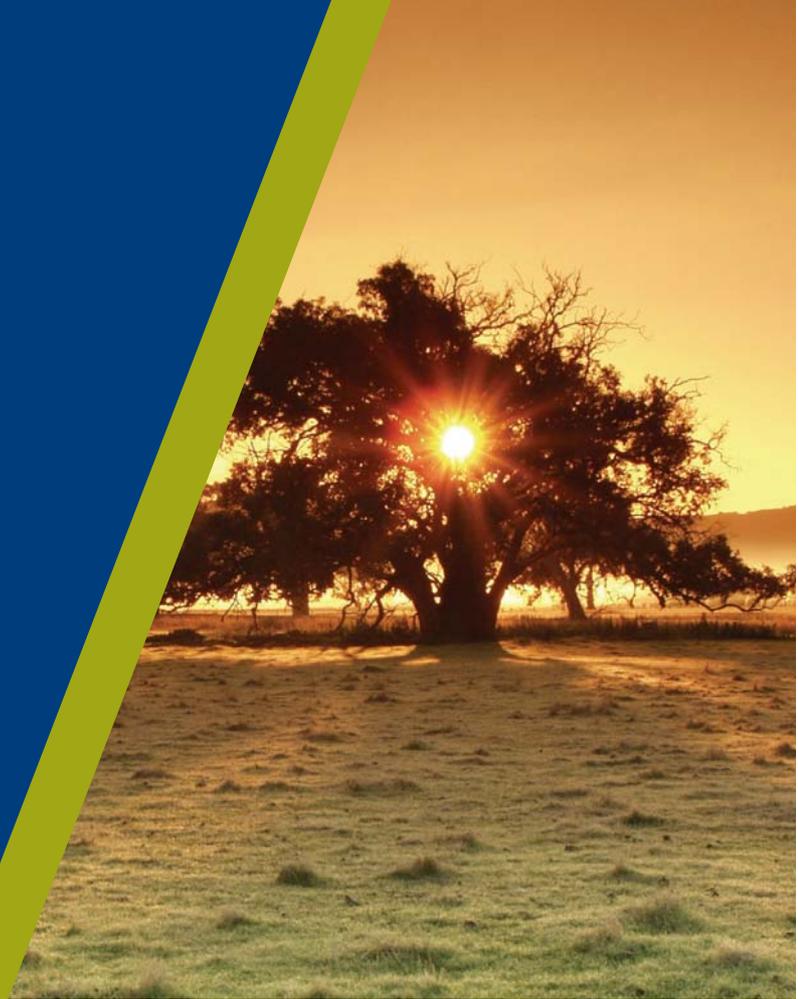


Spring 2013

Faith-Based Organisations Update



Welcome to the first edition of BWB's Faith-Based Organisations Update.

At BWB, we have for many years advised faith-based organisations from across the spectrum of different faiths. We also work with a number of inter-faith and sector umbrella organisations. Our work has highlighted that, increasingly, our clients in this field face issues special to them and that notwithstanding differences in faith or belief, there are many common themes.

Within BWB, our Faith-Based Organisations Group is a cross-departmental group that brings together lawyers with special expertise, many of whom are involved with or are trustees of faith-based charities. This means we have personal, as well as professional, experience of the challenging issues facing the sector.

The aim of this newsletter is to cover some of these special issues and introduce you to some of the members of our Faith-Based Organisations Group.

We hope you enjoy this first edition of our newsletter. The year ahead promises to hold further legal developments for the faith-based sector. If there are any particular topics you would like us to cover either in future editions of our newsletter or at one of our seminars, contact Lucy McLynn or Leona Roche, who jointly lead BWB's Faith-Based Organisations Group.



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2012 was quite a year for the faith-based sector with a number of high profile and significant legal developments. In particular, the sector has been getting to grips with the application of the Equality Act 2010 and its impact on the operation of faith-based organisations.

In this newsletter, we highlight some of the key developments that have taken place over recent months.

On page 4, **Louise McCartney** explains the decisions in *Eweida & Others*, four cases brought by practising Christians alleging their human right to manifest their religion had been breached.

On page 7, **Mark Traynor** looks at how places of worship could be affected by the change to the VAT rules on 1 October 2012, which removed the VAT zero rate for alterations to listed buildings.

The Supreme Court has now ruled that volunteers are not covered by the anti-discrimination provisions in the Equality Act 2010 that apply to employees.

Lucy McLynn explains this decision in the case of *X v Mid Sussex CAB* on page 8.

The long-running case of Catholic Care may finally have reached its end as the Upper Tribunal rejects Catholic Care's most recent appeal. **Leona Roche** outlines this latest decision on page 10.

The Charity Commission's refusal to register a Plymouth Brethren gospel hall as a charity has attracted controversy. **Stephanie Biden** explores the potentially far-reaching implications of this decision on page 12.

Mark Scodie considers the High Court's decision to reject London Christian Radio's challenge over an advert ban on page 13.

Specific risks arise when funding work overseas. On page 16, **Stephanie Biden** advises on how some of these risks can be managed.

Many of BWB's lawyers serve as trustees on charity boards. **Lucy Rhodes** shares her experience of trusteeship on the board of a faith-based organisation on page 18.

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Eweida and the Manifestation of Religion

What principles can be derived from the European Court of Human Rights' judgment in the high profile cases of Eweida & Others?

Louise McCartney reports on recent ECHR cases brought by practising Christians



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The European Court of Human Rights recently issued judgment in relation to four UK cases brought by practising Christians who alleged their human right to manifest their religion had been breached. The cases have received widespread coverage, but by way of recap the basic facts are as follows:

- Mrs Eweida was employed by BA as a check-in assistant. She wanted to wear a small cross. BA refused to allow it saying that it contravened their uniform policy, the aim of which was to ensure staff projected BA's corporate image.
- Ms Chaplin was a nurse who wanted to wear her confirmation crucifix on a neck chain. Her employer was content for her to wear the cross as a brooch but not on a chain, saying that represented an unacceptable health and safety hazard for both Ms Chaplin and patients.
- Ms Ladele worked for the London Borough of Islington as a registrar, performing civil ceremonies. Her employer said she must perform civil partnerships for same-sex couples as well as heterosexual civil marriage ceremonies. Ms Ladele was not prepared to do so, believing it would be contrary to her Christian faith.
- Mr Macfarlane was a Relate relationship counsellor. His employer required him to provide sexual counselling to same-sex as well as heterosexual couples. He was not willing to agree to do so, for similar reasons to Ms Ladele.

All four claimants brought claims in the Employment Tribunal, and all went to the Employment Appeal Tribunal and then to the Court of Appeal. With the exception of

Mrs Eweida, whose claim was initially successful at the Employment Tribunal, all the claims failed at every stage in the domestic courts.

All four then went to the European Court of Human Rights. They alleged that their Article 9 right to religious freedom had been unlawfully breached, either when read alone or when read in conjunction with Article 14. Essentially, their argument was that there had been impermissible interference with their right to 'manifest' their religion.

Article 9.1 provides:

'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.'

Article 9.2 then goes on to provide:

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

Article 14 provides:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national

or social origin, association with a national minority, property, birth or other status.’

The key point to bear in mind when trying to understand the ECHR judgment is that the rights set out at Article 9.1 are not absolute and unassailable rights. Interference and limitation of those rights is specifically contemplated by the words of Article 9.2. Whether interference with an individual’s rights is permissible depends on whether the interference is in pursuance of a legitimate aim and whether it is also a proportionate response. Of particular relevance to these cases were interferences ‘for the protection of ... health ... [and] ...the protection of the rights and freedoms of others’.

When deciding the cases, the ECHR had first to identify and consider all the relevant factors in each case and then perform a ‘balancing exercise’ to weigh up whether, on the particular facts of each case, the employee’s right under the Convention to manifest their religion outweighed, or was outweighed by, the arguments in support of the interference or limitation of that right.

The ECHR upheld Mrs Eweida’s case, but not the three others. In Mrs Eweida’s case, the ECHR took into account that:

- Mrs Eweida’s cross was small and discreet;
- There was no evidence that wearing it would impinge on anyone else’s rights, nor any evidence of an adverse effect on BA’s corporate image;
- Other members of BA staff wore highly visible symbols of their religion (for instance turbans) without any apparent negative consequences for corporate image or anyone else;

- BA had since voluntarily modified the uniform policy and permitted Mrs Eweida to wear her cross in any event.

On balance the ECHR concluded that BA’s initial interference with Mrs Eweida’s right to freedom to manifest her religion was not justified. (Although the decision should not be taken as indicating a general rule that economic interests can never outweigh an individual’s rights; that could still be an outcome in a case with different facts.)

The balancing exercise came down against the employees in the other three cases. Although the Court held that Ms Chaplin’s desire to wear her cross did amount to a ‘manifestation’ of her religion and was therefore protected conduct under the Convention, it noted that she was not prohibited from wearing it altogether; she was merely required to do so in a way that did not compromise health and safety. Her employer had been willing to compromise and its interference with Ms Chaplin’s freedom had been in furtherance of a legitimate aim (health and safety) and was a proportionate response. On balance, therefore, those considerations outweighed Ms Chaplin’s freedom to manifest her religion in the specific manner of her own choosing.

In both the Ladele and Macfarlane cases, the Court attached great weight to the fact their employers were motivated by a desire to avoid discriminating against members of the public with their own Convention rights.

These kinds of judgments are always very fact-specific. However the main points of significance and the principles that will be followed in future cases are as follows:

Our Services

Our Faith-Based Organisations Group provides a full range of legal services to faith-based organisations, including:

- Establishment and registration
- Governance and constitutional matters
- Fundraising and financing
- Contracts and grants
- Charity and company law
- Employment law
- Equality issues
- Incorporations and mergers
- Property
- Intellectual property
- Data protection
- Freedom of Information
- Immigration
- VAT and gift aid

“The court confirmed that though an individual’s manifestation of their religion will attract some weight, how much and whether it is sufficient to outweigh other competing interests will depend on the particular facts and circumstances”

- It confirms that there is a ‘fair balance’ to be struck between competing interests but that individual states have a ‘wide margin of appreciation’, or discretion, to determine where that fair balance lies.
- Having said that, it confirmed that the UK courts have been taking the wrong approach when deciding whether a claimant’s desired manner of conducting themselves amounts to a ‘manifestation’ of their religion. The point is that (for this purpose) it is only conduct amounting to a ‘manifestation’ of religion that is protected under Article 9.

UK courts have previously recognised a claimant’s behaviour or conduct as a ‘manifestation’ only if it is required (‘mandated’) by the particular religion. For example, in the *Eweida and Chaplin* cases the manifestation was the wearing of Christian symbols but because Christianity does not require adherents to wear visible symbols this UK-imposed hurdle counted against Mrs Eweida and Ms Chaplin in the domestic courts. (In the *Ladele* and *Macfarlane* cases, the alleged manifestation was their ‘conscientious objection’ to engaging in conduct they believed contrary to Christian teachings.) The ECHR judgment makes plain that to ‘count’ as a manifestation, claimants need only show a close connection between their religion and the behaviour or conduct in respect of which they seek Article 9 protection.

- The ECHR judgment also made plain that just because an employee has the ‘freedom’ to leave their job, thereby removing the employer’s ability to interfere with the employee’s freedom to manifest their religion, that does not mean there was no employer interference, and nor does it remove the

need for that interference to be justified. Again, UK courts had been taking the wrong approach to the protection of Convention rights when holding that because the employee was ‘free’ to walk away, their claims failed. The employee’s option to resign is just one factor to weigh in the balance.

- The court confirmed that though an individual’s manifestation of their religion will attract some weight, how much and whether it is sufficient to outweigh other, competing interests will depend on the particular facts and circumstances. However, the right of others not to be discriminated against, particularly in connection with their Convention rights, should be accorded a particularly heavy weighting by the courts.

VAT Changes

Changes to the VAT treatment of alterations to listed buildings could affect many places of worship

Many places of worship could be affected by one of the changes to the VAT rules announced in the 2012 budget; namely the removal of the VAT zero rate for alterations to listed buildings, which became operational from 1 October 2012.

Prior to this, approved alterations to listed buildings attracted a zero rate of VAT. Many of the listed buildings in the UK are places of worship (for example, 45% of the Grade 1 listed buildings in England are maintained by the Church of England), so the zero rate helped many faith-based organisations to keep the costs of carrying out such alterations, which can be substantial, to a manageable level.

The changes in the 2012 budget mean that since 1 October 2012, the zero rate has been abolished and approved alterations to listed buildings are subject to VAT. The abolition of the zero rate is expected to raise £85 million by 2013/2014, and the Government's justification for the move is that there was previously a perverse incentive to alter buildings rather than simply maintain or repair them, as repair and maintenance works are subject to VAT at the standard rate.

George Osborne's announcement in March 2012 as to the proposed change sparked concern amongst many faith-based organisations, which were faced with having to find an extra 20% in funding to carry out alterations (there are transitional provisions in place to protect owners who had already entered into a contract for the works prior to the budget).

In response to the pressure from faith-based organisations, which argued that places of worship should be exempt from the change, the Chancellor performed a partial u-turn and announced that the Listed Places of Worship Grant Scheme would be extended and funded by a further £30 million, so that approved alterations to listed places of worship will receive a 100% grant to cover the cost of the extra VAT.

The Government says that the changes to the Listed Places of Worship Grant Scheme will ensure that all of the additional costs for approved alterations to listed places of worship will be covered, but while this has eased the initial concerns, whether this 100% support will remain in the long term is yet to be seen. While the Listed Places of Worship Grant Scheme could be cut back or even ended entirely by a future government, under European rules once a VAT zero rate is abolished it cannot be re-implemented. Understandably there is concern amongst faith-based organisations that the full consequences of the removal of the zero rate may take some time to become clear.

Mark Traynor reports on how the removal of the VAT zero rate will impact disproportionately on the faith-based sector



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Find Out More

You can download the HMRC guidance on VAT rates for listed buildings from: http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032282

X v Mid Sussex CAB

Volunteers and discrimination – is this the end of the line?

Lucy McLynn, who successfully defended the *X v Mid Sussex CAB* case for the CAB, looks at the impact of the Supreme Court ruling



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In addition to this case, Lucy has acted in other ground-breaking cases, including *Coleman v Attridge Law*, which established the principle of associative discrimination under UK law.

In December 2012 the Supreme Court confirmed in the case of *X v Mid Sussex CAB* that volunteers are not covered by the anti-discrimination provisions in the Equality Act 2010 that apply to employees. BWB acted for the CAB in successfully resisting the claim by the volunteer ('X') that she has the same entitlement as an employee to bring employment tribunal proceedings alleging disability discrimination.

X argued that 'employment' needed to be interpreted widely enough to include many forms of volunteering, relying on the fact that the European equality legislation (with which UK legislation must comply) also covers 'occupation'. She placed reliance on a French ruling in which it was held that it was unlawfully discriminatory for Muslim women not to be permitted to wear the hijab when accompanying children on school trips in a voluntary capacity. This showed, it was said, that other EU member states interpret European law as giving protection from discrimination regardless of volunteer status. The Supreme Court were not persuaded, however, that this assisted them in determining how EU law ought to be interpreted.

“The case has shown... what a central importance the issue of volunteers and their legal status has for many faith-based organisations”

The case of X was followed with particular interest and concern by many faith-based organisations, which routinely use the services of volunteers from within their own faith without considering that this could amount to religious discrimination against others. Whilst in reality the possibility of, for example, a non-Hindu wanting to volunteer to clean the temple might seem entirely far-fetched, there are clearly more probable scenarios, such as a highly successful Jewish advisory service that only uses Jewish volunteers, but which is perceived as offering a stepping-stone to employment for its volunteers in other advice agencies. Such an organisation might well be open to challenge from a non-Jewish would-be volunteer if this legal route were available to the disappointed candidate. Equally, there are some individuals who actively set out to bring discrimination claims, and organisations with a religious tenor are an obvious target for this kind of claimant. Whilst careful consideration is generally given to the question of 'occupational requirement' by faith-based organisations appointing only members of a particular faith to paid posts, volunteering tends to be much more ad hoc, and not subject to the same level of scrutiny. At the same time, faith-based organisations are often heavily reliant on volunteers to carry out their activities.

The Christian Institute intervened in the Supreme Court, arguing against X's case (as did the Government), and made the point that the motivation of volunteers for many faith-based organisations is often primarily religious or otherwise selfless – 'It flows from an ethic of service'. Such a basis for volunteering is entirely incompatible with the imposition of a framework of rights and obligations on both sides.

With the Supreme Court's ruling in favour of the CAB, and no further domestic route of legal appeal for X, these concerns may appear to have been unfounded. Certainly the feared outcome of volunteers automatically acquiring legal rights has been avoided. The case has shown, however, what a central importance the issue of volunteers and their legal status has for many faith-based organisations. There remains the risk that volunteers will be able to demonstrate that, on the facts of their individual volunteering arrangements, they are in fact employees for the purposes of discrimination protection. This is an argument that has been successfully run by volunteers in a number of cases over the years (*Chaudry v Migrant Advisory Services*, *Armitage v Relate*, *Murray v Newham CAB*). Extreme care needs to be taken to ensure that volunteers are not treated in a way that could give rise to such claims.

There are a number of features of the relationship that should be considered, in particular:

- That the volunteer does not receive any monetary reward for volunteering, and that re-imbursment of expenses is only for expenses actually incurred, or a reasonable pre-estimate of such expenses;
- That there are no obligations placed on the volunteer in terms of attendance and notification of absence, and no suggestion of 'disciplining' the volunteer for anything relating to their voluntary activities;
- That no benefits are provided to the volunteer, including any training that is not necessary for carrying out the volunteering role.

This last factor is particularly significant, as we expect there to be a challenge at some point from a volunteer seeking to argue that they have protection under the Equality Act as a recipient of services. Whilst we would not expect such a claim to succeed, it is obviously important to ensure that the arrangements with volunteers have not, in fact, given rise to a relationship that could be characterised in that way.

Find Out More

We have covered this case extensively in previous employment law updates, which are available from our website: www.bwbllp.com/knowledge/updates.

You can also read a news item on the ruling here:

www.bwbllp.com/knowledge/news/2012/12/12/the-supreme-court-maintains-the-status-quo-for-volunteers/

Catholic Care Loses Again

In November 2012, the Roman Catholic adoption agency Catholic Care (Diocese of Leeds) lost its legal battle in a landmark ruling at the Upper Tribunal (Tax and Chancery)

Leona Roche reports on the long-running battle concerning adoption services



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The complex history of the Catholic Care case has been well rehearsed over the past 5 years. To briefly recap, the Leeds-based charity is an established social care organisation that has placed children with adoptive parents for more than 100 years. In line with the teachings of the Catholic faith, it restricted its adoption services to heterosexual couples only and did not consider homosexual or same-sex couples seeking to adopt.

This practice was lawful until the end of 2008 when changes in equality law came into force prohibiting discrimination in the provision of services to the public on grounds of sexual orientation (as well as other characteristics). Only a limited exception from this prohibition existed – one that may have allowed Catholic Care to restrict its adoption services to heterosexual couples if its governing document required it to do so and the charity could show that this practice was a ‘proportionate means of achieving a legitimate aim’. This exception is now contained in section 193 of the Equality Act 2010.

Catholic Care stopped providing its adoption services at the end of 2008 and applied to the Charity Commission to amend its objects to include a restriction that would prevent it from offering its adoption services to homosexual couples. In this way, it wanted to bring itself within the exception and resume offering its adoption services in line with its previous practice. The Charity Commission refused to allow Catholic Care to change its objects – since this time, the charity has been seeking without success to have the Charity Commission’s decision overturned.

The Upper Tribunal considered Catholic Care’s latest appeal from a decision of the First Tier Tribunal (‘FTT’), which was given on 26 April 2011. The FTT had heard a detailed examination of the facts, with evidence given on both sides, and had considered whether Catholic Care had established a defence of objective justification to allow it to discriminate against same-sex couples. The FTT found against Catholic Care and upheld the Charity Commission’s refusal to grant permission for the charity to amend its objects.

Catholic Care had accepted that its religious views alone could not provide it with an objective justification for the denial of its adoption services to same-sex couples. Instead, it sought to argue that its proposed discrimination was proportionate to its legitimate aim of increasing the number of adoption placements for children who would otherwise not be placed with adoptive families. Unless it was permitted to amend its objects, the charity would no longer be able to raise the voluntary income from its supporters that it needed to run its adoption services, and it would have to close its adoption services permanently.

Whilst the FTT found that Catholic Care’s stated aim was a legitimate aim, it concluded on the evidence before it that there was no realistic prospect of the charity increasing the number of adoption placements by its proposed method of discrimination. The FTT found that Catholic Care had only achieved about 10 successful placements of children with adoptive parents each year. A lengthy period had elapsed between the end of 2008 (when Catholic Care stopped providing its adoption services) and the

FTT hearing in 2011. No evidence was forthcoming from the local authorities with which the charity had worked to show that in practice there had been any significant problem in placing children for adoption as a result. On the contrary, there was a surplus of potential adoptive parents available through other voluntary adoption agencies. The charity needed to show serious and weighty reasons in order to justify its proposed discrimination against homosexuals, and it had failed to do so.

Catholic Care appealed to the Upper Tribunal on the basis that the FTT had erred in law on a number of grounds in reaching its decision. Whilst the Upper Tribunal did find that the FTT had made some errors in law, these were not considered serious enough (either individually or in combination) to render the FTT's judgment wrong and the charity's appeal was dismissed.

It is clear that the decision in Catholic Care very much turned on the facts of this particular case, and it is therefore difficult to predict at present the full extent and impact that this decision will have.

However, there are a number of points that can be taken from the decision:

- The interests of children will always be a very powerful consideration, and the extent of benefits to children and the likelihood that such benefits might be achieved will be relevant considerations to be taken into account in determining whether weighty and convincing grounds have been established to justify a proposed discrimination.
 - A desire to promote traditional family life is a legitimate point of view in a pluralist, democratic society.
 - However, religious conviction alone cannot in law provide a justification for the denial of services to people on the grounds of a protected characteristic.
 - It is clear that there is a tension between Article 14 (prevention of discrimination) and Article 9 (freedom of conscience and religion) of the European Convention on Human Rights, neither of which is an absolute or unqualified right.
- Catholic Care is now considering whether to appeal the Upper Tribunal's decision to the Court of Appeal.
- Direct discrimination by reference to a protected characteristic such as sexual orientation is capable of being lawful provided it is objectively justified on the facts.
 - Such justification will require particularly weighty and convincing reasons. A high threshold must be met therefore, and it is likely to be a very special and unusual case that falls within the section 193 exception.

Scottish News

The Office of the Scottish Charity Regulator (OSCR) has now ruled in its equivalent of the Catholic Care case. St Margaret's Children and Family Care Society, a Catholic adoption agency, has been told by OSCR that it does not provide public benefit and therefore fails the charity test because its assessment criteria for adoptive parents unlawfully discriminate against same-sex couples by preferring married couples. OSCR considered both the charities exception and the religious exception and found that St Margaret's could not rely on either to justify its discrimination. The charity has been given until 22 April 2013 to amend its assessment criteria if it wishes to retain its charitable status.

The Plymouth Brethren Case

In June 2012, the Charity Commission refused to register a local gospel hall as a charity, in a decision that has received significant media coverage and attracted Parliamentary interest.

Stephanie Biden reports on the implications of the Charity Commission's refusal to register a local gospel hall as a charity



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Following the Charity Commission's refusal to register Preston Down Trust ('the Trust'), a Plymouth Brethren gospel hall, as a charity, the Trust sought to appeal the Charity Commission's decision to the First-Tier Tribunal (Charity).

The Commission had decided that it could not conclude that the Trust was established for the advancement of religion for public benefit. The decision focused on concerns that the Trust does not allow the public enough access to its worship services or interact sufficiently with the wider community. The Commission also appeared to have taken into account public criticism of some Plymouth Brethren religious practices in its decision, while acknowledging that it did not have evidence to demonstrate that the practices led to disadvantage that would negate public benefit.

The decision identified a number of key principles about the advancement of religion and public benefit and stated the Commission's view that these principles are now in doubt since the Charities Act 2006 removed the presumption of public benefit for religious charities.

This was contrary to assurances that were given in Parliamentary debate on the Charities Act 2006, when Ministers stated that the Act was not intended to narrow the range of activities that are recognised as charitable nor to impose onerous obligations on individual religious charities.

MPs have responded furiously, portraying the Commission as an unelected quango, flouting the will of Parliament. There have been heated evidence sessions to the

Public Administration Select Committee and a Westminster Hall debate where MPs accused the Commission of an "anti-Christian" secularising agenda, and a 10-minute rule bill was introduced seeking to reinstate the presumption of public benefit for religious charities.

The Commission does not deserve this vitriol (much of it ill-informed) but the position set out in its decision has the potential, if logically applied, to open up serious issues not just for mainstream Christian denominations, but also in relation to the exclusive nature of Orthodox Jews, some Muslim groups and other faiths.

It is interesting to note that the Tribunal gave the Commission permission to serve anonymous witness statements and request other protection measures for its witnesses. This was apparently in response to former members of the Plymouth Brethren requesting the opportunity to give evidence and suggests that the Tribunal was minded to consider alleged harm that could negate public benefit.

However, the Tribunal proceedings have now been stayed to allow the Plymouth Brethren an opportunity to seek to resolve the issues with the Charity Commission without incurring the costs of going to the Tribunal. This is unlikely to afford the same opportunity for questions of public benefit, and possible harm, to be explored in a public forum.

Christian Radio Station “Political” Advert Ban

The High Court has rejected London Christian Radio’s challenge to a ban on a radio advertisement, ruling that the RACC’s decision to ban the ad was “rational and lawful”. An ECHR ruling in an animal welfare case will determine whether this decision will be the end of the matter.

London Christian Radio (LCR) and Christian Communications Partnership (CCP) intended to air an advert on the Premier Christian Radio (which is run by LCR) seeking information from Christians who felt marginalised in the workplace. This was presented as part of a campaign for a fairer society.

The advertisement was prepared for broadcast after surveys conducted by magazine publishers CCP disclosed that more than 60 per cent of active Christians believed that members of their faith were becoming increasingly marginalised in the workplace.

In order to broadcast the advert they needed to obtain clearance from radio’s regulatory body, Radio Advertising Clearance Centre (RACC). RACC refused to clear the advert because it held that the proposed advertisement infringed the prohibition on political advertising as set out in sections 319 and 321 of the Communications Act 2003 (‘the Act’).

Section 319 of the Act provides that:

‘(1)It shall be the duty of OFCOM to set, and from time to time to review and revise such standards for the content of programmers to be included in television and radio services as appear to them best calculated to secure the standards objectives.

(2)The standards objectives are — ...
(g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services; ...’
Section 321(2) of the 2003 Act defines ‘political advertising’ as follows:

‘For the purposes of section 319(2)(g) an advertisement contravenes the prohibition on political advertising if it is —

(a) An advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;

(b) an advertisement which is directed towards a political end;...’

Mr Peter Kerridge, the CEO of LCR, explained in his witness statement that:

‘The purpose of the advertisement was to gather accurate information from Christians in order to verify an initial survey carried out by CCP as to the extent of discrimination against Christians in the workplace. If this information corroborated the initial research, this would be used to inform, encourage and to equip Christians to deal with such matters, to raise it with the Equalities Commission and the Government and to inform the public and raise awareness generally that Christians are being marginalised in the workplace and that there is not the same level of respect and tolerance towards Christians and Christian values and belief as there is

Mark Scodie looks at the details of the case



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“While charity law allows faith-based groups and charities ... wide freedom to campaign on political issues, organisations wishing to use broadcast media also need to comply with relevant broadcasting laws”

for other groups, which in a pluralistic society is not acceptable, fair or democratic.’

The RACC refused to give consent to the broadcast on the grounds that their ‘common sense’ interpretation of the advert content was that the ‘advertiser intends to use the information provided to influence or change Government policy to help address the unfairness’ and therefore the advert, when taken as a whole, was ‘directed towards a political’ end as defined in the Act.

LCR and CCP brought a judicial review against the decision of RACC, contending that the advertisement did not fall within the prohibition in the Act. They claimed that even if the advertisement might be political, this was not the aim of the advertisement itself. They further contended that if it did fall within the prohibition, then the prohibition is incompatible with their right of freedom of expression under Article 10 of the European Convention on Human Rights.

The Secretary of State for Culture, Olympics, Media and Sport, as Minister with overall responsibility for broadcasting, opposed the judicial review.

The High Court ruled on 20 April 2012 that the advert was ‘directed towards a political end’ as it was intended to obtain information in order to ‘influence or change Government policy’ and would therefore contravene the prohibition on political advertising on television and radio in the Act. It also found that there was no Article 10 infringement, following case law that recognises ‘a pressing social need for a blanket prohibition of political advertising’

because of broadcast media’s immediacy and impact and RACC’s decision was ‘rational and lawful’.

The application of LCR and CCP was accordingly dismissed.

The Court stressed that ‘it has not been suggested that the stance of the Secretary of State is any way anti-Christian or that his reasoning would not apply to any other religion’ and noted that the Claimant could use other advertising media, such as newspapers, magazines, direct mail and billboards to communicate the same message.

This decision in the London Christian Radio case calls to mind Ofcom’s decision in 2005 to ban the high profile ‘Make Poverty History’ (MPH) advertisements.

In December 2004 the Broadcast Advertising Clearance Centre (BACC) and the RACC initially cleared the television and radio advertisements, which featured celebrities saying that someone dies through poverty every three seconds. The advertisements directed viewers to the MPH website, which encouraged them to lobby the Prime Minister and Government directly to make it a high priority on their political agenda.

In the weeks leading up to the broadcast on 31 March 2005 a number of broadcasters contacted Ofcom to express concerns about whether the adverts amounted to political advertising. Having viewed the television advert and heard the radio advert on 31 March, Ofcom considered whether MPH was a body ‘whose aims were wholly or mainly political’, and as such was prohibited from

advertising on television and radio under sections 321(2)(a) of the 2003 Act (see above) and whether the adverts, by directing viewers to the MPH website, were 'directed towards a political end' in breach of section 321(2)(b) of the Act.

Ofcom noted in its decision that this argument missed the main point of the 2003 Act which had 'been worded very widely so that even if the content of a broadcast advertisement as transmitted is not in itself political it may nevertheless be an advertisement "directed towards" a political end. The word "towards" clearly implies that if the advertisement has political objectives, as defined by the Act, then the advertisement itself is caught.' Ofcom concluded that since the only call to action was to visit the MPH website, and since the objective of the MPH website was fundamentally about supporting MPH campaigns, the advertisements were 'directed towards a political end'. Ofcom also found that MPH was a body whose objects are wholly or mainly of a political nature.

These cases highlight that while charity law allows faith-based groups and charities in general wide freedom to campaign on political issues, organisations wishing to use broadcast media also need to comply with relevant broadcasting laws.

However, in the LCR/CCP decision the Court relied in part on a previous, 'strikingly similar' House of Lords case in which Animal Defenders International (ADI), an organisation promoting animal rights, unsuccessfully tried to challenge the decision of the former television equivalent of the RACC (now replaced by Clearcast) to refuse to clear a television advert

concerning the use of primates by humans in science and commerce. ADI took their case to the European Court of Human Rights (ECHR), and the case was eventually heard in March 2012. The Court indicated that if the ECHR were to rule that the House of Lords's decision in the ADI case was wrong, LCR and CCP could make a fresh application to the RACC.

The aim of the Communications Act 2003 was to introduce a lighter regulatory framework for the electronic media and communications industries. One outcome of the Act that has impacted faith-based organisations in these industries is the relaxation of the prohibition on religious bodies controlling certain broadcasting licences. Under previous broadcasting laws religious bodies had been automatically disqualified from holding broadcasting licences.

However, when it comes to political advertising, the Act is currently interpreted restrictively, giving a wide interpretation to 'political' for the purposes of the contravention on political advertising in television or radio services. Examples of objects of a political nature and political ends are set out in section 321(c) and extend to 'influencing public opinion on a matter which...is a matter of public controversy'. Whether this restrictive approach continues will depend on the ECHR's forthcoming ruling in the ADI case.

Find Out More

Faith-based organisations planning advertising campaigns using broadcast media should seek advice at the planning stage, to avoid wasting time and money in producing advertisements that are subsequently held to contravene the Act.

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Funding Work Overseas – Managing the Risks

With funding for international development growing, faith-based organisations making payments overseas need to take reasonable steps to ensure the money is spent on charitable purposes - or risk the scrutiny of HMRC

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A recent report* shows that UK foundations spend around £292 million on international development annually, and the Department for International Development funds NGOs globally at around twice that level. Many organisations that support, or carry out, work overseas will be faith-based organisations, whether they are working to relieve poverty or to advance teaching of their faith (or both). International charitable funding is growing – and scrutiny is growing with it.

Since the Finance Act 2010, payments may only be made by charities to bodies outside the UK if the trustees have taken such steps as HM Revenue & Customs (HMRC) considers reasonable to ensure that payments are applied for charitable purposes. The change confers discretion on HMRC, rather than relying on an objective test, and trustees should refer to HMRC's guidance. If HMRC decides that trustees have not taken reasonable steps to protect funds the payment may be taxable as non-charitable expenditure and the charity would lose tax exemption on an equivalent amount of its income and gains.

With heightened scrutiny and threats to tax reliefs, trustees of faith-based organisations should review their policies and procedures and ensure they have appropriate agreements in place with overseas partners. There can be particular challenges for organisations starting work in new territories, where they may not have prior knowledge of the organisations receiving funding or networks on the ground to help monitor how funds are being used. Funding capital or endowment projects and working

in areas where local regulation or law enforcement is ineffective can also pose challenges. In these scenarios, due diligence into potential partners and practical steps to reduce risk become more important than relying on a written agreement with local partners.

HMRC Guidance

The full updated HMRC Guidance can be viewed online at:
http://www.hmrc.gov.uk/charities/guidance-notes/annex2/annex_ii.htm#9

It states that the charity trustees must be able to:

- describe the steps they take;
- explain how those steps ensure charitable application of funds;
- demonstrate that those steps were reasonable; and
- produce evidence that the steps were, in fact, taken.

The charity's knowledge of, and previous relations with, the overseas body, the history of that overseas body, and the amounts involved in both absolute and relative terms are all relevant factors. Trustees may be asked to provide information about:

- the entities receiving the payment;
- the charitable purpose payment is given for;

*Global grant-making: A review of UK foundations' funding for international development by Cathy Pharoah and Lynda Bryant published by The Nuffield Foundation, November 2011.

“If HMRC decides that trustees have not taken reasonable steps to protect funds the payment may be taxable as non-charitable expenditure and the charity would lose tax exemption on an equivalent amount of its income and gains”

- what guarantees or assurance have been given by the recipient about how the payment will be used;
- what steps the trustees took to ensure the payment will in fact be applied for charitable purposes; and
- what follow-up action the trustees took to confirm that payments were applied properly.

It is important to have appropriate records in place. Faith-based organisations that have been funding projects on the basis of longstanding informal relationships – for example, churches supporting small projects linked to missionaries they know overseas – should consider formalising their relationships with overseas partners.

The steps that should be taken in this area will depend on the scale of operations and the sums involved. For ‘small one-off payments’ an exchange of correspondence between the charity and the overseas body, on headed notepaper and confirming the payment will be used for charitable purposes, will normally be sufficient.

However, for larger or on-going commitments HMRC states that ‘more thorough work by the trustees will be required’, potentially including:

- independent verification of the overseas body’s status and activities; and
- reporting and verification of how funds are used.

If the recipient is not bound by its domestic law to apply all of its income for charitable purposes (under English law), the trustees of the funding charity should consider a legally binding agreement to ensure that the payment is applied charitably. They must also be able to check whether the agreement has been complied with in practice.

Where large sums or long-term commitment are involved, HMRC expects to see ‘comprehensive evidence of the trustees’ considerations’. This may include:

- a detailed project plan;
- formal funding applications; and
- records of the evaluation procedure carried out by the trustees.

HMRC would also expect there to be a formal agreement with the recipient providing for:

- payment of grants in stages based on specific targets;
- a series of reviews to monitor project delivery; and
- claw-back provisions if the project fails or the building is not used as intended.

Other issues for international funders:

The Bribery Act 2010 provides for British citizens and organisations connected with the UK to be prosecuted regardless of

where acts of bribery occur. There are offences not just of paying bribes and bribing foreign public officials, but also receiving a bribe. Charities may also be caught by the offence of failure of commercial organisations to prevent bribery. It is a defence to show that the organisation had adequate measures in place against bribery.

This makes it crucial to have a zero-tolerance policy on bribery and a high level commitment from the trustees to tackle bribery. Staff should receive appropriate training on the Bribery Act and steps they can take to reduce the risk of situations where they may be asked to pay a bribe. Agreements with local overseas partners should also reflect the zero-tolerance approach.

Trusteeship in a Faith-Based Organisation: Philemon UK

'Every man, whoever he may be and however downtrodden he may be, demands - perhaps only instinctively, perhaps only unconsciously - respect for his dignity as a human being. The prisoner himself knows that he is a prisoner, an outcast... but there are no brands and no fetters that can make him forget that he is a human being. And since he really is a human being he should be treated humanely. My God, humane treatment may humanise even one in whom the image of God has long been obscured'

Dostoyevsky, The Dead House

Lucy Rhodes shares her experience of trusteeship on the board of a faith-based organisation



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I have been a trustee on the board of Philemon UK since April 2011. Philemon UK was set up to support the work of the Kenyan charity, Philemon.

Philemon (Kenya) was registered as a charity in 2002 by former prisoner, Kelvin Mwikya. In 1992 Kelvin had been convicted on trumped-up charges of robbery as a result of his refusal to give false evidence on behalf of his uncle in a business dispute. A guard told him, 'Prison is for poor people who can't afford to bribe.' The guard was right. Without family to support him, a lawyer to represent him or money to pay the 50,000 shillings bribe requested by the police, Kelvin began a 13 year sentence in a squalid Kenyan jail.

Kenyan prisons are regularly the subject of international criticism. They are overcrowded, holding more than double their official capacity, and endemic corruption within the police force means that inmates are often innocent but simply too poor to raise bail, to pay their way out or instruct lawyers to represent them.

During his time in prison, Kelvin, in reading the Bible, came across the story of Philemon who was encouraged by Paul to forgive and receive his runaway slave back as a brother. The story defied the disgrace and marginalisation that prisoners and ex-prisoners often face. Kelvin made a pledge to serve prisoners if he was ever released from jail. After an early release in 1996, he

used part of his first wage as a carpenter to return to the prison with toilet paper so that his former roommates would no longer need to use Gideons Bibles as a substitute! Since this first act of simple kindness, Kelvin has led Philemon's development into a prisons charity operating across Kenya.

Philemon UK was established as a charity in England and Wales in 2004 by volunteers who had met Kelvin whilst setting up a prison legal aid and education programme in Kenya's prisons on behalf of the Kenya Christian Lawyers' Fellowship. One of the UK board's principal roles is to raise funds in the UK that can be sent to Philemon in Kenya.

Before I started my training contract at BWB in September 2012, I spent a month in Kenya seeing Philemon's work inside and out of the prisons. One lady I met left a lasting impression on me for her courage and initiative.

On 23 December 2003, Loise was convicted on two counts of robbery and sentenced to death. Her boyfriend had committed the offences, but when the police failed to find and arrest him, they took Loise to pay for his crime instead. The police subsequently found her boyfriend, but both Loise and he were jointly prosecuted. The prosecution's case against her was that she must have benefitted from his theft.

Philemon first came into contact with Loise during an outreach visit to Lang'ata womens' prison. When Loise was acquitted Philemon gave her Ksh. 4,000 (£30), which enabled her to start paying the rent for living space and a shed to set up a vegetable selling business, and vegetables for her first sales.

With determination and focus, Loise has worked hard to make her business a success and today makes a profit of Ksh. 1,000 (£7) a day. Loise is now the treasurer of a Philemon ex-prisoners support group in Nairobi and provides inspiration and encouragement to many women coming out of prison.



As a trustee on the board of a small charity my role has been hugely varied. It has included fundraising, interviewing, drafting documents, speaking at events, marketing, financial planning, setting strategic goals and negotiating with our partners in Kenya. I have learned a great deal about what is involved in the running of the charity and about a subject and a country that I had previously known next to nothing about. I am now setting up a social enterprise - Kwera Kenya - to train women in prison to make jewellery and other accessories which they will be employed to produce upon their release and which we will sell in the UK. I have also become a trustee on the board of the UK charity, the Prisoners Advice Service.

Many young people think that they do not have enough work or life experience to become a trustee. From my experience, this is rarely the case. There is huge demand from charities for young and enthusiastic trustees who can offer a different perspective to their older counterparts and who will have skills and insight to offer, in spite of what they may think. In return, young trustees gain invaluable experience and fantastic opportunities and we all benefit from the participation of a wider demographic in a sector that plays a vital role in society.



Trustees Unlimited, a joint venture between BWB, NCVO and Russam GMS, has an online database of trustees and a network of charities looking for trustees. To sign up, visit the Trustees Unlimited website at: www.trustees-unlimited.co.uk

For more information on what trusteeship entails, BWB has published a number of resources for charity trustees, which can be found at: www.bwbllp.com/knowledge/publications/2013/01/01/resources-for-trustees/

The information contained in this update is necessarily of a general nature. Professional advice should be sought for specific situations.



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