Competing rights in foster care: *R (Cornerstone) v Ofsted* [2021] EWCA Civ 1390

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Introduction

1. The Appellant ('Cornerstone') is an independent fostering agency and a registered charity. The Respondent ('Ofsted') is the statutory body which registers, regulates and inspects fostering agencies. Cornerstone describes itself as 'the only Christian Fostering Agency in the UK'. It has a policy that it only recruits foster carers who are practising Christians in opposite sex marriages and that foster parents must *"… abstain from all sexual sins including ... homosexual behaviour …"* ('the Policy'). In a report in June 2019, Ofsted assessed Cornerstone as 'inadequate'. This was in large part because it considered Cornerstone's recruitment and selection process for foster carers did not comply with the requirements of the Equality Act 2010 ('EqA 2010') and the Human Rights Act 1998 ('HRA 1998'), in particular discrimination because of religious belief and sexual orientation. It required Cornerstone to change the Policy. Cornerstone sought judicial review of this assessment.

High Court (Julian Knowles J)

2. Mr Justice Julian Knowles made the following findings.

   (a) The Policy was not unlawful on the grounds of religious belief because the exception in paragraph 2 of Schedule 23 EqA 2010 (organisations relating to religion or belief) applies.

   (b) The Policy unlawfully discriminates against gay men and lesbians.

   (c) Ofsted's report did not violate Cornerstone's rights under Articles 9-11 and 14 ECHR.

   (d) Ofsted's report was not unlawful or in breach of its guidance

Court of Appeal (Peter Jackson LJ)

3. Permission to appeal was given to Cornerstone on the following grounds:

   (a) Whether Ofsted had the jurisdiction to require Cornerstone to disapply or modify its recruitment policy when the Charity Commission had previously found that Cornerstone did not contravene the EqA 2010;

   (b) Whether Cornerstone's selection policy for carers was direct discrimination because of sexual orientation, within the meaning of s13(1) EqA 2010;

   (c) Whether Cornerstone's selection policy for carers was a proportionate means of achieving a legitimate aim for the purposes of indirect sexual orientation discrimination, within the meaning of s19(2)(d) EqA 2010;

   (d) Whether in selecting carers in accordance with its policy, Cornerstone acts incompatibly with Ar. 14 (read with Art 8) ECHR in respect of hypothetical gay or lesbian evangelical Christians who might wish to become Cornerstone foster carers;

   (e) Whether, by requiring Cornerstone to change its policy, Ofsted was in breach of Cornerstone's Convention rights as a religious organisation (Art 9-11 and/or 14 ECHR)

Ofsted's jurisdiction

4. Put simply, Cornerstone's argument was that as the Charity Commission had concluded in 2011 that Cornerstone did not contravene the EqA 2010, Ofsted did not have the power (or if it did should not use the power) to find otherwise **[42]**. This was rejected on the basis that Parliament has not conferred exclusive jurisdiction upon the Charity Commission to determine whether Cornerstone is compliant with HRA 1998 and EqA 2010 and there is no reason why, in relevant circumstances, a charity cannot have more than one regulator **[51-53]**.

Direct discrimination on grounds of sexual orientation

5. As Cornerstone is a registered charity, this ground posed two questions. First, whether the Policy amounted to direct discrimination pursuant to s13 EqA 2010. Second, if so, whether it was a proportionate means of achieving a legitimate aim, so that the exception for charities under s193(2)(a) EqA 2010 applies **[56]**. In relation to s13 EqA 2010, the key question was whether any less favourable treatment was *because of* sexual orientation. Cornerstone sought to argue that the Policy focused on what it meant to be an evangelical Christian and this religious requirement applied to all **[65-66]**. The Court of Appeal gave

this short shrift, stating: *"Cornerstone's policy, which specifically requires carers not to engage in homosexual behaviour, is as clear an instance of direct discrimination"*. The fact this requirement forms part of a broader belief system does not alter the fact that the Policy expressly excluded people of a particular sexual orientation. Furthermore, Cornerstone's distinction between married Christian couples (which on Cornerstone's definition explicitly excludes same sex marriages) and everyone else, introduces impermissible discriminatory circumstances (such as those in *James v Eastleigh Borough Council*) **[67]**.

6. The issue of justification was dealt with at the end of the judgment (see below).

Indirect discrimination on grounds of sexual orientation

7. Cornerstone did not dispute that the first three conditions of s19(2) EqA 2010 were satisfied; i.e. there was a PCP which applied to all but put those who are not heterosexual at a disadvantage **[69-71]**. The sole issue was proportionality, which was dealt with at the end of the judgment.

Convention discrimination against hypothetical foster carers

8. As Cornerstone is a 'hybrid public authority', s6 HRA 1996 applies. S7(1) HRA 1998 provides that a person may bring a claim against a (hybrid) public authority for acting in breach of s6 HRA 1998 only when they are a 'victim' **[72-73]**. Cornerstone argued that Ofsted has no right to assert the rights of foster carers had been breached when there are no actual or identifiable "victims" – the June 2019 Report referred only to 'prospective carers' **[77-78]**. This was rejected. Ofsted was not seeking to bring a claim on behalf of a victim but was instead identifying where it considered Cornerstone's policies to be in breach of Convention rights. As a regulator, it was entitled to do so **[79-80]**.

Convention discrimination against Cornerstone

9. The primary Convention right relied upon was Article 9 (manifestation of religion). Other relevant rights included Article 8 (respect for private life) with Article 14 (non-discrimination), and Article 10 (freedom of expression). Furthermore, as religious communities typically exist in the form of organised structures (with, effectively, an autonomous existence from their individual members), these rights must be interpreted in light of Article 11 (freedom of association) (*Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46) **[81-84]**.

10. In relation to Article 9, the first question was whether the Policy was a manifestation of Cornerstone's beliefs, and therefore whether the right was engaged at all. The Court of Appeal disagreed with the High Court, holding that Cornerstone was explicitly set up to enable carers manifest their faith through fostering activities. This brings the Policy within the scope of Article 9 **[88-93]**.

11. The second question was whether Ofsted's requirements interfered with Cornerstone's Article 9 right. The High Court considered that it did not as Cornerstone could still fulfil its Christian mission of providing homes for children without restricting the recruitment of carers **[94]**. The Court of Appeal held that this was an error as it focussed on the manifestations of religion that Cornerstone could still do rather than accepting that Ofsted was placing a limitation on other manifestations it wished to portray **[98]**.

Proportionality

12. The most significant issue was whether any prima facie breaches of the EqA 2010 or Convention rights identified above were justified as a proportionate means of achieving a legitimate aim (these were direct/indirect discrimination under the charities exception in s193(2)(a) EqA 2010, indirect discrimination under s19(2)(d) EqA 2010, the alleged breaches of Convention rights by Cornerstone and the alleged breaches of Convention rights by Ofsted).

13. The aims relied upon by Cornerstone to justify the Policy 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; manifesting the beliefs of evangelical Christianity in the practice of Christian charity and the support of Christian family life; and, more generally, increasing the number of foster carers **[111]**.

14. The first instance judge applied the four-stage test in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700: (i) whether the aims are sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) balancing the effect on the rights of the individual affected against the importance of the objective.

15. The judge considered Cornerstone failed a number of stages of this test; in particular that a policy which excludes gay or lesbian evangelical Christians was not sufficiently connected to its stated aims and that these aims could be achieved by a non-discriminatory measure. He found, and it was not disputed, that there will be members of any faith

community who are homosexual and inferred that a section of gay and lesbian evangelical Christians would want to foster through an agency founded on a Christian ethos **[112-116, 136]**. He also considered that any interference with Cornerstone's rights under Articles 9, 10, 11 and 14 ECHR was proportionate, in particular noting that Ofsted's desire to promote diversity and inclusion is reflected in para 2(10), Sch 23 EqA 2010 (which prohibits sexual orientation discrimination when acting on behalf of a local authority) **[118-119]**.

16. Peter Jackson LJ agreed with this conclusion albeit for slightly different reasons, in an eloquent conclusion to the judgment which is worthy of reading in full **[124-147]**.

17. He noted that the ECHR 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 (albeit this is an inexact category), citing *R (SC, CB and others) v SSWP* [2021] UKSC 26 **[125-126]**. It was particularly significant in this case that Parliament had prohibited discrimination on the basis of sexual orientation where religious organisations (which may otherwise be exempt) are offering a service to the public. This alone, however, was not conclusive **[127,140]**.

18. More significantly, he highlighted that *'an important purpose of the EqA 2010 is to support progress on equality'* and *'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'* **[137]** (see further below).

19. However, he did consider there were more factors in the proportionality assessment in Cornerstone's favour, than were given credit for by the first instance judge. These included the absence of identified victims, the apparent success of Cornerstone's work for children under the Policy, the critical support provided by co-religionists, and Cornerstone's own perception of the quandary in which Ofsted's requirement placed it **[141]**.

20. Nevertheless, despite placing some points on Cornerstone's side of the proportionality scales, the conclusion remained that the different treatment arising under Cornerstone's recruitment policy was not justified, either through the lens of the EqA 2010 or of the HRA 1998. In order to justify a policy of this nature, Cornerstone would have to have provided credible evidence that there would otherwise be a seriously detrimental impact on carers and children **[142-145]**.

Conclusion and comment

21. This judgment is a prime example of the difficult and often messy job courts are asked to do in navigating a path which balances competing rights. Cornerstone's fundamental submission was that as part of its entitlement to limit its pool of carers to those of evangelical Christian faith, it should be able to require such carers to subscribe to an important tenet of that faith, namely the prohibition against sexual conduct outside of a Christian marriage. As Peter Jackson LJ put it: "*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."* **[40]**

22. Building on this, a significant feature of the judgment is the emphasis on the role that the Equality Act 2010 plays in progressing equality, noting that *"religious doctrine does not stand still"* and *"it is only by protecting those who are discriminated against in small numbers that equality can be progressed for wider communities"* **[137]**. This suggests that, where possible within the legislative framework, the court is no longer afraid to take a muscular approach to advancing equality in areas previously considered out of its hands.

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