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 SPEAKING NOTE
for closing submissions
7 – 8 November 2022

At the Tribunal's request, this note is intended to make it easier to follow App's oral submissions. It is not intended to replace App's main skeleton argument, nor the oral submissions themselves.

Burden of proof

1. It is for the putative charity to prove it meets the tests in CA 2011: *ISC* at [110] **[Auths/Tab 19/508]** (internal 253). CC response is therefore incorrect to say otherwise at ¶53 **[Vol 1/Tab 12/66]**. But, as suggested by *ISC* at [110], the case is unlikely to turn on this.

ISSUE 1: Determining the purposes for which LGBA is established

Applicable principles

2. CA 2011 s.1: *"an institution which … is established for charitable purposes only"* [**Auths/1/4]**.

3. *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 (UT) **[Auths/Tab 19/469]**:

   3.1. What matters is what the institution is established to do: [191] (internal p276) **[at 531**];

   3.2. The institution's *"particular purposes"*: [82] (internal p245) **[at 500]**.

4. Rs argue (subject to limited qualification) that, where the constitution appears unambiguous on its face, it is to that document alone that one looks: CC skeleton at **[Vol 4/Tab 5/46-48]** ¶¶35-43; LGBA skeleton at [**Vol 4/Tab 6/72-74**] ¶¶22-29 (esp. ¶29).

5. *ISC* [Auths/Tab 19/469ff]:

   5.1. Written constitution is the "*starting point*":": [187]-[188]. The principal point in [187] is that (subject to *Ross*, as discussed below) where there is a written constitution you don't normally look at subsequent activity.

   5.2. Normal canons of construction apply: [189] last sentence, referring back to [116].

5.3. See also [193] **[p532**]: if there no written constitution, or an incomplete one, look at entirety of the evidence. Identifying an institution's purposes (in the charity context) is not just an exercise in interpreting words.

6. *R (Westminster City Council) v National Asylum Support Service* [2002] 1 W.L.R. 2956 (HL) at [5] **[Auths/Tab 16/416ff, at 418**]. Lord Steyn: *"language in all legal texts"* conveys meaning depending on its context.

7. See, in similar vein regarding use of extrinsic evidence:

   7.1. *Cosmetic Warriors Ltd v Gerrie* [2015] EWHC 3718 (Ch) [**Auths/Tab 23/652ff**]: in the context of AOA, the admissible background is limited to what any reader of the articles would reasonably be supposed to know.

   7.2. Tudor on Charities (10th ed) at 7-016 **[Auths/Tab 39/1089]** (internal 400): *"it is permissible in all cases to adduce extrinsic evidence to establish what was known to or assumed by the parties… at the time they executed the document as an aid to interpretation"*.

   7.3. *Helena Housing Ltd v HMRC* [2011] STC 1307 (UT) **[Auths/Tab 20/559]**. At [17]-[18] **[568]** (internal 1316-7) (citing Lord Hoffmann in *Belize Telecom*): *"a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed*".

   7.4. *Shore v Wilson* (1842) 8 E.R. 45 **[Auths 1/Tab 3/56ff**]: *"poor and godly preachers of Christ's holy Gospel"*. See headnote at **[p57]** (internal p451)).[1] If Lady Hewley had been an Anglican, the same words would have meant something very different.

   7.5. *Celestial Church of Christ* [2017] PTSR 790 [**Auths/Tab 27/p757**] (internal 803) at [20]: the focus is on identifying "*what was known to or assumed by the parties at the time of the adoption of the constitution*"; no ambiguity threshold in charities cases.

8. In the context of charity, the courts are cautious of instruments which (without deception) do not set out the full position on purposes with clarity. For example:

   8.1. *A-G v Ross* (Scott J) **[Auths 1/Tab 13/365ff**].

      8.1.1. Students' union with long list of objects: **[p369-370] (**internal 256-7).

      8.1.2. Factual background *"may serve to elucidate the purpose for which the union was formed"*: **[p376]** (internal p263 E).

      8.1.3. Need for caution re: the *"skill of Chancery draftsmen"* at producing *"a constitution of charitable flavour"* that allows the pursuit of non-charitable aims: p263 F.

      8.1.4. Subsequent activity may be considered: p263 E; but subject to two requirements: (1) it must be *intra vires* (p264 D); and (2) it must have probative value towards the question of why the institution was <u>formed</u> (p 264 F).

   8.2. *Southwood v Attorney General* [2000] 3 ITELR 94 **[Auths 1/Tab 15/397]** (CA, upholding the decision of Carnwath J which appears at **[Auths 1/Tab 14/379**]):

[1] It is unlikely to be necessary to look beyond the headnote of *Shore v Wilson*. The full report is convoluted and tricky to navigate (partly due to outdated 19th century procedures, including various cases stated for the opinion of other judges). The short judgment of Lord Cottenham LC in the House of Lords at **[pp143-144]** is, however, the authoritative one.

8.2.1. Project on Demilitarisation (Prodem). Objects include: *"the advancement of the education of the public in the subject of militarism and disarmament"*. These objects are *"redolent with the flavour of charity*": **[p400]**, internal p97.

8.2.2. But extensive background material (listed at **[p401ff]**, internal pp98-105) shows that *"education … in the subject of militarism"* has a slanted ideological meaning.

9. *McGovern v Attorney General* [1978] 1 Ch 321 **[Auths/Tab 12/331]** is another example (background documents were used to shed light on Amnesty International Trust's purposes).

10. Two FTT cases cited in CC skeleton ¶39-41 **[Vol 4/Tab 5/p47ff]** do not assist. The use of 'ambiguity' thresholds reflected the way CC had chosen to frame its case:

10.1. *Human Dignity Trust* (CA/2013/0013, 9 July 2014) **[Auths/Tab 21/p590]**. CC relied on an 'ambiguity' threshold (see [18], first two sentences). The analysis at [29] reflected that.

10.2. *Vernor-Miles* (CA/2014/0022, 15 June 2015) **[Auths/Tab 24/p695]**. Both parties had invited the FTT to apply an 'ambiguity' threshold: [21]-[22]; and [34]-[35] reflected that.

A 'sham' threshold?

11. CC puts forward a 'sham' threshold. This misapprehends App's case:

11.1. It refers to a supposed claim that there are *"true"* purposes lying behind R2's stated purposes **[Vol 4/Tab 5/p44**].

11.2. "*True*" does not appear in App's skeleton. It is mentioned in passing in GOA ¶8 **[Vol 1/Tab 11/39-40]** (*"on a proper interpretation… taken in their context… the true, main or particular purposes for which LGBA is established are or include…"*). That is not an allegation of sham; it is grounded in orthodox case-law about the use of contextual material.[2]

12. A sham is not the only gateway for extrinsic evidence where there is a written instrument:

12.1. That would be contrary to the ratio of the CA in *Southwood*.

12.2. The only case cited by CC is the FTT decision in *Hipkiss* **[Auths/Tab 29/p778**] in which the CC had itself raised a sham argument (which was impliedly rejected). *Hipkiss* also has no precedential value.

13. Re CC's apparent concern about administrative burden of examining the wider context (CC skeleton ¶46.4 at [**Vol 4/Tab 5/pp49-50**]):

13.1. The circumstances of this case are one-off.

13.2. CC already carries out basic enquiries sufficient to meet those principles. See App's skeleton at ¶42 [**Vol 4/Tab 4/19]**; and documents at **[Vol 2.1/pp131-133**] (standard questions for educational charities) and **[Vol 2.2/pp134-139**] (standard questions for all charities).

13.3. App is not suggesting CC is required to do anything other than what it currently does. It has wide discretion under CA 2011 as to how much (if any) factual investigation it makes. The trustees must supply any information the CC requests: s.35(2)(c). The CC is entitled to rely

[2] Different formulas appear in different cases. "*Main or dominant or essential object"*: *Bushnell* at p1605 **[Auths/Tab 11/326]**. *"Main purpose"*: *McGovern* at p341D **[Auths/Tab 13/351]**; *Ross* at p363H; 264E. *"Particular purpose"*: *ISC* at [82] **[Auths/Tab 19/500]**. *"The real purpose for which an organisation was formed"*: *McGovern* p263 **[Auths/Tab 12/376]**.

on their answers without enquiring into their accuracy: see s.60 CA 2011 (criminal offence of supplying false or misleading information to CC).

Applying principles to facts: what are the purposes for which LGBA was established?

14. Identify the thrust of LGBA's purposes at a fairly high level – what is predominant? Not an exercise in identifying a precise linguistic formulation. (See e.g. *Southwood* [**Auths/Tab 14/379ff**]. Carnwath J at [**379**] (internal 135a): challenging the policies of Western governments *"is the clear and dominant message*".)

15. This is clearly a case where it would be wrong to stop at the written objects:

    15.1. They are written in very broad terms and could bear a range of meanings (the similarities to Stonewall's written objects demonstrate this).

    15.2. LGBA have accepted that the objects can only be understood by reference to how gender-critical people use language: see e.g. 13/3/20 submission to CC **[Vol 2.1/944**]. BJ and KH accepted orally that the AOA's wording must be filtered through a gender-critical lens.[3]

16. What extrinsic material should the Tribunal consider? At least the following:

    16.1. KH and BJ spent 3 months contacting *"stroppy"* people who shared their views, identifying those concerned about the erasure of sex. (See BJ WS ¶¶17-18 **[Vol 1/Tab 24/p168]** and KH 18/1/20 speech [**Vol 2.1/Tab 5/887**].)

    16.2. The formation of LBGA was a process. Critical steps in that process were the meeting of 22/10/19 at Conway Hall (see BJ ¶¶17-18 **[Vol 1/Tab 24/p168]**, oral evidence of BJ/KH [ref tbc]); and the drawing up of a mission statement at that meeting: **[Vol 2.1/Tab 5/883-6]**. Allison Bailey's tweet of 22/10/19 objectively encapsulates the rationale for forming LGBA: **[Vol 2.2/Tab 8/1445**]. It was to campaign against so-called *"gender extremism"*.

    16.3. There is no single statement of LGBA's views. They are not limited to the abstract proposition that *"biological sex is immutable"*. LGBA use that proposition (and similar expressions) as a shorthand for various more specific views:

        16.3.1. **views about language** – e.g. that persons should be described (including for the purposes of classifying their sexuality) in accordance with their sex assigned at birth, regardless of any legal / medical / social transition; that *"the word lesbian is taken"* (KH in oral evidence [ref tbc] and BJ WS ¶71 **[Vol 1/Tab 24/1845]**).

        16.3.2. **views about trans rights/equality** – that there is a conflict between LGB rights and trans rights/equality; their interests are opposed (BJ WS ¶49 **[Vol 1/Tab 24/177]**; KH WS ¶22 **[Vol 1/Tab 25/220-1]**;

        16.3.3. **derogatory views about others** – that a handful of organisations (a *"lobby"*) are engaged in promoting so-called *"gender identity ideology"* which is said to be homophobic and anti-LGB, and/or in *"transing the gay away"* (e.g. BJ WS ¶130 **[Vol 1/Tab 24/202]**; **[Vol 2.1/Tab 5/912]** (*"profoundly homophobic"*); **[Vol**

[3] E.g. BJ accepted that *"discrimination"* and *"abuse of human rights"* in LGBA's AOA were, at least partly, references to the *"shared belief that LGB people can face discrimination and abuse at the hands of gender identity activists"* including *"transing the gay away"* (Day 4, ref tbc). KH similarly said that she thought *"most people"* reading LGBA's AOA would understand the definitions as being *"biology based"*. She suggested that the AOA might have benefited from a gloss to clarify this (Day 5, ref tbc).

2.1/Tab 5/987ff., esp. 990; 1000] (Schools Campaign); and BJ Day 3 (ref tbc) (*"they all pursue the same agenda"*);[4]

16.3.4. **views on matters of public policy** – such as who ought to have access to public spaces; the process for obtaining gender recognition certificates (**"GRCs"**); and healthcare and education for young people (for an overview see e.g. JN WS ¶19(b) **[Vol 1/Tab 23/156ff]** referring to exhibits at **[Vol 2.2/1311-1340]**).

16.4. All this was known by those who attended the meeting and supported the launch of LGBA (as accepted by BJ and KH: refs tbc). The fact LGBA was being organised around these views was also a matter of public knowledge from 22/10/19.

17. LGBA's AOA dated 28/11/19 **[Vol 2.1/22ff**] are to be understood against that background. It informs how a reasonable reader would understand the references to discrimination and abuses of human rights, and the advancement of LGB rights, in the AOA.

18. In light of this, the purposes for which LGBA was established can be expressed in various ways, but they include:

18.1. promoting their particular gender critical beliefs (as identified above) by a range of means including by campaigning, by publications seeking to persuade the public, and by seeking to influence the education of young people;

18.2. campaigning for or against (as appropriate) changes in the law (including in Scotland) and policies of government bodies (e.g. the EHRC); and

18.3. impeding the work of organisations (particularly charities) that work for the benefit of trans people, including by promoting the view they spread disinformation, and by seeking to deprive them of funding.

Equalities legislation

19. App's position is the appeal can be determined without reference to any debates surrounding the Equality Act 2010 (**"EA 2010"**). See App's skeleton ¶17-18 **[Vol 4/Tab 4/12-13**] **(**citing *Afariogun v Charity Commission*).

20. However, LGBA made it clear on Day 1 that they consider determination of equality issues of greater importance to this case than App does.

21. In those circumstances, to avoid the suggestion that LGBA's points have gone unanswered, App provides its analysis in the **Appendix**. (This is without prejudice to our view that such issues do not need to be determined.)

Subsequent activities

22. App relies primarily on events before LGBA's incorporation (28/11/19). But later events provide further support for its case. They may be taken into account on a proper application of *Ross*: (1) they were *intra vires*; and (2) they have probative value on what LGBA was set up to do. (Generally, earlier events have more value due to their proximity to LGBA's foundation.)

[4] For the belief that these specific views are consequences of *"sex is immutable"*, see e.g. BJ Day 3 [ref tbc] (the *"definition of LGB people"* can only be *"secured*" by stopping self-ID laws); KH Day 5 [ref tbc] (the *"logic"* of sex being immutable, in KH's view, is that gender identity is homophobic); [ref tbc] (the definitions are central to KH's thinking because of the *"activities"* of those *"who wish to remove sex from the law"*).

ISSUE 2: Do those purposes fall exclusively within the descriptions in s.3(1) of the CA 2011?

23. This has to be applied to whatever are found to be LGBA's particular purposes under Issue 1.

24. Unless all the particular purposes identified by the Tribunal fall exclusively within s.3(1), the question of public benefit does not arise. It is a separate hurdle: see s.2(2).

25. We say that the purposes, correctly identified, do not fall exclusively within s.3(1) CA 2011.

ISSUE 3: Is the nature of those purposes beneficial to the community ('public benefit in the first sense')?

The principles

26. Public benefit is assessed differently in different areas, and has two strands – 'first sense' and 'second sense': *ISC* at [44] [**Auths/Tab 19/489-90**] (internal p235-6).

27. The first sense may be paraphrased as: *"is the advancement of the purpose a good thing?"* Tudor on Charities (10th ed.) at 1-043 **[Auths/Tab 39/1051]** (internal 26). Three overlapping aspects are highlighted in the LOI [**Vol 4/Tab 2/3]**: (1) politics; (2) consensus of enlightened opinion; (3) balance of benefits and disbenefits.

28. First, as regards political purposes (App skeleton: **[Vol 4/Tab 4/19-20]**):

    28.1. *McGovern v Attorney-General* [1978] 1 Ch 32 **[Auths/Tab 12**].

    28.2. Unacceptable political purposes:

        28.2.1. changing law; procuring reversal of government policy/decisions: *McGovern* at internal 340B-D [**Auths/Tab 12/331ff, at 350**];

        28.2.2. opposing changes to law or government policy: *Re Hopkinson* [1949] 1 All ER 346 at 350C-D **[Auths/Tab 4/146, at 150**];

        28.2.3. need not be a topic of acute controversy (per Lord Normand in *Anti-Vivisection* at internal 78 [**Auths/Tab 5/153ff, at 199**];

        28.2.4. may be lawful and widely regarded as desirable: e.g. *McGovern* [**Auths/Tab 12/331, at 364**] (internal 354) (*"a function which many will regard as being of great value to humanity"*); the point is that it is not the court's constitutional role to determine their desirability.

    28.3. CC claims at ¶70 of its skeleton **[Vol 4/Tab 5/56]** that it is common ground that *"the promotion of human rights and equality and diversity is for the public benefit"*. This goes too far. There is no presumption of this (that would of course be contrary to s.4(2) CA 2011). The true position is that they are capable of being for the public benefit. Each case must be judged on its facts.

    28.4. 'Educating the public' may be political in some circumstances:

        28.4.1. *"Political propaganda… masquerading as education": Re Hopkinson* at p350 [**Auths/Tab 4/150**].

        28.4.2. *Re Bushnell* **[Auths/Tab 11/317ff**] (*"he was trying to promote his own theory of education… I am unable to avoid the conclusion that the main or dominant or essential object is a political one"*: p1605 **[326]**.) There is a need for balance.

28.4.3. *Southwood* [**Auths/Tabs 14 & 15]** (promoting the theory that the policies of Western governments are a threat to peace).

29. Second, as regards the common understanding of enlightened opinion:

29.1. Under the 'fourth head' there is need for positive proof of objective benefit on the evidence. See *McGovern* at 333 [**Auths/Tab 12/343**].

29.2. Given the law's *"tendency… towards tangible and objective benefits"*, intangible benefits cannot be recognised unless there is broad social consensus that they are a 'good thing'. *Anti-Vivisection* [**Auths/Tab 5/171**] (internal 49): *"approval by the common understanding of enlightened opinion for the time being"*.

29.3. With respect to CC (see its skeleton at ¶¶66, 73, 82.2) it is not the case that purposes must be recognised as beneficial unless they (a) are inherently unlawful or contrary to public policy; or (b) *"necessarily"* give rise to unlawful discrimination. These propositions turn the test on its head, and are not supported by authority.

29.4. The true position is that there must be positive evidence of benefit (either (i) tangible, or (ii) intangible but supported by consensus). If there is no such evidence, the court or tribunal does not sit on the fence. Nor does it give the body the benefit of the doubt. It will decline to recognise the body as a charity: *McGovern* at 334A **[Auths/Tab 12/344]**.

30. Third, as regards balance of benefits and disbenefits:

30.1. *Anti-Vivisection* [**Auths/Tab 5/153ff**] e.g. Lord Wright at internal 49 **[at 171]** (*"What it seems to do however is to destroy a source of enormous blessings to mankind… Nothing is offered by way of counter-weight but a vague and problematical moral elevation."*) The society's purposes were lawful, but nevertheless detrimental to the public.

30.2. See also *ISC* [**Auths/Tab 19/469ff**] at [94]-[100] and [106] (internal 249-253, and 252). Disadvantages need to be clearly demonstrated.

Public benefit in the first sense: application to the facts

31. LGBA was established (in whole or in part) as a vehicle for extensive political/campaigning activity, campaigning and lobbying. Indeed that seems to have been accepted by LGBA's witnesses to have been one of their purposes.

32. There is extensive evidence of LGBA's political nature:

32.1. The process by which LGBA came into existence (as discussed already).

32.2. The very first step taken post-22/10/19 was to write to the EHRC: **[Vol 2.1/Tab 1/874]** & **[Vol 2.1/Tab 5/1003]**.

32.3. LGBA campaigns to change, or to stop changes to, legislation and the policies of government bodies in line with its beliefs. This is detailed in JN's WS **[Vol 1/Tab 23/149ff.]**

32.4. On 9/3/20 BJ gave a speech listing four *"priorities"*, all of which were essentially political or polemical **[Vol 2.1/Tab 5/895]**. They were "*building an organisation to challenge the dominance of those who promote the damaging theory of gender identity*".

33. On the totality of that evidence, the Tribunal is invited to find that political/campaigning activity is a predominant purpose, not ancillary. BJ's oral explanation was that LGBA would turn to non-

political activities once it had *"secured"* its political goals.[5] In App's submission that is not enough.

34. In any event LGBA's benefits are (at best) intangible. So it must establish they are supported by a common understanding of enlightened opinion. It has failed to do so:

    34.1. CC says there is a consensus that the promotion of human rights is beneficial (CC skeleton ¶70ff. at **[Vol 4/Tab 5/56ff]**. That is the wrong approach. The question is whether LGBA's *particular* purposes are beneficial to the public – not just 'human rights' in the abstract. There is no presumption of public benefit just because human rights appear in s.2(1)(h) of the CA 2011: see s.4(2).

    34.2. LGBA argues that their views must be for the public benefit because they involve no more than a faithful adherence to equality law (see LGBA skeleton ¶81 **[Vol 4/Tab 6/91]**.) That cannot be right because there is no consensus to that effect. The law is in a state of ongoing development (see **Appendix**) and remains highly contested.

    34.3. As regards educating the public, LGBA accepts that it does so from one point of view, and seeks to persuade the public of the merits of that view. See e.g. **[Vol 2.1/944**] (*"In educating the public… LGB Alliance's position will be that…"*) and BJ ¶41 **[Vol 1/Tab 25/175**]. BJ and KH gave oral evidence to the effect that LGBA approached educating the public on the footing that gender-critical beliefs would be put forward as *"facts"*.[6]

    34.4. This is a paradigm case: there is no consensus of enlightened opinion that LGBA's objectives are a 'good thing'. In line with *McGovern* at 334A **[Auths/Tab 12/344]** this means the Tribunal should decline to recognise LGBA as a charity.

35. Finally, the Tribunal is entitled to weigh up disbenefits/detriments to the public. LGBA's worldview and objectives are based on conflict and confrontation. This makes its approach fundamentally unpleasant, aggressive and corrosive of public discourse. That is a detriment of significant weight, and nothing is offered by way of counterweight other than vague references to human rights.

ISSUE 4: Do those purposes benefit the public or a sufficient section of the public ('public benefit in the second sense')?

36. This is addressed in our skeleton at [**Vol 4/Tab 4/22-23**] ¶¶58-61 (principles) and ¶¶74-76 (facts).

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[5] BJ cross-examination, Day 4 c.11.40am (ref tbc): *"Q. … It's a campaign to stop things, isn't it? A. To stop things going in a direction we thought was disadvantageous to people with same-sex sexual orientation. Q. That's a political objective, isn't it? A. It is in pursuit of our charitable objects, to protect and promote the rights of people with same-sex sexual orientation. Q. It is higher than that, isn't it? It puts it front and centre, rather than ancillary. A. I'd disagree. It's difficult to set up all the activities we want for LGB people until we've secured our position with LGB people with the definition that we need to re-establish."* Supplementary questions from Tribunal, Day 4 c.2.30pm (ref tbc): *"Judge Neville. I want to clarify one answer you gave earlier. Mr Gibbon put to you that some of your purposes were political. And you said it was in pursuit of your charitable objects: [He quotes the passage above.] What did you mean by "secured our position"? A. Preventing self-ID, basically. Self-ID replaces the objective reality of being gay or straight with self-definition, and therefore it erases homosexuality. It was important to prevent self-ID being imposed on the public without due reflection. Judge Neville. By self-ID, do you mean reforms to the Gender Recognition Act, or in a wider sense? A. The specifics of introducing the ability to change one's gender by self-declaration, rather than going through the rather more considerable process at the moment."*

[6] BJ – Day 3 (ref tbc): *"Our approach… is that education must be based on facts… It is not a fact that everyone has a gender identity… We do not think it is right to teach boys they may be girls, or girls they may be boys…"* Day 4: *"Q. In educating, LGBA's aim is to put forward the gender-critical view that sex is immutable? A. Yes…"* Later on Day 4: "*Q. So when you say children must be taught facts, those facts include the immutability of sex? A. Yes…"* KH – Day 5 (ref tbc):): *"Q. I suggest it is clear that you won't be neutrally putting forward 'gender identity' and gender-critical views. Because you think 'gender identity ideology' is fundamentally wrong. When putting forward the educational purposes of LGBA, 'educating the public' to you means facts, and you say that facts and evidence are overwhelmingly in your favour. A. Yes…"*

37. This question must be looked at in a practical sense. LGBA claim to represent and advance the rights of all LGB people, defined according to *"biological sex"*. But it regards and labels anyone who disagrees with its gender critical views as homophobic.[7] On any view, that will be considered as profoundly offensive by a significant proportion of those whom LGBA claim to serve. It is fanciful to suggest that these people receive any benefit from LGBA.

ISSUE 5: Standing

Principles

38. CA 2011 s.319 and Sch 6 **[Auths/Tab 1/21; 24]**.

39. *Nicholson v Charity Commission* [2016] UKUT 198 (TCC) **[Auths/Tab 25/704]**:

    39.1. See generally ¶¶78-94 of our skeleton **[Vol 4/Tab 4/28-32]**. NB. Contrary to CC skeleton ¶21 **[Vol 4/Tab 5/42]** it is not our case that *Nicholson* should be *"watered down"*. *Nicholson* is binding at this level for the principles it decides.

    39.2. Mr Nicholson's claims to standing: (1) as an addressee; (2) because of public interest; and (3) due to emotional and social effect on him. See [23].

    39.3. The category of persons with standing is *"not prone to a definitive definition"*: [42]. (Cf. *ISC* at [45]: *"the law of charity… has built up not logically but empirically"* **[Auths/Tab 19/491]** (internal 236).)

    39.4. At [44] two requirements are proposed: (1) the decision relates to the person; (2) there is an identifiable impact on legal rights that is likely to occur. But avoid a *"prescriptively narrow"* approach: [45].

    39.5. Lord Carlile's formula (described at [45] (bundle **724**) as a good starting point) can be found at [17] (bundle **714**): *"an interest that is materially greater than, or different from, the interests of an ordinary member of the public"*.

    39.6. As regards *"legal rights"*:

        39.6.1. Note *Colman v Charity Commission* at [17], which is quoted in *Nicholson* at [22] **[Auths/Tab 25/717]** regarding reputational and financial harm.

        39.6.2. At CC skeleton at ¶20.4 **[Vol 4/Tab 5/41]** it is claimed that a person who has rights that are actionable elsewhere does not have standing. That analysis must be wrong: an effect on legal rights is by definition actionable.

Application of principles to facts

40. Why has Mermaids brought this appeal?

    40.1. LGBA persistence in attacking Mermaids.

    40.2. Highly unusual circumstances. Core to LGBA's worldview is the view that Mermaids must *"meet its match"* (cf. **[Vol 2.2/Tab 8/1445]**). LGBA's purposes (properly understood) include propagating the view that Mermaids is fundamentally homophobic and dangerous.

[7] E.g. **[Vol 2.1/Tab 5/912]**; BJ stood by this allegation on Day 3 (ref tbc). BJ also said that *"as soon as you move"* away from her definition of sexuality you are *"disadvantaging gays and lesbians in a way that it homophobic"*. *"homophobic, as soon as you move"* towards defining sexuality by reference to gender: (ref tbc). KH alleged that a *"massive number of people"* were participating in *"a new homophobia"*: Day 5 (ref tbc).

40.3. CC's registration decision was therefore profoundly alarming; it amounted (inadvertently) to recognition by the CC that a vituperative campaign against Mermaids could be *"for the public benefit"*.

41. LGBA's tweet: *"charity status changes everything"* **[Vol 2.2/Tab 6/p1164]**. KH accepted that registration amplifies LGBA's activity (ref tbc): *"Q. Do you accept that LGBA is stronger from having charitable status? A. Yes."*

42. As to those activities:

42.1. A significant proportion (perhaps the majority) include seeking to interfere with/undermine the work of the 'gender identity lobby'. The Tribunal heard a great deal of evidence about this. BB WS: Mermaids has been a *"target"*, "*relentlessly subjected to some of [LGBA's] worst treatment."* ¶49, **[Vol 1/Tab 22/137]**.

42.2. Not just civilised criticism; the attacks are often factually false and harmful. This is detailed by BB at length in her WS – e.g. claims that Mermaids is involved in propaganda, or child abuse, or a deliberate drive to medicalise children; an example appears at **[Vol 2.2/Tab 5/1029]**. They also frequently involve calling to shut Mermaids down or *"cut their funding"*. They are unpleasant in tone: e.g. **[Vol 2.2/Tab 6/1145-1158]**; **[Vol 2.1/Tab 5/931]**.

42.3. Not just incidental. Such attacks are inherent in LGBA's purportedly charitable objects. As already explained, LGBA's AOA are drafted on the premise that Mermaids (and the 'gender identity lobby') are responsible for *"discrimination"* and *"human rights abuses"*.

42.4. Bates Wells addressed the effects of registration in their letter to the CC at **[2/500]** (appears undated, but sent on 23 April 2020). See, in particular, the fourth point re: political lobbying activities (it may be inferred, of a kind that aims to bring negative effects on Mermaids).

43. Taking all these circumstances into account, and applying the principles in *Nicholson* in this particular context, Mermaids is or may be affected by the decision to register LGBA.

Final remarks

44. Whether something is a charity is a decision for the court or tribunal on all material facts before it (*Anti-Vivisection* internal p41) **[Auths 1/Tab 5/153 at 163]** per Lord Wright).

45. There is ample material on which the Tribunal can conclude that for charity law the dominant purposes of LGBA include being a political campaigning body. Moreover, its actions reflect that.

46. Not being a charity doesn't prevent LGBA pursuing lawful objectives: e.g. *Re Hopkinson* [1949] 1 All ER 346, 350G: *"The principle that legitimate and proper political aims and ambitions are not charitable is far too well settled for me at this stage to attempt to depart from or refine upon it…"* Examples in the case-law are the Secular Society and Amnesty International (but also consider e.g. national political parties).

Michael Gibbon Q.C.,

Ted Loveday

7 November 2022

Appendix

Appellant's position on equalities issues

1. As explained, this Appendix is without prejudice to App's position that the issues covered in it do not require determination in order to decide whether LGBA is a charity.

2. This Appendix addresses (1) definitions of sex and sexual orientation; and (2) issues around equal treatment. It is worth adding that EA 2010 s.193 is not relevant to charitable status. It only applies where an organisation is already a charity (see s.193(1)(a)); its function is to give certain charities a qualified defence to discrimination claims. See Reply to R2 ¶19 **[Vol 1/Tab 17/90**].

(1) Definitions of sex and sexual orientation

3. LGBA contend that their definitions of sex and sexual orientation (specifically, definitions that solely have regard to a person's sex assigned at birth) simply follow those under the EA 2010. See ¶¶45-60 of LGBA's skeleton [**Vol 1/Tab 6/81-85]**.

4. That approach to EA 2010. It is inconsistent with its true scope.

5. The obvious difficulty for LGBA can be seen from EA 2010 s.7(1) **[Auths/Tab 2/p37]**. Three observations about that definition: (1) 'sex' isn't exclusively biological; it includes *"physiological and other"* factors; (2) 'sex' is not immutable: one can undergo *"a process of reassigning… sex"*; (3) 'sex' and 'gender' are used interchangeably, not analytically distinct as proposed by LGBA. So there must be some nuance in how 'sex' (and hence 'sexual orientation') is applied in EA 2010.

6. See also Gender Recognition Act 2004 ("**GRA 2004**") s.9, found in *R(C) v SSWP* at **[Auths/Tab 26/736]**, internal p4135 (where it is cited by Baroness Hale). Note that (1) 'sex' and 'gender' used interchangeably; (2) 'sex' isn't immutable: it can be changed *"for all purposes"*. LGBA's position is extreme; it is that you remain 'male'/'female' (and should be treated as such) even if you have undergone social and medical transition and obtained a GRC. This runs contrary to the law.

7. Turning to the definition of 'sex', s.11 EA 2010 refers to s.212 (general interpretation) **[Auths/Tab 2/p52**]. LGBA are misplaced in relying on s.212:

   7.1. In ordinary parlance (outside gender critical circles) the words *"male"* and *"female"* are capable of encompassing trans people, and (put at its lowest) are frequently used in that way. In fact *"male"* and *"female"* take us little further than *"man"* and *"woman"*.

   7.2. The reason Parliament used *"male"* and *"female"* in s.212 had nothing to do with trans individuals. The obvious conclusion to draw from considering the wording of the Act is that s.212 clarifies that the protected characteristic of sex extends to children. In its absence, the argument might have arisen that a child cannot claim sex discrimination because, on its face, s.11 relates to *"men"* and *"women"*. It is far more likely that this point (of potentially wide application) was primarily what was in Parliament's mind in s.212 EA 2010.

8. LGBA place some reliance on *Elan-Cane* [2022] 2 WLR 133 **[Auths/Tab 35/946]**. In that case (which addressed non-binary passports) the SC held that much legislation as it currently stands treats sex and gender as *"binary"*. *Elan-Cane* does not, however, establish that sex or gender must be treated as "*biological*" or "*immutable*". On the contrary, Lord Reed PSC (speaking for the unanimous Supreme Court) makes observations about sex and gender being interchangeable and not always rigid. See [5] **[Auths/Tab 35/p951**] and [52] [**Auths/Tab 35/p963**].

9. LGBA also cite *For Women Scotland Limited v Lord Advocate* [2022] CSIH 4 [**Auths/Tab 37/p1028**], a recent decision of the Scottish Inner House (18 Feb 2022). Some comments:

    9.1. Scottish judgment, no precedential value in this jurisdiction. Much of the argument apparently revolved around the detail of devolution legislation.

    9.2. It was held that a quota for women, designed to address *"sex discrimination"*, should only have regard to sex as assigned at birth. But the first-instance judge (the Lord Ordinary) had reached a credible view to the contrary, grounded in EU law: see [16] at [**Tab 37/p1033**]. This was not, therefore, a straightforward decision. It remains contested whether the English courts (or the SC) would prefer the reasoning of the appellate or first-instance decision.

    9.3. In another judgment handed down the following week (24 Feb 2022) the same court held that the word "*sex*" may have different meanings in different contexts, and need not be rigidly defined by assignment at birth: *Fair Play for Women Ltd v Registrar General* [2022] CSIH 7 [**Auths/36/p1028**]. So these topics are live and contested.

10. In short, the better view is that the EA 2010 does not use LGBA's definition of *"sexual orientation"*. But for current purposes it is sufficient that the law is unsettled and contested, such that LGBA cannot rely on it to establish an intangible claim to public benefit.

11. In any event, under EA 2010, individuals are *prima facie* entitled to protection against direct and indirect discrimination (and harassment/victimisation) on grounds of gender reassignment. The definition in s.7(1) is broad and inclusive (and does not turn on holding a GRC) **[Auths/2/p37]**. EA 2010 most certainly does <u>not</u> mandate a blanket approach that trans women must be lumped with cisgender men (or that trans lesbians must be excluded from lesbian spaces) as LGBA propose. Such an approach would be discriminatory; and would require the repeal of the EA 2010.

12. This approach accords with the EHRC's Code of Practice **[Auths/Tab 44/p1168]**:

    12.1. Treating trans people differently from the role in which they present *"will only be lawful where the exclusion is a proportionate means of achieving a legitimate [aim]"*: ¶13.57, last sentence **[p1171]**.

    12.2. Where a trans person is *"visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary"*: ¶13.59 **[p1172]**.

    12.3. Worked examples: (1) banning a trans woman from a women's spa: ¶4.5 **[p1170]**; (2) changing rooms in a clothes shop: ¶13.58 **[p1172]**.

    12.4. NB. This document is a <u>statutory</u> code of practice (unlike a more recent document at Tab 45). See ¶1.5 at **[p1169]** ("*Status of the Code*").

13. See also Baroness Hale in *Chief Constable of West Yorkshire Police v A (No 2)* [2005] 1 AC 51 at [56] (citing earlier EU case-law): *"for the purposes of discrimination between men and women in the fields covered by the [Equal Treatment] Directive, a trans person is to be regarded as having the sexual identity of the gender to which he or she has been reassigned"*.

14. LGBA are therefore wrong to suggest that their position about how people and organisations <u>ought</u> to deal with trans people (specifically, that trans people ought generally to use services etc. in accordance with their sex assigned at birth) are consistent with EA 2010. Such positions would require the amendment or repeal of EA 2010.