Neutral Citation Number: [2021] EWCA Civ 1390

Case No: C1/2020/1444

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH DIVISION)
Mr Justice Julian Knowles
CO/2373/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 September 2021

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

THE QUEEN (ON THE APPLICATION OF CORNERSTONE (NORTH EAST) ADOPTION AND FOSTERING SERVICES LTD) — **Appellant/ Claimant**

-and-

HER MAJESTY'S CHIEF INSPECTOR OF EDUCATION, CHILDREN'S SERVICES AND SKILLS (OFSTED) — **Respondent/ Defendant**

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Aidan O'Neill QC and **Ben Silverstone** (instructed by **Ai Law**) for the **Appellant/Claimant**
Sarah Hannett QC (instructed by **Ofsted Legal Services**) for the **Respondent/Defendant**
Hearing dates: 29-30 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday, 24 September 2021.

Lord Justice Peter Jackson:

Introduction

1. The Appellant ('Cornerstone') is an independent fostering agency ('IFA'). It recruits and supports carers for children in local authority care who need to be fostered and in some cases adopted. The Respondent ('Ofsted') is the statutory body whose functions include the registration, regulation and inspection of IFAs.

2. The issue in this case is whether it is lawful for Cornerstone only to accept heterosexual evangelical Christians as potential carers. Ofsted considers that it is unlawful and, in a report issued in draft on 12 June 2019 ('the Report'), it assessed the effectiveness of Cornerstone's leaders and managers as 'Inadequate'. This was in large measure because Ofsted considered that, by only recruiting foster carers who are practising Christian carers in opposite sex marriages, Cornerstone's recruitment and selection process for foster carers did not comply with the requirements of the Equality Act 2010 ('EA 2010') and the Human Rights Act 1998 ('HRA 1998'). It asserted that the policy contravened both enactments as being discriminatory on the grounds of sexual orientation and that it contravened the HRA 1998 on the grounds of religion or belief. It required Cornerstone, by 31 July 2019, not to discriminate in its recruitment of foster carers in either respect.

3. On 19 June 2019, Cornerstone issued judicial review proceedings, seeking a declaration that Ofsted's finding that its recruitment policy contravened the EA 2010 or the HRA 1998 was unfounded, an order quashing the requirement in the draft report, and damages.

4. The claim came before Mr Justice Julian Knowles ('the Judge') at a hearing on 6-7 May 2020. In a judgment dated 7 July 2020 ('the Judgment'), reported as *R (on the application of Cornerstone (North East) Adoption and Fostering Service Ltd v Office for Standards in Education, Children's Services and Skills* [2020] EWHC 1679 (Admin), he made these findings:

   (1) Cornerstone's recruitment policy is not unlawfully discriminatory under either the EA 2010 or the HRA 1998 on the grounds of religious belief because the exception in paragraph 2 of Schedule 23 EA 2010 applies.

   (2) Cornerstone's policy of requiring applicants to refrain from homosexual behaviour unlawfully discriminates against gay men and lesbians under the EA 2010, and in requiring applicants to be heterosexual it unlawfully discriminates against gay men and lesbians under the HRA 1998.

   (3) Ofsted's report did not violate Cornerstone's rights under Articles 9-11 and 14 of the European Convention on Human Rights ('the Convention').

   (4) Ofsted's report was not unlawful as being in breach of its guidance on the inspection of IFAs, entitled 'Social Care Common Inspection Framework: Independent Fostering Agencies' (February 2017) ('SCCIF').

The Judge therefore dismissed Cornerstone's claim and he ordered it to pay 75% of Ofsted's costs. On 11 August 2020, Ofsted published a version of the Report that had been amended to reflect the aspects of Cornerstone's claim that had been upheld.

5. Ofsted does not appeal from the Judge's finding in relation to religious discrimination.

6. Cornerstone appealed on twelve grounds. The Judge granted permission to appeal on four grounds (Grounds 3, 4, 9 and 10). The application in relation to the other grounds was renewed and on 1 March 2021 King LJ granted permission on one further ground only (Ground 1).

7. The five grounds for which permission has been granted are:

> Ground 1: the judge erred in concluding that Ofsted properly had – and in all the circumstances properly exercised its – power and jurisdiction to require Cornerstone to disapply or modify its recruitment policy for foster carers as contained in its charitable instrument, notwithstanding the finding by the Charity Commission – exercising the specific mandate afforded to it by Parliament under Section 193 EA 2010 – that when acting in pursuance of this charitable instrument, Cornerstone did not contravene the EA 2010.
>
> Ground 3: the judge erred in concluding that Cornerstone's recruitment, selection and appointment of Cornerstone foster carers in accordance with its policy constituted direct discrimination because of sexual orientation, within the meaning of s. 13(1) EA 2010.
>
> Ground 4: the judge erred in concluding that Cornerstone's recruitment, selection and appointment of Cornerstone foster carers in accordance with its policy is not a proportionate means of achieving a legitimate aim and is therefore unlawful indirect discrimination, within the meaning of s. 19(2)(d) EA 2010, on grounds of sexual orientation.
>
> Ground 9: the judge erred in holding that when it recruits, selects and appoints Cornerstone foster carers in accordance with its policy, Cornerstone acts incompatibly with the Convention right under Art. 14 (read with Art. 8) of hypothetical gay or lesbian evangelical Christians who might wish to become Cornerstone foster carers; and
>
> Ground 10: the judge erred in holding that Ofsted's requirement that Cornerstone disapply or modify its recruitment policy for foster carers as contained in its charitable instrument was compatible with respect for the Convention rights under Arts. 9-11 and/or 14 which Cornerstone could pray in aid as a religious organisation.

8. The seven grounds of appeal for which permission was refused are (in summary) that the Judge was wrong to find that:

> 2. Cornerstone acts as a "service-provider" concerned with the provision of a service to the public or a section of the public, for the purposes of Section 29(1) EA 2010.
>
> 5. The recruitment of foster carers is done on behalf of a public authority, within the meaning of paragraph 2(10)(a) of Schedule 23 EA 2010.
>
> 6. The recruitment of foster carers is done under the terms of a contract between Cornerstone and a public authority, within the meaning of paragraph 2(10)(b) of Schedule 23 EA 2010.
>
> 7. Cornerstone is providing a service or otherwise acting in the exercise of a function that is a function of a public nature for the purposes of the HRA 1998 and so also for the purposes of Section 29(6) EA 2010 (by virtue of Section 31(4)).
>
> 8. When it recruits foster carers Cornerstone acts in breach of its obligations under Section 6 HRA 1998 even in circumstances where there is no alleged "victim" within the meaning of Section 7 HRA 1998.
>
> 11. Ofsted did not act unlawfully in not following the SCCIF in the circumstances of this case.
>
> 12. Ofsted's finding that Cornerstone had been guilty of unlawful discrimination on grounds of religion or belief was severable from Ofsted's decision to downgrade its previous assessment of Cornerstone's services as an IFA.

Preliminary applications

9. On 21 June 2021, Cornerstone issued an application to reopen the refusal by King LJ of permission to appeal in respect of Grounds 2 and 7, which concern the finding that it is a service-provider within the meaning of s. 29 EA 2010. As to Ground 2, it argued that the Judge was wrong to hold that when it recruits foster carers it provides a service, as opposed to making an appointment to a personal office. In consequence, it can rely upon exceptions that arise under Part 3 of the EA 2010 (which concerns 'Work'), but not under Part 5 (which concerns 'Services'), and specifically upon paragraphs 2 and 3 of Schedule 9. As to Ground 7, Cornerstone argued that in relation to the HRA 1998 its recruitment of carers was a private act and that it was therefore not obliged to act compatibly with the Convention. The Judge was wrong to elide its recruiting activities with the distinct act of placing children with a carer.

10. The Judge rejected these arguments at [174-178] and [259]. In the latter paragraph he stated:

> "259. I do not accept Cornerstone's argument that the act of recruiting a potential foster carer is akin to an employment

> recruitment decision by a private body, because it is not. Foster carers do not work under contract (cf *National Union of Foster Carers v Certification Officer* [2019] IRLR 860) and their recruitment and training is subject to statutory regulation (eg in Part 5 of the Fostering Regulations) in the way that the recruitment of an employee is not."

Cornerstone made the same arguments to King LJ, who rejected them for the reasons given by the Judge.

11. In seeking to reopen, Cornerstone cites the subsequent decision of this court in *National Union of Professional Foster Carers v Certification Officer* [2021] EWCA Civ 548 ('*NUPFC*'), handed down on 16 April 2021. The case concerned the Convention rights of foster carers under Article 11 ECHR associated with the formation of a trade union. This court, differing from the decision of the Employment Appeal Tribunal that was cited by the Judge, considered that foster carers were in an employment relationship with fostering services: see Underhill V-P at paragraphs 95, 121, 123 and 145. However, the court noted that it was bound by its decision in *W v Essex County Council* [1999] Fam 90, which is longstanding authority for the proposition, relied on by the Judge, that there is no contract between a local authority and its foster carers. Moreover, Underhill V-P affirmed at paragraph 152 that the effect of the *NUPFC* decision was limited to the issue of trade union rights, although both he and Bean LJ made observations about general state of the law relating to foster carers, and whether it needs revision by legislation or by the Supreme Court.

12. In the light of *NUPFC* and other earlier decisions (*Armes v Nottinghamshire County Council* [2017] UKSC 60; [2018] AC 355; *Sindicatul Familia Constanţa v Direcţia Generală de Asistenţă Socială şi Protecţia Copilului Constanţa* Case C-147/17; [2019] ICR 211; *Glasgow City Council v Johnstone* [2020] IRLR 908, EAT), Cornerstone submits that the case law appears to be developing towards a fuller recognition of foster carers as akin to being in an employment relationship with a fostering agency (whether a local authority or an IFA) which trains, supervises, and places children with them. It asserts that the decision of this court to refuse permission to appeal on Grounds 2 and 7 was vitiated by the confused state of the case law preceding *NUPFC*.

13. We refused Cornerstone's application at the outset of the hearing. CPR 52.30 provides:

> "(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In [paragraph (1)]… "appeal" includes an application for permission to appeal."

The effect of this rule has been considered a number of times by this court, most recently in *Municipio De Mariana & Ors v BHP Group PLC* [2021] EWCA Civ 1156 (27 July 2021) at [57-64], following *R (Goring-on-Thames Parish Council) v. South Oxfordshire District Council* [2018] EWCA Civ 860, [2018] 1 WLR 5161 at [10-15]. In summary, a decision will only be reopened in exceptional circumstances where there is a powerful probability that a significant injustice has occurred and where the decision would have been different if the integrity of the earlier process had not been critically undermined.

14. In this case, that stringent test was plainly not met by an argument, correct or otherwise, that the law is developing. There was no fault in the process by which permission to appeal was refused, still less any injustice. Further, the decision in *W v Essex County Council* means that, at the level of this court, the ordinary appeal test was in any case unlikely to be satisfied. The decision to refuse permission to appeal was unexceptionable and it would have been wrong for us to reopen it.

15. We also considered two applications to admit further evidence. Before the hearing of the appeal, Cornerstone applied for permission to rely on a witness statement of the Reverend Matthew Mason dated 12 May 2021. This evidence was produced to counter the Judge's assertion that there are gay evangelical Christians, just as there are gay Roman Catholics. Rev. Mason responds, with reference to theological teaching, that a person who embraces a sinful lifestyle (as defined by the Bible) cannot validly claim to be an evangelical Christian. One therefore cannot be an evangelical Christian and engage in same-sex sexual relationships. Ofsted opposed admission of the evidence on the basis that the existence of gay people within all religions is so obvious that the Judge could take judicial notice of it. However, as the Judge founded part of his assessment of direct and indirect discrimination upon his own understanding of the requirements of evangelical Christianity, and as that question had not directly featured in the argument before him, we admitted Rev. Mason's statement.

16. On the afternoon of the concluding day of the hearing before us, and after Ms Sarah Hannett QC had completed her submissions for Ofsted, Mr Aidan O'Neill QC applied for permission to file a further (fourth) witness statement from Ms Pamela Birtle, the co-founder and CEO of Cornerstone, dealing with matters that had arisen during submissions and since the hearing before the Judge. We could see no basis on which we could properly admit this evidence, and we refused the application, though we noted a publicly available report, exhibited to the statement, of an 'Assurance Visit' carried out by Ofsted in February 2021.

17. In what follows, I shall summarise the factual background and address the grounds of appeal in turn. For a fuller treatment of the facts, the law and the wider arguments below, I commend the Judge's careful and comprehensive account.

The background

Cornerstone

18. Cornerstone was founded in 1999 and is based in the North East of England. It is constituted as a charity by a trust deed registered with the Charity Commission, and is a company limited by guarantee. It has been registered as an IFA since March 2006.

19. Cornerstone is a small organisation and, at the time of the Ofsted inspection which gave rise to the Report, it had 14 approved fostering households caring for 18 children, plus a number of other homes for children who had been adopted. It specialises in working with children who can be hard to place, including large sibling groups, children from minority ethnic backgrounds, and those with complex medical needs.

20. Cornerstone's foundational purpose is to recruit evangelical Christian foster carers. Its charitable objects are

> "…to provide a high quality adoption and fostering child care service according to Christian principles…"

It believes that by encouraging members of that community to be foster carers and by supporting them (practically, emotionally and spiritually) in caring for a child, Cornerstone and its recruits manifest their love of God and their Christian faith. The basis for its recruitment policy is set out in its Memorandum and Articles of Association at clause 5:

> "5. The policy of the Charity shall be to restrict employment by the Charity and acceptance of any application to foster or adopt children through the charity to evangelical Christians being those:
>
> (a) who shall have first signed the Statement of Beliefs set out in the Schedule hereto and
>
> (b) whose personal lifestyle conduct and practice is consistent with the practice of the Statement of Beliefs set out in the Schedule hereto and traditional Biblical Christian standards of behaviour as set out by the trustees in their Code of Practice issued from time to time and who shall have first signed the said Code of Practice at the commencement of their employment or in the case of foster carers or adoptive applicants at the time of their initial application."

This is the present form of Clause 5, the provision having been amended in April 2007 to bring the requirements for foster carers into line with those for Cornerstone's staff. That alteration was approved by the Charity Commission and registered with Companies House.

21. The Code of Practice mandated by Clause 5 is in these terms:

> "As Cornerstone is a Christian organization it is expected that all carers conduct themselves in a manner that will give proper expression to faith in Jesus Christ as Lord. This Code of Practice presents a brief summary of biblical teaching regarding Christian lifestyle and morality. The Bible, as the revealed Word of God, shall be the final authority in such matters.
>
> The Trustees will seek to give proper regard to the place of grace and forgiveness within a Christian organisation but they will also

> give proper regard to their duty to ensure that Cornerstone presents a consistent Christian witness.
>
> There is an expectation on all Cornerstone carers to:
>
> 1. Sign a copy of Cornerstone's Statement of Beliefs indicating a personal acceptance of the beliefs stated.
>
> 2. Maintain a personal devotional life through regular times of prayer and Bible reading. (Psalm 119:105; Col 4:2)
>
> 3. Attend regularly a local church fellowship and be in good standing with that church. (1 Tim 4:13-14; Heb 10:25)
>
> 4. Seek to be Christ-like in attitude and action towards all persons regardless of race, social class, religious beliefs or position of influence within the community. (Lev 19:18; Matt 22:39)
>
> 5. Be honest in all areas of handling money and finance. Avoid the love of money. (Ex 20:15; Luke 16:13-15; Col 3:5)
>
> 6. Be honest in speech and seek to avoid all speech which could be regarded as blasphemous or profane. (Col 4:6; Eph 5:4)
>
> 7. Maintain a home and working environment free from harassment, bullying and victimisation. (1 John 4:7)
>
> 8. Abstain from involvement in the occult, astrology and witchcraft. (Deut 19:10-12; Acts 19:19; Gal 5:19-20)
>
> 9. Maintain a lifestyle that recognises the effects of alcohol on the body and avoids drunkenness and other forms of substance misuse, at all times. (Rom 13:13-14; Eph 5:18)
>
> 10. Set a high standard in personal morality which recognises that God's gift of sexual intercourse is to be enjoyed exclusively within Christian marriage; abstain from all sexual sins including immodesty, the viewing of pornography, fornication, adultery, cohabitation, homosexual behaviour and wilful violation of your birth sex. (1 Cor 12:23; 1 Cor 6:12-20; Eph 4:17-24; 1 Thes 4:1-8; Rom 1:26-27; 1 Tim 1:9-11; Gen 1:27; Deut 22:5)
>
> 11. Give proper regard to the laws of the land. (Rom 13:1-7)"

The prospective carer then signs this declaration:

> "As long as I am a carer for Cornerstone (North East) Adoption and Fostering Service I agree to maintain the Christian ethos of the organisation by accepting the above code of practice."

22. The issue in this case concerns the lawfulness of the requirements in Clause 10 that sexual intercourse is to be enjoyed exclusively within Christian marriage and that carers should abstain from homosexual behaviour.

23. The evidence from Ms Birtle that was before the Judge stated that feedback from Cornerstone's foster families indicated that many would not have considered fostering without the support they receive from its faith community, including the opportunity to join together in Christian prayer and worship. Ms Birtle also stated that Cornerstone's recruitment policy is essential to the continuation of its work and community, ensuring that it maintains its core beliefs. If carers did not share the faith and values set out in its Statement of Beliefs and Code of Practice, they would not feel fully included, and thus Cornerstone could not continue its Christian fellowship and worship, or that would be marginalised. However, evangelical Christian beliefs are not imposed on children within placements. Cornerstone makes clear to its carers that they must support any child placed with them, whether the child has a Christian faith, another faith or no faith.

24. The only evidence of any complaint concerning Cornerstone's policy arose from a complaint received by Ofsted in March 2016 from a prospective foster carer. She was concerned that the agency would only assess practising Christians who were a married couple, and she expressed the view that this discriminated against her belief system.

The Report

25. The Judge set out Ofsted's powers in relation to the registration and inspection of fostering agencies at [66-74] of the Judgment. Prior to the 2019 inspection, Cornerstone's IFA services had most recently been inspected in 2015. In the resulting report, issued on 13 July 2015, Ofsted assessed Cornerstone as 'Good' in all categories. It also judged Cornerstone's Adoption Support service as 'Good' in all categories following an inspection of that service in 2019.

26. Between 27 February and 4 March 2019, Nicola Thomas of Ofsted carried out an inspection of Cornerstone's work as an IFA. The Report was provided to Cornerstone in draft on 12 June 2019, ahead of intended publication on 20 June 2019, but publication was suspended after Cornerstone issued its judicial review claim.

27. Under the heading 'Key findings from this inspection', the Report states:

> "The agency's recruitment and selection process for foster carers is not inclusive and it does not comply with the requirements of the Equality Act 2010. The agency only recruits foster carers who are practicing Christian carers in opposite sex marriages. The requirement to be in a heterosexual marriage discriminates against potential carers who have a different sexual orientation contrary to the Equality Act 2010 and contrary to Article 14, read with Article 8, of the European Convention on Human Rights (the ECHR). The requirement to be a practicing Christian discriminates against potential carers on the ground of their religion or belief contrary to article 14, read with article 8, of the ECHR."

28. Under the heading 'What does the independent fostering agency need to do to improve?' was (inter alia) the following:

> "*Statutory requirements*
>
> This section sets out the actions that the registered person(s) must take to meet the Care Standards Act 2000, the Fostering Services (England) Regulations 2011 and the national minimum standards. The registered person(s) must comply within the given timescales.
>
> *Requirement*
>
> …
>
> An agency must be carried on in accordance with the relevant requirements.
>
> In this section "relevant requirements" means –
>
> the requirements of any other enactment which appear to the registration authority to be relevant.
>
> (Care Standards Act 2000, s 14 (1)(c)(3)(b))
>
> In particular, to comply with the enactment, sections 13, 19 and 29 of the Equality Act 2010 and section 6 of the Human Rights Act 1998 not to discriminate on the grounds of sexual orientation in the recruitment of foster carers and to comply with the enactment, section 6 of the Human Rights Act 1998 not to discriminate on the grounds of religion and belief.
>
> Due date 31 July 2019"

29. Under the heading 'Inspection judgements', it is stated:

> "*Overall experiences and progress of children and young people: requires improvement to be good*
>
> …
>
> The agency works with placing authorities and other agencies to provide specialist therapeutic support for children and young people. This agency offers a faith-based support service for its foster carers. Foster carers feel that this is highly beneficial to them and in turn the children that they care for, as they feel that it offers them enhanced support through Christian prayer, for example, and from individuals who share their perspectives and values.
>
> The agency's recruitment policy is discriminatory, in that it excludes prospective carers who do not meet marital status and

> faith criteria. Although this had not directly impacted on the experience and progress of children and young people in the cases seen, it does not ensure that prospective carers are considered without prejudice and with appropriate emphasis on their capacity to care for children. This is not compliant with the Equality Act 2010 and the Human Rights Act 1998.
>
> ….
>
> *The effectiveness of leaders and managers: inadequate*
>
> The agency's recruitment and selection process does not comply with the requirements of the Equality Act 2010 or the Human Rights Act 1998. The agency only recruits foster carers who are practising Christian carers in heterosexual marriages. The agency's policy on recruitment discriminates against potential carers of a different sexual orientation or religion or belief."

The Charity Commission

30. Ofsted is not the only agency with which Cornerstone has engaged regarding its recruitment policy. In August 2010, the Charity Commission wrote to Cornerstone regarding the High Court judgment in *Catholic Care (Diocese of Leeds) v. Charity Commission for England and Wales* [2010] EWHC 520 (Ch); [2010] 4 All ER 1041 (Briggs J). The Commission noted that the implications of the judgment were that an organisation that discriminates in a way that is not justified is not likely to be established for the public benefit, and as such will not be a charity.

31. Cornerstone responded in November 2010, setting out its reasons why, in its view, it did not discriminate against prospective foster carers on the grounds of sexual orientation. It contended that: (a) Cornerstone was not providing goods, facilities or services to the carers, (b) it did not discriminate on the ground of sexual orientation but on the basis of standards of sexual behaviour, and (c) any discrimination was justified and proportionate.

32. The Charity Commission replied in January 2011. It stated that it accepted that Cornerstone did not discriminate on the grounds of sexual orientation, although it gave no reasoning. It also noted that Cornerstone was providing services only to evangelical Christians, which required justification, but that it fell within paragraph 2 of Schedule 23 to the EA 2010, which permits the restriction of services because of the purpose of the organisation and/or to avoid causing offence on grounds of religion or belief.

The grounds of appeal: preliminary

33. I shall not summarise the Judgment or the arguments presented to the Judge separately, but will instead refer to the relevant legal and forensic material when considering each ground of appeal. Before coming to the individual grounds, I make these observations about the matters that are not in play on this appeal.

34. The first concerns the grounds of appeal for which permission has not been given. In the case of Grounds 2, 5 and 6, the consequence is that the Judge's findings concerning the public character of Cornerstone's work are undisturbed. Accordingly:

    a. Cornerstone is providing a service to the public or a section of the public (foster carers and children and young people) under s. 29(1) EA 2010 or exercising a function of a public nature under s. 29(6).

    b. Its recruitment of foster carers is done on behalf of a public authority, within the meaning of paragraph 2(10)(a) of Schedule 23 EA 2010.

    c. Its recruitment of foster carers is done under the terms of a contract between Cornerstone and a public authority, within the meaning of paragraph 2(10)(b) of Schedule 23 EA 2010.

    d. Cornerstone is a "hybrid" public authority for the purposes of s. 6 HRA 1998.

    These findings are of importance, because the public character of an organisation is significant for its treatment under both the EA 2010 and the HRA 1998; it determines the availability of statutory exceptions and is also relevant to questions of proportionality and justification.

35. The EA 2010 prohibits discrimination in a number of contexts, including services, premises and work. Section 29 EA 2010, which concerns services, applies to this case:

> "29 (1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—
>
> (a) as to the terms on which A provides the service to B;
>
> (b) by terminating the provision of the service to B;
>
> (c) by subjecting B to any other detriment
>
> …
>
> (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation…"

36. Unsuccessful Ground 8, concerning the absence of an alleged 'victim' within the meaning of s. 7 HRA 1998, raises an argument that falls to be considered within grounds for which permission has been given. The other unsuccessful grounds of appeal (11 and 12) require no separate comment.

37. Cornerstone has not specifically appealed from the Judge's proportionality finding under s. 193(2)(a) EA 2010, the exception that allows charities to restrict the provision of benefits to persons who share a protected characteristic where that is a proportionate means of achieving a legitimate aim. However, it firmly challenges the Judge's indistinguishable proportionality finding in respect of indirect discrimination under s.19, and in those circumstances I consider that the issue under s. 193 also remains open.

38. My other preliminary observation concerns the undisturbed finding that Cornerstone's recruitment policy is *not* unlawfully discriminatory under the EA 2010 or the HRA 1998 on the grounds of religious belief. As I have said, that conclusion rests on the exception in paragraph 2 of Schedule 23 EA 2010, which provides that a religious organisation is permitted to apply a restriction based on religious belief or on sexual orientation if it is necessary to comply with the doctrine of the organisation. However, paragraph 2(10) disapplies this exception in the case of a sexual orientation restriction where the organisation is acting on behalf of a public authority under the terms of a contract. This distinctive provision explains why the claim of religious discrimination under the EA 2010 was not pursued.

39. The Judge considered this difference:

> "285. Paragraph 2 of Sch 23 represents Parliament's considered response to the question of whether, and if so how far, religious organisations should be allowed to discriminate on grounds of religion. Parliament did not give these organisations a blanket exemption on anti-discrimination laws, as I found earlier in relation to [2(10)]. Its was a nuanced response, taking into account a range of factors and interests. In other words, in enacting [2] of Sch 23 in the terms that it did, Parliament was deciding how the balance was to struck between, on the one hand, the freedoms properly to be accorded to religious and faith based organisations, and on the other, the rights of those who might be discriminated against."

Against this background, the Judge correctly noted at [287] that Parliament had allowed discrimination on religious grounds except in respect of acts done on behalf of a public authority pursuant to contract which are discriminatory on the grounds of sexual orientation. He considered that this provision in the EA 2010, coming a decade after the HRA 1998, represents Parliament's intention to create a fair and proportionate balance between religious freedom and anti-discrimination. The outcome under both legislative schemes is therefore likely to be consistent.

40. The Judge's analysis on this point provides an answer to Cornerstone's fundamental submission that he failed to observe the constitutional principle of religious toleration and the principle that the protection of the autonomy of religious organisations must be practical and effective. Cornerstone argues that it is contradictory that it is entitled to limit its pool of carers to those of evangelical Christian faith but prevented from requiring such carers to subscribe to an important tenet of that faith, namely the prohibition against sexual conduct outside the bonds of a Christian marriage. The argument has a certain logic: *"We are entitled to discriminate against persons who are not evangelical Christians"*, therefore *"Because homosexuality is unacceptable to*

evangelical Christianity we are entitled to discriminate against homosexuals". The difficulty with this logic is that it equates religious discrimination with sexual orientation discrimination in all circumstances when that is something that Parliament has not done. Each protected characteristic has a quality of its own and the consequences of discrimination upon individuals and upon society as a whole will differ according to the context. Parliament has, speaking broadly, chosen to give priority to religious faith in a private context but to give priority to sexual orientation where public services are concerned – always subject to considerations of proportionality in the individual case. If Cornerstone's argument were correct, it could take advantage of the parts of the legislation that protect it and ignore the parts that protect others. As Baroness Hale said in *Preddy v Bull* [2013] 1 WLR 3741 at [37],

> "To permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We do not normally allow people to behave in a way which the law prohibits because they disagree with the law. But to allow discrimination against persons of homosexual orientation (or indeed of heterosexual orientation) because of a belief, however sincerely held, and however based on the biblical text, would be to do just that."

41. The result of Ofsted's stance, upheld by the Judge, is that Cornerstone's exclusionary recruitment policy is untouched, except as regards one aspect of paragraph 10 of its Code of Conduct. This outcome represents a quandary for Cornerstone but I do not accept that it is legally contradictory. It instead represents Parliament's attitude in principle to reconciling the two particular protected characteristics that are engaged.

Ground 1: Ofsted's jurisdiction

42. Cornerstone's case is that Ofsted had no power to require it to disapply or modify its recruitment policy for foster carers as contained in its charitable instrument, when the Charity Commission had concluded in 2011 that Cornerstone did not contravene the EA 2010; alternatively, that if it had the power it should not have used it here.

43. Neither the Judge nor this court has had the benefit of the views of the Charity Commission on this question. Had the answer been obscure (and I do not believe it is), an intervention from the Commission would probably have been necessary. As it is, we can decide the issue unassisted.

44. One of the objectives of the Charity Commission under s. 14 of the Charities Act 2011 ('CA 2011') is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities. Under s. 15, the functions of the Charity Commission include:

> "1. Determining whether institutions are or are not charities.
>
> 2. Encouraging and facilitating the better administration of charities.

> 3. Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities."

45. Charities are specifically provided for within the general exceptions found in Part 14 of the EA 2010. Section 193 materially provides that:

> "(1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if –
>
> (a) the person acts in pursuance of a charitable instrument, and
>
> (b) the provision of the benefits is within subsection (2).
>
> (2) The provision of benefits is within this subsection if it is—
>
> (a) a proportionate means of achieving a legitimate aim, or
>
> (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic…
>
> […]
>
> (8) A charity regulator does not contravene this Act only by exercising a function in relation to a charity in a manner which the regulator thinks is expedient in the interests of the charity, having regard to the charitable instrument."

The charity regulator is the Charity Commission: s. 194(5)(a).

46. Ofsted's powers in relation to Cornerstone arise under the Care Standards Act 2000 ('CSA 2000'), which provides for the registration and regulation of fostering agencies. A person seeking registration must apply to Ofsted under s. 13 CSA 2000, which relevantly provides:

> "(2) If the registration authority is satisfied that -
>
> (a) the requirements of regulations under section 22; and
>
> (b) the requirements of any other enactment which appears to the registration authority to be relevant,
>
> are being and will continue to be complied with (so far as applicable) in relation to the establishment or agency, it shall grant the application; otherwise it shall refuse it."

Under s. 14, Ofsted may cancel a registration on the ground that the organisation is being carried on otherwise than in accordance with the relevant legislative requirements, which are defined in the same way. The power to inspect arises under s. 31 CSA 2000.

47. Ofsted has determined that, when it inspects an IFA, the EA 2010 and the HRA 1998 are relevant enactments. The Judge considered this a matter for Ofsted's expert judgement, indeed he held at [269] that in relation to the HRA 1998 its conclusion was plainly right. He addressed Cornerstone's argument that the Charity Commission had exclusive jurisdiction at [227-231]. He thought there was nothing in the point and concluded:

> "231. I agree with Ofsted's submissions that ss 13, 14 and 31 CSA 2000 entitle it to examine an IFA's compliance with the EA 2010 and the HRA 1998. These provisions contain Ofsted's inspection and regulatory duties. These differ from the Charity Commission's duties, which are set out in s 15 of the Charities Act 2011. The Commission's duties include the determination of whether or not institutions are charities, and encouraging and administering their better administration. In its Skeleton Argument at [72], Ofsted accepts that it must take the view of the Charity Commission into account, and that it did so. However, it maintains, rightly in my view, that it is not required to follow the Commission's view. I agree that overlapping jurisdiction between regulators is neither surprising nor problematic. For example, health and safety issues at a children's home fall within the remit of the Health and Safety Executive (or the relevant local authority, depending on the nature of the issue), but Ofsted would also have the power to comment on such issues as part of its inspection duty."

48. Before us, Cornerstone argues that the Judge adopted an unduly narrow approach to the role of the Charity Commission. He was wrong to refer to an "overlapping jurisdiction" when s. 193(8) EA 2010 confers on the Commission a special power not to enforce the non-discrimination provisions where the result of such enforcement would be disproportionate, for example in requiring the charity to close down completely and cease its work, which the Commission otherwise accepts results in public benefit. That regime reflects the careful balance struck by Parliament in the CA 2011 and the EA 2010. It was therefore not open to Ofsted to conclude that the EA 2010 was among the enactments which it was empowered to apply. By arrogating to itself the power to enforce alleged breaches of the EA 2010, Ofsted supplanted the special regulatory function accorded to the Commission, which had in 2011 accepted that no breach was occurring. It was not open to another regulator to require Cornerstone to depart from its approved charitable objects. There should not be a multiplicity of regulators, diverting charities' scarce resources away from their activities. What has occurred is "sustained regulatory harassment". Reliance is placed on the judgment of Briggs J in the first *Catholic Care* decision at [64] and *R (Z) v Hackney London Borough Council* [2020] 1 WLR 4327 at [80, 98, and 101-109], the latter decision postdating the Judge's decision in this case. In it, Lord Sales discusses the regulation of charities and the balance struck by Parliament between, on one hand, the public interest in promoting charitable activities and protecting charities' resources, and, on the other hand, protecting Convention rights.

49. Ofsted makes these points in response:

(1) As the Judge said, it was plainly open to it to conclude that the EA 2010 and HRA 1998 are relevant to the functions performed by IFAs, and therefore that it needed to assess for itself whether the IFA meets the requirements of those statutes. Ofsted's inspection and regulatory duties are distinct from those of the Charity Commission. Overlapping jurisdiction between regulators is neither surprising nor problematic: for example, Ofsted is entitled to comment on unsafe premises at a children's home, even though that would also fall within the jurisdiction of the Health and Safety Executive.

(2) Not all IFAs are charities, and some are for-profit organisations. If Cornerstone is correct that Ofsted is not entitled to consider whether an IFA is complying with the EA 2010, that must apply equally to charitable and non-charitable IFAs.

(3) Cornerstone's argument is impossible to reconcile with Ofsted's public sector equality duty under s. 149 EA 2010 to give due regard to eliminating discrimination.

(4) The Charity Commission's decision in this case (see paragraph 32 above) was based on an untenable distinction between sexual orientation and sexual behaviour. Its January 2011 letter does not state that the exemption from discrimination on the grounds of sexual orientation applied.

(5) The purpose of s. 193(8) is to ensure that the Charity Commission does not itself breach EA 2010 in exercising its regulatory functions. It does not constrain another regulator from reaching its own conclusion as to a charity's compliance with EA 2010.

(6) There are significant factual and legal differences between this case and *R (Z) v Hackney*, including:

i) That case concerned a charity whose objective was to support a disadvantaged group (Orthodox Jews), whereas in this case there is no suggestion that the beneficiaries of Cornerstone's policy (married evangelical Christians) face any disadvantage.

ii) Unlike Cornerstone's recruitment policy, the discriminatory practices in that case were not a blanket policy. (This does not seem to be correct: see *R (Z) v Hackney* at [77], for example.)

iii) *R (Z) v Hackney* was concerned with the positive action provisions in s. 158 EA 2010 and s. 193(2)(b), neither of which are engaged here. This case turns on s. 193(2)(a), which, unlike s. 193 (2)(b), requires the discriminatory restriction on the provision of a benefit to be proportionate.

iv) The objective of the charity in *R (Z) v Hackney* was to make social housing available to Orthodox Jews, and the discrimination at issue was the more favourable treatment of Jewish applicants; thus, there was a direct link between the more favourable treatment and the recipients of the charitable benefits. In contrast, Cornerstone's discrimination is against non-heterosexual applicants, not against non-evangelical Christians: there is no direct relationship between the restriction of the benefit provided by the charity and the group privileged in the charitable instruments (evangelical Christians).

v) In any event, *R (Z) v Hackney* is not authority for the proposition that once the Charity Commission has determined that discrimination falls within an exemption in EA 2010, it is not open to another regulator in a different regulatory context to reach a different view.

50. Like the Judge, I am in no doubt that, when inspecting IFAs, Ofsted is entitled to regard the EA 2010 and HRA 1998 as relevant enactments under ss. 13 and 14 CSA 2000. The argument that Parliament has conferred exclusive jurisdiction upon the Charity Commission is unpersuasive for reasons of principle and practice.

51. In the first place, there is no doubt that the Charity Commission is competent to assess the compatibility of Cornerstone's charitable objects and governing documents with the EA 2010. However, if the intention of the legislation was to exclude other regulators from concerning themselves with equality issues, Parliament could easily have said so. It did not do this, and the wording of s. 193(8) EA 2010, which does no more than give immunity to the Charity Commission if it makes a decision that it considers "expedient in the interests of the charity", falls far short of doing that. This provision is at most tangentially linked to the Commission's powers to assess whether the objects of a charity comply with applicable EA 2010 duties and it cannot be said to confer upon the Commission the exclusive right to answer that wider question. Further, the pervasive nature of equalities legislation is manifest in the public sector equality duty in s. 149 EA 2010, which applies equally to Ofsted and requires it to have due regard to the need to eliminate discrimination.

52. Second, there is indeed nothing surprising in the concept of overlapping regulators, or of different regulators reaching their own conclusions about matters within their respective competences. For example, if someone in the management of a charitable fostering agency was convicted of an offence connected with the running of that organisation, that would plainly fall within the ambit of the Charity Commission's function in identifying and investigating mismanagement of a charity (s. 15 CA 2011), and also within Ofsted's powers to de-register a fostering agency (s. 14(1)(a) CSA 2000). In such circumstances, there would be nothing inherently troubling about both regulators taking action in respect of their own functions. If they reached different conclusions, that would create a situation that might have to be legally resolved. In the present case, Ofsted was entitled to reach a different conclusion to that of the Charity Commission in 2011 for a number of reasons. The Commission's letter, running to a little over one page, is not entirely easy to interpret, but it certainly accepted that the required standards of sexual behaviour did not amount to discrimination on the ground of sexual orientation. However, that is a conclusion that cannot survive the decision in *Preddy*. It also took no issue with Cornerstone's assertion that it was not a service-provider under s. 29 EA 2010. Accordingly it did not touch upon the question of whether there was a public element to Cornerstone's activities and it made no reference to paragraph 2(10) of Schedule 23 EA 2010. The different stances taken on this issue by two regulators some seven years apart is undoubtedly disappointing for Cornerstone, but the reasons for it are not hard to find. The charge of regulatory harassment is overblown.

53. Third, the decision in *R (Z) v Hackney* does not support Cornerstone's position. It was not concerned with the issue of multiple regulators. It dealt with the positive action provision in s. 158 and with s. 193(2)(b) EA 2010. These provisions do not directly arise in our case, though I could accept that some of the observations made by Lord

Sales at [104-107] might also apply to a case under s. 193(2)(a). However, the key question there was whether a charity has to justify its actions on a case-by-case basis or whether it can rely upon justification on a group basis. The court held that the latter was correct, and at [105], that section 193(2)(b) provides a defence with "bright line characteristics". That outcome protects the limited resources of charities, but the fact that a charity has limited resources does not translate into a conclusion that it can have only one regulator.

54. I would therefore reject Ground 1 and uphold the Judge's conclusion that Ofsted was entitled to have regard to the EA 2010 and the HRA 1998 when carrying out its inspection.

Ground 3: Direct discrimination on grounds of sexual orientation

55. As the Judge explained, the EA 2010 has two main purposes – to harmonise discrimination law, and to strengthen the law to support progress on equality. Part 2 defines various forms of "prohibited conduct", including direct and indirect discrimination.

56. The questions that need to be answered under this ground are:

(1) Does Cornerstone's policy amount to direct discrimination?

(2) If so, is the policy in the case of a charity a proportionate means of achieving a legitimate aim, so that the exception under s. 193(2)(a) EA 2010 applies?

The other potentially relevant exception for a religious organisation under Sch. 23 para. 2 does not apply because of the Judge's findings about the public character of Cornerstone's provision of services: see paragraph 34 above.

57. The second question, the assessment of proportionality, also arises in relation to indirect discrimination under Ground 4 and in relation to the balancing of Convention rights under Grounds 9 and 10. The exercise is similar, if not identical, in each case and I shall address this important aspect of the case at one and the same time after considering the other aspects of the grounds of appeal.

58. Direct discrimination is defined in s. 13(1) EA 2010:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

In the individual case it is therefore necessary to identify the protected characteristic, the comparator, and the reason for the less favourable treatment.

59. As to the protected characteristic, s. 4 provides that religion or belief and sexual orientation are protected characteristics for the purposes of s. 13. Under s. 12, sexual orientation means a person's sexual orientation towards a person of the same sex, the opposite sex, or either sex. The protection against discrimination on grounds of sexual orientation relates as much to the manifestation of that orientation in the form of sexual behaviour as it does to sexuality as such: *R (Amicus) v. Secretary of State for Work and Pensions* [2004] EWHC 860 (Admin); [2007] ICR 1176 per Richards J at [119].

60. In order to assess how "A treats or would treat others", the identity of the "others" must be determined. Section 23 prescribes how this comparator is to be defined:

> "23 *Comparison by reference to circumstances*
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
>
> (2) …
>
> (3) If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is a civil partner while another is married ... is not a material difference between the circumstances relating to each case.
>
> (4) If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is married to, or the civil partner of, a person of the same sex while another is married to, or the civil partner of, a person of the opposite sex is not a material difference between the circumstances relating to each case."

This provision makes clear that the comparison is to be made "by reference to circumstances". It also provides that marriage and civil partnership are not to be treated as a material difference in circumstances. Further, circumstances that are themselves discriminatory are not "circumstances relating to each case" for the purposes of s. 23(1): *R (E) v. Governing Body of JFS* [2010] 2 AC 728 at [35] and [119-120], following *James v. Eastleigh Borough Council* [1990] 2 AC 751 at 762A-C, which construed equivalent provisions in the Sex Discrimination Act 1975. In *James* a council provided free swimming to persons over retirement age, then being 60 for women and 65 for men. The council had argued that the relevant comparator was the section of the public comprising persons of statutory pensionable age. The Court of Appeal rejected that argument, holding that it was not permissible to define the section of the public in terms which were themselves discriminatory in terms of gender, and this conclusion, which was not challenged on the further appeal, was described as clearly right by the House of Lords, which was itself concerned with the next inquiry, to which I now turn.

61. That inquiry concerns the reason for the discrimination: what is it "because of"? Here, our highest court has repeatedly made clear that the focus is on the objective factual criteria that are applied, and not upon the subjective motives for which they are applied: see, for example, *James* at 765H-766A, 769G, 772B-G; *JFS* at [13-23], [65, 71] and [196]; *Preddy* at [30] and [61]. As Lord Phillips put it in the *JFS* case at [20]:

> "Whether there has been discrimination on the ground of sex or race depends upon whether sex or race was the criterion applied as the basis for discrimination. The motive for discriminating according to that criterion is not relevant."

This applies equally to discrimination on the basis of sexual orientation.

62. A further question arises where a criterion that is applied as a basis for discrimination is not expressed to apply directly to a person with a protected characteristic. Here, the question is whether the difference in treatment is necessarily linked to a characteristic indissociable from the protected characteristic: *Preddy* at [20]. In *James*, the criterion of pensionable age was indissociable from the protected characteristic of sex. In *Preddy*, the requirement that a couple be married if they were to occupy a room with a double bed was indissociable from the protected characteristic of sexual orientation.

63. A still further question concerns cases where, as in *Preddy* and the present case, the allegedly discriminatory criterion has an impact that extends beyond the particular protected characteristic. That will not prevent a finding of direct discrimination, provided that the difference in treatment is objectively because of the protected characteristic or a characteristic indissociable from it. So, where the hotel keepers in *Preddy* favoured married couples at the expense both of unmarried heterosexual couples, who are not a protected group, and of homosexual couples, a finding of direct discrimination against the latter group was made. The fact that, when discriminating against B, A also discriminates against C, does not provide A with an answer to B's claim of discrimination.

64. In the present case, the Judge expressed his conclusion in this way:

> "179. The next question is whether Cornerstone's recruitment policy is discriminatory on the grounds of sexual orientation. I conclude that it is. Clause 10 of Cornerstone's Code of Practice requires applicants to:
>
> "Set a high standard in personal morality which recognises that God's gift of sexual intercourse is to be enjoyed exclusively within Christian marriage …"
>
> and to:
>
> "… abstain from all sexual sins including ... homosexual behaviour …"
>
> In my judgement this policy clearly, directly, and unambiguously discriminates against non-heterosexuals. Under Cornerstone's policy, gay men and lesbians are bound to be treated less favourably than heterosexual men and women. That is because no matter how much such a person might wish to become a foster parent, and no matter how wonderful and loving a foster parent he or she might make, Cornerstone will not accept them simply because of their sexual orientation. It will not provide them with its services. It will not train them. It will not approve them. That is to treat gay men and lesbians less favourably than heterosexual men and women because of their sexual orientation, which is a protected characteristic (ss 12 and 13(1) EA 2010). I reject Cornerstone's argument that because its policies refer to 'homosexual behaviour' rather than sexual orientation, it does not discriminate on the latter ground."

65. As to this, Cornerstone contends that:

(1) The Judge's conclusion on this issue contradicts his conclusion on religious discrimination and renders nugatory its right to limit its carers to those of evangelical Christian faith. (I have addressed this argument above.)

(2) It did not discriminate directly against prospective foster carers "because of" their sexual orientation. Its constituent documents do not refer to gay or lesbian individuals, but only set out what it means to be an evangelical Christian. That is a religious requirement that applies to all, regardless of sexual orientation.

(3) Contrary to the Judge's reasoning, the appropriate comparators are not opposite- and same-sex married evangelical Christian couples. The material difference between the two cases is not the person's sexual orientation, but whether they are in a Christian marriage. Someone in a same-sex marriage would not be in a Christian marriage as Cornerstone understands it.

(4) *Preddy* is distinguishable, because the hotel owners' policy made no reference as a matter of religious doctrine to a need for those accommodated to be in what evangelical Christians consider a Christian marriage. Instead, its policy was defined with reference to sexual orientation ("heterosexual married couples only"). Further, *Preddy* did not concern a religious organisation, only religious individuals.

(5) Finally, and unlike in *Preddy*, any discrimination in this case is entirely abstract: no instance of discriminatory treatment against any person has been identified or relied upon. Consequently, it was not open to the judge to conclude that Cornerstone engaged in direct discrimination.

66. Responding, Ofsted observes that Cornerstone's case on direct discrimination seeks to import the religion and motives of the service provider as being relevant to whether or not there has been less favourable treatment, and that this is contrary to the structure of the EA 2010 and established authority. It supports the Judge's conclusion that less favourable treatment "because of" a person's sexual orientation, is broad enough to capture discrimination based on activities which are closely connected to sexual orientation, namely sexual behaviour with a person of the same sex. Cornerstone's position misunderstands established principles of direct discrimination. There must be an "an exact correspondence between the disadvantage and the protected characteristic" (*Preddy* [23]): here there is an exact correspondence between the discriminatory criterion and the protected characteristic of sexual orientation. The criterion that is applied to all is marriage, but that criterion is applied differently depending on whether the applicant is part of a same-sex or an opposite-sex marriage. Further, Cornerstone's criticism of the comparators adopted by the Judge misunderstands the principles applicable to comparators. Under s. 23(1) EA 2010, there "must be no material difference between the circumstances relating to each case", and s. 23(4) expressly provides that the fact someone is married to a person of the same sex and another is married to a person of a different sex does not constitute a material difference between circumstances. Further, per *James*, discriminatory circumstances are not "circumstances relating to each case". It is only by treating the religious beliefs of Cornerstone as a material difference that one can conclude that its provision of services does not involve direct discrimination, but those beliefs are themselves discriminatory, in that they do not recognise same sex marriage as equivalent to opposite sex marriage.

Moreover, if religious beliefs constituted a material difference for the purposes of s. 23, there would be no need for some of the specific exemptions in EA 2010, such as those at Sch. 22 paras. 9A-9C, which exempt religious organisations from solemnising marriages of same-sex couples. Finally, Ofsted argues that as a regulator it did not need to identify an actual victim to conclude the policy was discriminatory.

67. I do not accept Cornerstone's arguments on this issue, essentially for the reasons given by Ofsted and accepted by the Judge. On this objective factual inquiry, Cornerstone's policy, which specifically requires carers not to engage in homosexual behaviour, is as clear an instance of direct discrimination "because of" a protected characteristic as can be imagined. Specifically:

(1) The fact that the rule on homosexual behaviour forms part of a broader belief system does not alter the fact that this aspect of Cornerstone's policy expressly excludes people of a particular sexual orientation. The argument that it does not discriminate directly on the basis of sexual orientation because it also distinguishes between applicants on a wide range of other grounds is the argument that was rejected in *Preddy*. Nor does the matter turn on the labelling of the criterion. The assertion that this is not a sexual orientation requirement but a religious belief requirement falls foul of Lord Bridge's observation in *James* at 764C that "it cannot possibly make any difference whether the alleged discriminator uses the shorthand expression or spells out its full meaning."

(2) The Judge was also right to reject the false distinction between sexual behaviour (banned) and sexual orientation (not mentioned).

(3) The overall conclusion does not turn on the precise identity of the comparator, but it was reasonable for the Judge to select a couple, as that is in reality the profile of Cornerstone's carers, and to compare the treatment of same-sex and opposite sex married couples. The former will automatically be rejected, constituting a clear difference in treatment. The comparison proposed by Cornerstone, which appears to be between married Christian couples and everyone else, introduces impermissible discriminatory circumstances in the manner that was rejected by the Court of Appeal in *James*.

(4) The attempt to distinguish *Preddy* on the basis that the hotel keepers were not a religious organisation and that their policy was not explicitly religiously-based is unpersuasive. What matters in this context are the actual circumstances, not the identity of the discriminator or the reasons for discrimination.

(5) The question of whether a policy is objectively discriminatory does not depend on identifying any specific instance of discrimination arising from its implementation, though that may be relevant to justification: see below.

68. For these reasons I would hold that the Judge was right to find that this is a case of direct discrimination. That disposes of this ground of appeal unless Cornerstone succeeds on the proportionality exception under s. 193 EA 2010, which I consider later.

Ground 4: Indirect discrimination on grounds of sexual orientation

69. Because direct and indirect discrimination are mutually exclusive, this ground therefore only arises if the conclusion regarding direct discrimination is incorrect.

70. Indirect discrimination is defined in s. 19 EA 2010:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

By s. 19(3), religion or belief and sexual orientation are relevant protected characteristics for the purposes of s. 19(1).

71. Cornerstone argues that its requirement that carers do not engage in homosexual behaviour does not discriminate on grounds of sexual orientation: like the Judge, I have rejected that argument. Otherwise, it does not dispute that the first three conditions in s. 19(2) are satisfied, but it seeks to show that its policy is a proportionate means of achieving a legitimate aim under s. 19(2)(d). Again, I return to that below.

Ground 9: Convention discrimination against hypothetical foster carers

72. By s. 6 HRA 1998, because Cornerstone is, on the Judge's finding, a "hybrid" public authority, it is unlawful for it to act in a way which is incompatible with a Convention right.

73. Section 7(1) HRA 1998 provides that a person who claims that a public authority has acted or proposes to act in a way which is made unlawful by s. 6 may bring proceedings, "but only if he is (or would be) a victim of the unlawful act". Article 34 of the Convention provides that applications to the European Court of Human Rights ('ECtHR') may be made by an applicant claiming to be a victim. That court has made clear that it does not consider cases in the abstract, but that an applicant must be directly affected by the measure complained of.

74. The relevant Convention rights under this ground are Articles 8 and 14.

> "*Article 8*

> *Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
>
> "*Article 14*
>
> *Prohibition of discrimination*
>
> 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."

75. At [281-290], the Judge considered whether Cornerstone's recruitment policy breached the Convention, and specifically Article 14, read with Article 8. He noted that fostering falls within the ambit of Article 8: *EB v France* App no 43546/02; [2008] 1 FLR 850. He found that Cornerstone's policy produced a difference in treatment between first, a non-evangelical Christian applicant, and a similarly placed evangelical Christian applicant (a difference in treatment based on religious belief), and second, between a heterosexual evangelical Christian applicant, and a gay or lesbian evangelical Christian applicant (a difference in treatment based on sexual orientation). The critical question in each case was whether that differential treatment was justified. In respect of discrimination on grounds of religious belief, the Judge held that Cornerstone's policy *was* objectively justified. Schedule 23, para. 2(3) EA 2010 specifically allows religious organisations such as Cornerstone to discriminate on the grounds of religious belief in relation to the provision of services. It would be fundamentally incompatible with Parliament's intention to hold that under Article 14 a religiously based fostering agency cannot restrict its services to applicants holding the same faith, when Parliament has clearly and unambiguously permitted it to do so. That, said the Judge, was determinative. To that extent, therefore, Ofsted was wrong to conclude that Cornerstone's policy unlawfully discriminated on the basis of religious belief.

76. However, in respect of discrimination on grounds of sexual orientation, at [292] the Judge upheld Ofsted's case on the basis that Parliament had struck the proportionality balance differently in para. 2(10) of Sch. 23; again, I return to this below.

77. At this stage, I address Cornerstone's argument that Ofsted has no right to assert the rights of foster carers when there are no actual or identifiable "victims" whose Convention rights are engaged by Cornerstone's policy. The Report refers to "prospective carers", but none have been identified.

78. Before the Judge, Cornerstone challenged Ofsted's right to raise alleged breaches of Convention rights on the basis that (i) there is no identified victim, and (ii) it had no rights of its own, and accordingly no standing. Accordingly, Ofsted could not consider the HRA 1998 to be a "relevant requirement" under s. 14 CSA 2000. It notes that, unlike the Equality and Human Rights Commission, which by s. 30(3) of the Equality Act 2006 can rely on s. 7(1)(b) HRA 1998 without the need for it to be a victim, Ofsted has not been given a similar power.

79. The Judge rejected these arguments:

> "266. None of these submissions is controversial, but I agree with Ofsted that they miss the point. Ofsted is not seeking to bring proceedings on behalf of a victim (or otherwise) under s 7 HRA 1998. Ofsted's conclusions about Cornerstone's recruitment policy not being compliant with the Convention were made pursuant to its inspection and reporting powers. These empower it to comment on the extent to which an IFA is complying with any law which Ofsted considers relevant to its operation."

80. I consider that this conclusion is plainly right. The process of regulation is different from the bringing of a claim of discrimination. A regulator is entitled to identify a breach in the law where it finds it. However, as I have already said, the existence or non-existence of potential victims may be relevant to justification, and I will return to the question in that context.

Ground 10: Convention discrimination against Cornerstone

81. Because Ofsted is a public authority, it is unlawful for it to act in a way which is incompatible with a Convention right. The relevant Convention rights under this ground are Articles 8 and 14 (above) and Articles 9, 10 and 11, the focus here being on Article 9 and, to a lesser extent, Article 11:

> "*Article 9*
>
> *Freedom of thought, conscience and religion*
>
> 1. 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.
>
> 2. 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 interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
>
> *Article 10*
>
> *Freedom of expression*

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> *Article 11*
>
> *Freedom of assembly and association*
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

82. The importance of the right protected by Article 9 was expressed in *Kokkinakis v Greece* (Application no. 14307/88); (1994) 17 EHRR 39 at [31]:

> "As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."

83. It is not for others, including the courts, to adjudicate on the truth of religious beliefs: *Shergill v Khaira* [2014] UKSC 33; [2015] AC 359 at [45]. The state should be neutral with regard to the membership, internal organisation and leadership of religious

groupings: *BXB v Watch Tower and Bible Tract Society* [2020] EWHC 156 (QB); [2020] 4 WLR 42 at [27]. See also *Williamson* at [22] and *Doğan and Others v. Turkey* (Application no. 62649/10) at [69].

84. The same theme is found in cases under Article 11, for example *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46 at [58]:

> "Since religious communities traditionally exist in the form of organised structures, Art.9 must be interpreted in the light of Art.11 of the Convention, which safeguards associative life against unjustified state interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary state intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Art.9 affords. The State's duty of neutrality and impartiality, as defined in the Court's case law, is incompatible with any power on the state's part to assess the legitimacy of religious beliefs."

85. In the present case, these questions arise:

(1) Are Cornerstone's rights under Article 9 engaged because its recruitment policy is a manifestation of religion?

(2) If so, did Ofsted's requirements materially interfere with Cornerstone's right to manifest its beliefs?

(3) Further, were Cornerstone's rights in fact breached by the production of the draft Report?

(4) If Cornerstone's rights were breached, did Ofsted's actions pursue a legitimate aim in a proportionate manner?

86. As to the first question, an act will be a manifestation of religion if, on the facts of the case, there is a sufficiently close and direct link between the act and the underlying belief, see *Eweida v United Kingdom* (2013) 57 EHRR 8 at [82]:

> "In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question…"

87. So, whether there is a sufficient nexus between the act in question and the religious belief is a question of fact for the court. In *R (Williamson) v. Secretary of State for Education and Employment* [2005] 2 AC 246 it was held that the belief that corporal punishment at home and in school was necessary for the proper upbringing of children was capable of being a manifestation of belief that fell within Article 9. In *Ladele*, one of the cases forming part of the decision in *Eweida*, the applicant was a registrar who was dismissed for refusing to celebrate civil partnerships because of what the ECtHR described as the orthodox Christian view that marriage is the union of one man and one woman for life. It was accepted that her objection was directly motivated by her religious beliefs.

88. In this case, the Judge accepted the beneficial, faith-based motives of Cornerstone in setting up a fostering service, but he did not consider its exclusionary recruitment policy to be a manifestation of belief:

> "297. … I do not doubt for a moment that Cornerstone and its staff are motivated to do what they do because they consider the provision of fostering and adoption services falls within Christian observance and fulfils an important Biblical mission, as Ms Birtle explains in her first witness statement. That belief is a religious belief within Article 9(1) and it is sincerely and genuinely held. I also accept that Cornerstone wishes to encourage evangelical Christians to fulfil that observance by becoming foster or adoptive carers. However, I do not regard Cornerstone's requirement that carers must be evangelical Christians as being sufficiently intimately or necessarily linked to those aims in a way that engages Article 9(1). That is all the more so because, as Ms Birtle says at [11] of her first witness statement, carers must support children of no faith. From this I understand her to mean that children who not evangelical Christians are not sought to be converted."

89. To like effect, the Judge addressed the question of sexual orientation:

> "303. I turn to the question of sexual orientation. For essentially the same reasons, I have concluded that the non-recruitment of gay and lesbian foster carers is not a manifestation of religious belief for the purposes of Article 9(1). It does not have a sufficiently close connection with Cornerstone's *forum internum*. The ban on the recruitment of gay and lesbian carers does not directly express the belief concerned and is only remotely connected to a precept of faith. Evangelical Christian gay men and lesbians are full members of that faith community in every sense."

90. On appeal, Ofsted supports the Judge's reasoning. For its part, Cornerstone contends that the Judge adopted an unduly narrow approach to this question. His reasoning overlooked its own understanding of its religious obligations, and the communal aspect of its manifestation of its evangelical beliefs, which were explained in Ms Birtle's evidence. It also notes that Ofsted accepted, and the Judge found, that in the context of religious discrimination this restriction on foster carer recruitment was "necessary to

comply with the doctrine of the organisation" for the purposes of paragraph 2(7)(a) of Schedule 23 EA 2010.

91. In my view, the Judge was wrong to conclude that Cornerstone's policy did not amount to a manifestation of religion. This error is one of principle, and not one of an evaluative kind that would call for deference on our part. As can be seen, his conclusion at [297] rests on the finding that Cornerstone's policy was not sufficiently closely connected to its *aims*, when the correct question was whether it was sufficiently closely connected to its *beliefs*. Further, the paragraph that I have quoted forms part of a substantial discussion at [291-301], see below, in which the Judge addresses both the issue of manifestation and the issue of substantial interference. In merging the two questions, he has overlooked his finding in relation to the doctrinal necessity of the religious criterion, a finding of clear importance to the question of manifestation.

92. Of course, the fact that a religious person does a good deed is not in itself a manifestation of religion. To take an inconsequential and unlikely example, where a person leaving a religious gathering, full of good intentions, likes to help elderly people across the road, a by-law reserving the task to uniformed crossing attendants will not be a breach of Article 9, whatever else it may be. In this case, however, Cornerstone was explicitly set up to manifest the faith of its carers through its fostering activities, which is a different matter altogether. The Judge also left out of consideration the fact that carers associate with each other for mutual support as part of what they see as their mission. It is also unclear how the neutral religious upbringing of children is relevant to the issue of whether their carers are manifesting their religion.

93. I would therefore hold that the Judge erred in this respect and that Cornerstone's foster carer recruitment policy falls within the protection of Article 9 of the Convention.

94. The second question is whether Ofsted's requirements interfered with Cornerstone's religious belief "materially, that is, to an extent which was significant in practice": *Williamson*, per Lord Nicholls at [39]. The Judge did not consider that it did:

> "298. Cornerstone can fulfil – perhaps even more fully fulfil - its Christian mission of providing homes for children and young people who are in need of them by ensuring it has the widest possible pool of potential carers as recruits and by not restricting potential applicants to just one faith. What Ofsted said in its Report did not impinge or interfere with the rights of Cornerstone or its officers, staff or volunteers to manifest their religion in the manner that is protected by Article 9(1).
>
> 299. Cornerstone's belief that providing fostering and adoption services is the implementation of an important Biblical injunction was in no way impaired by Ofsted's Report. It can carry out that mission still. In addition, Cornerstone and its staff remain free to believe their Christian beliefs as they see fit; they can worship as they wish at a time and a place and in a manner that they wish; they can conduct their meetings with prayer and worship as they see fit; and they are able to manifest their beliefs publicly as they wish. They remain free to evangelise, proselytise, dispute and discuss (although, as I have said, they do

> not do so in relation to fostered children). They can continue to supply an evangelical Christian framework and support network for their carers. The requirement that Cornerstone not discriminate against non-evangelical Christians did not impinge on any of its or its human components' acts which are so closely linked to matters such as acts of worship or devotion and which form part of the practice of their religion or belief that they attract the protection of Article 9(1) as a manifestation of that belief.
>
> 300. In short, Cornerstone could continue to have a religious ethos whilst not placing a blanket exclusion on those of different or no religion. Cornerstone does not contend that the role of foster carer demands or is enhanced by a particular religion or belief.
>
> 301. For these reasons, I do not find that the requirement that potential carers be evangelical Christians was the manifestation of a religious belief for the purposes of Article 9(1)."

I include the final paragraph to make good my conclusion on the first question.

95. Cornerstone strongly objects to the Judge's assessment of this issue. It charges that he has severely overreached the court's role at [298] by telling it how it can (better) fulfil its religious mission and at [300] that it can continue to have *a* religious ethos, when it has a right to have *its* religious ethos. Ofsted's decision, upheld by the court, appears to require Cornerstone to change a core religious belief. That is a profound issue of great theological consequence, which goes far beyond the competence or expertise of Ofsted or indeed the court. In short, the state has no business to be telling Cornerstone how to practise its religion. Besides, the belief in question is also held by mainstream religious organisations.

96. Cornerstone further challenges the Judge's assertion that evangelical Christian gay men and lesbians are full members of that faith community in every sense. That finding was, it says, based on no evidence, and is now contradicted by the evidence of Rev. Mason. It appears to spring from evidence filed in the *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (No 2)* [2013] 1 WLR 2015, cited at [203]. However, the Judge's statement about that does not bear on the question within which we are now concerned, and I return to it below.

97. In response, Ofsted charges Cornerstone with taking a purely subjective approach, which would result in any manifestation of a religious belief attracting the protection of Article 9. That is not the case and seen in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 per Lord Hoffman at [50]: "Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing.", and *Sahin v Turkey* (2007) 44 EHRR 99 at [105]: "Article 9 does not protect every act motivated or inspired by a religion or belief."

98. Again, I consider that the Judge was wrong to find that there had been no material or significant interference with Cornerstone's right to manifest its beliefs. Based upon his findings, it is impossible to escape the conclusion that the requirement that it should change its practice so as to admit carers who were not in a Christian heterosexual

marriage (a belief that he had found to be a doctrinal necessity) was a significant interference with the way it chooses to manifest its beliefs. The Judge fell into error in his examination of this question by confining his inquiry to enumerating all the things that Cornerstone *could* still do. That is no doubt part of the inquiry, but it is not the whole picture. If it was, the wearing of a cross at work in *Eweida* would not have been an interference with what was presumably an untrammelled religious life in other respects. Instead, at [94] and [97], the ECtHR accepted that the prohibition on the wearing of crosses in the two cases amounted to an interference with Article 9. Nor do I accept Ofsted's argument that Cornerstone seeks to apply a subjective test alone: the severity of a violation should be assessed, taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case: *JD & AV v United Kingdom* (Applications nos. 32949/17 and 34614/17); [2020] HLR 5 at [65]. Here, Cornerstone is an association and the impact on its collective practice is a relevant matter. Ofsted's requirement that it changes its recruitment policy in a manner that is dissonant with one of its foundational purposes is consequently a matter that is of significance for it in practice. The school and university dress cases (*Denbigh*, *Sahin*) concerned choices that, as in *Eweida*, were not doctrinally necessary, and I note that even in *Denbigh* the minority on this issue (Lord Nicholls and Baroness Hale) were inclined to the view that there had been an interference.

99. The third question is whether Cornerstone's rights were in fact interfered with by the production of the draft Report.

100. As regards sexual orientation discrimination, the Judge implicitly accepted that if (contrary to his findings) Cornerstone's Convention rights had been engaged and significantly interfered with, the requirement in the Report would amount to a breach of those rights unless it was justified as proportionate: see [306].

101. However, as regards religious discrimination, the Judge additionally found that the issuing of the draft report was not a breach of Cornerstone's Convention rights:

> "302. … I accept Ofsted's submission in its post-hearing Note that, on the facts, there has not been any interference with Cornerstone's rights in relation to this aspect of its recruitment policy in terms which engage the Convention. Cornerstone's case is that it was the statutory requirements imposed by the Report which breached its rights under the Convention. But on the facts, Cornerstone has not been required to take any step to meet those requirements. Ofsted points out that, on the contrary: (a) since the report was issued Cornerstone has continued to apply its recruitment policy regarding evangelical Christians; (b) Ofsted has taken no steps to enforce the statutory requirements; (c) the Report has not been published, and to the extent the issues raised by this claim are in the public domain, that is not in consequence of steps taken by Ofsted. Therefore, if my judgment stands, Ofsted will be required to remove the HRA 1998 imposed requirements about the non-recruitment of evangelical Christians and its Report will be issued in an amended form. As such, the pleaded breach of the Convention by Ofsted, namely the requirement Cornerstone take the steps required by the statutory requirements, has not yet occurred and will not ever

> occur. There will have been no significant impact on its recruitment policy and thus no interference in Convention terms."

102. This finding arose in the following way. While the Judge was preparing his judgment, he sent a message to the parties asking for their submissions about the question of a remedy if (putting it more bluntly than he did) Cornerstone won on the issue of religious discrimination but lost on the issue of sexual orientation. The parties made written submissions. Cornerstone's submissions did not address the Judge's question, other than to state that it was entitled to an effective remedy. Ofsted argued (i) that an error in relation to religious discrimination would have had no meaningful effect as it would still have concluded that the policy was unlawful on the grounds of sexual orientation, (ii) that there had been no interference with Cornerstone's Convention rights because, as the report had not yet been published, it had not been required to do anything and the pleaded breach had not yet occurred, and (iii) in any case, if there was an interference, the court's judgment would be sufficient remedy. It can be seen that the Judge based his conclusion on (ii).

103. The finding at [302] was not the subject of a specific ground of appeal, but the point falls within the general assertion in Ground 10. In written submissions to us, Ofsted describes the finding as unanswerable, while Cornerstone does not address it at all. Neither party referred to the issue in oral submissions. Had it been of importance, we could have required supplemental written argument, but the point is not dispositive and I do not think that necessary.

104. I nevertheless record that I have some difficulty with the Judge's conclusion on this issue. I say nothing about Ofsted's other arguments about it and focus on the argument that he accepted, which was that, because the draft report had not been published, there had been no interference with Cornerstone's rights.

105. The ordinary powers of the court to grant a declaration on a question of law have not been abridged by the HRA 1998. It will be recalled that by s. 7 a person who claims that a public authority has acted or proposes to act in a way which is made unlawful by s. 6 may bring proceedings, "but only if he is (or would be) a victim of the unlawful act". Section 8, which concerns judicial remedies, provides by sub-section (1) that:

> "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."

The HRA 1998 accordingly extends to proposed acts by a public authority that would be unlawful. There is nothing to say that the proposal to act unlawfully must persist until trial. If a threatened unlawful act is not in fact carried out a remedy in damages may be inappropriate, but I would need more argument to be persuaded that in a case of any importance the court should not at least consider making a declaration that such an act would have been unlawful had it been carried out. Otherwise a public authority can make an unlawful requirement, cause a putative victim to litigate to defend itself, drop the unlawful requirement, and thereby escape any remedy. This cannot be conducive to good administration: on the contrary, a formal acknowledgement of the unlawful basis of the proposed act may be just and appropriate, although the court will

of course be able to take account of any countervailing factors when deciding whether or not to grant a declaration in the particular case before it.

106. That concludes my consideration of all aspects of this appeal, except for the critical issue of proportionality. Taking stock at this point, the Judge was in my view right to find that:

(1) Ofsted was entitled to have regard to the EA 2010 and the HRA 1998 when carrying out its inspection.

(2) Cornerstone's recruitment policy does not violate Article 14 of the Convention read with Article 8, insofar as it requires carers to be evangelical Christians.

(3) Cornerstone's policy does constitute direct, alternatively indirect, discrimination on grounds of sexual orientation, and will be unlawful under the EA 2010 and the HRA 1998 in the absence of justification.

107. The parts of the Judge's analysis that are in my judgement incorrect concern his treatment of Cornerstone's own claim under the HRA 1998, as to which I would hold that:

(1) Ofsted's requirement that Cornerstone change its recruitment policy in relation to the sexual orientation of carers amounted to a significant interference with Cornerstone's Convention rights.

(2) The conclusion that Ofsted did not breach Cornerstone's Convention rights because the requirement in the draft Report that it change its policy on the religious identity of carers was never published is doubtful.

Proportionality

108. We come at last to what I would regard as the decisive question in this case. The question of justification arises in these contexts:

(1) Direct and indirect discrimination by Cornerstone, via the exception provided for charities under s. 193(2)(a) EA 2010.

(2) Indirect discrimination by Cornerstone, via s. 19(2)(d) EA 2010.

(3) Alleged breach of the Convention rights of putative foster carers by Cornerstone.

(4) Alleged breaches of Cornerstone's Convention rights by Ofsted.

109. On the facts of this case, it is common ground that the outcomes under each of these heads will harmonise, and that is how the Judge approached the matter. He addressed the question of proportionality in detail when considering indirect discrimination at [185-211], reasoning that the inquiries under s. 193 [224-226], under the Convention [290], and in respect of Cornerstone's own claim [303-306] led him to the same result.

110. The Judge's starting point was that particularly weighty reasons are required to justify differential treatment on the grounds of sexual orientation (see, for example *Catholic*

Care at [48]; *R (Steinfeld and Keidan) v Secretary of State* [2020] AC 1 at [32], and he noted that the burden of showing this lay on Cornerstone.

111. Cornerstone pleaded its legitimate aims as being its right to religious freedom, reflected in Article 9, its right to freedom of association under Article 11, and the "principles of subsidiarity, pluralism and diversity". In practical terms, the aims on which it sought to rely (at paragraph 78 of its skeleton argument) were: increasing the pool of evangelical Christian foster carers; affording critical support to carers; allowing those within the evangelical Christian community to serve by promoting stable and durable placements; and manifesting the beliefs of evangelical Christianity in the practice of Christian charity and the support of Christian family life, to the benefit of the carers, the children cared for, Cornerstone and society as a whole. The following paragraph added:

> "And in increasing the numbers of evangelical Christian foster carers, C's activities also accord with the broader social aim - against the background of an overall national shortage of foster carers for the amount of placements of children required - of increasing the number of foster carers overall and thereby making more places available for children in need outside of institutional care."

112. The Judge approached the question of proportionality under the EA 2010 through the four stages set out in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700:

a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;

b) whether the measure is rationally connected to the objective;

c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and

d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, the former outweighs the latter.

He then summarised the decision in *Catholic Care*, which I consider below, and gathered from that case that a key question is whether the policy provides benefits to children and young persons or whether, if it were changed, that would produce a disbenefit, for example, by reducing the available number of foster carers. This required consideration of the evidence that had been filed.

113. The Judge then turned to consider the legitimate aims relied upon by Cornerstone. In relation to the alleged national shortage of foster carers, which he described as "a core part of Cornerstone's case", he found that this was not supported by the evidence. He noted evidence provided by Ofsted to the effect that there was no national shortage of foster carers, only a relative shortage of carers to meet the specific needs of children in care, and that there was nothing to suggest that recruiting evangelical Christian carers would respond to any relative shortage driven by such 'matching' problems. He noted that the evidence in *Catholic Care* was to the same effect.

114. Having carried out that assessment, the Judge stated his position:

> "202. I have reached the conclusion that there is insufficient evidence to show that there are sufficiently weighty and convincing reasons why Cornerstone should be permitted to have a policy which is, at a minimum, indirectly discriminatory on the grounds of sexual orientation. Its current policy is not, or not sufficiently, rationally connected to the aims it says the policy pursues. Therefore it fails the second stage of the *Bank Mellat*, supra, test of proportionality (whether the measure is rationally connected to the objective it seeks to achieve). It also fails the third stage: it could achieve what it wants to achieve by a less restrictive measure, ie, one which is not discriminatory on grounds of sexual orientation.
>
> 203. Assessment of proportionality involves striking a balance between various interests, and in doing so I have had full regard, as Cornerstone urged me to, to its rights under the Convention. I will return to these later. However, I fail to see how excluding a category of evangelical Christians (gay men and lesbians) from being foster carers achieves the aim which Cornerstone says it has of increasing the number of evangelical Christian carers. There are gay evangelical Christians, just as there are gay Roman Catholics (treating the two religious descriptions as being different for these purposes). For example, in *Catholic Care*, supra, Sales J referred at [29] to evidence filed in that case from the Roman Catholic Caucus of the Lesbian and Gay Christian Movement. It is a reasonable inference that a section of gay and lesbian evangelical Christians would want to foster through an agency founded on an evangelical Christian ethos and which would support them in all of the ways Ms Birtle describes. The number of gay and lesbian evangelical Christians is obviously not known, but what is certain is that Cornerstone's policy means that it does not have available to it the largest and most diverse number of potential applicants. There is no evidence that if Cornerstone accepted gay men or lesbian any, or any significant, number of heterosexual carers would not apply to it, or would not apply to other agencies."

115. He similarly dismissed the other aims articulated by Cornerstone:

> "206. I also fail to see how a discriminatory policy positively impacts on Cornerstone's aim of affording critical support to carers. I do not understand how this aspect of the policy aids or assists in allowing those within the evangelical Christian community to serve by promoting stable and durable placements, unless it be said that gay and lesbian evangelical Christians cannot provide such placements, a position which, as I have said, I flatly reject. Nor do I see how altering the policy so as to be non-discriminatory would adversely impact the ability of evangelical Christianity to manifest the practice of

> Christian charity and the support of Christian family life - to the benefit of the carers, the children cared for, Cornerstone and society as a whole."

116. Therefore:

> "208. Overall, Cornerstone has not satisfactorily explained why the use of Scriptural doctrine, prayer and Biblical reflection cannot be conducted with evangelical Christians who are gay or lesbian and/or in a same sex marriage… In other words, Cornerstone has failed to show that there is a less intrusive means of meeting the aims identified in its Skeleton Argument, and I accept Ofsted's argument on this aspect of the case."
>
> 209. I fully accept that Cornerstone is founded upon what it perceives to be evangelical Christian beliefs, for all of the reasons set out in Ms Birtle's witness statements and its Skeleton Argument. I respect and acknowledge its ethos and the beliefs of its staff and volunteers. But it seems to me to be clear that its policy on 'homosexual behaviour' is driven, first and foremost, by its belief such conduct is simply not compatible with Christianity, and that it is sinful. Indeed, Clause 10 says this in express terms…
>
> 210. Cornerstone has failed to show by convincing evidence that its policy benefits children and young people in a way it would not if the policy did not discriminate. But conduct which is discriminatory on the grounds of sexual orientation that is pursued because of religious belief is not thereby justified…"

And he went on to cite the passage from *Preddy* that appears at paragraph 40 above. He accordingly concluded that Cornerstone had failed to establish that its policy was justified under s. 19(2)(d) EA 2010.

117. At a later stage, when considering this issue in the context of the HRA 1998, the Judge conducted a detailed study of the various formulations that have been proposed for the proportionality test, but for our purposes, the statement recently reaffirmed by the Supreme Court in *R (SC, CB and others) v Secretary of State for Work and Pensions* [2021] UKSC 26 at [187] is sufficient. A difference in treatment will only be justified if it pursues a legitimate aim and where there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

118. In considering whether, if the Report was an interference with Cornerstone's Article 9 rights, it was nonetheless justified under Article 9(2), the Judge stated his conclusion in this way:

> "305. In considering this issue, I have had full regard to Cornerstone's right to religious freedom. For example, Cornerstone relies on *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46 [58]-[61] ('… the autonomous existence of religious communities is indispensable for pluralism

in a democratic society …'). It also cites (inter alia) *Islam-Ittihad Association and others v Azerbaijan* [2014] ECtHR 5548/05, [2014] ECHR 1220, [40] ('[P]luralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs …'). I do not doubt the worth and significance of these relatively high level statements of principle, and the others cited by Cornerstone in its Skeleton Argument. But as Lord Neuberger observed in a broadly similar context in the extract from *Ladele*, supra, that I set out earlier, they cannot be allowed to override Ofsted's desire to promote diversity and inclusion in the recruitment of foster carers by IFAs acting on behalf of local authorities and funded by public money, and its wish to ensure key communities are not discriminated against. In other words, Cornerstone's rights are not absolute but have to be balanced against other factors. I have found that Cornerstone performs duties on behalf of public authorities pursuant to contract, for which it is paid. I have also found that the recruitment of foster carers is a public function. Parliament has specified in [2(10)] of Sch 23 to the EA 2010 that in these circumstances, discrimination on the grounds of sexual orientation is not permissible and is unlawful. In my judgement, it follows that the requirement imposed by Ofsted – mirroring as it does Parliament's specifically expressed will – is proportionate and necessary in a democratic society. The rights and freedoms of religious organisations and how they are to [be] weighed against the societal imperative of ensuring that gay men and lesbians are not discriminated against was a question of social policy for Parliament first and foremost. Parliament considered this very question when it passed the EA 2010 against the backcloth of the HRA 1998 and decided where the line was to be drawn. In my judgement that is conclusive on the question of proportionality."

119. On the same basis, the Judge rejected Cornerstone's claims under Articles 10, 11 and 14 of the Convention: the interference with Articles 10 and 11 was justified and proportionate, and any discrimination against Cornerstone contrary to Article 14 was also proportionate.

120. On appeal, Cornerstone submits that the Judge's assessment of proportionality was based on a series of errors of approach or of evaluation:

(1) He overlooked a key point of distinction between this case and *Catholic Care*: there, the Charity Commission had opposed the charitable objects proposed by the charity, whereas in this case, the Commission had approved Cornerstone's objects. Sales J relied on the margin of appreciation to be afforded to the Commission in that case, which in the present case drives the conclusion that the court should have afforded greater weight to the Commission's approval of Cornerstone's objects.

(2) He was wrong to regard the assertion that there is a national shortage of foster carers as a "core part of Cornerstone's case", when its evidence concerned its specialism

in placing more challenging children, for whom it is common ground there is a shortage of carers. Similarly, he misunderstood Cornerstone's case in concluding that its policy would not achieve the aim of increasing the number of evangelical Christian carers.

(3) He misdirected himself in law in positing the existence of gay and lesbian evangelical Christians who would want to foster through an evangelical Christian agency, but are excluded by Cornerstone's policy. In effect, he created a non-existent category of potential victims by assuming the existence of gay evangelical Christians. His reliance on the letter from the Roman Catholic Caucus of the Lesbian and Gay Christian Movement filed in *Catholic Care* highlights the dangers of entering into theological and ecclesiastical issues. This case concerns evangelical Christians, not Roman Catholics, and the membership criteria are different: the latter is based on institutional and sacramental considerations, whilst the former is premised on commitment to a Christian lifestyle.

(4) The decision is, says Mr O'Neill QC, "unanchored". In order to conduct a proportionality exercise correctly, you need to know the facts. In *Preddy* and *R (Interim Executive Board of Al-Hijrah School) v Ofsted* [2018] 1 WLR 1471, the cases concerned real people. Reliance is placed on *An application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27; [2019] 1 All ER 173, where the NIHRC was found to lack standing to bring the proceedings.

(5) The Judge failed to have regard to a number of specific factors that supported Cornerstone's case:

(i) The absence of evidence of harm caused to any prospective carer as a result of Cornerstone's application of evangelical Christian precepts (unlike in *R (Z) v Hackney*, where Lord Sales noted at [79] that the courts below rightly took into account the small impact of the policy in question on others in their proportionality assessment).

(ii) The fact that fostered children had not been harmed by Cornerstone's fostering policy; on the contrary, there was evidence of the positive outcomes.

(iii) Cornerstone's evidence that its religiously informed mission would be harmed if it was forced to permit carers who contravene Biblical principles about Christian marriage.

(6) He had no regard to Cornerstone's rights under Articles 9-11 and 14 of the Convention in considering whether its policy constituted a proportionate means of achieving a legitimate aim.

(7) In interpreting Parliament's will, the Judge failed in this context to refer to Section 193 EA 2010, and in particular subsection 193(8), which also forms part of the balance struck by Parliament as to how non-discrimination law should apply to a charity.

121. In reply, Ofsted notes that an appeal court ought not disturb the first instance judge's findings on proportionality unless he erred in principle or was wrong (*R (AR) v. Chief Constable of Greater Manchester* [2018] 1 WLR 4079 at [64]). It challenges each of

Cornerstone's arguments. In particular, it asserts that he did not misunderstand the argument about national foster carer numbers, however Cornerstone failed to prove how continuing to provide its services in a discriminatory manner would address this need, for instance by providing evidence that it facilitated a placement for a child that would otherwise not have been fostered. The Judge was not wrong to consider that there are lesbian and gay evangelical Christians who would wish to be foster carers. His reference to the evidence in *Catholic Care* did not disclose an error: it merely supported his point that there are lesbian and gay people in all religious denominations. He was entitled to find that Cornerstone would be able to manifest its beliefs in a different way and in doing so he was not telling it what its beliefs are. The argument that the exclusion of lesbian and gay carers is justified by its sincerely held religious convictions was rejected in *Preddy* and *Catholic Care*.

122. With regard to Cornerstone's criticism of the Judge's specific assessment, Ofsted avers that: the absence of harm to fostered children is not a material consideration and the Judge did consider whether the policy benefitted children; he provided detailed reasons for rejecting Cornerstone's evidence that its mission would be harmed if it were forced to change its recruitment policy; and he specifically considered Cornerstone's rights under the Convention.

123. As to Cornerstone's own claim under the Convention, the Judge was right to hold that the Report pursued the legitimate aim of protecting the rights and freedoms of lesbians and gay men, and that it is proportionate for Ofsted to seek to ensure that the services provided in the public sphere are conducted in a non-discriminatory way. Further, he was entitled to note that Ofsted's approach mirrored the balance struck by Parliament in paragraph 2, Schedule 23 to the EA 2010.

Conclusion

124. This appeal sees a collision between two protected characteristics, championed by parties whose arguments have, to an unusual extent, tended to pass each other by. On the one side, Ofsted is a national regulatory authority that seeks to uphold equality law by reference to general principles; on the other, Cornerstone is a small religious charity that seeks to justify difference in treatment by reference to its own experience. This asymmetry makes the court's task more demanding. Arguments of principle can be easier to evaluate when they come down to disputes about homely items like beds, necklaces or cakes, but in this case the gulf in perspectives is not embodied in individuals such as Mr Preddy, Ms Eweida, or Mr Lee. Despite that, the principles underpinning the assessment of proportionality are clear enough.

125. In the first place, while there is no automatic hierarchy under the HRA 1998 as between qualified Convention rights (*Re S (a child)* [2004] UKHL 47; [2005] 1 AC 593 at [17]), the ECtHR has repeatedly emphasised the need for particularly weighty reasons to justify differential treatment on the ground of sexual orientation or other 'suspect' grounds of discrimination. These encompass birth out of wedlock, sex, sexual orientation, race and ethnic origin, and nationality; it is as yet unclear whether the ECtHR considers religion to be included in this category.

126. In *R (SC, CB and others) v SSWP*, at [98-116], Lord Reed considered the approach taken by the Strasbourg court.

> "100. One particularly important factor is the ground of the difference in treatment. In principle, and all other things being equal, the court usually applies a strict review to the reasons advanced in justification of a difference in treatment based on what it has sometimes called "suspect" grounds of discrimination. However, these grounds form a somewhat inexact category, which has developed in the case law over time, and is capable of further development by the European court. Furthermore, a much less intense review may be applied even in relation to some so-called suspect grounds where other factors are present which render a strict approach inappropriate, as some of the cases to be discussed will demonstrate."

At [107] he considered sexual orientation discrimination, noting that the ECtHR had stated that differences in treatment require "particularly serious reasons" by way of justification, while at [109-111] he described a similar approach to religious discrimination. However, he also noted that the court has taken a less strict approach in some cases of religious discrimination where other factors were relevant. He summarised at [115-116] the court's approach to justification generally and noted that it is a matter of some complexity. He identified a number of general factors that may be relevant in the circumstances of a particular case and concluded that, unless one factor is of overriding significance, it is necessary for the court to make a balanced overall assessment.

127. Here, 'other factors' are relevant to the overall assessment. It is of particular significance that Parliament has, in relation to religious organisations that offer a service to the public, given a clear indication that discrimination on the basis of sexual orientation is impermissible. The Judge described this feature as 'determinative' at [287] and 'conclusive' at [305]. I would prefer to regard it as a significant indicator of what Parliament intended when the question of proportionality is considered in the contexts of indirect discrimination generally under s.19, charities under s. 193, and Convention rights under the HRA 1998. I would not treat it as conclusive because it is possible to envisage circumstances in which, despite the Schedule 23 exception, different treatment on grounds of sexual orientation could be justified on the facts of a particular case, for example where there was good evidence that a significant number of children would not be fostered at all but for a discriminatory policy.

128. In this context, it is instructive to note that the position of children in need of placement was a prominent factor in the recent decision of the United States Supreme Court in *Fulton v. Philadelphia* 593 U. S. 2021, where, in similar circumstances, a ban was imposed by the City of Philadelphia on a long-standing Catholic fostering agency because it would not place children with unmarried couples, regardless of sexual orientation, or with same-sex married couples. The ban was struck down, and in a concurring judgment Alito J placed emphasis on the fact that it had left children at risk of being left homeless. However, that outcome was predicated on the First Amendment to the Constitution, which, amongst other things, protects the free exercise of religion. In contrast, the present case must be decided within the framework of our equalities and human rights legislation, which does not give the same prominence to the rights of religious organisations.

129. Cornerstone draws attention to general statements from the ECtHR, such as those in *Manoussakis v. Greece* (1997) 23 EHRR 387, where Jehovah's Witnesses had been

convicted of establishing and operating a place of worship without prior authorisation. At [44] it was said that the restrictions imposed on the freedom to manifest religion called for very strict scrutiny. So, Mr O'Neill QC argues, there is an equivalence: *"Your 'very weighty reasons' are my 'very strict scrutiny.'"* This is not the effect of the case law, either at European or domestic level. Enhanced protection on the ground of sexual orientation exists to counteract historic injustice towards homosexuals, the causes of which include religious beliefs.

130. *Catholic Care* is the domestic decision that comes closest to the present case on its facts. It concerned an application by an adoption agency to amend its charitable objects to permit different treatment on the grounds of sexual orientation and it turned on the exception for charities under s. 193. (A significant point of difference with the present decision is that it did not consider the exception for religious organisations under Schedule 23, which came into force on 1 October 2012. The hearing in *Catholic Care* took place in September 2012, with judgment being given in November.)

131. I gratefully adopt the Judge's summary of the litigation history in that case:

> "191. In *Catholic Care*, supra, Sales J (as he then was) sitting in the Upper Tribunal considered the policy of a Roman Catholic adoption charity only to recruit heterosexual couples. This was in the context of s 193, which I will come to, however, the question of justification is the same as in relation to s 19(2).
>
> 192. The facts were that until the end of 2008 the charity had adopted the practice of providing adoption services to heterosexual adoptive parents so as to constitute a family of mother, father and child, excluding same sex couples from consideration as potential adoptive parents for reasons of religious doctrine. Following a change in the law prohibiting discrimination in the provision of services on grounds of sexual orientation, the charity sought to avail itself of the limited exemption for charities in regulation 18 of the Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263), made under s 81 of the Equality Act 2006, by applying to the Charity Commission for consent under s 64 of the Charities Act 1993, as amended, to amend its charitable objects to provide adoption services only to heterosexuals and in accordance with the tenets of the Roman Catholic Church.
>
> 193. The Commission refused permission to amend both then, and after the matter had been remitted to it by the High Court following an appeal: *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (Equality and Human Rights Commission intervening)* [2010] EWHC 520 (Ch); (Briggs J).
>
> 194. Regulation 18 was superseded by s 193 of the EA 2010 but the effect of the two provisions is identical.
>
> 195. On the Charity's appeal to the First-tier Tribunal against the Commission's decision, the charity contended that the legitimate aim to be served by the amendment to its memorandum of association and consequent resumption of its provision of adoption services limited to

heterosexuals was the prospect of increasing the number of children, particularly hard to place children, placed with adoptive families, and that unless it were permitted to discriminate as it proposed its voluntary income would reduce leading to a loss of provision of adoption services and fewer children placed with adoptive families.

196. The Tribunal dismissed the appeal, concluding that the charity had not demonstrated that the legitimate aim which it identified would be achieved by its proposed method and so the charity had not established that particularly weighty reasons existed to justify the discrimination.

197. The charity appealed to the Upper Tribunal. It was common ground that s 193 of the EA 2010 should be interpreted as allowing a charity to seek to establish that a defence of objective justification was made out by reference to the principles applied for the purposes of Article 14 of the Convention. It was also accepted by the Charity that 'religious conviction alone could not in law provide a justification for the denial of its adoption services to same sex couples.'"

132. Sales J dismissed the appeal. As relevant to the present case, he held that:

(1) Where, as a consequence of some people having prejudices about gay men and lesbians, some real detriment to the general public interest of sufficient weight might arise unless a discriminatory practice were adopted, it was in principle possible under Article 14 of the Convention and s 193 of the EA 2010 for such a practice to be proportionate to the legitimate aim of preventing that detriment or harm and hence objectively justified. What is required is a practical approach, looking to see if there really would be a serious detriment to some aspect of the public interest or legitimate objective if a practice involving such differential treatment were not followed. So, if it was shown that there was a significant prospect that more children would be placed for adoption if the organisation was allowed to discriminate against homosexuals than would otherwise be the case, then the interests of those children provide an argument in favour of permitting the Charity to proceed in that way. [38, 41, 52]

(2) The sincerely held preference of donors, motivated by respect for Roman Catholic doctrine, to support adoption within a traditional family structure, being in line with a major tradition in European society, had a legitimate place in a pluralist, tolerant and broadminded society; but that, in the context of assessing whether the Charity had made out a case of objective justification, the Charity's view that the traditional family should be promoted was not entitled to be given the same degree of weight as if it had been adopted by the national authorities; further, even where a body acts in accordance with such views, if in doing so it discriminates against homosexuals, it is still necessary for it to show that there are particularly convincing and weighty reasons justifying differential treatment. [45, 47, 48]

(3) The analysis of the Tribunal, rejecting on the basis of the evidence before it the Charity's claim that discrimination against homosexuals would be likely to increase in a significant way the number of children placed with adoptive families, could not be faulted and disclosed no error of law. The Charity had failed to show that there were sufficiently weighty and convincing reasons why it should be permitted to

change its memorandum of association to enable it to discriminate as it proposed. [55]

133. The proportionality assessment in *Catholic Care*, while focusing on s. 193 only, shows how the court will closely scrutinise the evidence within the framework of principle.

134. I turn then to Cornerstone's arguments.

135. The fact that the Charity Commission approached this case differently to *Catholic Care* does not in my view assist Cornerstone. Consistently with the outcome on Ground 1, the Commission's stance one way or another cannot determine whether the recruitment policy is a proportionate means of pursuing a legitimate aim.

136. Similarly, the ontological argument about the existence or non-existence of gay evangelical Christians is in my view a false trail. The Judge found at [203] that, as in any other community, there will be members of that faith community who will be homosexual. Mr O'Neill QC did not dispute this, saying that a homosexual orientation would be regarded as "a cross to bear" for the individual concerned. The Judge further inferred that a section of gay and lesbian evangelical Christians would want to foster through an agency founded on an evangelical Christian ethos and which would support them in all of the ways Cornerstone describes. That inference was in my view reasonable. The Judge was not obliged to adopt Cornerstone's doctrinal definition of evangelical Christians so as to find that gay and lesbian evangelical Christians are not merely unidentified but non-existent. That would be to substitute the precepts of the faith for the reality. If gay evangelical Christians wishing to foster are few and far between, it is no doubt to some extent because of those precepts, and not because people like that do not exist. Like the Judge, I therefore reject the proposition that there are no victims of this policy.

137. Furthermore, an important purpose of the EA 2010 is to support progress on equality and it must be recognised that religious doctrine does not stand still: see, for example the remarks of Lord Walker in *Williamson* at [57]. The law is entitled to have regard to the rights of those who might wish to be free of a discriminatory practice currently endorsed by their faith. Ms Hannett QC encapsulated these ideas in the submission that there is such a thing as "regulatory virtue" in securing compliance with the EA 2010, though she did not rest her case on that alone. At first, that seemed to me to be a chilly submission, but on further thought I would accept that it is only by protecting those who are discriminated against in small numbers that equality can be progressed for wider communities. For completeness on the issue of victims, the *Northern Ireland Human Rights Commission* case was a decision about the statutory remit of that body and does not assist Cornerstone.

138. In equating the position of evangelical Christians with Roman Catholics, the Judge overlooked the doctrinal differences underlying membership of the two faith communities, and we therefore admitted Rev. Mason's evidence. However, that evidence does not advance Cornerstone's case. The Judge was bound to form a view about the extent of any interference with its manifestation of its beliefs and in doing so he was not entering into theological and ecclesiastical issues or, taken as a whole, telling it what to believe. I note the concerns about his phraseology at [298] and [300], but the choice of words was not essential to the decision.

139. Nor do I accept that the Judge paid no regard to Cornerstone's rights under the Convention: he referred to them at a number of stages and carried out an extensive analysis of that very question.

140. I have accepted that the Judge may have somewhat overstated the case when describing the terms of Schedule 23 paragraph 2 as conclusive. But he did in fact assess proportionality and he did not treat that provision as foreclosing on Cornerstone's arguments. Rather, he considered and rejected them.

141. However, it does seem to me that the Judge's proportionality assessment effectively amounted to a complete acceptance of one case and an entire rejection of the other. In my view, the matter is less clear-cut and some of Cornerstone's arguments on justification warranted fuller consideration:

(1) *Carer numbers.* The Judge's characterisation at [200] of an alleged national shortage of foster carers as "a core part of Cornerstone's case" set up something of a soft target. I have described the matters relied upon by Cornerstone to justify its policy at paragraph 111 above. Its case on carer numbers was centrally that it specialises in finding carers for children who are difficult to place. It asserted that there is a shortage of carers for these children, and that was also Ofsted's evidence. Further, Ofsted's evidence, accepted by the Judge, was that there was no evidence that recruiting evangelical Christian carers would respond to any shortage driven by 'matching' problems, but against this the court had Cornerstone's evidence that placing 'hard to place' children is what it has always done, and it is unclear why the Judge gave no weight to that. It was also Cornerstone's case that its ethos would encourage evangelical Christians to come forward as carers, but the Judge did not engage with this plausible assertion. Instead he viewed the matter solely from the point of view of the pool of carers being reduced by the exclusion of homosexuals. In my view there is some substance in Cornerstone's complaint that the Judge did not squarely address its case in these respects. In analytical terms, this challenges his conclusion at [202] that its case failed at the second stage of the *Bank Mellat* test (whether the measure is rationally connected to the objective it seeks to achieve).

(2) *Relevant factors.* In my view the Judge should have given at least some weight to some or all of the following:

- The absence of identified victims.

- The apparent success of Cornerstone's work for children under the current policy regime.

- The intensity of the challenge for those fostering children with high levels of need (see, for example *Prospective Adopters v Sheffield City Council* [2020] EWCA Civ 1591).

- The critical support that carers were reported (by Ofsted) to gain from being part of a common venture with co-religionists:

  "Foster carers feel that this is highly beneficial to them and in turn the children that they care for, as they feel that it offers them enhanced

support through Christian prayer, for example, and from individuals who share their perspectives and values."

- Cornerstone's own perception of the quandary in which Ofsted's requirement placed it, when it is better placed than the court to decide what it ought to feel about that.

These matters challenge the Judge's conclusion that Cornerstone's case failed at the third stage in *Bank Mellat*: whether it could achieve what it wants to achieve by a less restrictive measure.

142. Drawing matters together, I therefore accept that some of Cornerstone's arguments deserved to be placed in the balance in its favour on the question of justification. In consequence, I would hold that the real issue arose at stage four of *Bank Mellat*: whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, the former outweighs the latter. As to that, I have reached the clear conclusion that the Judge was right to find that the different treatment arising under Cornerstone's recruitment policy was not justified, either through the lens of the EA 2010 or of the HRA 1998. My reasons can, after all that has gone before, be shortly stated.

143. The detrimental impact on society and on individuals of discrimination on the ground of sexual orientation has led the law to set a demanding standard of justification. As Baroness Hale said in *Preddy* at [53], we should not underestimate the continuing legacy of centuries of discrimination against homosexuals and, adapting her words to this case, we should be slow to accept that prohibiting fostering agencies from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.

144. Further, and critically, the ordinary requirement that such discrimination requires weighty reasons is heavily underscored by statute in the case of a religious organisation that provides services to the public. The Judge was right to accord very considerable significance to this, for the reasons given at paragraphs 39-40 and 137 above, and to require nothing less than clear evidence to prove that the discriminatory policy was justified.

145. In the end, although there were matters that the Judge should, I think, have placed on its side of the scales, the simple fact is that this was Cornerstone's claim and its evidence, taken at its highest, fell short of discharging the burden upon it. Ms Birtle's statements set out the organisation's perspective, and there can be no doubting the value of its work or the sincerity of its motives. However, in order to justify a policy of this nature, it needed to provide credible evidence that there would otherwise be a seriously detrimental impact on carers and children. The evidence it actually advanced did not go beyond the level of general assertion. In consequence, the Judge understandably found it impossible to conclude that the ability to discriminate against homosexuals was a matter of such importance to Cornerstone that, without it, the wellbeing of current and future carers and children would be seriously affected. He was entitled to treat assertions of the impact on carers as being at best inconclusive, and no attempt was made to prove any impact on present or future children. In short, while I would not rule out the possibility of an organisation in this position putting up a substantial evidence-based case on justification, Cornerstone simply did not do that, and its claim

failed on the facts. In that respect, the outcome mirrors *Catholic Care*, but the challenge facing Cornerstone was all the greater because of the implications of Schedule 23 EA 2010 for the proportionality assessment.

146. Finally, I accept that it is a distinctive feature of this case, unlike the other decided cases, that the policy in question has been explicitly held not to be unlawful as discrimination on the basis of religious belief. As noted at paragraph 40 above, that cannot be an answer to the sexual orientation claim, but it was a relevant factor for the court to hold in mind, and I am satisfied from reading the Judgment as a whole that the Judge did so.

147. Accordingly, for reasons that are similar but not identical to those given by the Judge, I conclude that Cornerstone's claim of justification was rightly rejected. Alongside Ground 1, Grounds 3, 4, 9 and 10 must also fail, and I would therefore dismiss the appeal.

Lady Justice Asplin

148. I agree.

Lady Justice Nicola Davies

149. I also agree.