sex attraction"* as this is how LGB Alliance employs such terms. (For an analysis of this concept, see Further Reply paras 6-7 **[1/87]** and WS of Paul Roberts para 29(b) **[1/108]**.)[12]

    69.2. *"Discrimination on the grounds of sexual orientation"* (arts. 2.1.1; 2.2) refers to LGB Alliance's unsubstantiated theory (as mentioned at para 64.4 above) that there is an ongoing campaign of discrimination against lesbians and gay people at the hands of 'gender identity groups'. Accordingly, the stated purposes of combatting anti-LGB discrimination actually relate to intended campaigns by LGB Alliance to roll back or prevent advancements in trans rights.

    69.3. *"Equality and diversity in respect of lesbian, gay and bisexual people"* (arts. 2.1.2, 4) relates to LGB Alliance's belief that equality for LGB people is endangered unless trans rights are not expanded and preferably reduced.

    69.4. *"Human rights abuses"* (arts. 2.2.1, 2.2.2, 2.2.3 & 2.2.12) (and other references to *"human rights"*) refer to alleged risks to human rights which are said to be posed by the advancement of trans rights and healthcare for transgender persons. For instance, LGB Alliance wrote to the Welsh Government stating that its LGBTQ+ Action Plan would *"damage sex-based rights for lesbian, gay and bisexual people"* **[2/969]** (see e.g. WS of Beverley Jackson, paras 78; 82; 114-5 **[1/186ff]** and WS of Kate Harris at para 65 **[1/229]**).

[11] **[2/1021]** was archived in February 2020. A slightly earlier variation of the Mission Statement, archived in January 2020, appears at **[2/59]**.

[12] As set out in Grounds of Appeal para 8 **[1/87]**, Mermaids' view is that LGB Alliance's definitions do not track those under the Equality Act 2010. That Act does not contain the expression *"biological sex"* and adopts a broad definition of *"gender reassignment"* at s.7, reflecting a legislative policy of protecting trans people from discrimination regardless of the stage or nature of their transition.

69.5. The references to public education and research (arts. 2.1.2 & 3; 2.2.4 & 5) refer to the provision of information that is designed to persuade readers of LGB Alliance's own point of view. This is admitted by Beverley Jackson at para 41 of her WS **[1/175]**. Examples of such material will be explored at the hearing.

70. Therefore, on the totality of the evidence, the Tribunal will be asked to conclude that LGB Alliance was established for the purposes in para 8 of the Grounds of Appeal **[1/39]**, namely (1) promoting its anti-trans worldview, principally through social media; (2) seeking or opposing changes in the law and/or lobbying government bodies on transgender issues (a goal which has been so dominant within LGB Alliance from the start that it cannot possibly be seen as merely ancillary); and (3) impeding the work of registered charities that work for the benefit of transgender people (which it claims are engaged in eroding LGB people's rights).

(ii) LGB Alliance's public benefit in the first sense

71. Having identified LGB Alliance's particular purposes, the Tribunal should first ask whether any of them are political in the sense described at para 48 above. It is Mermaids' case that LGB Alliance falls at this hurdle:

71.1. LGB Alliance was essentially set up to influence legislation and government policy on trans issues. LGB Alliance's very first action on the day after its inaugural meeting on 22 October 2019 was writing to the Equality and Human Rights Commission to lobby it **[2/57]**. Such activities are plainly not ancillary to some other overarching objective: they are LGB Alliance's main purpose.

71.2. As for claimed educational purposes, there is no real intention to present a balanced set of neutral information. LGB Alliance is established to share propaganda relating to a particular, controversial worldview masquerading as education (see para 53 above) and therefore cannot be for the public benefit. For example, Ms Jackson described one of LGB Alliance's four top priorities as being to *"stop the rollout of Stonewall's 'LGBT-inclusive curriculum' for primary schools"* **[2/64]**; and LGB Alliance's former solicitors told the Commission that its educational purposes were premised on a *"position... that there are only two sexes and gender is a social construct"* **[2/136]**.

72. If (contrary to the above) LGB Alliance's political and educational activity is purely ancillary to broader gender-critical purposes, such purposes equally do not meet the public benefit test. There is no evidence to suggest that such purposes provide tangible benefits to the community. As for alleged intangible benefits, LGB Alliance cannot rely on them because the benefit or otherwise of gender-critical goals is highly controversial. There is certainly no *"common understanding of enlightened opinion"* that they are beneficial.

73. Finally, even if LGB Alliance is somehow able to demonstrate that all its purposes give rise to a recognisable benefit, the Tribunal will need to consider whether they are outweighed by detriments or disbenefits (see paras 56-57 above). It is Mermaids' case that LGB Alliance's chosen approach is fundamentally unpleasant, confrontational and damaging. This is detailed in Mermaids' witness statements and will be explored further at the hearing.

(iii) LGB Alliance's public benefit in the second sense

74. Based on the articles of association, the Commission has identified the class of beneficiaries as either 'all LGB people' or 'the wider public' (Decision paras 18-21 **[2/7]** and First Respondent's Response, Annex A, paras 47-51 **[1/63ff]**). It is accepted that 'all LGB people' would constitute a sufficient section of the public. However, as explained at para 42 above, public benefit is assessed on the evidence in the context of the particular institution. Accordingly:

    74.1. LGB Alliance cannot be said to benefit 'all LGB people'. No evidence has been offered of concrete benefits to LGB people, or indeed of attempts to benefit anyone beyond LGB Alliance's ideologically committed supporters. LGB Alliance claims that *"all the LGBTQ+ groups around the country are essentially now homophobic"*: **[2/912]** at para 3. An institution which makes allegations of this kind about much of the LGB community can hardly claim them as beneficiaries.

    74.2. LGB Alliance similarly does not benefit the whole community. It does not even purport to do so. Its approach is inherently divisive, defined by its opposition to those who support trans rights.

75. In reality LGB Alliance's class of intended beneficiaries is much smaller. It may be characterised as 'those who share LGB Alliance's views', or perhaps 'lesbian, gay and bisexual people who share LGB Alliance's views'. Kate Harris accepts this at para 51 of her WS: *"LGB Alliance seeks to give a voice and to provide services and help to and for those who believe, like I do, that LGB rights are the rights of people who are same-sex attracted and who consider that "same gender attraction" is something different"* **[1/227]**.

76. It is difficult to see how such a class could survive the capriciousness test set out at paras 59-60 above. It is not rationally connected to the benefits that arise out of advancing human rights or eliminating discrimination. A requirement that beneficiaries should subscribe to a particular belief system may be acceptable for a religious charity, but there is no reason why it should be acceptable for a charity operating in the field of human rights and anti-discrimination. The Tribunal may also reach the view that LGB Alliance's narrow definition of terms such as 'gay' and 'bisexual' is likely to exclude potential trans beneficiaries (or beneficiaries who are attracted to trans people) in a manner that is capricious. Such questions will need to be considered in light of the oral evidence.

(iv) Summary

77. Accordingly, LGB Alliance is not established for purposes that are for the public benefit, both because they are not beneficial in manner recognised by charity law, and because they do not serve the community at large or a sufficient section of it. It follows that LGB Alliance is not a charity within the meaning of s.1(1) of the 2011 Act.

G. Standing

(i) Nicholson

78. It is common ground that the leading authority on the phrase *"is or may be affected"* in Schedule 6, column 2 of the 2011 Act is Asplin J's judgment in *Nicholson v Charity Commission* [2016] UKUT 0198 (TCC).

79. *Nicholson* concerned a refusal to deregister several existing charities under s.34 of the 2011 Act. Those facts were quite different from the present case. The charities in *Nicholson* had not been established to target Mr Nicholson personally, to interfere with his daily activities or to seek to deprive him of his finances. There was no evidence of any loss to him caused by the registration. In short, there was no nexus between Mr Nicholson and those charities akin to the one between LGB Alliance and Mermaids (discussed at paras 95-103 below).

80. Mr Nicholson claimed to be an 'affected person' on the grounds that (1) he was an 'addressee' of the decision who had engaged in correspondence with the Commission about the registration application; (2) the issue was of considerable public interest and, in effect, he was acting in a quasi-representative capacity on behalf of others; and (3) although he was not affected financially, the decision affected him *"emotionally and socially"*. See [23] of the decision.

81. Asplin J rejected these arguments and held that Mr Nicholson had no standing. As her decision is relatively concise, it is respectfully submitted that the Tribunal will wish to read it in full.

82. At [17] Asplin J cited *R (International Peace Project 2000) v Charity Commission* [2009] EWHC (Admin) 3446 (another deregistration case under what is now s.34 of the 2011 Act) in which Lord Carlile QC (sitting as a deputy High Court Judge) suggested the following approach:

> *"A person who is or may be affected, in my judgment, means someone who has an interest that is materially greater than, or different from, the interests of an ordinary member of the public. This is a question of fact rather than a question of law."*

83. At [22] Asplin J considered *Colman v Charity Commission* CA/2014/0001 and CA/2014/0002 (a decision of the FtT concerning orders under s.76(3)(d) and (g) of the 2011 Act). In that case Principal Judge McKenna had held that:

    83.1. There was no *"one-size-fits-all way to decide"* who is or may be affected by decisions of the Commission. The decision was *"highly fact-sensitive and will depend on the nature*

of the decision made and the individual's relationship to it". Lord Carlile QC's formula in *International Peace Project* (quoted above) was not determinative, although it was a good starting point for assessing each case: [16].

83.2. The appellant claimed to be *"affected"* due to risks of financial loss and reputational damage. These were, in principle, capable of giving him an interest greater than ordinary members of the public. But, on a proper analysis of the facts, the orders under s.76(3)(d) and (g) did not actually cause such risks: [17].

83.3. A *"wide and inclusive approach"* should be taken if a person's legal rights are affected. In order for a person to be affected in the sense identified by Lord Carlile, there should be *"an identifiable impact upon that person's legal rights at the time the order is made"*. In order to be a person who *"may"* be affected, there should be *"an identifiable impact on that person's legal rights which is sufficiently likely to occur to make it fair to allow them a right of appeal*": [18].

84. Asplin J's conclusions (having had regard to these authorities, and the statutory wording and context) may be summarised as follows:

84.1. The category of affected persons in each case *"is not prone to a definitive definition"*: [43]. It is fact-sensitive and *"should not be approached on a prescriptively narrow basis"*: [45].

84.2. It is necessary to focus solely on the particular decision and to determine whether in all the circumstances it has had an effect on the particular person in question: [44].

84.3. For a person to be affected by the decision, *"first the decision itself must relate to the person in some way. Secondly, the person's legal rights must have been impinged or affected by the decision and to be a person who "may" be affected, there must be an identifiable impact on the person's legal rights which is likely to occur…"*: [44].

84.4. A person is not *"affected"* solely (1) by virtue of being an *"addressee"* of the decision (as decisions may be sent to a variety of people who may or may not be affected by it): [46]-[47]; or (2) by virtue of disagreeing with the decision emotionally, politically or intellectually, or being a concerned taxpayer: [47]. The other factors relied on by the appellant also did not assist him: [53]-[58].

85. A few qualifications should be made to this summary.

86. First, as will be discussed below, the facts of this case are different. Mermaids is not just an aggrieved taxpayer or busybody. It has suffered, and continues to suffer, real harm as a result of the decision.

87. Second, while *Nicholson* is binding on the Tribunal, Asplin J's decision should not be read as if it were a statute. As she acknowledged in [42], she was not laying down a definitive definition, and therefore her comments should not be read as detracting from the wording of Schedule 6.

88. Among other things, Asplin J's choice of expression *"likely to occur"* at [44] does not replace the statutory test *"may"*. The term *"likely"* could create confusion: it can have a wide range of meanings, ranging from *"possible"* to *"more probable than not"*. The latter cannot apply here; it would impermissibly upgrade the threshold from *"may be affected"* to *"will be affected"* (on the civil standard of proof). The phrase *"may be affected"* is simple and does not require any gloss. As the Divisional Court put it in *Green v Turkington* [1975] R.T.R. 322 (in the context of a magistrate who had construed *"may suggest"* as *"reasonably likely to suggest"*):

> *"when you have simple statutory language such as that comprised in the two simple English words 'may' and 'suggest', I think that one must set about construing those words and not set up alternatives as a possible meaning for the phrase."*

89. Third, Asplin J's emphasis on the need for caution should (like *International Peace Project*) be understood in the context of a decision not to deregister charities under s.34. Such challenges are uniquely disruptive to charities and the integrity of the register, especially if they are combined with third-party requests to deregister the charity under s.36. With around 168,000 charities on the register, there are good grounds for concern about the 'floodgates' opening if too many people can bring challenges under s.34. That rationale does not necessarily carry across to other types of challenge, a point made by B. Crumley and J. Picton, *"Still Standing?": Charitable Service-Users and Cy-Pres in the First-tier Tribunal (Charity)* (2018) 82 Conv 262 (**"Crumley and Picton"**).[13]

90. With challenges under s.30, there is less concern about upsetting the status quo since the institution is newly registered. Disruption is minimised by need to bring an appeal within 42 days of the decision or its publication (see r.26(1) of the GRC Rules). So any analogy with 'non-deregistration' cases is limited.

91. Fourth, it should be borne in mind that there are good policy reasons in favour of promoting access to the Tribunal in appropriate cases. As explained by Crumley and Picton at pp.264-265:

> *"The policy justification for the existence of an appeals process against Commission decisions feeding into the First-tier Tribunal (Charity) is two-fold. First, the right of appeal is intended to encourage litigation and prevent legal ossification. Second, like any other tribunal, it is intended to provide redress. It 'puts right' bad decision-making. These policy goals lean heavily towards a wide right of standing. The wider the right, the more cases will feed into the legal system, so allowing the twin aims to be achieved."*

[13] *Colman* (which does not have precedential status but was cited with approval in *Nicholson*) concerned appeals against interim orders under s.76(3)(d) and (g) of the 2011 Act. Here, too, there may be good reasons for restricting access to the Tribunal. Such orders do no more than essentially preserving the status quo against potential risk of mismanagement or loss of charity property, and excessive challenges to such orders undermine the Commission's ability to take swift protective action. Some of this reasoning can be seen in *Colman* at [16]-[17] (quoted at [22] of *Nicholson*).

92. Such factors are especially important in appeals against registration. As to the first, the Commission's published registration decisions are (whilst not binding) often cited as persuasive indications of how the law on charitable status has developed over time.[14] As to the second, it is especially important to ensure a means of redressing a bad decision if it results in the admission of a new type of charity to the register for the first time, with severe consequences for third parties.

93. Fifth, nothing in *Nicholson* detracts from the need to apply *"is or may be affected"* in Schedule 6 in a manner that does not frustrate Parliament's intention to create an effective system of accountability and redress. By s.319(1) (read with Schedule 6) Parliament provided that registration decisions were subject to appeal to the Tribunal. Those appeals have various features that are more user-friendly than judicial review. They are quicker, cheaper, have limited adverse costs risks, and are determined by a specialist tribunal taking a fresh decision on the evidence. It is therefore legitimate (albeit not determinative) to consider who else might bring a challenge if those in the position of Mermaids could not do so:

    93.1. In *Nicholson*, Asplin J placed considerable emphasis on the fact that the Attorney General had a right of appeal under s.319(2)(b): [43] and [55]. That is not a realistic possibility here. There is no evidence of a desire by government to have an extensive role in policing registration decisions. Since the formation of the First-tier Tribunal (Charity) in 2009, the Attorney General has never (so far as Mermaids is aware) appealed against a charity's registration.

    93.2. The putative charity trustees and the institution itself are expressly listed in Schedule 6, column 2. But they are only likely to bring appeals against decisions <u>not</u> to register their charity.

    93.3. HMRC could be said to be *"affected"* if LGB Alliance claims tax reliefs. In principle it seems unlikely that HMRC would take a proactive stance at registration stage. Like the Attorney General, HMRC has never brought a registration appeal in practice.

    93.4. Local authorities could be said to be *"affected"* if LGB Alliance claims relief from business rates. But they may not wish to get involved in areas of political controversy, and they may have limited resources. There is also no evidence that LGB Alliance has claimed such relief; and moreover Mermaids is unaware of such an appeal ever having been brought by a local authority.

    93.5. In *Nicholson*, counsel suggested at [37] that disappointed residuary legatees and significant beneficiaries and donors may be *"affected"*. The former are only relevant

[14] The Commission acknowledges on its website that charity registration decisions *"set a legal precedent"*: https://www.gov.uk/government/collections/charity-commission-registration-decisions.

where the charity is a trust established under a will; and the latter have no reason to want to challenge registration.

94. Therefore, if the Tribunal takes an unduly prescriptive approach to *"affected persons"*, the only real check on the Commission's inadvertent registration of institutions such as LGB Alliance as charities will be central government. That would place it under pressure to bring appeals in controversial cases and drag charity registration into the political arena. It may also create risks for the Commission's independence from central government—an important policy reflected in s.13(4) of the 2011 Act: *"In the exercise of its functions the Commission is not subject to the direction or control of any Minister of the Crown or of another government department."*

(ii) The facts – effects of the Decision on Mermaids

95. The WS of Dr Belinda Bell **[1/123ff]** addresses the facts relevant to Mermaids' standing.

96. Mermaids exists to relieve the distress of children and young people who are affected by gender identity issues (and their families). At paras 6-10 **[1/124ff]**, Dr Bell explains the concrete forms of support provided by Mermaids for its beneficiaries, and emphasises that it does not itself advise children on the appropriateness of any particular medical treatment.

97. There is a unique relationship between LGB Alliance and Mermaids. One of LGB Alliance's most persistent activities since its foundation has been attacking Mermaids and a handful of similar organisations. Mermaids sits alongside Stonewall at the top of LGB Alliance's 'hit list'. It has faced accusations of *"child abuse"* and *"chemically castrating"* children **[2/1145]**. As explained by Dr Bell at paras 28-48 **[1/131ff]** and 51-52 **[1/137ff]**, LGB Alliance has published a stream of misinformation about Mermaids' policies and functions.

98. Not only does LGB Alliance attack Mermaids as an organisation, it directly undermines its core charitable activities (and thereby, at least to some extent, the ability of its trustees to fulfil their duties). One of the four original *"Aims"* recorded on its website was to *"protect children and young people from being taught unscientific gender doctrines, particularly the idea that they may have been born in the wrong body, which may lead to life-changing and potentially harmful medical procedures"* **[2/1021]**.[15] Its major activities include a *"Schools Campaign"* focused on preventing children's education from exploring gender issues **[1/84]** including a page accusing Mermaids of child abuse **[2/89]**. It appears that LGB Alliance lobbies government ministers against Mermaids, both openly and in secret (see paras 24 and 27 of Dr Bell's WS **[1/130]**).

[15] As with other language in this sphere, the use of *"born in the wrong body"* is nuanced and evolving over time. An article from 2020 sets out Mermaids' broad position on it **[2/2194]**, in essence that (1) *"no child is born in the wrong body"* and transgender children should not *"be encouraged to reject"* their bodies; but (2) the phrase has been useful in the past, and many transgender people still find it personally meaningful.

99. In concrete terms, LGB Alliance has sought to inflict direct financial loss on Mermaids by seeking to cut off its sources of funding and intimidate bodies that work with it (see paras 53-57 of Dr Bell's WS **[1/140ff]**).

100. There is every reason to believe that the Decision makes such events more likely, and accordingly that Mermaids *"is or may be affected"* by the Decision for the purposes of the fact-sensitive assessment under Schedule 6 to the 2011 Act. This is not a matter of speculation; there is documentary evidence of a direct causal link between the Decision and the continued waging of attack campaigns against Mermaids (including attempts to inflict financial loss on it):

    100.1. In an undated letter to the Commission, LGB Alliance's former solicitors asked for the registration to be expedited on the basis that registration was crucial to its ongoing activities and it was *"increasingly difficult to obtain funding"* until registration was effected: **[2/500]**. As consequences of registration, the letter cited attracting donors whose *"funding is vital to continue operating the Charity"* (giving two concrete examples of donors whose gifts would be conditional on charitable status); obtaining Gift Aid relief (which was said to be essential to running the October 2021 conference) and putting discussions with government bodies on a *"formalised"* footing.

    100.2. LGB Alliance's October 2021 conference was made possible by the Decision: **[2/1158]** (conference venue allowing the event due to LGB Alliance being *"a government registered charity"*); and defended on the basis of the Decision: **[2/1161]**. The headline topics at the conference included whether affirming trans children's gender identity amounted to *"child abuse"* and *"child conversion"*, in the same vein as previous accusations levelled against Mermaids: **[2/980]**.

    100.3. By January 2022, LGB Alliance had been invited to meet two government ministers and spoke to them about young people with gender dysphoria, repeating (it can be inferred) the same myths that they had previously levelled against Mermaids' policies on social media: **[2/1171]**.

101. LGB Alliance's other false claims about Mermaids are now inevitably taken more seriously, including by those in positions of power and potential supporters. Dr Bell explains at paras 68-70 of her WS how this is already having a concrete effect on Mermaids' work, and is likely to continue doing so in future.

102. This case is, therefore, a long way from the 'public interest'-based challenges shut out in *International Peace Project* and *Nicholson*. The appellant is a body directly threatened by the Decision, and is likely to suffer detriment of various kinds including concrete financial loss, abusive communications and fortified campaigns to undermine its own charitable activities.

Mermaids both *"is"* affected by the Decision and *"may be"* affected further in future. This extends to existing and potential interference with its income, its legal entitlements (such as its entitlements to be free from interference with contracts, and from defamatory statements) and its trustees' legal obligation to seek to relieve the suffering of children facing gender identity issues.

103. The Tribunal is therefore respectfully invited to conclude that Mermaids has standing to appeal against the Decision on a proper application of Schedule 6 and the guidance in *Nicholson* to the facts of the case.

H. Conclusion

104. The Tribunal is asked to find that LGB Alliance is not a charity, to quash the Decision and to direct the Commission to rectify the register.

Michael Gibbon Q.C.

Ted Loveday

Maitland Chambers

15 July 2022