

Exemptions from equality legislation for adoption agencies

Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales
CA/2010/0007, April 26, 2011

Implications for practitioners

This case is highly relevant to charitable organisations seeking to rely on s193 of the Equality Act 2010 (EA). S193 allows charities to restrict the provision of a benefit to those with a particular protected characteristic. S193 imposes two requirements: firstly, there must be appropriate authority for the restriction in the organisation's charitable instrument, and secondly, any restriction in respect of a protected characteristic must be a proportionate means of achieving a legitimate aim or for the purpose of preventing or compensating for a disadvantage linked to the particular protected characteristic. Without s193, such a restriction is likely to amount to direct discrimination.

This decision indicates that both stages will present challenges for organisations as the Charity Commission (CC) will not automatically accept amendments to a charity's governing document. The importance of independent evidence being required to justify restrictions on the services provided by a charity is also clear.

Practitioners advising on potential claims in the provision of goods and services should be aware that challenges to CC decisions may offer opportunities to intervene and make representations on justification at an early stage.

Facts

The Equality Act (Sexual Orientation) Regulations 2007 prohibited discrimination on the grounds of sexual orientation in the provisions of goods, facilities or services to the public or a section of the public. Regulation 18 provided an exemption for charitable organisations which has now been replaced by s193 of the EA. Under s193, organisations that wish to restrict the provision of benefits to persons who share a particular protected characteristic can do so if they act in pursuance of a charitable instrument and it is:

- a) *a proportionate means of achieving a legitimate aim, or*
- b) *for the purposes of preventing or compensating for a disadvantage linked to the protected characteristic.*

Catholic Care (Diocese of Leeds) (CCDL) is a registered charity providing adoption agency services. CCDL applied to the CC to amend its memorandum

of association to state that CCDL would only provide adoption services to heterosexuals and in accordance with the tenets of the Roman Catholic Church, to allow CCDL to take advantage of the exemption set out in regulation 18, now s193 EA.

The CC refused permission on the basis that the proposed amendment would not allow CCDL to rely on regulation 18 and therefore did not serve any purpose. The CC defined benefits as benefits of a charitable nature provided to a charity's beneficiaries, who were the children who would be adopted or fostered through its services.

The CC therefore considered that the proposed amendment would not allow CCDL to restrict services to heterosexual prospective parents. This decision was upheld by the Charity Tribunal and CCDL applied to the High Court.

High Court

CCDL argued that the construction of regulation 18 was wrong in law. The EHRC, intervening, argued that no organisation with the objects proposed by CCDL could be charitable as this type of discrimination could not be for the public benefit.

Briggs J held that regulation 18 was not limited to the provision of benefits to the charity's intended beneficiaries and that the language could not be reasonably intended to achieve such an outcome. He also observed that charities exist to serve a permitted, publicly beneficial purpose rather than a particular class of beneficiaries. However, he declined to decide whether such differential treatment would amount to a breach of the prohibition on discrimination in article 14 of the European Convention on Human Rights (ECHR). Parliament had allocated the task to the CC. The issue was therefore remitted back to the CC.

The CC made a fresh decision, again refusing permission for amendment. The reasons for the decision were that the proposed discrimination was not justified under article 14 of the ECHR and as a result could not meet the public benefit requirement imposed by the Charities Act 2006. The CC accepted that the aim of CCDL to provide suitable adoptive parents for children who would otherwise go unprovided for was a legitimate one, but considered that there was no

rational connection between CCDL's aim and the proposed means of achieving it. CCDL appealed this decision to the Charity Tribunal (CT).

Charity Tribunal

Before the CT, CCDL's stated aim was revised slightly and formulated as the '*prospect of increasing the number of children, (particularly 'hard to place' children) placed with adoptive families.*' CCDL argued that unless it was permitted to rely on the exemption under s193, it would no longer be able to raise voluntary income for the service and would have to close. CCDL accepted that religious conviction alone cannot justify a decision to deny adoption services to same sex couples.

The CT heard evidence about the reasons for the number of adoptions that currently take place and concluded that this was primarily affected by the fees paid by the local authority. A voluntary adoption agency would have little impact on the number of adoptions simply by increasing the number of available adopters. The CT also noted the need to '*open the door as wide as reasonably possible*' to find suitable adoptive parents.

CCDL's voluntary income was unrestricted and was not earmarked for the adoption service. There was also no independent evidence of the alleged impact on voluntary income if CCDL was required to operate an open adoption service. While a bishop had given his opinion that donors would no longer support the service, the CT could not see how he could identify with precision why individuals chose to donate. The CT was not convinced that CCDL would be compelled to close its service if they restricted their

services but even if this would occur, it had to be balanced against the detriment to same sex couples and society of permitting the proposed discrimination. The appeal was therefore dismissed and the proposed amendment to CCDL's objects would not be permitted.

CCDL requested leave to appeal but that was refused by the CT on June 7, 2011. CCDL has one month to renew its application for appeal directly to the Upper Tribunal.

Comment

Further guidance from the CC in respect of s193 is expected later this year but charities that restrict benefits to particular groups should be reviewing their activities and governing documents to ensure that they fall within the exemption.

It appears from this decision that s193 will be narrowly construed in cases where the proposed restriction is not intended to overcome a disadvantage faced by a particular group. It remains to be seen whether the courts adopt a different attitude towards charities with an existing restriction in their governing document, which will still need to show that such a restriction is justified.

Deborah Nathan

Sukanya Ransford

Russell-Cooke LLP

Deborah.nathan@russell-cooke.co.uk

Sukanya.ransford@russell-cooke.co.uk