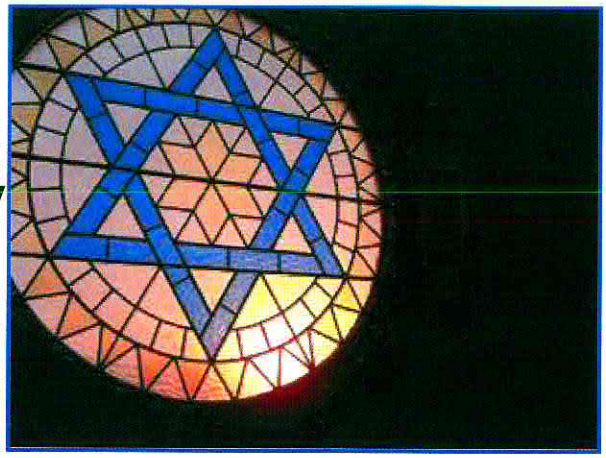
A year in charity



29 June 2010

By Michael King, **Tom Murdoch**, **Darren Hooker**

Stone King's charity team reflects on the most significant cases this year, including religious and sexual orientation discrimination, contested legacies and the role of the Charity Tribunal

Several events of the last year have had a significant impact on the charity sector, ranging from the first case before the Supreme Court to the emergence of the Charity Tribunal.

In March, the High Court ruled that the charity Catholic Care could potentially discriminate against gay couples, by exploiting an ambiguous exemption to the Equal Rights (Sexual Orientation) Regulations 2007. The case, which should also be considered in light of the yet-to-be-implemented Equalities Act 2010, has wide implications for many charities which restrict benefits to particular groups of people (see solicitorsjournal.com, 17 March 2010).

When the regulations were introduced, they were widely understood to be intended to prevent faith-based adoption agencies from discriminating against same-sex couples. Indeed Labour ministers considered the strong contrary views of the Catholic Church but decided to proceed with the regulations unamended. Nevertheless, the regulations did provide for a number of exceptions, in particular the "charitable instrument exemption", which allows charities to discriminate where they are acting in pursuance of a charitable instrument – for example, their constitution, or the terms of any other trusts on which they hold charitable funds. There was a further exemption, permitting the Charity Commission to make such constitutional amendments without breaching the regulations.

In *Catholic Care (Leeds) v The Charity Commission* [2010] EWHC 520 Ch, the commission refused to allow the charity to amend its objects to make it clear that its services were limited to heterosexual couples in accordance with Catholic doctrine. The commission refused on the grounds that the charity's beneficiaries were the children in the charity's care, not potential adoptive parents and that discrimination against the latter was not permissible. When Catholic Care appealed to the Charity Tribunal, the tribunal upheld the commission's decision – although on different grounds.

Catholic Care then appealed the tribunal's decision. Although the rules have since changed, at that time appeals from the tribunal were heard in the High Court. Briggs J found that the charitable instrument exemption is not restricted, as the Charity Commission had contended, to benefits provided directly to the ultimate beneficial class of that charity (the children up for adoption). In other words, discrimination against adopting parents, as indirect beneficiaries, is potentially permissible.

Briggs J referred the question of whether the charity will, in fact, be permitted to amend its constitution to allow it to discriminate in this way, back to the Charity Commission. In deciding this question, the commission must have regard to its own guidance on public benefit, in particular the principles that restrictions on those who can benefit must be reasonable and proportionate to the aims and that benefits must be balanced against any detriment or harm. As a public body, the commission must also act consistently with articles 8 and 14 of the European Convention on Human Rights, the right to privacy and family life and the freedom from discrimination respectively.

In leaving the decision to the commission, Briggs J noted that existing European case law, which underlines

the importance of proportionality, illustrates that particularly strong reasons would be needed to permit discrimination in adoption services. However, he also noted that Catholic Care's status as an adoption agency of last resort and the needs of children that might otherwise not be adopted may constitute a special case.

Equal measures

That position is similar, but not identical, to the terms of the Equalities Act, which received assent on 8 April and is likely to be implemented in October this year. The Act will consolidate a wide range of existing legislation, prohibiting discrimination against a wide range of 'protected characteristics', including age, disability, race, sex and sexual orientation.

The Act will also contain a charitable instruments exemption, but those relying on it will also have to show that they are employing a proportionate means of achieving a legitimate aim or acting for the purpose of preventing or compensating for a disadvantage linked to a protected characteristic.

Of course, the concept of proportionality is familiar from European law, but how it and the phrase 'legitimate aim' will be interpreted in practice by domestic courts remains uncertain. Charities seeking to justify discrimination in future may prefer to rely on some of the more concrete exemptions available under the Act, provided they can satisfy the relevant conditions. These exemptions include single-sex and religious schools, religious charities, communal living charities and the 'positive action exemption' for charities seeking to help persons with protected characteristics.

Wider issues

Ultimately, many charities like Catholic Care are dependent on funding from the local authority and other public bodies. While charities are for the most part private institutions, not bound by the Human Rights Act, public bodies are bound by it. Unless dependent charities can satisfy public bodies that their work is compliant with articles 8 and 14 (and any other applicable convention rights) their funding may therefore dry up. The extent to which the Charity Commission, as another public body, should, or should not, impose Human Rights Act obligations on charities is, of course, controversial – even where they offer public services.

Other issues lurking in the background of the Catholic Care case may have further significance. In particular, the commission's narrow interpretation of charitable benefit is likely to resurface, possibly to be challenged by independent schools and other fee-charging charities. The secretary of state for education has recently asked his officials to hold discussions with the commission on the public benefit question.

Supreme debut

Discrimination also featured in the 2009 case *E v JFS* [2009] UKSC 15, which attracted headlines late last year as the first case to be heard before the new Supreme Court (see solicitorsjournal.com 16 December 2009).

It concerned the admissions policy of the voluntary-aided Jews' Free School and in particular its selection criteria given that the school is popular and constantly oversubscribed. The criteria stated that in the event of oversubscription priority would be given to those students who were recognised by the Office of the Chief Rabbi as orthodox Jews.

The child in question, E, was not recognised as an orthodox Jew, owing to his mother's unorthodox conversion to Judaism – she was previously a Christian and her conversion followed a form which was not recognised by the Chief Rabbi. Consequently, the child was refused a place at the JFS.

The court held that the admissions policy was discriminatory on the grounds of ethnic origin and therefore constituted unlawful race discrimination, though the judges of the Supreme Court took great care to say that the Chief Rabbi and the school were not themselves racially motivated.

These two cases and the forthcoming introduction of the Equalities Act suggest that discrimination will remain a hot topic beyond 2010.

Contested legacies

In October 2009, Dr Christine Gill brought a case to the High Court to contest her mother's will which left her entire estate, valued at between £1.2 and £1.4m, to the RSPCA with no provision for herself (see *Solicitors Journal* 153/39, 20 October 2009).

In *Gill v Woodall* [2009] EWHC 3778 (Ch), Dr Gill fought the case on two main grounds. First, she argued that at the time her mother made her will she did not know and approve of its contents. Second, she argued that her mother had completed the will under the undue influence of her husband, notwithstanding that Mr Gill had predeceased his wife by many years. Mr Gill was described as a domineering, self-opinionated man with a short temper. The court concluded that Mrs Gill had indeed been coerced.

Dr Gill also made an alternative claim of proprietary estoppel, claiming she had received assurances from her mother that she would receive the farm, which she had relied upon to her detriment – by helping on the farm. The court accepted this argument too and held that the farm should pass to her.

Noting that Dr Gill had made three offers to settle, all of which were refused, the judge ruled that the RSPCA had shown reluctance to accept mediation or negotiate a fair out-of-court settlement. He therefore ordered the RSPCA to pay approximately £1m of the costs – which in total had amounted to £900,000 for Dr Gill and £400,000 for the charity.

A charitable dilemma

The RSPCA maintains it had a duty to pursue the case: Mrs Gill's apparent testamentary intention, to exclude her daughter, appeared to be clear. The decision has been criticised by some for unfairly punishing a charity that was simply pursuing its legitimate interests, but others, including some trust and estates lawyers, have said that charities have become unreasonably aggressive in pursuing such interests, not least burial costs.

Cases like this one illustrate how difficult the decision can be. However, before going to court, charity trustees should always consider three points: the likely success of their case; the risk of adverse publicity from the case; and the potential costs of the case.

Equally, trustees must not simply give up and settle out of court at the first hint of negative publicity. Publicity can work both ways – perhaps equally damaging could be a perception that trustees have been too weak in

protecting the charity's assets. Settling cases that have no real legal grounds could also be interpreted as an ex gratia payment, falling outside the charity's objects and requiring a specific order from the Charity Commission.

The way for trustees to protect themselves against allegations of getting this balancing act wrong is to seek the advice of the commission and to obtain legal advice, where necessary, on the strength of a claim. Sometimes the commission will sanction a proposed compromise or settlement. Alternatively, the commission can grant trustees permission to seek a 'Beddoe order' from the court, which authorises the charity to pay for legal costs and protects the individual trustees from any personal liability in the event they are unsuccessful.

The Charity Tribunal

One of the most significant developments in the regulation of charities in the last 12 months has been the emergence of the First-tier Tribunal (Charity) as a route of appeal from the Charity Commission. The tribunal has been sharply critical of the performance of the commission, in particular of its compliance team, and the decisions have made for some interesting reading. It will also be interesting to see whether the new government looks to expand the role of the tribunal, in particular its jurisdiction, which at present is still defined by the rather limited range of decisions and actions of the commission defined in the (amended) Charities Act 1993.

Like those of the Charity Commission, decisions of the First-tier Tribunal do not create binding legal

precedent. However, decisions of the Upper Tribunal, the route of appeal from the First-tier Tribunal, are binding. To facilitate the development of charity law, therefore, the presidents of the Upper Tribunal now propose to allow the transfer of suitable cases direct from the First-tier Tribunal into the Upper Tribunal. Possibly in future this development will assist with resolving important and controversial issues, like the interpretation of 'public benefit'.

Despite their lesser legal weight, valuable lessons for the charity sector can be learned from several of the recent decisions of the First-tier Tribunal.

The Kidd Legacy

This case is of particular importance because the role of local authorities as sole trustees of charities is receiving more and more attention. Here, two local residents challenged the sale by a local council of recreational land known as the Kidd Legacy, in breach of trust. The appellants, who had limited resources, were given considerable assistance by the tribunal.

Although they were unsuccessful in overturning the sale, they did force the commission to set out a framework in which the council's conflict of interest as sole trustee could be managed and replacement property would be purchased by the council.

The case is a valuable reminder of the significance of an earlier Court of Appeal case, known as *Oldham Borough Council v AG* [1993] 2 All ER 432, which dealt with the sale of 'specie' land – land held on trust for a particular purpose. Following the Oldham precedent, the tribunal found that, because the particular land comprising the Kidd Legacy was not essential to the trust's purposes, it could potentially be sold, provided suitable replacement property was purchased to be held on exactly the same trusts.

Seevaratnam

In this case, the commission removed a trustee for improper conduct. The tribunal overturned the commission's decision and criticised the commission's compliance team for:

- poor information gathering and lack of procedural fairness;
- changing the grounds for removing the trustee substantially between the making of the order and the tribunal hearing; and
- not providing the trustee with all relevant information.

The tribunal concluded the decision to remove the trustee was unreasonable and disproportionate. Seevaratnam is significant because of the high volume of work carried out by the compliance team and the likelihood of similar appeals being made in future.

Organisational schisms

In *Dean v Patience* [2009] EWHC 1250 (Ch), the High Court considered the Russian Orthodox Church in London. Stone King Sewell represented certain members of the London parish. Following a schism within the parish, resolutions were passed by the governing bodies of the parish and diocese to the effect that most of their moneys and assets should be applied to promote the Russian Orthodox church under the jurisdiction and subject to the ultimate control of a body known as the Ecumenical Patriarchate, essentially owing allegiance to the Eastern Orthodox Church other than Moscow. Those members of the London parish who recognised the authority of the Moscow Patriarchate successfully contended in the High Court that, on the proper construction of the trust deeds, those resolutions were invalid.

The lesson perhaps for adherents to a particular denomination who are concerned about the liturgy or doctrinal direction – and perhaps for concerned trustees generally – is to avoid the urge to 'up and leave' but to stay, if possible, and try to change things from within. The case gives credence to the old adage 'possession is nine points of the law'.

Postscript:

Michael King, Tom Murdoch and Darren Hooker are members of the charity team at Stone King, formerly Stone King Sewell. Contact: www.skslaw.co.uk