Neutral Citation Number: [2020] EWHC 1679 (Admin)

Case No: CO/2373/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
LEEDS DISTRICT REGISTRY

Leeds Administrative Court
The Courthouse, 1 Oxford Row,
Leeds, LS1 3BG

Date: 07/07/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

THE QUEEN ON THE APPLICATION OF CORNERSTONE (NORTH EAST) ADOPTION AND FOSTERING SERVICE LTD	**Claimant**
- and –	
THE OFFICE FOR STANDARDS IN EDUCATION, CHILDREN'S SERVICES AND SKILLS	**Defendant**

- -
- -

Aidan O'Neill QC and Ben Silverstone (instructed by **Ai Law**) for the **Claimant**
Sir James Eadie QC and Sarah Hannett (instructed by **Ofsted Legal Services**) for the **Defendant**

Hearing dates: 6 - 7 May 2020

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Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. This important case involves the question whether it is lawful for an adoption and fostering agency only to accept heterosexual evangelical Christians as the potential carers of fostered children. The Claimant, Cornerstone (North East) Adoption and Fostering Service Ltd (Cornerstone), seeks to judicially review a report by the Defendant (Ofsted), which found its carer recruitment policy to be in violation of equality and human rights laws and required it to change the policy.

2. Cornerstone is a charity based in the North East of England. It operates as an independent fostering agency (IFA). It specializes in offering foster and permanent homes to children in the care of local authorities. Cornerstone is founded on, and operates according to, its perception of evangelical Christian principles. It will only recruit carers (as well as staff and volunteers) who are prepared to abide by its Statement of Beliefs and Code of Practice. Among other things, these require them to be evangelical Christians and to refrain from 'homosexual behaviour' as it is described in the Code of Practice. In practice, the only potential carers Cornerstone accepts are evangelical married heterosexual couples of the opposite sex. It regards any other form of sexual activity as sinful.

3. Ofsted is a statutory body corporate and a non-ministerial government department whose statutory functions include the registration, regulation and inspection of IFAs.

4. Ofsted inspected Cornerstone in 2019. It provided its draft report to Cornerstone on 12 June 2019 (the Report). Ofsted concluded that Cornerstone's recruitment policy violates various provisions of the Equality Act 2010 (EA 2010) and the European Convention on Human Rights (the Convention) read with the Human Rights Act 1998 (HRA 1998). It required Cornerstone to change its policy. In this claim Cornerstone challenges Ofsted's conclusions.

5. Permission was granted by Jefford J on 9 October 2019.

6. The following principal issues arise on the claim:

   a. whether Ofsted erred in concluding that Cornerstone's carer recruitment policy breaches the EA 2010 in respect of sexual orientation;

   b. whether Ofsted erred in concluding that the Cornerstone's practices breach the HRA 1998;

   c. whether the Report (and the recommendations contained in the Report) breach Cornerstone's rights under Articles 9, 10, 11 and 14 of the Convention as given effect by s 6 of the HRA 1998;

   d. whether Ofsted failed to have regard to the guidance in the *Social Care Common Inspection Framework (SCCIF): Independent Fostering Agencies* (22 February 2017) (the SSCIF).

7. These main issues involve a number of sub-issues.

Factual background

Cornerstone

8. Pamela Birtle is the co-founder (with her husband) of Cornerstone. She has been its CEO since 2014. She has made three witness statements setting out the factual background to Cornerstone and its work.

9. Cornerstone was founded in 1999 and is based in Sunderland, with a supporting office in Doncaster. It is constituted as a charity by a private trust deed registered with the Charity Commission. It is also a company limited by guarantee in England and Wales. It has been registered with Ofsted as an independent fostering agency (IFA) since March 2006.

10. Cornerstone offers a range of foster placements, including short term, emergency and respite placements, but primarily it focuses on providing permanent placements – sometimes known as 'Forever Families' - ie, families who will care for a child, or a sibling group, beyond their time in care. Ms Birtle explains that Cornerstone specialises in working with children who can be hard to place. These include large sibling groups, children from black and minority ethnic backgrounds and those with complex medical histories. Ms Birtle says that several of the children currently in the care of families recruited by Cornerstone were previously thought to be unplaceable because of the severity of their needs.

11. Ms Birtle says that the vast majority of the placements arranged by Cornerstone have been successful in their stability and longevity. She says in Cornerstone's 20 years of operation, 80% of the children placed by it have gone on to be adopted by their foster carers. None of the adoptions have broken down.

12. Cornerstone is a relatively small organisation. At the time of the inspection I am concerned with, Cornerstone had 14 Approved Fostering Households which were caring for 18 fostered children. (This is distinct from the families and children in pre and post adoption). Cornerstone's funding derives primarily from payments made by local authorities across England, which are made when an authority places a child for fostering, with the money following the placement. Cornerstone operates on a not-for-profit, charitable basis (as opposed to a commercial basis).

13. Prior to the 2019 inspection, Cornerstone's IFA services were most recently inspected by Ofsted in 2015. In the resulting report, issued on 13 July 2015, Ofsted assessed Cornerstone as 'Good' in all categories (overall effectiveness; experiences and progress of, and outcomes for, children and young people; quality of service; safeguarding children and young people; and leadership and management). Ofsted also judged Cornerstone's Adoption Support service as 'Good' in all categories following an inspection of that service in 2019.

Cornerstone's Christian ethos and practices

14. Cornerstone's foundational purpose is to recruit Christian foster carers to provide loving and stable homes for sibling groups. At the time it was founded, Ms Birtle says that there was no specifically Christian organisation supporting foster carers in the North East of England. To that end, Cornerstone follows what it perceives to be Biblical injunctions to care for children in need by encouraging those from an evangelical Christian background to offer themselves as carers, particularly in circumstances where they might otherwise choose not to do so in the absence of the pastoral and religiously based and faith-imbued support which Cornerstone provides to them.

15. An example of a Biblical injunction which Ms Birtle refers to is Isaiah 1:17:

> "Learn to do right; seek justice. Defend the oppressed. Take up the cause of the fatherless; plead the case of the widow."

16. Also, in Psalms 82:3 it is written:

> "Defend the poor and fatherless: do justice to the afflicted and needy."

17. There are a significant number of other relevant Biblical passages referenced in Ms Birtle's first witness statement and in Cornerstone's Skeleton Argument.

18. Ms Birtle says that this approach has the objective of ensuring that those within what Cornerstone regards as the evangelical Christian faith can serve the wider community in a way which conforms with and reflects their religiously informed conscience and values. Cornerstone views its placing of a child for fostering and/or adoption, and the fostering and adoption by the parents, as an expression of its Christian faith in action. Cornerstone regards the adoption of a child as a profoundly important theological motif and theme in evangelical Christianity.

19. Cornerstone believes that by encouraging fellow Christians to be foster carers (and/or potential adoptive parents) and by supporting them (practically, emotionally and spiritually) to provide a loving and supportive home for a child whether as foster carers or as adoptive parents, Cornerstone and those recruited manifest their love of God and their Christian faith.

20. Cornerstone says that its Memorandum and Articles of Association (MoA) reflects these aims and beliefs. Clause 3 provides:

> "The Charity's objects… are to provide a high quality adoption and fostering child care service according to Christian principles to alleviate the needs of children and young people who are, or may be, temporarily or permanently separate from their families and to promote the relief and care of children without families or parents able to care for them by the provision of substitute families able to meet their needs with the aim of improving the conditions of life and future of such children and young people."

21. Clause 5 provides:

> "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."

22. The Statement of Beliefs in the MoA's Schedule sets out the beliefs which Cornerstone's staff and the carers it recruits are required to subscribe to. There are eleven statements of belief. They include the following:

> "We believe in
>
> 1. The one true God who lives eternally in three persons, the Father, the Son and the Holy Spirit.
>
> …
>
> 3. The divine inspiration and supreme authority of the Old and New Testament Scriptures, which are the written word of God – fully trustworthy for faith and conduct."
>
> …
>
> 5. The incarnation of God's eternal Son, the Lord Jesus Christ – born of the Virgin Mary; truly divine and truly human, yet without sin.
>
> …
>
> 10. The Church, the body of Christ both local and universal, the priesthood of all believers – given life by the Spirit and endowed with the Spirit's gifts to worship God and proclaim the gospel, promoting justice and love."

23. The Code of Practice referred to in Clause 5 of the MoA is provided by Cornerstone to its staff and to potential foster carers. The introductory paragraph states:

> "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."

24. The paragraphs which follow require carers (*inter alia*): to maintain a personal devotional life through regular prayer and Bible readings; to attend church regularly; to seek to be Christ-like in attitude and action towards all persons; to be honest in the handling of money and finance, to avoid the love of money; and to avoid drunkenness and substance abuse.

25. Cornerstone's Skeleton Argument at [16] indicates that as an organization it is intended to reflect and encapsulate what it regards as traditional orthodox Biblically founded Christian beliefs on these moral issues. Included in the Code of Practice at [10] is an expectation that Cornerstone's members of staff and foster carers must:

> "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 Corinthians 12:23; 1 Corinthians 6:12-20; Ephesians 4:17-24; 1 Thessalonians 4:1-8; Romans 1:26-27; 1 Timothy 1:9-11; Genesis 1:27; Deuteronomy 22:5)".

26. Cornerstone amended its MoA in April 2007 by revising Clause 5 to bring its foster carer requirements into line with its employed staff. Cornerstone's Skeleton Argument at [17] argues that Clause 5 (in its original and amended forms) makes no reference to sexual orientation nor is it aimed at seeking to discriminate on those grounds. Instead, it seeks to underline Cornerstone's religious foundation and ethos, based on its interpretation of the beliefs and practices of evangelical Christianity which is expressed, in part, by requiring the conforming of individuals' lifestyle, conduct and practice to what it regards as traditional Biblically based Christian standards of behaviour. It says the changes were borne out of a conviction that Cornerstone needed more thoroughly and clearly to set out and codify its clear Christian basis and ethos. This alteration was approved by the Charity Commission and subsequently registered with Companies House.

27. Ms Birtle's evidence is that Christian families from around the country approach Cornerstone with a view to joining its faith community, underpinned by prayer and Scriptural principles. Cornerstone's case is that the Christian faith of staff members, volunteers and carers rely on God in their work, and that the evangelical Christian life calls upon them to provide the best care they can within their families.

28. Cornerstone's employees start every meeting (including training, panels to recommend the approval of carers, team meetings and social gatherings) with Christian prayer,

including on occasion singing, biblical reflection and Holy Communion. Cornerstone's chair is an ordained Church of England minister, and a local chaplain provides support to staff, families and trustees, particularly on spiritual matters.

29. Ms Birtle says at [17] of her first witness statement:

> "Feedback from families indicates that many would not have considered fostering without the support they receive from that faith community. They particularly value the opportunity to join together in prayer, the assurance of prayer if requested and the annual Cornerstone holiday, where staff and carers worship together."

30. Ms Birtle says at [7] of her second witness statement that Cornerstone's recruitment policy (of carers, staff and volunteers) is essential to the continuation of its work and community. It ensures that Cornerstone maintains its core values and beliefs. If carers who did not share the faith and values set out in various documents set out above were recruited, Ms Birtle says there would inevitably be a sense that they were being excluded, with a consequent erosion of Cornerstone's Christian identity and sense of community, and a marginalisation of the role of Christian fellowship and worship within the organisation.

31. Cornerstone's Skeleton Argument says at [22] that it ensures that there is support and pastoral care specifically for foster carers, but also for any foster children who are from an evangelical Christian background. In so doing, Cornerstone also makes sure, among other things, that there are foster carers available to meet the needs of children of that religious persuasion (or whose birth family is of that religious persuasion) and, in particular, are able, where appropriate, to provide a home in which a child may be given a religious upbringing in accordance with the tenets of evangelical Christianity. Various provisions require a fostered child's religious beliefs to be taken into account: see, eg, regs 11(b)(ii) and 26(2)(a)(c)(i) of, and [12] of Sch 3 to, the Fostering Services (England) Regulations 2011 (SI 2011/581) (Fostering Regulations) and ss 22(5)(c), 33(6)(a), 61(3)(c), 64(3)(c) of, and [12E(d)] of Sch 2 to, the Children Act 1989 (CA 1989).

32. Ms Birtle says at [11] of her first witness statement and [6] of her second witness statement that Cornerstone makes clear to its carers that, irrespective of their own beliefs, they must support any child placed with them, whether the child has a Christian faith, another faith or no faith, and that they must comply fully with equalities standards in all respects. She says that Cornerstone's carers, volunteers and staff are clear that the evangelical Christian life guides their own lives and is not something which they impose on children within placements. She also says that Cornerstone has had successful placements of children and teenagers of no faith, and from faiths other than Christianity, and has been praised by the placing local authorities on the awareness, respect and good practice that has been demonstrated in such homes.

The 2019 inspection and the draft Report

33. Between 27 February and 4 March 2019 Nicola Thomas, a social care inspector with Ofsted, carried out an inspection of Cornerstone's work, in accordance with Ofsted's

statutory duty to conduct regular inspections of registered fostering agencies. I will set out the statutory provisions later.

34. Ms Thomas' draft Report (the Report) was provided to Cornerstone on 12 June 2019 and was, at that stage, due to be published on 20 June 2019. The headline assessments were that:

   a. 'Overall experiences and progress of children young people' was graded 'requires improvement to be good'.

   b. 'How well children and young people are helped and protected' was graded 'requires improvement to be good'.

   c. 'The effectiveness of leaders and managers' was graded 'inadequate'.

35. Ms Roberts wrote:

> "The independent fostering agency is not yet delivering good help and care for children and young people. However, there are no serious or widespread failures that result in their welfare not being safeguarded or promoted."

36. Under the heading 'Key findings from this inspection' Ms Thomas set out a number of conclusions. The key one for the purposes of this case is this:

> "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."

37. The Report also contains a number of other criticisms of Cornerstone's work and its leadership.

38. In her second witness statement at [13] Ms Birtle takes issue with the statement that Cornerstone only recruits foster carers who are practising Christian carers in heterosexual marriages. She writes:

> "This is not an accurate summary of our policy or practice. Essentially, we only recruit practicing Christian carers. This requires that any person fostering through Cornerstone must conduct himself or herself in a manner consistent with Christian marriage (which is between a man and a woman, in

> accordance with our Statement of Faith and biblically based Code of Practice). However, our governing documents do not preclude us from taking single people of either gender, provided their conduct is consistent with biblical teaching."

39. Lisa Pascoe is one of Her Majesty's Senior Inspectors of Schools, Children's Services and Skills. She is a deputy director of Ofsted and policy lead for children's social care. She has made two witness statements in which she deals with a number of topics. She produces as an exhibit the notes Ms Roberts made during her inspection and interview with Ms Birtle. As Ms Pascoe sets out at [27] of her first statement, these record Ms Birtle as telling Ms Roberts, 'we do not take single people only take married couples'; Ms Roberts asking how foster carers could be treated without prejudice 'given their policy on recruiting only married heterosexual carers', a statement which was not corrected or denied by Ms Birtle. At [27(b)] of her statement Ms Pascoe quotes a 2016 email from Ms Birtle to a prospective applicant in which she said:

> "We assess practicing Christians who are married couples only. We are unique in the UK in this regard. You do not specify your faith or relationship status. If you are able to meet our criteria I would be delighted to discuss this with you."

40. In response, in her third witness statement at [6] Ms Birtle commented on this paragraph of Ms Pascoe's statement as follows:

> "6. Paragraph 27 refers to evidence collected by Ofsted that is at odds with Cornerstone's position that single persons are not excluded from being carers. Consistent with our 'Statement of Beliefs' and 'Code of Practice' single persons are not excluded and we have recruited single people in the past. Paragraph 27 fails to mention the lengthy conversation I had with the Inspector regarding a single carer who was assessed as approved. The support network was considered in detail and felt to be sufficient to allow the match with a single child with emotional and behavioural difficulties. Unfortunately the support network pulled back when faced with the reality of the level of need, leaving the single carer unable to manage the placement on her own despite the significant level of professional support offered to her by Cornerstone."

41. I do not think I need to resolve the question of whether Cornerstone's *policy* means it will not recruit single carers. The evidence shows that *in practice* it now does not do so (although there was one historical example) . As I will explain, the characteristics in issue in this case are religious belief and sexual orientation rather than marital status.

42. Cornerstone did not accept that it would not recruit gay men or lesbians. It said its policy was to require carers not to engage in homosexual activity, and that was different. I reject that contention. The evidence is quite clear that Cornerstone will only recruit heterosexual carers. Ms Birtle does not say that Cornerstone has ever accepted

an application from a gay man or lesbian to be a carer. Paragraph 13 of her second witness statement is notably silent on the question of sexual orientation.

43. It is only fair to point out that the Report also identified strengths in Cornerstone's services, including that:

> "- The majority of children's cases seen at this inspection demonstrate that they live in good-quality, stable and permanent placements with foster carers from this agency.
>
> - The agency provides a specialist faith-based support service to carers. Foster carers have reported enhanced levels of resilience and ability to care for children as a direct result of this support.
>
> - Foster carers and supervising social workers receive regular supervision and have opportunities to reflect on their practice.
>
> - The agency offers regular events, holidays and supportive forums for children, carers and social workers to share their experiences and to socialise. Service developments are well informed by children's feedback.
>
> - Training for foster carers and social workers is research-based and sourced from a variety of external providers. This equips the staff and carers to safely meet the needs of the children in their care.
>
> - Placing authorities and children have provided positive feedback about the quality of care offered by foster carers."

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

> "*Statutory requirements*
>
> This section sets out the actions that the registered person(section) must take to meet the Care Standards Act 2000, the Fostering Services (England) Regulations 2011 and the national minimum standards. The registered person(section) 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”

45. Under the heading ‘Inspection judgements’ Ms Roberts concluded (*inter alia*):

> **“***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."

Remedy sought

46. The relief Cornerstone seeks is as follows:

    a. A declaration that the finding that Cornerstone's policy for recruiting foster carers contravened the EA 2010 and/or the HRA 1998 is unfounded in fact and law.

    b. An order quashing the statutory requirements contained in the Report.

    c. Damages pursuant to s 8 of the HRA 1998 in respect of Ofsted's breaches of Cornerstone's Convention rights.

    d. Costs and further or other relief.

Chronology

47. In the years prior to the inspection in 2019 Cornerstone was in correspondence with the Charity Commission about its recruitment policy. Ofsted has prepared the following helpful Chronology setting out the detail.

Date	Event
18.8.10	The Charity Commission writes to Cornerstone in respect of the judgment in *Catholic Care (Diocese of Leeds) v. Charity Commission for England and Wales* [2010] 4 All ER 1041. The letter notes that the implications of the High Court judgment are that an organisation that discriminates in a way that was not justified is not likely to be established for the public benefit, and where that is the case, will not be a charity.
12.11.10	Cornerstone writes to the Charity Commission, setting out its reasons why it did not discriminate against prospective foster carers on the grounds of sexual orientation as: (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, or (c) any discrimination was justified and proportionate.
11.1.11	The Charity Commission writes to Cornerstone, stating that the Cornerstone submission that it did not discriminate on the grounds of sexual orientation was accepted to be correct (although no reasons were provided). The letter notes that Cornerstone was limiting the services provided to evangelical Christians which required justification, but that

	any such discrimination was justified under [2] of Sch 23 to the EA 2010.
17.3.12	Ofsted inspects Cornerstone in respect of its independent fostering agency (IFA) status and makes an overall inspection judgement of satisfactory.
13.7.15	Ofsted inspects Cornerstone in respect of its role as regulator of IFAs and makes an overall inspection judgement of 'Good'.
24.2.16	Cornerstone applies to be registered as a voluntary adoption agency (VAA).
30.3.16	Ofsted receives a complaint from a prospective foster carer about Cornerstone's recruitment practices. The complainant was concerned that Cornerstone would only assess practising Christians who were a married couple, and she expressed the view that this discriminated against her belief system.
5.7.16	Ofsted writes to Cornerstone informing them of the complaint received, and, in respect of the extant VAA registration application, asks questions about Cornerstone's compliance with the EA 2010. In particular, Ofsted asks whether Cornerstone intends to recruit prospective adopters or provide services on behalf of local authorities.
28.7.16	Cornerstone responds. It confirms that there had been no further correspondence with the Charity Commission, no change in its recruitment policy and that 'we do intend to recruit prospective adopters <u>on behalf of</u> local authorities. This is in line with the way we currently provide fostering services'.
27.10.16	Ofsted writes to Cornerstone. The letter sets out Ofsted's understanding of the EA 2010 and asks Cornerstone a series of questions, including asking it to confirm whether it provided any of its services on behalf of a local authority (or any other public authority) under the terms of a contract between it and the local authority (question 16).
31.3.17	Cornerstone responds via its solicitors. The letter states 'the fact that there is a contract between local authorities and Cornerstone is not enough for this sub-paragraph ([2(1)] of Sch 23 EA 2010) to apply. In providing its fostering and childcare services Cornerstone is acting for and on behalf of children seeking placement and for and on behalf of the prospective carers/parents who wish to provide a home for a child. It is not acting 'on behalf of' local authorities, albeit that it may receive payment from them in

	respect of a successful placement'.
22.9.17	Ofsted responds to Cornerstone's letter. The letter again requests that Cornerstone provide details of contractual arrangements with any local authorities, whether Cornerstone was a party to the National Fostering Contract or any analogous framework contract, and if not, to explain the contractual arrangements in place. The letter asks for copies of all contracts, and for Cornerstone to provide details (and copies) of any standard form individual placement agreements used by Cornerstone and the details of the inter-agency fee arrangements.
23.2.18	Cornerstone's solicitors respond. They do not provide copies of contracts or confirm any contractual arrangements it was party to, except for the provision of a sample Inter-Agency Placement Agreement. Cornerstone assets (at [3.19]) that the reference to acting 'on behalf of' local authorities in the letter of 28 July 2016 was a 'typing error'. Rather, Cornerstone was said to act on its own behalf as a 'Placement Provider' for and on behalf of the prospective parents who wish to provide a home for a child, and the local authority acts on its own behalf as a 'Placing Authority'. Cornerstone was said not to contract with the local authority to act on its behalf.
6.4.18	Ofsted writes to the Charity Commission requesting the disclosure of information in accordance with s 56 of the Charities Act 2011, specifically the correspondence exchanged between the Commission and Cornerstone relating to the latter's registration as a charity and its compliance with the EA 2010.
7.12.18	Ofsted sends notice of its proposal to refuse to register Cornerstone as a VAA.
4.1.19	Cornerstone's solicitors make submissions in response.
27.2.19-4.3.19	Ofsted inspects Cornerstone in respect of its IFA inspection duty, resulting in the Report that is subject to challenge in these proceedings.
12.6.19-14.6.19	Ofsted sends the Report to Cornerstone. Cornerstone sends a letter to Ofsted asking Ofsted to postpone the publication of the report.
17.6.19	Ofsted responds to say that it will agree to postpone publication if Cornerstone issues a judicial review application by 2pm on 19 June 2019.

19.6.19	Cornerstone issues its application for permission to seek judicial review.
16.7.19	Lane J refuses the joint application of the parties for the claim to be rolled up, and required the parties to lodge a joint statement of reasons.
24.7.19	Joint statement of reasons lodged. Ofsted's Acknowledgement of Service lodged, accepting that permission should be granted.
9.10.19	Order of Jefford J granting permission.
22.10.19	Cornerstone lodges a 'clarification' on its position in respect of whether Cornerstone constitutes a public authority for the purposes of s 6 of the Human Rights Act 1998.
18.11.19	Ofsted lodges Detailed Grounds for Defending the Claim.

Legal framework

48. I turn to the statutory and legal framework.

Local authorities' duty to accommodate children

49. By ss 20 and 22 of the CA 1989 a local authority is obliged to provide accommodation for, and provide other services to, any child in need within its area who appears to it to require accommodation as a result of:

    a. there being no person who has parental responsibility for him;

    b. his being lost or having been abandoned; or

    c. the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

50. Further, it is the duty of the local authority to provide accommodation to, and maintain, any child in its care by virtue of a care order: ss 22A-22B and 105(1) CA 1989.

51. All such children are referred to as 'looked after children' in the CA 1989: s 22(1).

52. Section 22C CA 1989 provides for the ways in which looked after children are to be accommodated and maintained. Under section 22C(5)-(6), if the local authority is

unable to make arrangements for the child to live with a parent of his, a person who otherwise has parental responsibility for him, or (in certain circumstances) a person named in a child arrangements order as a person with whom the child was to live, then the authority must place the child in whichever of the types of placement is, in the authority's opinion, the most appropriate placement available. Those placements are:

a. with an individual who is a relative, friend or other person connected with the child and who is also a local authority foster parent;

b. with a local authority foster parent who does not fall within (a);

c. in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000 (CSA 2000); or

d. in accordance with other arrangements which comply with any regulations made for the purposes of s 22C. By virtue of s 22C(11) the Secretary of State has power to make regulations for the purposes of s 22C. Paragraph 12G of Sch 2 CA 1989 provides that regulations under s 22C may, in particular, make provision as to the circumstances in which local authorities may make arrangements for duties imposed on them by the regulations to be discharged on their behalf.

53. As to this last category, the relevant regulations are:

a. the Fostering Regulations; and

b. the Care Planning, Placement and Case Review (England) Regulations 2010 (SI 2010/959) (the Care Planning Regulations).

54. A 'local authority foster parent' is defined in s 105(1) CA 1989 (insofar as material) as a person authorised as such in accordance with regulations made by virtue of [12F] of Sch 2, CA 1989. The local authority may determine the terms on which it places the child with a local authority foster parent (including terms as to payment but subject to any order made under s 49 CA 2004).

Regulation of fostering agencies

55. The CSA 2000 makes provision for the registration and regulation of, *inter alia*, fostering agencies. Section 4(4) defines a 'fostering agency' as:

a. an undertaking which consists of or includes discharging functions of local authorities in England in connection with the placing of children with foster parents (s 4(4(a)), or

b. a voluntary organisation in England which places children with foster parents under s 59(1) of the CA 1989 (s 4(4)(b)).

56. Section 121 defines 'undertaking' as including any business or profession, and a 'voluntary organisation' as having the same meaning as in s 2(5) of the Adoption and Children Act 2002 (the ACA 2002), namely 'a body other than a public or local authority the activities of which are not carried on for profit'.

57. The Explanatory Notes to the CSA 2000 at [39] explain the distinction between a fostering agency that falls within s 4(4)(a), and one that falls within s 4(4)(b) CSA 2000 and s 59(1) CA 1989:

> *"*The definition is intended to include both independent agencies which provide a fostering agency service to local authorities, and voluntary organisations (such as Barnardos) who operate in their own right. Both types of fostering agency recruit and train foster parents and place children with them. Agencies defined by *subsection (4)(a)* make placements under powers delegated to them by local authorities, and they may or may not be voluntary organisations. Agencies defined by *subsection (4)(b)* are voluntary organisations which place children with foster parents in their own right."

58. A fostering agency falling with s 4(4)(a) is known as an 'independent fostering agency': reg 2, Fostering Regulations. Those within s 4(4)(b) are known as 'voluntary adoption agencies'.

59. It is common ground that Cornerstone is an IFA within s 4(4)(a) CSA 2000. Cornerstone has not alleged that it falls within s 4(4)(b) of the CSA 2000 and s 59(1) of the CA 1989. That relates to organisations which place non-looked after children (which might, for example, include placements by organizations such as Barnardos). Cornerstone applied for registration as a VAA but Ofsted rejected Cornerstone's application on 30 April 2020

60. Fostering agencies are subject to regulation under the Fostering Regulations. Regulation 2 defines a 'fostering agency' as having the meaning given in s 4(4) of the CSA 2000. A 'fostering service provider' means:

    a. in relation to a fostering agency, a registered person, or

    b. in relation to a local authority fostering service, a local authority.

61. The same regulation defines 'registered person', in relation to a fostering agency, as a person who is the registered provider or the registered manager of the fostering agency; and 'registered provider', in relation to a fostering agency, as a person who is registered under Part 2 of the 2000 Act as the person carrying on the fostering agency.

62. Part 4 of the Fostering Regulations sets out the requirements for conducting a fostering service. Regulation 11 provides:

> "The registered person in respect of an independent fostering agency must ensure that—
>
> (a) the welfare of children placed or to be placed with foster parents is safeguarded and promoted at all times, and

(b) before making any decision affecting a child placed or to be placed with a foster parent due consideration is given to the child's -

(i) wishes and feelings (having regard to the child's age and understanding), and

(ii) religious persuasion, racial origin and cultural and linguistic background.

63. Part 5 of the Fostering Regulations makes provision for the approval of foster parents. A fostering service provider must:

    a. maintain a fostering panel, which has the function of considering each application by a person for approval as a foster carer, to recommend whether the person is suitable, and to review that approval at the prescribed reviews (regs 23-25);

    b. carry out any assessment of a person's suitability to become a foster parent in accordance with the Fostering Regulations (see reg 26);

    c. enter into a written agreement with any approved foster parent covering the matters set out in Sch 5 (which sets out the terms of the foster parent's approval and the obligations placed on him or her) (see reg 27(5));

    d. review the approval of each foster parent in accordance with the Fostering Regulations (reg 28);

    e. maintain a register of foster parents containing prescribed particulars (reg 31).

64. Where the fostering agency falls within s 4(4)(b) of the CSA 2000, it is also subject to the regulations contained in the Arrangements for Placement of Children by Voluntary Organisations and Others (England) Regulations 2011 (SI 2011/582).

65. Further regulations relating to placements with local authority foster parents under s 22C, CA 1989 are contained in regs 21 - 26, Care Planning Regulations. They specify the conditions to be complied with before a child can be placed with a local authority foster parent (reg 22).

Ofsted's role: registration of fostering agencies

66. Ofsted is the registration authority for various establishments and agencies, including fostering agencies: s 5(1)(1A) CSA 2000. Formally, Ofsted is referred in the CSA 2000 as Her Majesty's Chief Inspector of Education, Children's Services and Skills (CIECSS): s 5(1)(a).

67. It is an offence to carry on or manage an establishment of an agency without being duly registered: s 11(1) CSA 2000.

68. By s 12 CSA 2000 a person seeking registration must apply to Ofsted under s 13; Ofsted can cancel a registration under s 14. Section 13 requires Ofsted to be satisfied,

prior to granting registration, that the agency complies with 'the requirements of any other enactment which appear to the registration authority to be relevant'. Section 13(2) 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."

69. By s 22, regulations may be made by which requirements are imposed in relation to establishments and agencies: the Fostering Regulations and the Care Planning Regulations have in part been made under that power. Under s 23 the appropriate Minister may prepare and publish statements of national minimum standards applicable to establishments or agencies. The current standards applicable to the provision of fostering services are *Fostering Services: National Minimum Standards* (Department for Education, 2011).

70. The relevant parts of s 14 (Cancellation of registration) are as follows:

> "(1) The registration authority may at any time cancel the registration of a person in respect of an establishment or agency -
>
> (a) on the ground that that person has been convicted of a relevant offence;
>
> (b) on the ground that any other person has been convicted of such an offence in relation to the establishment or agency;
>
> (c) on the ground that the establishment or agency is being, or has at any time been, carried on otherwise than in accordance with the relevant requirements;
> …
>
> (3) In this section "relevant requirements" means—
>
> (a) any requirements or conditions imposed by or under this Part; and
>
> (b) the requirements of any other enactment which appear to the registration authority to be relevant."

Ofsted's role: inspection

71. Ofsted's power to inspect establishments and agencies is endowed by s 31 CSA 2000, which empowers it to require the provision of documents and records, and to enter and inspect premises, for the purposes of inspections.

72. A fostering agency must be inspected at least once in every three-year period: reg 27(1)(b) of Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc.) Regulations 2015 (SI 2015/551). In her first witness statement at [11] Ms Pascoe explains that the frequency of inspection depends upon previous findings: IFAs rated as 'inadequate' are inspected again six to 12 months later whilst agencies which are deemed to 'require improvement' but are not inadequate are revisited within 12 to 18 months.

73. Ofsted is required to prepare a report of any inspection; to provide a copy to each person who is registered in respect of the establishment or agency; and to make copies available for inspection by any person: s 32(5)-(6), CSA 2000.

74. Guidance relating to the inspection of IFAs is contained in Ofsted's publication, *Social Care Common Inspection Framework: Independent Fostering Agencies* (February 2017) (SCCIF). In assessing the effectiveness of leaders and managers, Ofsted will inspect 'the extent to which leaders and managers actively promote equality and diversity.'

Equality Act 2010

75. Domestic discrimination law has developed over more than 55 years since the first Race Relations Act in 1965. Subsequently, other personal characteristics besides race have been protected from discrimination and similar conduct, sometimes as a result of domestic initiatives and sometimes through implementing European Directives. The EA 2010 has two main purposes – to harmonise discrimination law, and to strengthen the law to support progress on equality. The Act brings together and re-states a large number of enactments (listed in [4] of the Explanatory Notes to the EA 2010) and a number of other related provisions.

76. Part 2 EA 2010 defines various forms of 'prohibited conduct', including 'direct discrimination' and 'indirect discrimination'.

77. Direct discrimination is defined in s 13:

> "1. 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.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

> (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
>
> (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
>
> (6) If the protected characteristic is sex—
>
> (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
>
> (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
>
> (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
>
> (8) This section is subject to sections 17(6) and 18(7)."

78. By s 4, sexual orientation and religion or belief are protected characteristics for the purposes of s 13.

79. The Explanatory Notes to the EA 2010 give the following examples of direct discrimination ([63]):

> "If an employer recruits a man rather than a woman because she assumes that women do not have the strength to do the job, this would be direct sex discrimination.
>
> If a Muslim shopkeeper refuses to serve a Muslim woman because she is married to a Christian, this would be direct religious or belief-related discrimination on the basis of her association with her husband.
>
> If an employer rejects a job application form from a white man who he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception.
>
> If an employer advertising a vacancy makes it clear in the advert that Roma need not apply, this would amount to direct race discrimination against a Roma who might reasonably have considered applying for the job but was deterred from doing so because of the advertisement.

If the manager of a nightclub is disciplined for refusing to carry out an instruction to exclude older customers from the club, this would be direct age discrimination against the manager unless the instruction could be justified."

80. Age is the only protected characteristic in relation to which direct discrimination may potentially be justified: s 13(2). Direct discrimination on grounds of sexual orientation and religion or belief can never be justified (save for the specific exceptions provided for later in the Act which I will discuss in a moment).

81. Indirect discrimination is defined in s 19:

> "(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."

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

83. It should be noted that by reason of s 19(2)(d) indirect discrimination on the grounds of these protected characteristics can potentially be justified.

84. The Explanatory Notes to the EA 2010 at [81] give the following examples of indirect discrimination:

> "A woman is forced to leave her job because her employer operates a practice that staff must work in a shift pattern which she is unable to comply with because she needs to look after her children at particular times of day, and no allowances are made because of those needs. This would put women (who are shown to be more likely to be responsible for childcare) at a disadvantage, and the employer will have indirectly

> discriminated against the woman unless the practice can be justified.
>
> An observant Jewish engineer who is seeking an advanced diploma decides (even though he is sufficiently qualified to do so) not to apply to a specialist training company because it invariably undertakes the selection exercises for the relevant course on Saturdays. The company will have indirectly discriminated against the engineer unless the practice can be justified."

85. Section 29 EA 2010, which is within Part 3, is headed 'Provision of services, etc' and the relevant sub-sections are as follows:

> "(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…"

86. Section 31 contains the following relevant interpretative provisions:

> "(2) A reference to the provision of a service includes a reference to the provision of goods or facilities.
>
> (3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function.
>
> (4) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998…

(6) A reference to a person requiring a service includes a reference to a person who is seeking to obtain or use the service…"

Equality Act 2010: Exceptions

87. Part 14 of the EA 2010 provides for a number of general exceptions. Section 193 EA 2010 relates to charities. It materially provides:

> "(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."

88. The relevant charity regulator in respect of Cornerstone is the Charity Commission for England and Wales: s 194(5)(a).

89. Section 196 gives effect to Sch 23, which contains various general exceptions to the obligations under the Act. Among those are exceptions applicable to '[o]rganisations relating to religion or belief' in [2] of Sch 23, which relevantly provides as follows:

> "(1) This paragraph applies to an organisation the purpose of which is -
>
> (a) to practise a religion or belief,
>
> (b) to advance a religion or belief,
>
> (c) to teach the practice or principles of a religion or belief,
>
> (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief …

(2) This paragraph does not apply to an organisation whose sole or main purpose is commercial.

(3) The organisation does not contravene Part 3 [which includes s 29], 4 or 7, so far as relating to religion or belief or sexual orientation, only by restricting—

(a) membership of the organisation;

(b) participation in activities undertaken by the organisation or on its behalf or under its auspices;

(c) the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices;…

(4) A person does not contravene Part 3, 4 or 7, so far as relating to religion or belief or sexual orientation, only by doing anything mentioned in sub-paragraph (3) on behalf of or under the auspices of the organisation

[…]

(6) Sub-paragraphs (3) to (5) permit a restriction relating to religion or belief only if it is imposed—

(a) because of the purpose of the organisation, or

(b) to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.

(7) Sub-paragraphs (3) to (5) permit a restriction relating to sexual orientation only if it is imposed -

(a) because it is necessary to comply with the doctrine of the organisation, or

(b) to avoid conflict with strongly held convictions within sub-paragraph (9)

[…]

(9) The strongly held convictions are -

(a) in the case of a religion, the strongly held religious convictions of a significant number of the religion's followers;

> (b) in the case of a belief, the strongly held convictions relating to the belief of a significant number of the belief's followers.
>
> (10) This paragraph does not permit anything which is prohibited by section 29, so far as relating to sexual orientation, if it is done—
>
> (a) on behalf of a public authority, and
>
> (b) under the terms of a contract between the organisation and the public authority
>
> […]
>
> (13) In this paragraph—…
>
> …
>
> (b) 'public authority' has the meaning given in section 150(1)."

90. Section 150(1) EA 2010 defines a 'public authority' as a person who is specified in Sch 19 EA 2010. Among the various bodies and organisations identified in Part 1 of Sch 19 are local authorities (but not fostering agencies).

91. Of particular relevance to this claim are sub-paragraphs 1, 3, and 10 of [2] of Sch 23. In its Skeleton Argument at footnote 8, Ofsted accepts that Cornerstone is an organisation that falls within [2(1)] of Sch 23, and thus that it is able to rely on the exception in [2(3)] so far as religion or belief is concerned. In other words, Ofsted accepts that Cornerstone *does not* unlawfully discriminate in breach of s 29 against non-evangelical Christians by only recruiting such people as carers. However, Ofsted maintains that [2(10)] applies because Cornerstone arranges fostering placements on behalf of local authorities pursuant to contractual arrangements with them, and thus that Cornerstone *does* unlawfully discriminate (directly or indirectly) on grounds of sexual orientation by requiring carers to be heterosexual. Cornerstone says that [2(10)] does not apply to it.

92. It is also relevant to note that [15] of Sch 3 (which is given effect by s 31(10)) confers an exemption in relation to '[c]are in the home'. By that provision, a person (A) does not contravene s 29 EA 2010 only by participating in arrangements under which (whether or not for reward) A takes into A's home, and treats as members of A's family, persons requiring particular care and attention. Accordingly, foster carers are not required to comply with s 29 EA. The Explanatory Notes to the EA 2010 provide the following relevant example (at [704]): a Muslim family could choose only to foster a Muslim child. This would not constitute discrimination against a non-Muslim child.

The Convention and the Human Rights Act 1998

93. The relevant Articles of the Convention for the purposes of this claim are Articles 8 – 11 and Article 14.

94. Articles 8-11 of the Convention provide:

"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 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."

95. Article 14 provides:

"*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."

96. By s 6(1) HRA 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The Convention rights are those provided for by the Articles of the Convention, and certain Protocols, reproduced in Sch 1 HRA 1998. Section 6 provides:

"6 Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if -

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a

way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section 'public authority' includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

..

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) 'An act' includes a failure to act but does not include a failure to -

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order."

97. In accordance with s 7(1)(b) HRA 1998 a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by s 6(1)(a) may rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act. A person is a victim of an unlawful act for these purposes only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights (ECtHR) in respect of that act: s 7(7), HRA 1998

Justification/proportionality

98. Justification/proportionality are relevant to the EA 2010 aspects of this claim in two principal ways:

    a. justification for indirect discrimination pursuant to s 19 on grounds of sexual orientation under the EA 2010;

    b. justification for discrimination on grounds of sexual orientation under s 193.

99. In assessing justification, the test is the four step test of proportionality set out in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, [74] *per* Lord Reed: cf A*kerman-Livingstone v Aster Communities Ltd* [2015] AC 1399, [28]; *R (Ward) v London*

Borough of Hillingdon [2019] PTSR 1738, [91]; *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (No 2)* [2013] 1 WLR 2105, [48] (in the context of s 193).

100. The four steps are:

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. In *JT v First-tier Tribunal (Social Entitlement Chamber) (Equality and Human Rights Commission intervening)* [2019] 1 WLR 1313, [83], Leggatt LJ said that, put more shortly, the fourth question is whether the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure. He said that another way of framing the same question is to ask whether a fair balance has been struck between the rights of the individual and the interests of the community.

101. The burden is on the party seeking to justify what would otherwise be unlawful discrimination to demonstrate that the test of proportionality has been met: see, for example, *R (Independent Workers' Union of Great Britain) v Mayor of London* [2019] 4 WLR 118, [69]; *Starmer v British Airways* [2005] IRLR 862, [31]. That is not disputed.

102. Justification and proportionality also come into play in relation to the Convention and the HRA 1998 in as much as the rights in Articles 9-11 and Article 14 may be interfered with in so far as the interference is proportionate.

The parties' submissions

Cornerstone's submissions

103. As set out in the Report, Ofsted contends that Cornerstone's carer recruitment policy constitutes:

a. discrimination on the basis of sexual orientation in breach of the duties which Ofsted says are imposed on Cornerstone by ss 12, 13, 19 and 29 EA 2010;

b. discrimination on the basis of sexual orientation in breach of Article 14, read with Article 8, of the Convention and so contrary to the duty which Ofsted alleges that s 6, HRA 1998 imposes on Cornerstone; and

c. discrimination on the grounds of religion or belief in breach of Article 14, read with Article 8, of the Convention and so, again, contrary to the duties which Ofsted alleges that s 6 HRA 1998 imposes on Cornerstone.

104. Cornerstone strongly challenges each of these conclusions, and submits that Ofsted's approach in the Report constitutes a breach of *its* right to freedom of religion, freedom of expression and association, and freedom not to be discriminated against, under Articles 9-11 and 14 of the Convention respectively, as well as a contravention of the guidance in the SCCIF, such that the Report is unlawful and the relevant parts liable to be quashed.

105. In response to the accusation that it is in breach of its obligations under the EA 2010, Cornerstone submits as follows.

106. As set out in at [45] et seq of its Skeleton Argument, Ofsted's case on this issue is that Cornerstone provides a service for the purposes of s 29(1) EA 2010 or, alternatively, that it exercises a public function for the purposes of s 29(6); that Cornerstone directly or indirectly discriminates against carers of a particular sexual orientation within the meaning of ss 13 or 19; and that Cornerstone's activities are *not* exempt from the requirements of s 29 by virtue of [2(10)] of Sch 23.

107. In response, Cornerstone contends that its activities do not fall within the scope of s 29; that, to the extent that they amount to indirect discrimination, they are a proportionate means of achieving a legitimate aim; and that in any event those activities are exempt from s 29 by virtue of [2] of Sch 23 and s 193. Further, Cornerstone submits that, in purporting to enforce obligations under the EA 2010 by way of the Report, Ofsted has unlawfully trespassed on the statutory function of the Charity Commission

108. In support of its submission that its recruitment of carers does not constitute the provision of a service to the public or a section of the public, or the exercise of a public function within s 29, Cornerstone argues that in deciding whether to recruit prospective foster carers, it does not provide a service to those potential carers. Rather, it takes steps to assess such individuals and decide whether they would provide an appropriate placement to a child who is in need of foster care. It says any such individual is not 'a person requiring the service' from Cornerstone in terms of s 29(1). It says it acts as a private body.

109. Ofsted's alternative case is that, even if not for the provision of a service to the public or a section of the public, Cornerstone exercises a 'public function' in accordance with s 29(6) EA 2010. It submits that the meaning of 'public function' in that context is the same as in s 6, HRA 1998. Cornerstone rejects that argument and says what it does is not a public function. I will set out Cornerstone's submissions on that issue later in relation to the HRA 1998.

110. Further or alternatively, Cornerstone submits that insofar as its carer recruitment policy amounts to *indirect* discrimination on grounds of sexual orientation, it is a proportionate means of achieving a legitimate aim and so is lawful under s 19(2). Cornerstone argues that fidelity to evangelical Christian principles and practices is central to its existence and work, as is apparent from its MoA, Statement of Beliefs, Statement of Faith and Code of Practice, and from the evidence of Ms Birtle. Cornerstone's emphasis on

Scriptural doctrine, on prayer and on Biblical reflection nurtures its faith-based, fostering community and provides critical support to staff members and carers. Cornerstone points out that the Report recognises the value of its 'faith-based support service for its foster carers', and that it states that '[f]oster 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 argues that a requirement that it depart from its evangelical Christian values in its recruitment policy would undercut its objectives and the features of its activities which are of real benefit to the well-being of children and carers.

111. On the facts of the present case, Cornerstone says its carer recruitment policy pursues and achieves at least the following legitimate aims: increasing the pool of evangelical Christian foster carers; affording critical support to carers; allowing those within the evangelical Christian community to serve 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 carers, the children cared for, Cornerstone itself and society as a whole. It is submitted that Cornerstone's policy is an eminently proportionate and proper means of achieving these legitimate aims.

112. Cornerstone further submits that it is exempt from the requirements of s 29 EA 2010 in relation to sexual orientation by virtue of [2(3)] of Sch 23 EA 2010. It rejects Ofsted's reliance on [2(10)], which provides that the general exemption in [2(3)] 'does not permit anything which is prohibited by section 29, so far as relating to sexual orientation, if it is done (a) on behalf of a public authority, and (b) under the terms of a contract between the organisation and the public authority'. Cornerstone submits, in essence, that its fostering service does not constitute the type of activity specified in [2(10)]. Similarly, Cornerstone argues that the conduct which is allegedly prohibited under section 29 is not made under the terms of a contract between it and a public authority.

113. Accordingly, Cornerstone says that [2(10)] is not engaged and thus that it is exempted from the requirements in s 29 by operation of [2(3)] of Sch 23.

114. Further or alternatively, Cornerstone argues that it is exempted from the requirements of s 29 by s 193 EA 2010. It says it acts in pursuance of a charitable instrument and its provision of benefits is a proportionate means of achieving a legitimate aim.

115. Next, Cornerstone argues that in purporting to enforce obligations under the EA 2010, Ofsted has unlawfully trespassed on the statutory function of the Charity Commission, which is its statutory regulator. Cornerstone argues that Parliament expressly empowered the Charity Commission as the relevant 'charity regulator' to oversee the enforcement of the non-discrimination provisions of the EA 2010 against a charity such as Cornerstone and that Ofsted has improperly infringed the Charity Commission's statutory function and acted a manner which is incompatible with the scheme and intent of s 193(8) EA 2010.

116. Further, Cornerstone says that the contents of the Report engage its rights under Articles 9-11 and 14 of the Convention. It submits that the approach taken by Ofsted is contrary to the guidance of the ECtHR above, and that Ofsted has failed to use its

powers 'sparingly', to construe exceptions to those rights 'strictly' and to provide 'convincing and compelling reasons' to justify those restrictions: *Magyar Keresztény Mennonita Egyház v Hungary* (2017) 64 EHRR 12, [83-84].

117. Cornerstone says that Ofsted was wrong to regard the HRA 1998 as being one of the 'relevant requirements' within s 14(1)(c) and s 14(3)(b) to which it can have regard during an inspection of an IFA. It says Ofsted's approach is 'exorbitant'.

118. I turn to Cornerstone's arguments in response to Ofsted's case that Cornerstone is in breach of its obligations under the HRA 1998 by only recruiting heterosexual evangelical Christian carers.

119. Firstly, Cornerstone submits that it is not a public authority within the meaning of s 6 HRA 1998, and is therefore not subject to the Act at all.

120. It maintains that it is not a 'hybrid' public authority under s 6(3)(b) and (5) HRA 1998, in that its functions are not of a public nature and in any event, the acts to which Ofsted objects in the Report are private in nature. It in particular relies on *YL v Birmingham City Council and ors* [2008] 1 AC 95. It therefore argues that the HRA 1998 does not apply to it.

121. Second, it submits that there are no actual and identifiable 'victims' (*per* s 7(7) HRA 1998) whose Convention rights are engaged by the acts (or omissions) identified by Ofsted. Cornerstone says that the ECtHR case-law is clear that it does not consider the law in the abstract and that a person must be directly affected by a measure complained of in order to bring an application the Convention.

122. Next, Cornerstone says the acts (or omissions) to which Ofsted objects are not incompatible with the Convention in any event. It argues that to the extent that its policy amounts to discrimination within Article 14 read with Article 8 of the Convention, it is justified and proportionate. It says its own rights under Articles 9, 10 and 11 have to be given weight in the balancing exercise required by a proportionality assessment.

123. Cornerstone goes further and says that Ofsted's Report breaches *its* rights under Articles 9, 10 and 11 of the Convention. It says the Report interferes with its freedom to manifest its religious beliefs, contrary to Article 9(1). of religion under In addition, in protecting the right to freedom of expression, Article 10 also protects what might be termed the freedom of non-expression, which is to say a right not to be compelled to express or commit oneself to a particular view point (or to be forced to assent in or appear to give support to another's views). Cornerstone also relies on Article 11, and freedom of association in this context as explained in *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46, [71], [74-5]. It also prays in aid (albeit faintly) Article 14.

124. Finally, Cornerstone says that in the event of any conflict between the obligations under the HRA and the exemptions under the EA 2010, the latter take precedence. It argues that given that the provisions of Sch 23 EA 2010 are reflective of democratic constitutional principles such as subsidiarity, respect for pluralism and maintenance of tolerance of dissenting views, then they should have precedence over the HRA 1998.

125. Finally, Cornerstone submits that Ofsted has unlawfully departed from SCCIF. It says Ofsted is required to act in accordance with its guidance contained in SCCIF, unless it has good reason not to. It says that the Report is at odds with [13.1] of SCCIF, which in essence says that requirements imposed by Ofsted must be in respect of breaches having an impact on children's experiences, and that is not the case here. Cornerstone contends that there is no good reason in the present case to deviate from [13.1] of SCCIF.

Ofsted's submissions

126. Ofsted submits that Cornerstone's claim raises, broadly, four main issues:

a. whether Ofsted erred in concluding that Cornerstone's recruitment practices breach the EA 2010 in respect of sexual orientation;

b. whether Ofsted erred in concluding that Cornerstone's practices breach the HRA 1998 and the Convention, namely, Article 14 read with Article 8;

c. whether the Report breaches the Claimant's ECHR rights, namely Articles 9, 10, 11 and 14 (read with Article 9);

d. whether Ofsted improperly failed to have regard to the guidance in the SCCIF.

127. Ofsted says that the effect of Cornerstone's MoA, Statement of Beliefs and Code of Practice is that in practice Cornerstone recruits only evangelical Christian heterosexual married couples. It says this means that a same-sex couple, even if married/civilly partnered and of the evangelical Christian faith, would be excluded. A married heterosexual couple who are not evangelical Christians would be excluded. An unmarried couple (same sex or opposite sex) would also be excluded.

128. In relation to the first issue, Ofsted submits as follows.

129. The EA 2010 is a relevant enactment for the purposes of ss 13 and 14 of the CSA 2000. Ofsted must therefore determine whether or not an IFA complies with the EA 2010. Ofsted concluded that the Claimant did not comply with the EA 2010 on the basis that:

a. Cornerstone provides a service for the purposes of s 29(1) or, alternatively, it exercises a public function for the purposes of s 29(6);

b. Cornerstone directly discriminates against carers of a particular sexual orientation within the meaning of s 13 or, alternatively, indirectly discriminates against carers contrary to s 19; and

c. Cornerstone's activities are therefore not exempt pursuant to [2] of Sch 23 of the EA 2010 by virtue of [2(10)].

130. Ofsted submits that it was correct in each of these conclusions.

131. As I have already noted, Ofsted accepts that Cornerstone does not breach the EA 2010 in respect of religion or belief because it accepts that [2] of Sch 23 to the EA 2010 applies to it as a religious organisation.

132. In relation to the provision of a service, Ofsted says that Cornerstone is concerned with the provision of a service to the public or a section of the public in the sense that it enables a carer to be considered for fostering. Specifically, the Claimant: (a) approves applicants to be potential foster carers, (b) maintains that approval, and (c) on behalf of the local authority selects the approved foster carer, or puts a foster carer forward for selection by the local authority, to have a child placed with him or her. Ofsted's point is that the approval and subsequent recommendation to a local authority amounts to a 'service' within the meaning of ss 29(1) and 31(6).

133. Ofsted says this conclusion is consistent with the view expressed by Sales J in *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (No 2)* [2013] 1 WLR 2105, [12], and with the approach taken by the Divisional Court in *R (Johns) v. Derby County Council* [2011] 1 FLR 2095, [95] and [101].

134. Alternatively, Ofsted submits that the Claimant exercises a public function for the purposes of s 29(6) of the EA 2010. It notes that s 31(4) imports the HRA 1998 definition into the EA 2010, namely, it provides that a public function is a function that is a function of a public nature for the purposes of the HRA 1998.

135. In relation to the question of discrimination contrary to ss 13 (direct discrimination) and/or 19 (indirect discrimination), Ofsted notes that the latter is capable of justification under the EA 2010 (by virtue of s 19(2)(d)), the former is not. Ofsted submits that the recruitment practice amounts to direct discrimination. In the alternative, however, it amounts to indirect discrimination.

136. In relation to direct discrimination, Ofsted says that because Cornerstone only recruits foster carers who are part of a heterosexual married couple, this constitutes direct discrimination, being analogous to the factual position in *Preddy v Bull* [2013] 1 WLR 3741, [29-31] per Baroness Hale.

137. Section 23(1) requires that there must be no material difference between the circumstances relating to each case. By reason of s 23(4), Ofsted says that the correct comparison is between a person who is part of an opposite sex married evangelical Christian couple, and a person who is part of a same sex married evangelical Christian couple. The Claimant would consider the former as a foster carer, but would not consider the latter. The only material difference between the two people is their sexual orientation. That amounts to direct discrimination.

138. Further or alternatively, Ofsted says that Cornerstone's policy amounts to indirect discrimination against carers of a particular sexual orientation contrary to s 19 taken with s 12. Ofsted argues that Cornerstone applies a provision, criterion or practice (PCP) that requires a carer be an evangelical Christian who complies with the Code of Practice and in particular to refrain from 'homosexual behaviour'. The PCP applies to all potential carers. So, says Ofsted the PCP places prospective lesbian and gay carers at a particular disadvantage compared to prospective heterosexual carers because gay or lesbian carers will be less likely to be able to comply with [10] of the Code of Practice.

139. Ofsted says that Cornerstone cannot show the PCP to be a proportionate means of achieving a legitimate aim. It says that it does not accept Cornerstone's case that discrimination on grounds of sexual orientation arising out of the Claimant's sincere religious beliefs can, of itself, constitute a justification for discrimination: *Preddy*, supra, [37-38]; *Catholic Care*, supra, [15].

140. Ofsted complains that there are additional legitimate aims pleaded in Cornerstone's Skeleton Argument at [79]-[80] which had not previously been pleaded including: increasing the pool of evangelical Christian foster carers; affording critical support to carers; allowing those within the evangelical Christian community to serve promoting stable and durable placements; 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, the Claimant and society as a whole; and to increase the number of foster placements available against what is alleged to be an overall national shortage of foster carers for the number of placements required for children. In any event, Ofsted says these do not amount to the necessary justification

141. In assessing the asserted justification, particularly weighty and convincing reasons are required to justify differential treatment on the grounds of sexual orientation (see *Catholic Care*, supra, [48]; *R (Steinfeld and Keidan) v Secretary of State* [2020] AC 1, [20]. Further, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights under the Convention compatible. The religious community must also show: *Fernández Martinez v. Spain* (2014) 37 BHRC 1 (GC), [132]:

> " … that the risk alleged is probable and substantial and that the impugned interference [with the ECHR rights] does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy":

142. Ofsted makes a number of points in relation to Cornerstone's more developed case. First, there is no evidence before the Court that there is a shortage of evangelical Christian carers in the sense that local authorities have children who they consider have a particular need to be placed with such carers, and are not able to identify such placements. According to Ms Pascoe's second witness statement Ofsted are not aware of such a shortage. Further, the Claimant has not provided evidence from its foster carers making good the proposition that one of them would not have become a foster carer for a different IFA had the Claimant not existed. Ofsted says that whilst there is undoubtedly a virtue in recruiting a diverse pool of foster carers, such an aim cannot justify discrimination against lesbian and gay prospective carers. Further, Cornerstone's recruitment policy has a corresponding disbenefit of reducing diversity of foster carers in excluding same sex couples.

143. Second, the Claimant does not explain why the use of scriptural doctrine, prayer and Biblical reflection (Skeleton Argument, [73]) cannot be conducted with evangelical Christians who are in a same sex marriage. In other words, the Claimant fails to show that there is a less intrusive means of meeting the aims identified by Cornerstone.

144. Third, as to the argument that if Cornerstone is not permitted to discriminate against same sex married couples it will close, and so its services will be lost to children and local authorities. This argument is not supported by evidence, and indeed it proceeds on the false factual premise that there is a national shortage of foster places. Rather:

a. There is no absolute national shortage of foster places; rather there is a relative shortage of carers to meet the specific needs of looked after children.

b. Cornerstone provides no evidence from a local authority in support of the proposition that they have facilitated a foster placement for a child that would not otherwise have been fostered (through the local authority or another IFA).

c. Cornerstone has provided no evidence that the foster parents found by and fostering services provided by other IFAs would be inadequate or that such services would not find good numbers of suitable foster carers.

d. Cornerstone is, overall, a small organisation. At the time of the inspection there were 18 approved households caring for 16 children (see the Report) as compared to 88 370 nationally at as 31 March 2019.

145. Hence, Ofsted submits that the Claimant has not shown that its recruitment practices are a proportionate way of achieving a legitimate aim.

146. I turn to Ofsted's case on the exemption in [2] of Sch 23 EA 2010. Its case is that [2] of Sch 23 does not exempt Cornerstone's discrimination, because it says that [2(10)] applies to all or most of the Claimant's activities as an IFA in that it (a) acts on behalf of a public authority, and (b) under the terms of a contract between it and the public authority.

147. Ofsted submits, first, that by recruiting a foster carer the Claimant acts 'on behalf of a public authority'. It says that is because:

a. The definition of an IFA in s 4(4)(a) of the CSA 2000 is 'an undertaking which consists of or includes discharging functions of local authorities in England in connection with the placing of children with foster parents'.

b. For a looked after child to be placed with a foster carer the foster carer must be approved by the local authority or an IFA: see reg 22(2) of the Care Planning Regulations.

c. Recruitment and approval of foster carers by IFAs is done pursuant to the Fostering Regulations.

d. The Claimant only places looked after children identified by local authorities. The act of recruitment and approval of a foster carer is not done for anyone other than a local authority. It is not, as the Claimant wrongly suggests, done on the Claimant's own account.

e. The phrase 'on behalf of' does not require a relationship of agency between a local authority and an IFA. The relationship is better understood in this context as

one of delegator/delegate (Cornerstone undertakes a task that the local authority would otherwise be required to undertake).

148. Secondly, Ofsted says that Cornerstone acts 'under the terms of a contract between the organisation and the public authority'. This merely requires the service in question to be done under the terms of the contract. It does not require, says Ofsted, the discriminatory act to be required by the terms of the contract.

149. Ofsted points out that the Care Planning Regulations require, where a local authority delegates its functions under reg 22 of those Regulations, the local authority to enter into a written agreement with the IFA which includes prescribed information: reg 26. If a contract entered into between a local authority and an IFA required a discriminatory recruitment practice, it would, in any event, be unlawful under s 142 EA 2010 and removeable from the contract on application by anyone with an interest (see s 143). On Cornerstone's interpretation, [2(10)] of Sch 23 to the EA 2010 would be redundant.

150. Ofsted says the evidence is clear that when Cornerstone provides a foster carer to a local authority for a foster placement it does so pursuant to a contract, and points to examples of contracts that are in evidence.

151. I turn to Ofsted's case on the exemption in s 193. Ofsted accepts that Cornerstone acts in pursuance of a charitable instrument. Ofsted does not accept, however, that the provision of the benefits is a proportionate means of achieving a legitimate aim for the reasons it set out in relation to indirect discrimination.

152. In respect of Cornerstone's argument that it is solely for the Charity Commission to determine whether it is behaving in an unlawfully discriminatory manner under the s EA 2010, Ofsted replies that ss 13 and 14 of the CSA 2000 entitle Ofsted to examine compliance with the EA 2010. Ofsted has its own inspection and regulatory duties, which differ from those of the Charity Commission (which are set out in s 15 of the Charities Act 2011 and include the determination of whether or not institutions are charities, and encouraging and administering the better administration of charities). Whilst Ofsted must take the view of the Charity Commission into account (which it did), it is not required to follow it. Overlapping jurisdiction between regulators is neither surprising nor problematic and Ofsted gives the example of an inspection of a children's home, which would also come within the regulatory jurisdiction of the Health and Safety Executive.

153. I now summarise Ofsted's arguments on the issue whether it erred in concluding that Cornerstone is in breach of its obligations under the HRA 1998, ie, that its recruitment policy violates Article 14 read with Article 8 of the Convention.

154. First, Ofsted says that Cornerstone is a public authority for the purposes of the HRA 1998. It accepts that it is not a 'core' public authority for the purposes of s 6 of the HRA 1998 but maintains that it is a 'hybrid' public authority because certain of its functions – in particular, the recruitment of foster carers - are functions of a public nature pursuant to s 6(3)(b) of the HRA 1998. In summary, Ofsted says that Cornerstone performs a task which a public authority is under a duty to perform, namely the approval of prospective foster carers via a foster panel, the maintenance or withdrawal of that approval, and the matching of a foster carer to a foster child: Part 5

of the Fostering Regulations. It points out that an IFA is defined in s.4 of the CSA 2000 as an undertaking which consists of or includes discharging functions of local authorities in England in connection with the placing of children with foster parents. It says that provision makes clear that what Cornerstone does vis-à-vis foster carers is a public function.

155. In relation to Cornerstone's contention that no rights of a 'victim' have been engaged by the acts or omissions of Cornerstone in recruiting foster carers pursuant to s 7 of the HRA 1998 and its argument that Ofsted has no standing to rely on any identified victim's rights under the Convention, Ofsted replies that these arguments misunderstand Ofsted's role as a registration authority and as a regulator. By s 14 of the CSA 2000, Ofsted is required to assess whether an IFA is complying with the requirements of an enactment that it considers to be relevant. Ofsted considers the requirements of the HRA 1998 to be relevant to the agencies it regulates and inspects under the CSA 2000; and, as such, is entitled to consider whether the Clamant complies.

156. Ofsted's argument as to why it says Cornerstone is in breach of Article 14 read with Article 8 is as follows. It says there is a four-stage test as set out in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, [20] and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [134]. The fourth stage, justification, was explained in *Steinfield*, supra, [19]. Ofsted emphasizes, in relation to that paragraph, that where the difference in treatment is based on sexual orientation, a court must apply 'strict scrutiny' to the assessment of any asserted justification: 'particularly convincing and weighty reasons to justify' it are required.

157. Ofsted argues there is a difference in treatment between:

a. a person who is part of an opposite sex married evangelical Christian couple and a person who is part of a same sex married evangelical Christian couple (ie, there is a difference in treatment based on sexual orientation); and

b. a person who is an evangelical Christian and a person with any other religion or belief (ie, a difference in treatment based on religion).

158. Ofsted says that the difference in treatment (in either case) is not justified for the reasons it advanced in relation to s 19. That conclusion is not altered by consideration of the rights of the Claimant under Articles 9, 10, 11 and 14.

159. On the relationship between the EA 2010 and the HRA 1998, Ofsted says there is no inconsistency. The former contains exemptions for what would otherwise be discriminatory conduct by religious organisations on the ground of religion or belief. Where, however, the religious organisation acts as a public authority for the purposes of the HRA 1998, Article 14 prevents unjustified discrimination on the grounds of religion or belief - such discrimination is not exempt.

160. Further, and in any event, the EA 2010 and the HRA 1998 offer twin protective regimes, capable of operating alongside one another. The EA 2010 sets out a bespoke domestic anti-discrimination law, but Parliament was entitled to expect public authorities still to comply (in addition) with the HRA 1998.

161. Turning to the argument that Ofsted has breached Cornerstone's Convention rights, in particular under Articles 9, 10 and 11, Ofsted denies any breach but if there is, its actions pursued a legitimate aim, namely the need to ensure that IFAs recruit foster carers in a non-discriminatory manner.

162. The Report is a proportionate means of achieving that aim. Ofsted points out that the right to manifest a religion or belief protected by Article 9 is a qualified right: cf *R (SB) v. Governors of Denbigh High School* [2007] 1 AC 100, [50]; *Sahin v. Turkey* (2007) 44 EHRR 99, [105]. The same principles apply to the application of Articles 10 and 11 in this context.

163. It is proportionate for Ofsted to seek to ensure that the services practised by IFAs are conducted in a non-discriminatory way. In support of this proposition, Ofsted relies on *Ladele*, [2010] 1 WLR 955, [52]-[58]; *McFarlane v. Relate Avon Ltd* [2010] IRLR 872, [17]-[20], [25] (and the refusal of permission to appeal to the Court of Appeal by Laws LJ [2010] IRLR 872); *Johns,* supra, [73]-[105]; *Eweida v. United Kingdom* (2013) 57 EHRR 8, [79]-[88], [102]-[110].

164. As to Article 14, any failure to treat the Claimant differently to other IFAs without a religious ethos is both justified and proportionate for the same reasons.

165. Finally, in relation to the argument that Ofsted has failed to have regard to the guidance in the SCCIF and in particular at [13.1] that '[w]hen imposing a requirement, inspectors must ensure that there is sufficient evidence to support the breach and that they are able to show that this is having an impact, or is likely to have an impact, on children's experiences and progress', when there was no such impact identified in the Report, Ofsted replies that it is entitled to depart from its published policy where it has good reason to do so. Here, Ofsted considers that an important regulatory principle, namely non-discrimination in the activities carried out by an IFA, is pursued by the imposition of a requirement notwithstanding the lack of direct impact on the children.

Discussion

166. I have lengthy Skeleton Arguments from both parties and also a 49-page speaking note from Mr O'Neill QC which was filed and served on the morning of the hearing. Both parties also submitted post-hearing notes. Some 2500 pages of authorities were filed, together with a core bundle of several hundred pages. A large number of issues are canvassed in these documents. The fact that a specific point is not mentioned in the discussion which follows does not mean that it has been overlooked.

Did Ofsted err in concluding that Cornerstone's carer recruitment policy breaches the EA 2010 in respect of sexual orientation ?

Does s 29 apply to Cornerstone ?

167. The first question in relation to this issue is whether Cornerstone is caught by s 29(1) as an undertaking that is concerned with the provision of a service to the public or a section of the public. If it is, then it must not discriminate against a person (B) requiring the service by not providing that person with the service. Nor must it, in providing the service, discriminate against B as to the terms on which it provides the service to B; by terminating the provision of the service to B; or by subjecting B to any other detriment (s 29(2)). That is, of course, subject to the exemption in [2] of Sch 23, and s 193, which I will come to later.

168. In my judgement the answer to this question is clear. It is a straightforward question of fact. Cornerstone provides a service to at least two distinct sections of the public, namely (a) those adults who wish to become foster or adoptive parents; and (b) those children and young people who need to be fostered or adopted. Cornerstone provides a service by seeking to fulfil the wishes and desires of both groups, first, by recruiting and training carers, approving them, and then matching them with suitable children and young people. It can also be said that Cornerstone provides a service to the local authorities with whom it has contracted, as [39] of the Explanatory Notes to the CSA 2000 make clear, although whether local authorities can be regarded as 'a section of the public' within s 29(1) is not something I need decide.

169. First, reg 3(1)(b) of the Fostering Regulations provides that a fostering service provider (ie, in broad terms, in relation to a fostering agency, a nominated person or manager) must produce (emphasis added):

> "… a statement as to the *services and facilities* (including any parent and child arrangements) provided by the fostering service."

170. Second, there is a clue in the name. Cornerstone's full name is Cornerstone (North East) Adoption and Fostering *Service* Ltd (emphasis added).

171. Third, also of relevance are the terms of Cornerstone's MoA. Clause 3 provides (again, emphasis added):

> "3. The Charity's objects ('the Objects') are to provide a high quality adoption and fostering care *service* according to Christian principles *to alleviate the needs of children and young people* who are or may be temporarily or permanently separate from their families and to promote the relief and care of children without families or parents able to care for them by the provision of substitute families able to meet their needs with the aim of improving the conditions of life and future of such children and young people."

172. This clause shows that Cornerstone's primary object is to provide a service to children and young people.

173. This conclusion is reinforced by the terms of the agreements which Cornerstone enters into with local authorities. For example, its Framework Agreement with Cumbria

County Council defines 'Child/Children' as 'a child or young person aged from 0-17 years inclusive named in an [Individual Placement Agreement], to whom the Services are to be provided.' 'Services' is a defined term. It is defined as meaning, 'the provision of Foster Carers and accommodation, care and support services detailed in Schedule 1.'

174. So far as prospective carers are concerned, Cornerstone's document 'Recruitment, Selection and Approval of Foster Carers' sets out in detail how Cornerstone provides its service to those who approach it wishing to foster. It reinforces my conclusion that Cornerstone provides a service to sections of the public within the meaning of s 29(1). It makes clear that the first step is the recruitment of potentially interested applicants. One way in which it recruits is by accepting enquiries from those who are potentially interested. The document goes on:

> "All enquirers will be treated openly, fairly and with respect. Anyone the charity cannot help will be treated courteously and staff will pro-actively assist by recruiting enquirers to either a local authority or another agency that could help them. Cornerstone has links with many independent agencies in the area and has made specific provision with one particular agency that would be happy to receive referrals."

175. This strikes me as being very much the language of a service-provider, in particular the use of the words 'help' and 'assist'. This document goes on to explain how Cornerstone's social workers work with prospective carers by meeting with them; discussing fostering with them; providing training over a period of time to equip them with the necessary skills to become approved carers; assisting them to develop a portfolio demonstrating their suitability as carers; as well as many other matters. This material points unambiguously to Cornerstone being a service provider to prospective foster carers which it fulfils by (*inter alia*) training and equipping them with the skills for them to be approved as foster carers.

176. In my judgment a person who approaches Cornerstone with a view to becoming an approved carer falls squarely within s 31(6) EA 2010, and I reject Cornerstone's arguments to the contrary. Section 31(6) provides that:

> "A reference to a person requiring a service includes a reference to a person who is seeking to obtain or use the service."

177. That aptly describes a prospective carer who approaches Cornerstone with a view to being trained by Cornerstone and then, all being well, being approved by it as a foster carer and then matched with a child or young person.

178. If I wrong about this, and Cornerstone does not fall within s 29(1), then I am satisfied that its function of recruiting foster carers and placing children and young people with them is a public function for the purposes of s 29(6). I will explain why I have so concluded when I come to consider whether Cornerstone is a public authority for the purposes of s 6 of the HRA 1998.

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 …"

180. 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.

181. Looking at the issue in terms of couples (which, in practice, is who Cornerstone recruits although as I have said it says it does exclude the possibility of recruiting single carers) I accept Ofsted's submission that the comparison is between a married heterosexual couple and a married same sex couple and that, again, the latter would be treated less favourably because they would be bound to be rejected. The words of Baroness Hale in *Preddy*, supra, [30], where Christian hotel owners refused to allow a gay couple to occupy a double-bedded room because they would only let such rooms to married couples of the opposite sex, are relevant:

> "When it came to denying a double bed to Mr Preddy and Mr Hall, which they would have given to a heterosexual married couple, Mr and Mrs Bull were not only applying the criterion that they were unmarried. They were applying a criterion that their legal relationship was not that of one man and one woman, in other words a criterion indistinguishable from sexual orientation."

182. It follows that Cornerstone's policy will be unlawful as a breach of s 29(1) or s 29(6) unless an exemption applies.

Indirect discrimination and proportionality

183. I turn to the question whether Cornerstone's policy is indirectly discriminatory pursuant to s 19 taken with s 12 of the EA 2010, in case I am wrong in my conclusion that it is directly discriminatory.

184. Cornerstone argues that its policy does not discriminate on grounds of sexual orientation, but that it requires carers not to engage in 'homosexual behaviour', which it describes in Clause 10 of its Code of Practice as a 'sexual sin'. I accept Ofsted's submission that at a minimum this amounts to indirect discrimination. Although clause 10 applies to all potential carers, it puts gay and lesbian potential carers at a disadvantage as opposed to heterosexual potential carers because they more likely to engage in same-sex sexual activity and so be less likely to be able to comply with clause 10 and so less likely to be eligible to be recruited by Cornerstone.

185. The question, then, is whether Cornerstone can justify its policy under s 19(2)(d) as a proportionate means of achieving a legitimate aim.

186. The starting point in this analysis is that particularly weighty reasons must exist to justify discrimination on grounds of sexual orientation: *Steinfeld*, supra, [20(3)]; *Kozak v Poland* (2010) 51 EHRR 440, [92]; *EB v France* (2008) 47 EHRR 509, [91]; *Karner v Austria* (2003) 38 EHRR 528, [37]; *Smith v United Kingdom* (1999) 29 EHRR 493, [105]. Further, in cases involving discrimination on the grounds of sexual orientation, to be proportionate, the measure must not only be suitable in principle to achieve the avowed aim, it must also be shown that it was necessary to exclude those of the specific sexual orientation from the scope of the application of the provision: *Vallianatos v Greece* (2013) 59 EHRR 12, [85]. The burden of showing these things lies on Cornerstone.

187. As initially pleaded, the legitimate aims Cornerstone says its policy pursues are Cornerstone's right to religious freedom in Article 9 of the Convention, its right to freedom of association under Article 11, and the 'principles of subsidiarity, pluralism and diversity' (Statement of Facts and Grounds), [59(ii)].

188. The matter is further addressed at [73] et seq of Cornerstone's Skeleton Argument, especially at [79]-[80], in a more developed way, where the following legitimate aims are suggested as being served by its policy banning 'homosexual behaviour' by carers:

a. Increasing the pool of evangelical Christian foster carers;

b. Affording critical support to carers;

c. Allowing those within the evangelical Christian community to serve by promoting stable and durable placements;

d. 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; and

e. To increase the number of foster placements available against what is alleged to be an overall national shortage of foster carers for the number of placements required for children.

189. These aims are broadly reflected in the evidence of Ms Birtle in her first witness statement at [6]-[7] in particular, and in her second witness statement at [6].

190. In its Skeleton Argument at [57] Ofsted complains that these legitimate aims were not pleaded in the Statements of Facts and Grounds. I do not accept this as a valid point of objection. Ofsted was able to meet Cornerstone's case as it is now presented, and that is how I propose to deal with it.

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.'

198. Sales J dismissed the appeal, holding:

a. that, although the mere fact that some people might feel upset if gay men and lesbians were accorded equal treatment in some area of life could not of itself provide objective justification for discrimination on grounds of sexual orientation, where, as a consequence of some people having prejudices about or negative attitudes towards 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; and that the Tribunal had been correct to consider the question of justification as it had;

b. that the motivation of third party donors in withholding donations was capable of being relevant to the balancing exercise required under Article 14 of the Convention, and the latitude or width of the margin of appreciation to be allowed to a body to react to third party pressures when engaging with the public might be affected by the motivation of the third party;

c. that the sincerely held views of donors motivated by respect for Roman Catholic doctrine to have a preference 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;

d. that under s 193 of the EA 2010, as under the Convention, even where the charity in question acted with the legitimate view of promoting traditional family life, particularly convincing and weighty reasons were required to provide objective justification for discrimination on grounds of sexual orientation;

e. that the extent of the proposed benefits to children and the likelihood that such benefits might be achieved were relevant considerations to be taken into account in determining whether weighty and convincing grounds had been established to justify the proposed discrimination;

f. that 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 improve in a significant way the prospect of increasing the number of children placed with adoptive families, could not be faulted and disclosed no error of law;

g. and that, accordingly, the Tribunal had been right to conclude that 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.

199. A key question, therefore, is whether the policy provides benefits to children and young persons or whether, if it were changed as Ofsted requires, that would produce a disbenefit, for example, by reducing the available number of foster carers. This requires consideration of the evidence that has been filed.

200. As I have explained, a core part of Cornerstone's case is the assertion that there is a national shortage of foster carers. That issue is specifically addressed in Lisa Pascoe's second witness statement at [4]-[7]. She says that there is not a national absolute shortage of foster carers but a relative shortage of carers to meet the specific needs of children in care. She says that problems of unavailability stem from finding locally available carers who are adequately equipped to deal with specific children's needs, rather than the absolute capacity of the foster care system. Not every foster carer is right for every child, and this means there are always likely to be vacant please. Ofsted's most recent data shows that there were 88 370 fostering places available in England on 31 March 2019. 63% of these places were filled, 18% were unavailable, and 19% remained vacant. Hence, Ms Pascoe concludes at [7]:

> "There is no evidence, from the Claimant or otherwise, to suggest that there is a shortage of evangelical Christian carers or that recruiting such carers would respond to any relative shortage driven by 'matching' problems. There is no data reported nationally on either the religion of foster carers or of fostered children. The size of the pool of evangelical Christian carers is therefore not known."

201. I should point out that the evidence on this issue before Sales J in *Catholic Care*, supra, was broadly to the same effect: see [18], [55] ('18 … there is an over-supply of potential adoptive parents available through voluntary adoption agencies … 55 … there is a surplus of potential adoptive parents available through voluntary adoption agencies …')

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.

204. It follows I reject [7] of Ms Birtle's witness statement (emphasis added):

> "Our policy also achieves the aim of encouraging and ensuring that *all people from the evangelical Christian faith community and tradition* can serve the broader community in a manner that conforms to their conscience and faith values as reflected in our Memorandum and Articles."

205. Cornerstone's policy is exclusionary of, and discriminatory against, gay and lesbian evangelical Christians and it therefore does not and cannot achieve this aim. It hardly needs be said, but I categorically reject any suggestion that gay men and lesbians cannot make wonderfully loving foster and adoptive parents whether they are single or in a same-sex partnership. The words of the South African Constitutional Court in *Du Toit v Minister for Welfare and Population Development* (2002) 13 BHRC 187, [21]–[22], are relevant here:

> "21. In their current form the impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same-sex life partnerships and who would otherwise meet the criteria set out in section 18 of the Child Care Act [1983]. Their exclusion surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development, which can be offered by suitably qualified persons.
>
> 22. Excluding partners in same sex life partnerships from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle [of the paramountcy of the interests of the child]. It is clear from the evidence in this case that even though persons 184such as the applicants are suitable to adopt children jointly and provide them with family care, they cannot do so. The impugned provisions … thus deprive children of the possibility of a loving and stable family life … The provisions of the Child Care Act thus fail to accord paramountcy to the best interests of the children …"

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. Not 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.

207. I am not sure Cornerstone is arguing that it would close if it were required to change its policy so as to be non-discriminatory, but if it is, then I reject that argument. This argument is not supported by evidence, and indeed it proceeds on the false factual premise, as I have shown, that there is a national shortage of foster places. There is no evidence a child would not have been fostered if Cornerstone did not exist.

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 (Skeleton Argument, [73]). 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. The preamble to the Code of Practice demonstrates that its Code of Practice is driven by religious belief and nothing else:

> "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 faith and lifestyle and morality. The Bible, as the revealed Word of God, shall be the final authority in such matters."

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. In *Preddy*, supra, Baroness Hale said at [37]-[38] in relation to the Equality Act (Sexual Orientation) Regulations 2007:

> "37 Added to these considerations are those which weighed with the judge. 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.
>
> 38 Regard can also be had to the purpose of the Regulations, not as an aid to construction but in order to understand the problems they were meant to solve and how they proposed to solve them. The purpose was to secure that people of homosexual orientation were treated equally with people of heterosexual orientation by those in the business of supplying goods, facilities and services. Parliament was very well aware that there were deeply held religious objections to what was being proposed and careful consideration had been given to how best to accommodate these within the overall purpose. For the reasons explained in the Explanatory Memorandum to the Regulations, Parliament did not insert a conscientious objection clause for the protection of individuals who held such beliefs. Instead, it provided, in regulation 14, a carefully tailored exemption for religious organisations and ministers of religion from the prohibition of both direct and indirect discrimination on grounds of sexual orientation. This strongly suggests that the purpose of the Regulations was to go no further than this in catering for religious objections."

211. For these reasons, Cornerstone has failed to establish that its policy, which I have found (at a minimum) to be indirectly discriminatory, is justified under s 19(2)(d).

Does the exemption in [2] of Sch 23 to the EA 2010 apply ?

212. First I deal with [2] of Sch 23 and the questions whether the services which Cornerstone provides are done, first, on behalf of a public authority and, second, whether they are done under the terms of a contract between Cornerstone and the public authority, within the meaning of [2(10)]. If it is, then the exemption in [2(3)] for religious organizations does not apply, and Cornerstone will be in breach of s 29 because of its directly and/or indirectly discriminatory recruitment policy on the grounds of sexual orientation.

213. As I have already observed, Ofsted accepts that Cornerstone is an organization to which [2(1)] of Sch 23 applies, and it accepts that that Cornerstone applies the restriction on the sexual orientation of carers because it is necessary to comply with the doctrine of the organization for the purposes of [2(7)].

214. In my judgment, the statutory provisions governing foster care arranged by IFAs such as Cornerstone mean that it provides its agency services 'on behalf of' local authorities (which, obviously, are public authorities) for the purposes of [2(10)]. Also, the evidence shows those services are provided pursuant to contractual arrangements with the local

authorities in question. That is substantially for the reasons set out in [65] of Ofsted's Skeleton Argument, and for the following reasons.

215. As I set out earlier, local authorities have a statutory duty to provide accommodation for a 'looked after' child (as defined in s 22(1) CA 1989) either pursuant to s 20 or, where the child is subject to a care order, pursuant to s 22A. Section 22C provides for the ways in which looked after children are to be accommodated and maintained. Under s 22C(5)-(6), if the local authority is unable to make arrangements for the child to live with a parent of his, a person who otherwise has parental responsibility for him, or (in certain circumstances) a person named in a child arrangements order as a person with whom the child was to live, then the authority must place the child in whichever of the types of placement is, in the authority's opinion, the most appropriate placement available. Those placements are with an individual who is a relative, friend or other person connected with the child and who is also a local authority foster parent; with a local authority foster parent who does not fall within the first category; in a children's home in respect of which a person is registered under Part 2 of the CSA 2000; or in accordance with other arrangements which comply with any regulations made for the purposes of s 22C, ie the Fostering Regulations and the Care Planning Regulations.

216. It is common ground that Cornerstone is an IFA as defined in s 4(4)(a) CSA 2000. It therefore is an undertaking 'which consists of or includes discharging functions of local authorities in England in connection with the placing of children with foster parents'. The words 'discharging functions of local authorities' in my judgment show that IFAs act 'on behalf of' local authorities for the purposes of [2(10)] of Sch 23 to the EA 2010. The words 'in connection with' show that an IFAs' function on behalf of local authorities is not just placing children but matters incidental (including the recruitment of foster carers and their training and approval).

217. I accept Ofsted's submission that the phrase 'on behalf of' does not, as Cornerstone suggests, require a relationship of agency between a local authority and an IFA. I agree that the relationship is better understood in this context as one of delegator/delegate (Cornerstone undertakes a task that the local authority would otherwise be required to undertake). This point is clear from [41] of Lisa Pascoe's first witness statement:

> "All LAs [local authorities] recruit and approve foster carers of their own account. A small number of LAs deliver their fostering services through a third-party agency (such as a trust, which is registered as an IFA). In addition, LAs will use IFAs to a varying extent. Some local authorities use primarily in-house foster carers, supplemented by IFA foster carers, and in some authorities the converse is true. Many LAs prefer to place with their own in-house foster carers and will only use an IFA when they do not have a suitable carer available."

218. I accept Ofsted's submission that it is apparent from the clear words in the CSA 2000 addressing IFAs that their function is to carry out functions of a local authority; and that Parliament envisaged the possibility of broad delegation to IFAs for the efficient performance of a local authority's functions.

219. It is also clear that Cornerstone acts pursuant to contractual arrangements. Again, Ms Pascoe explicitly makes this point, at [44] of her first witness statement:

> "In England, only LAs can place looked after children in foster care. All of these placements are paid for by an LA. Where they use the services of an IFA, the LA will enter into a contract."

220. There are several contractual examples in evidence. For example, there is 'Agreement for Cumbria County Foster Care Framework between Cumbria County Council and [Cornerstone]'. Under 'Background' at [A], this explains that Cornerstone (which is defined as the 'Provider' at the beginning of the Framework) was selected to enter into the Framework Agreement following the placement of a 'contract notice' on 25 November 2016 in the Official Journal of the European Union. Clause 1 is the Agreed Terms or Interpretation Clause. 'Contract' is defined as meaning 'a legally binding agreement (made pursuant to the provision of this Framework Agreement) for the provision of Services made between a Customer and the Provider comprising an Individual Placement Agreement [IPA], its appendices, and the Call-off Terms and Conditions.' 'Customer' is defined to be the Council and any other contracting body (as defined in reg 2 of the Public Contracts Regulations 2015 (SI 2015/102) described in the OJEU Notice). Clause 3.3 provides that Customers may order Services from Cornerstone in accordance with Clause 4. Clause 3.4 provides that where Services under the Agreement are required, then every Customer (which, as I have said, includes the Council) must enter into a contract with the Provider for those Services. Clause 5.1 provides that Cornerstone must perform all Contacts entered into with a Customer in accordance with (a) the requirements of the Framework Agreement; and (b) the terms and conditions of the respective Contracts.

221. All of this demonstrates that Cornerstone provides its services under contract to a local authority for the purposes of [2(10)(b)] of Sch 23.

222. I accept Ofsted's submission that [2(10)(b)] requires the service in question to be done under the terms of the contract. It does not require, as Cornerstone suggested, that the *discriminatory act itself* be required by the terms of the contract. That would be nonsensical. The Care Planning Regulations require, where a local authority delegates its functions under reg 22 of the Care Planning Regulations, that the local authority enter into a written agreement with the IFA which includes prescribed information: reg 26. As Ofsted points out, if a contract entered into between a local authority and an IFA required a discriminatory recruitment practice, it would, in any event, be unlawful under s 142 of the EA 2010 and removable from the contact on application by anyone with an interest (see s 143). On Cornerstone's interpretation, [2(10)] of Sch 23 to the EA 2010 would be redundant.

223. It therefore follows that the exemption in [2(3)] does not apply, and thus that, subject to the general charitable exemption in s 193 which I discuss later, Cornerstone's recruitment policy is unlawful as being in breach of s 29 of the EA 2010 because of its discriminatory effect with regard to sexual orientation.

Does the exemption in s 193 apply ?

224. I turn, next, to s 193. My conclusion on this flows from my conclusion on s 19(2) because, as I have said, the test of proportionality is the same in relation to both.

225. Cornerstone contends that the exemption provided for charities in s 193 of the EA 2010 applies in respect of sexual orientation discrimination. This provides that a person does not contravene the EA 2010 by restricting the provision of benefits to persons who share a protected characteristic if the person acts in pursuance of a charitable instrument and (insofar as is relevant) the provision of benefits is a proportionate means of achieving a legitimate aim. Cornerstone argues the restriction of its services to heterosexual couples is a proportionate way of achieving a legitimate aim.

226. I accept that Cornerstone acts in pursuance of a charitable instrument. However, for the reasons I have set out in relation to s 19, by only providing its services to heterosexuals, Cornerstone is not acting in a proportionate way to achieve a legitimate objective.

227. Finally in respect of s 193, Cornerstone argues that Ofsted has no power to determine whether it is acting in a discriminatory manner under the EA 2010 because such decisions are the sole preserve of the Charity Commission. I do not think there is anything in this point.

228. I set out the chronology of Cornerstone's dealings with the Charity Commission earlier in this judgment. In summary, on 18 October 2010, after the decision of the High Court in *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] 4 All ER 1041, the Charity Commission wrote to the Claimant seeking evidence that the Claimant's recruitment practice fell within s 193 of the EA 2010.

229. In a letter dated 12 November 2010 the Claimant wrote to the Charity Commission setting out its view that it did not supply goods or services to carers; that it did not discriminate on the grounds of sexual orientation but on the ground of sexual behaviour, and that in any event any discrimination was justified as a proportionate to the success of its services and to the fact that evangelical Christianity is of fundamental importance to its carers, and that a particular feature of the services offered by the Claimant was prayer. The Claimant relied on the exemption in s 57 of the Equality Act 2006 (which is materially similar to what is now [2] of Sch 23 of the EA 2010).

230. The Charity Commission responded on 11 January 2011. The letter stated that it accepted the Claimant's argument that it did not discriminate on grounds of sexual orientation. This appears to have been an acceptance of the argument that Cornerstone discriminated on the ground of sexual behaviour rather than sexual orientation, rather than an acceptance that an exemption applied. The letter further accepted that the discrimination practised by Cornerstone on the grounds of religion or belief was exempted under [2] of Sch 23 to the EA 2010.

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.

EA 2010: conclusion

232. Overall, therefore, I conclude that Cornerstone's carer recruitment policy breaches s 29 of the EA 2010 read with s 13 or, alternatively, s 19, because the policy means that Cornerstone will not recruit gay men or lesbians as potential foster carers, and that amounts to unlawful discrimination on the grounds of sexual orientation.

Did Ofsted err in concluding that Cornerstone's policy breaches the HRA 1998 ?

Public authority

233. The first question is whether Cornerstone is a public authority within s 6 HRA 1998. If it is not, then the HRA 1998 does not apply to it, and this enquiry ends. If it is, then a subsidiary question is whether the act of only recruiting heterosexual evangelical Christians as foster carers is a private act.

234. The relevant part of s 6 provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> …
>
> (3) In this section "public authority" includes—
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
>
> …
>
> (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private."

235. In its Seventh Report of Session 2003–04, *The Meaning of Public Authority under the Human Rights Act* (HL Paper 39/HC 382), the Joint House of Lords and House of Commons Committee on Human Rights explained how s 6 operates at [5]-[6]:

> "5. First, under section 6(3)(a), 'pure' public authorities (such as government departments, local authorities, or the police) are required to comply with Convention rights in all their activities, both when discharging intrinsically public functions and also when performing functions which could be done by any private body. So, for example, a local authority must as a pure public authority comply with the non-discrimination standards imposed by Article 14 of the Convention not only in its provision of public housing but also in its dealings with building contractors.
>
> 6. Second, under section 6(3)(b), those who exercise some public functions but are not 'pure' public authorities are required to comply with Convention human rights when they are exercising a 'function of a public nature' but not when doing something where the nature of the act is private (section 6(5)). So, for example, a private security firm would be required to comply with Convention rights in its running of a prison, but not in its provision of security to a supermarket. These bodies to which section 6(3)(b) applies have been termed 'hybrid' or 'functional' public authorities."

236. I note what Lord Mance said about this report in *YL v Birmingham City Council* [2008] 1 AC 95, [90], but I do not think these passages are controversial.

237. The relevant cases are *R (TH) v. Chapter of Worcester Cathedral* [2016] EWHC 1117 (Admin), [64], summarising the principles in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546; *YL,* supra; and *R (Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363.

238. In *Weaver*, supra, [27]-[28] the Court of Appeal said this about s 6:

> "27. The effect of these provisions is that some bodies, conventionally referred to as 'core authorities', are public authorities for all purposes. They must at all times act in accordance with Convention rights; subsection (5) is inapplicable to such bodies. By contrast, subsection (3)(b) identifies and brings within the scope of the 1998 Act what is termed a "hybrid authority", ie one which exercises both public and private functions. Where its acts are in issue, the relevant question is whether the nature of the act is private. If it is, then subsection (5) provides that it will not be deemed to be a public authority with respect to that particular act.
>
> 28. Accordingly, once it is determined that the body concerned is a hybrid authority—in other words that it exercises functions at least some of which are of a public nature—the only relevant question is whether the act in issue is a private act. Even if the particular act under consideration is connected in some way

> with the exercise of a public function, it may none the less be a private one. Not all acts concerned with carrying out a public function will be public acts. Conversely, it is also logically possible for an act not to be a private act notwithstanding that the function with which it is most closely connected is a private function, although it is difficult to envisage such a case. Such situations are likely to be extremely rare."

239. Ofsted does not submit that Cornerstone is a core public authority, but says that it is a hybrid public authority for the purposes of s 6 HRA 1998 because certain of its functions are functions of a public nature within s 6(3)(b). Also, it says that Cornerstone's act of declining to provide its services to gay or lesbian potential foster parents is not private in nature (Skeleton Argument, [74], [78]). Cornerstone maintains that it is not a hybrid public authority. It says, first, its functions are not of a public nature and second, in any event, the acts to which Ofsted objected in the Report are private in nature and are akin to the recruitment of employees (Skeleton Argument, [98], [107]).

240. In *Weaver*, supra, [35]-[38], Elias LJ distilled the following principles from the two leading House of Lords' decisions on s 6, namely, *Aston Cantlow,* supra*,* and *YL*, supra:

> "35 In my judgment, the following principles can be gleaned from these cases.
>
> (1) The purpose of section 6 of the 1998 Act is to identify those bodies which are carrying out functions which will engage the responsibility of the United Kingdom before the European Court of Human Rights. As Lord Nicholls put it in the *Aston Cantlow* case [2004] 1 AC 546, para 6: "The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights." Lord Rodger, at para 160, Lord Hope, at para 52, Lord Hobhouse, at para 87, and Lord Scott, at para 129, were to the same effect. (Unfortunately, as Lord Mance pointed out in *YL*'s case [2008] AC 95 after analysing the Strasbourg jurisprudence, the case law from the European Court of Human Rights provides no clear guidance for gleaning how that test should be applied in a case such as this, where there is no formal delegation of public powers.)
>
> (2) In conformity with that purpose, a public body is one whose nature is, in a broad sense, governmental. However, it does not follow that all bodies exercising such functions are necessarily public bodies; many functions of a kind historically performed by government are also exercised by private bodies, and increasingly so with the growth of privatisation: see Lord Nicholls in the *Aston Cantlow* case, at paras 7–8. Moreover,

this is only a guide since the phrase used in the Act is public function and not governmental function.

(3) In determining whether a body is a public authority, the courts should adopt what Lord Mance in *YL*'s case described, at para 91, as a "factor-based approach". This requires the court to have regard to all the features or factors which may cast light on whether the particular function under consideration is a public function or not, and weigh them in the round. There is, as Lord Nicholls put it in the *Aston Cantlow* case, at para 12, "no single test of universal application". Lord Bingham in *YL*'s case [2008] AC 95 observed, at para 5, that "A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case".

(4) In applying this test, a broad or generous application of section 6(3)(b) should be adopted: per Lord Nicholls in the *Aston Cantlow* case, at para 11, cited by Lord Bingham in *YL*'s case, at para 4, and by Lord Mance, at para 91.

(5) In the *Aston Cantlow* case [2004] 1 AC 546 Lord Nicholls said, at para 12, that the factors to be taken into account: "include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service." Some of these factors were the subject of more detailed analysis in *YL*'s case. I shall briefly deal with them.

(6) As to public funding, it was pointed out that it is misleading to say that a body is publicly subsidised merely because it enters into a commercial contract with a public body: *YL*'s case [2008] AC 95, per Lord Scott, at para 27 and Lord Neuberger, at para 141. As Lord Mance observed, at para 105:

"Public funding takes various forms. The injection of capital or subsidy into an organisation in return for undertaking a non-commercial role or activity of general public interest may be one thing; payment for services under a contractual arrangement with a company aiming to profit commercially thereby is potentially quite another."

To similar effect, Lord Neuberger opined, at para 165, that

"it seems to me much easier to invoke public funding to support the notion that service is a function of 'a public nature' where the funding effectively subsidises, in whole or in part,

the cost of the service as a whole, rather than consisting of paying for the provision of that service to a specific person."

(7) As to the second matter, the exercise of statutory powers, or the conferment of special powers, may be a factor supporting the conclusion that the body is exercising public functions, but it depends why they have been conferred. If it is for private, religious or purely commercial purposes, it will not support the conclusion that the functions are of a public nature: see Lord Mance in *YL*'s case, at para 101. However, Lord Neuberger thought, at para 167, that the "existence of a relatively wide-ranging and intrusive set of statutory powers … is a very powerful factor in favour of the function falling within section 6(3)(b)" and he added, at para 167, that it will often be determinative.

(8) The third factor, where a body is to some extent taking the place of central government or local authorities, chimes with Lord Nicholls's 374observation that generally a public function will be governmental in nature. This was a theme running through the *Aston Cantlow* speeches, as Lord Neuberger pointed out in *YL*'s case, at para 159. That principle will be easy to apply where their powers are formally delegated to the body concerned.

(9) The fourth factor is whether the body is providing a public service. This should not be confused with performing functions which are in the public interest or for the public benefit. As Lord Mance pointed out in *YL*'s case, at para 105, the self-interested endeavour of individuals generally works to the benefit of society, but that is plainly not enough to constitute such activities public functions. Furthermore, as Lord Neuberger observed, at para 135, many private bodies, such as private schools, private hospitals, private landlords and food retailers, provide goods or services which it is in the public interest to provide. This does not render them public bodies, nor their functions public functions. Usually the public service will be of a governmental nature.

36 Their Lordships also identified certain factors which will generally have little, if any, weight when determining the public status. First, the fact that the function is one which is carried out by a public body does not mean that it is a public function when carried out by a potentially hybrid body. The point was powerfully and cogently made by Lord Scott in *YL's* case [2008] AC 95, paras 30–31. He highlighted the anomalies and absurdities that would result if this were the case. Second, it will often be of no real relevance that the functions are subject to detailed statutory regulation. Again, as Lord Neuberger pointed out in *YL*'s case, at para 134:

> "… the mere fact that the public interest requires a service to be closely regulated and supervised pursuant to statutory rules, cannot mean the provision of the service, as opposed to its regulation and supervision, is a function of a public nature. Otherwise, for example, companies providing financial services, running restaurants, or manufacturing hazardous materials, would ipso facto be susceptible to be within the ambit of section 6(1)."
>
> 37 Third, it is only of limited significance that the function will be subject to the principles of judicial review. The purpose of attaching liability under section 6 of the 1998 Act is different to the purpose of subjecting a body to administrative law principles, and it cannot be assumed that because a body is subject to one set of rules it will therefore automatically be subject to the other. So although the case law on judicial review may be helpful, it is certainly not determinative: see Lord Hope in *Aston Cantlow* [2004] 1 AC 546, para 52, cited with approval by Lord Mance in *YL*'s case [2008] AC 95, para 87.
>
> 38 It is also necessary to mention a Court of Appeal decision, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 in which the court held that the RSL under consideration in that case was a public authority with respect to the exercise of its functions. This was, however, principally because the body was set up at the behest of a local authority which exercised considerable control over its activities. In *YL*'s case [2008] AC 95 both Lord Mance, at para 87, and Baroness Hale, at para 61, observed that this was not a proper basis for reaching that conclusion since the court focused on the historical ties and did not apply a functional test. However, they did not indicate whether the decision itself 375was correct notwithstanding the defective reasoning. Accordingly, I do not gain any assistance from that case."

241. At [39]-[41] under the heading 'What is a private act ?', Elias LJ said:

> "39 In both the *Aston Cantlow* case and *YL*'s case there was some discussion whether, even if the relevant functions were public functions, the particular acts in issue were private acts. In the *Aston Cantlow* case [2004] 1 AC 546, all of their Lordships except Lord Scott expressed the view that the act of enforcing liability by the parochial church council was a private act. Lord Nicholls observed, at para 16, that the acts taken by the church council to compel the repair of the church was no more a public act than would be the enforcement of a restrictive covenant. Lord Hope held that the liability to repair the chancel arose as a matter of private law from the ownership

> of glebe land. He said, at para 64, that the "nature of the act is to be found in the nature of the obligation which the [parochial church council] is seeking to enforce. It is seeking to enforce a civil debt". Lord Hobhouse's speech was to the same effect on this point, at para 90. Lord Rodger also considered that enforcing the liability was not a public function. He appears to have treated the act and the function as the same. Lord Scott dissented on this point. He held that the parochial church council was a hybrid public authority because the act of enforcing the liability to pay was a public function. Again, he did not draw any distinction between the concepts of function and act in this context.
>
> 40 In *YL*'s case [2008] AC 95 the majority held that the act of moving the claimant out of the home was a private act. Again, emphasis was placed on the private source of power in issue. Lord Scott, with whose opinion Lords Mance and Neuberger agreed, commented, at para 34, that the notice to terminate the tenancy agreement was a "contractual provision in a private law agreement" which in his view "could not be thought to be anything other than private". Lord Mance, although not expressly referring to section 6(5), likewise held, at para 120, that the "source and nature of Southern Cross' activities differentiates them from any 'function of a public nature'". Lord Neuberger did not address this issue directly.
>
> 41 I would draw these tentative propositions from this analysis. First, the source of the power will be a relevant factor in determining whether the act in question is in the nature of a private act or not. Second, that will not be decisive, however, since the nature of the activities in issue in the proceedings is also important. This leads on to the third and related proposition, which is that the character of an act is likely to take its colour from the character of the function of which it forms part."

242. In *TH*, supra, Coulson J (as he then was) said at [59] that there were three questions to be considered:

   a. Is the body a 'core' public authority ?

   b. Is the body a 'hybrid' public authority ?

   c. Is the particular act in question private in nature ?

243. At [64] he said that he derived the following key issues from *Aston Cantlow,* supra, and *YL,* supra, in relation to the first two of these questions:

   a. Is the body performing a task which a 'core' public authority is under a duty to perform, and which has been delegated to it ?

b. To what extent is the function of a governmental nature and/or a part of public administration ?

c. Does the body have any special statutory powers in relation to the function in question ?

d. To what extent is the body supported or subsidised from public funds ?

e. To what extent is the body democratically accountable ?

f. Would the allegations, if made against the United Kingdom, render it in breach of its international law obligations ?

244. Applying these criteria, I have reached the conclusion that Cornerstone is a hybrid public authority within s 6(3)(b) HRA 1998. That is for the following reasons.

245. First, I conclude that it is plainly the case that Cornerstone, when it places 'looked after' children with foster parents, performs a task which the local authority, as a core public authority (see *Aston Cantlow*, supra, [7]) is under a duty to perform, but which it has delegated to Cornerstone in respect of those children pursuant to statutory powers. The statutory context and language is vital. As I explained earlier, a local authority has a statutory responsibility towards such children, which it can fulfil in various ways. One of those ways is by using the services of IFAs such as Cornerstone. The CSA 2000 makes provision for the registration and regulation of fostering agencies. Section 4(4)(a) CSA 2000 provides that a fostering agency is an undertaking which consists of or includes 'discharging functions of local authorities' in England in connection with the placing of children with foster parents. I cannot see that, where a statutory provision provides that a private entity can discharge the functions of a local authority, that the private entity can be doing anything other than exercising a public function for the purposes of s 6 HRA 1998. Also of relevance is reg 26 of the Care Planning Regulations, which is entitled, 'Independent fostering agencies – discharge of responsible authority functions'. It provides that a responsible authority (ie, the local authority looking after the child) may make arrangements in accordance with reg 26 for the duties imposed on it as responsible authority by reg 14(3) ('Termination of placement by the responsible authority') and reg 22 ('Conditions to be complied with before placing a child with a local authority foster parent') to be discharged on their behalf by a registered person. In short, to use the language of Lord Nicholls in the *Aston Cantlow* case, supra, [12], Cornerstone is 'taking the place of' local authorities when it places foster children with foster parents.

246. For the same reasons, the function of placing looked after children with foster parents is part of the public administrative duties of a local authority provided for and regulated by a number of different primary and secondary statutory provisions.

247. As to the third of Coulson J's criteria, the powers of an IFA are underpinned by a range of statutory powers including the CSA 2000, the Fostering Regulations and the Care Planning Regulations. For example, Part 5 of the Fostering Regulations gives fostering agencies the power to approve (or not) potential foster parents.

248. So far as the next factor, funding, is concerned, I consider this to be a neutral factor so far as fostering arrangements are concerned. Cornerstone enters into agreements with local authorities when it places a child with foster parents. It therefore does not receive an injection of capital, or a subsidy, the point made by Lord Mance in *YL*, supra, [105]. In general terms, it receives individual payments under individual contractual arrangements (albeit, on a charitable and not for profit basis).

249. In relation to democratic accountability, Cornerstone itself as a private body is not democratically accountable in the way that a local authority is. However, it is susceptible to judicial review (cf (*R (Raines) v Orange Grove Fostering Agency* [2016] EWHC 1887 (Admin)) and so is subject to outside scrutiny in that sense. In saying this, I have not overlooked the *dicta* above which make clear that this factor is not determinative. It is, however, at least relevant in the context of what is, as Lord Mance said in *YL,* supra, [91], a 'factor-based approach'. At a minimum, it weighs in favour of, rather than against, the conclusion that I have reached.

250. As to the last factor, it seems to me that the other factors taken together mean that the United Kingdom would be responsible at the Strasbourg level in relation to a human rights claim arising from the placement of a foster child with a foster parent. In *EB v France* [2008] 1 FLR 850, Application no. 43546/02, the Grand Chamber of the ECtHR held that the refusal to authorise an adoption application by a woman in a same-sex relationship, on the basis of her sexuality, amounted to a violation of Article 14 and 8 of the Convention. In that case the decision was taken by a state official, but once it is accepted, as it must be for the reasons I have given, that in England local authorities can delegate their functions to private agencies such as Cornerstone and invest them with powers which would otherwise be exercised by the local authority, then it follows that the United Kingdom would be responsible before the ECtHR in respect of a claim of a human rights violation by the private agency.

251. Cornerstone relied heavily on *YL*, supra, in support of its argument that it does not exercise public functions. In that case Mrs YL was an 84-year-old suffering from Alzheimer's disease. Under s 21 of the National Assistance Act 1948 the local authority had a duty to make arrangements for providing her with residential accommodation. The Act provided the Council could do that in various ways, including by contracting with private accommodation providers. Pursuant to its powers under s 26, the Council contracted with a private company, Southern Cross, an independent provider of health and social care services, for Mrs YL to be placed in one of its care homes. Mrs YL's fees were partly met by the Council and partly by her daughter. Problems developed and the company sought to terminate the contract for Mrs YL's care and remove her from the home. Mrs YL through her litigation friend commenced proceedings seeking, *inter alia*, a declaration that the company, in providing accommodation and care for her, was exercising public functions within s 6(3)(b) of the HRA 1998 and would breach her rights under Articles 2, 3 and 8 of the Convention were it to move her out of the home. The judge held as a preliminary issue that the company was not exercising a public function within the ambit of s 6(3)(b) and the Court of Appeal upheld that decision.

252. By a bare majority the House of Lords (Lords Scott, Mance and Neuberger in the majority; Lord Bingham and Baroness Hale dissented) upheld the Court of Appeal's decision and dismissed Mrs YL's appeal. All three of their Lordships in the majority

gave lengthy speeches (as did the dissenters) however I do not think it necessary to lengthen this already lengthy judgment by analysing them in detail. But their essential reasoning was that the relationship between Mrs YL and the company was a private contractual one, and the fact that some of her fees were paid by the Council, which had a statutory duty towards her under the 1948 Act, did not convert the company's function in providing her with accommodation into a public function for the purposes of s 6(3)(b) HRA 1998.

253. I consider that *YL* is plainly distinguishable from the present case and that it does not assist Cornerstone. As Lord Mance pointed out at [104] of his opinion, there was no question of the Council having delegated out its functions to the company so that it could be regarded as 'standing in the Council's shoes'. He said:

> "That powers or duties may in some circumstances be delegated to others is clear – witness the examples, given by Lord Nicholls [in *Aston Cantlow*], of privately run prisons and the regulation (at that time) of the solicitors' profession by the Law Society or the example of the private contactor entrusted with responsibility for enforcing the Road Traffic Regulation Act 1984."

254. Lord Mance then went to discuss other examples where a core public authority's powers or duties have been or can be delegated to private bodies pursuant to statutory authority, and concluded:

> "In such cases, where the acts or omissions are by statute attributed to the authority, there is a clear basis for regarding the authorized delegate as a person having functions of a public nature within s 6(3)(b). But no delegation of that sort exists in relation to the council's functions under s 21 of the 1948 Act."

255. The statutory provisions in relation to fostering do not make the acts of an IFA the acts of the local authority, but s 4(4)(a) of the CSA 2000 clearly provides for a delegation of local authority's powers in relation to fostering to IFAs, who do then 'stand in the authority's shoes'. The situation is therefore fundamentally different to the situation in *YL*, supra.

256. For these reasons, taken together, I am satisfied that Cornerstone exercises public functions in the placing of looked after children for fostering and adoption and thus that it is a hybrid authority for the purposes of s 6(1)(b) HRA 1998.

257. I turn to the question of whether the act of not recruiting gay men or lesbians as potential carers is a private act. In *YL,* supra, [25], Lord Scott emphasized that question – namely, the nature of the act under scrutiny - is a separate question from whether the body in question exercises public functions.

258. Initially I was attracted by the conclusion that the act of recruiting potential foster carers was a private act. This was on the basis that it involved a private arrangement between two private entities who were free to arrange the conditions of the bargain between themselves. Having thought further, however, I have concluded that this

function is preparatory to, and a necessary gateway for, the placing of the foster carer with a fostered child or young person under statutory powers which is, as I have said, a public function. There seems to me to be no basis to distinguish between the recruitment of potential foster carers as a private act, and the placing of a child or young person with such a carer as a public act. They are simply different stages of the same continuous process, which is public in its fundamental nature because it is a function which the local authority would otherwise have to undertake. If a local authority fostering service were to refuse an applicant on the grounds of his/her sexuality then they would unquestionably be performing a public act, and would be susceptible to challenge on Article 14/Article 8 grounds: see *EB v France,* supra. In my judgment the same conclusion must follow where that function is carried out by an IFA under statutory powers.

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.

260. For these reasons, I conclude that Cornerstone is a public authority to which the HRA 1998 applies.

Victims

261. The issue to which I now turn is whether Cornerstone is right in its submission that there are no actual or identifiable 'victims' whose Convention rights are engaged by the acts or omissions which Ofsted complains of. The term 'victim' comes from Article 34 of the Convention, which provides:

> "The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

262. It is also used in s 7(1) HRA 1998:

> "1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

263. Cornerstone contends that no rights of a victim are engaged by its recruitment policy pursuant to s 7 (Skeleton Argument, [108]-[111]). Alternatively, it contends that Ofsted has no standing to rely on any identified victims' rights under the Convention (Skeleton Argument, [112]-[116]).

264. In its Skeleton Argument Cornerstone cites a number of Strasbourg authorities which establish that the ECtHR does not consider the law in the abstract, and that a person must directly be affected by the measure complained of in order to bring an application under Article 34: see, eg, *Centre for Legal Resources on behalf of Valentin Campeanu v Romania* (2014) 37 BHRC 423, [96], [101].

265. Cornerstone also says that Ofsted as a governmental organization would not be entitled to bring a Convention claim and that, unlike the Equality and Human Rights Commission, which by s 30(3) of the Equality Act 2006 can rely on 7(1)(b) without the need for it to be a victim, Ofsted has not been given a similar power.

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.

267. Under ss 31 and 32 CSA 2000 Ofsted has powers and duties of inspection and reporting of IFAs. As I have explained, IFAs have to be registered with Ofsted, and by s 14 Ofsted:

> (1) … may at any time cancel the registration of a person in respect of an establishment or agency –
>
> (a) on the ground that that person has been convicted of a relevant offence;
>
> (b) on the ground that any other person has been convicted of such an offence in relation to the establishment or agency;
>
> (c) on the ground that the establishment or agency is being, or has at any time been, carried on otherwise than in accordance with the relevant requirements;"

268. 'Relevant requirements' are defined in s 14(3):

> "In this section 'relevant requirements' means -
>
> (a) any requirements or conditions imposed by or under this Part; and
>
> (b) the requirements of any other enactment which appear to the registration authority to be relevant."

269. Ofsted considers that the HRA 1998 is relevant to the running of an IFA. That is a matter for its expert judgment and I consider that it is plainly right. I reject Cornerstone's submissions that Ofsted has 'exorbitantly' interpreted the scope of s 14(3). Suppose an IFA succeeded in being registered by Ofsted and then subsequently changed its recruitment policy so that it would not recruit BAME carers for explicitly racist reasons. Ofsted would be signally failing in its duty if it were to decline to consider whether this meant that the IFA was being carried on otherwise than in accordance with the HRA 1998.

Does Cornerstone's recruitment policy breach the Convention ?

270. I turn to the question whether Cornerstone's recruitment policy breaches the Convention. Ofsted argues that by only recruiting evangelical Christian heterosexual carers, the policy breaches Article 14 of the Convention read with Article 8.

271. I set out the text of Article 14 earlier. It prohibits discrimination in relation to Convention rights on the listed grounds which expressly include religion, as well as on the grounds of 'other status'. Sexual orientation is an 'other status' for these purposes: *Steinfeld*, supra, [19].

272. The cases show that there are different ways of analysing what must be demonstrated in order to establish a violation of Article 14, although each analytical route crosses the same bridges and ends up in the same place. In *Ghaidan*, supra, [133] – [134], Baroness Hale analysed the requirements of Article 14 by reference to five questions:

> "133. It is common ground that five questions arise in an article 14 inquiry, based on the approach of Brooke LJ in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, para 20, as amplified in *R (Carson) v Secretary of State for Work and Pensions* [2002] 3 All ER 994, 1010, para 52; [2003] 3 All ER 577. The original four questions were: (i) Do the facts fall within the ambit of one or more of the Convention rights? (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (iii) Were those others in an analogous situation? (iv) Was the difference in treatment objectively justifiable? Ie, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?
>
> 134. The additional question is whether the difference in treatment is based on one or more of the grounds proscribed - whether expressly or by inference - in article 14. The appellant argued that that question should be asked after question (iv), the respondent that it should be asked after question (ii). In my view, the *Michalak* questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification.

> If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided."

273. In *Steinfeld*, supra, at [20] the Supreme Court summarised the relevant principles on justification (question (iv) of Baroness Hale's questions in *Ghaidan*, supra), under Article 14 as follows:

    a. The burden of proving justification is on the respondent (in this case, that means Cornerstone).

    b. It is not the scheme as a whole which must be justified but its discriminatory effect.

    c. Where the difference in treatment is based on sexual orientation, a court must apply 'strict scrutiny' to the assessment of any asserted justification: 'particularly convincing and weighty reasons to justify' it are required.

    d. The conventional four-stage test of proportionality (as outlined in cases such as *Bank Mellat,* supra, [74], and *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820, [33]), should be applied.

    e. In cases involving discrimination on the grounds of sexual orientation, to be proportionate, the measure must not only be suitable in principle to achieve the avowed aim, it must also be shown that it was necessary to exclude those of the specific sexual orientation from the scope of the application of the provision.

274. This analysis is consistent with decisions of the Strasbourg court such as *Salgueiro da Silva Mouta v Portugal* (1999) 31 EHRR 1055 and *EB v France*, surpra, which emphasise, to quote from [91] in the latter case:

    > "Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within article 8 …"

275. In *R (Carson) v. Secretary of State for Work and Pensions* [2006] AC 173, [64], Lord Walker said that this five-step approach might not always be the best one, and counselled caution about an over-rigid stepwise process, especially in the search for a comparator; see also Lord Hoffmann at [28] – [34].

276. In *R (JS) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] 1 WLR 1449, [8], Lord Reed took a four-stage approach, and said that the following must be shown to establish a breach of Article 14. There must be (a) a difference in treatment; (b) of persons in a relevantly similar position; (c) which does not pursue a legitimate aim, or (d) there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. He

derived this approach from what the Grand Chamber of the ECtHR said on the application of Article 14 in *Carson v United Kingdom* (2010) 51 EHRR 13, [61]:

> "… in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

277. In *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250, [16] – [47], Lord Wilson analysed the Article 14 issue arising in that case by way of three questions: (a) Did the difference in treatment fall within the ambit or scope of a Convention right ? (b) Did the difference in treatment arise on one of the grounds in Article 14 ? (c) Was the discrimination justified ? Lord Wilson considered the question of persons in a relevantly similar position at the second stage.

278. In *Re McLaughlin* [2018] 1 WLR 4250 Baroness Hale said at [15] that Article 14 raised four questions: (a) Do the circumstances 'fall within the ambit' of one or more of the Convention rights ? (b) Has there been a difference of treatment between two persons who are in an analogous situation ? (3) Is that difference of treatment on the ground of one of the characteristics listed or 'other status' ? (4) Is there an objective justification for that difference in treatment ?

279. These different modes of analysis simply demonstrate, as Baroness Hale said in *Ghaidan*, supra, and again in *In Re McLaughlin*, supra, [15], that there is room for overlap in the various questions that have to be considered in relation to Article 14 and that a rigidly compartmentalised approach is to be avoided.

280. That said, I propose to approach this issue by way of the five questions proposed by Baroness Hale in *Ghaidan*, supra, (the *Ghaidan* questions)

281. As to the first question, the approach is as follows. As its opening words make clear, Article 14 is not a freestanding prohibition of discriminatory treatment. It applies only in the context of securing the rights and freedoms set forth in the Convention. But this does not mean that the scope of Article 14 is limited to cases where there has been a breach of another Convention right. The ECtHR has held that, where a contracting state goes further than the Convention requires in protecting any of the rights set forth in the Convention, it must do so in a manner compatible with Article 14. In the phrase favoured by the Court, Article 14 applies to those additional rights falling 'within the ambit' of any Convention article for which the state has voluntarily decided to provide. Whilst there is no right to foster or adopt under the Convention, fostering and adoption fall within the ambit of Article 8: *EB v France*, supra, [41]-[51].

282. Taking questions (ii), (iii) and (v) of the *Ghaidan* questions together, it is plain that Cornerstone's policy will and does produce a difference in treatment in respect of Article 8 between a non-evangelical Christian applicant to Cornerstone, and a similarly placed evangelical Christian applicant (ie, there is a difference in treatment based on

religious belief), and between a heterosexual evangelical Christian applicant, and a gay or lesbian evangelical Christian applicant (ie, there is a difference in treatment based on sexual orientation).

283. None of this was really disputed by Cornerstone. The resolution of this issue depends on question (iv), objective justification. In this analysis it is necessary to consider religious belief and sexual orientation separately.

284. So far as discrimination on grounds of religious belief is concerned, I have concluded that Cornerstone's policy is objectively justified. That is because [2] of Sch 23 to the EA 2010, which I considered earlier, specifically allows religious organisations such as Cornerstone to discriminate on the grounds of religious belief in relation to various things, including the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices ([2(3)(c)]).

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.

286. It seems to me it would be fundamentally incompatible with Parliament's intention to hold under Article 14 that a religiously based fostering agency cannot restrict its services to applicants holding the same faith, when Parliament in [2] of Sch 23 has clearly and unambiguously permitted it to do so.

287. In its Skeleton Argument at [121] et seq, Cornerstone makes some elaborate submissions about religious freedom and the interplay between EA 2010 and the HRA 1998, including the application of various Latin maxims in relation to statutory interpretation. These submissions are helpful, but for the reasons I have given, I think the answer is straightforward. Proportionality is a sufficiently flexible concept that can take account of Cornerstone's religious freedoms. This court's assessment of the question of proportionality and objective justification under Article 14 must accommodate and take account of Parliament's intentions as expressed in specific, prior, legislation. It is trite that I have to allow a margin of discretion to the legislative branch in relation to this difficult area of social policy in determining whether it has struck a permissible balance. Some 10 years or so after the HRA 1998 came into force, Parliament enacted the EA 2010 with a full understanding of what the Convention and, in particular, Article 14 required. It decided that a fair and proportionate balance was to be struck between religious freedom and anti-discrimination in the terms in which [2] of Sch 23 struck it. As I have explained, it allows 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. That, in my view, is determinative. Cornerstone's carer recruitment policy, in so far as it discriminates on the grounds of religious belief, is objectively justified because Parliament, having considered the matter, can be taken to have

intended that that is so because it is permitted under the *lex specialis*, namely the EA 2010. Having regard to the margin of discretion I must afford it, I cannot say that Parliament was wrong.

288. I am fortified in this conclusion by the decision of the House of Lords in *R(Williamson) v Secretary of State for Education and Employment* [2005] AC 246, [50]-[51], in which the House of Lords upheld the legality of the statutory ban on corporal punishment in all schools and rejected the claim that the ban was incompatible with the right to religious freedom under Article 9 of the Convention. The claim was brought by parents and teachers who believed that corporal punishment was an aspect of their faith. In his speech, Lord Nicholls upheld the primacy of Parliament in relation to questions of social policy and the Convention, and how the relevant balance is to be struck:

> "50. Further, the means chosen to achieve this aim are appropriate and not disproportionate in their adverse impact on parents who believe that carefully-controlled administration of corporal punishment to a mild degree can be beneficial, for this reason: the legislature was entitled to take the view that, overall and balancing the conflicting considerations, all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable. On this Parliament was entitled, if it saw fit, to lead and guide public opinion. Parliament was further entitled to take the view that a universal ban was the appropriate way to achieve the desired end. Parliament was entitled to decide that, contrary to the claimants' submissions, a universal ban is preferable to a selective ban which exempts schools where the parents or teachers have an ideological belief in the efficacy and desirability of a mild degree of carefully controlled corporal punishment.
>
> 51 Parliament was entitled to take this course because this issue is one of broad social policy. As such it is pre-eminently well suited for decision by Parliament. The legislature is to be accorded a considerable degree of latitude in deciding which course should be selected as the best course in the interests of school children as a whole."

289. Ofsted argues that there is no inconsistency between the EA 2010 and the HRA 1998 because the former contains exemptions for what would otherwise be discriminatory conduct by religious organisations on the ground of religion or belief but that where the organisation is a public authority, Article 14 prevents unjustified discrimination. I do not accept that argument. Parliament carefully carved out an exception to the general exemption in [2(3)] by virtue of [2(10)]. If it had wished to provide that [2(3)] did not apply to a religious organisation that is a public authority for the purposes of the HRA 1998, it would have said so.

290. I turn to sexual orientation discrimination. On this issue, my conclusion largely flows from my earlier conclusions in relation to indirect discrimination and s 193. For the reasons I set out earlier, Cornerstone's policy is not objectively justifiable, in other

words, it is not a proportionate means of achieving a legitimate aim. Again, Parliament struck the proportionality balance in [2(10)] of Sch 23. Ofsted was therefore right to conclude that Cornerstone's blanket exclusion of gay and lesbian individuals from being carers violates Article 14 of the Convention, read with Article 8.

Did Ofsted's Report breach Cornerstone's Convention rights ?

291. The next issue is whether Ofsted's Report infringed Cornerstone's Convention rights. It relies upon Article 9 (freedom of religion), Article 10 (freedom of expression), and Article 11 (freedom of association) and Article 14 (non-discrimination). I propose to deal separately with the policy on the exclusive recruitment of evangelical Christians and the policy on non-recruitment of gay men and lesbians.

292. I do not consider that by requiring Cornerstone to alter its recruitment policy regarding religious belief – even though it had wrongly concluded that was required by the HRA 1998 - Ofsted interfered with Cornerstone's freedom to manifest its religious beliefs under Article 9(1). The question is whether Ofsted's Report interfered materially, that is, to an extent which was *significant in practice*, with Cornerstone's freedom to manifest its beliefs in this way: *Williamson*, supra, [39] (emphasis added).

293. The first question is whether Cornerstone's belief that in order to be consistent with its beliefs it must only recruit evangelical Christians as potential carers engages Article 9(1) at all. Article 9(1) is not engaged unless Cornerstone's recruitment policy is within the scope of the protection Article 9(1) affords to the manifestation of belief. As to this, the Strasbourg jurisprudence has consistently held that Article 9(1) does not protect every act motivated or inspired by a religion or belief. Article 9(1) does not 'in all cases' guarantee the right to behave in public in a way 'dictated by a belief': see, for example, the decision of the ECtHR regarding the wearing of an Islamic headscarf in *Sahin v Turkey* (2005) 44 EHRR 99, [66]; *Williamson*, supra, [30]. In the language of the Strasbourg jurisprudence, in exercising their freedom to manifest their beliefs an individual 'may need to take his specific situation into account': see *Kalaç v Turkey* (1997) 27 EHRR 552, 564, [27]; *Williamson*, supra, [38].

294. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only distantly connected to a precept of faith fall outside the protection of Article 9(1). 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. One example might be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form.

295. The relevant Strasbourg case law was summarised by the Court of Appeal in *London Borough of Islington v Ladele* supra, [54]-[59], which concerned the refusal of a Council registrar to conduct same sex civil partnership ceremonies on the grounds of her professed Christian beliefs:

> "54. Article 9(1) provides that everyone has "the right to freedom of thought, conscience and religion" and to manifest that religion, but article 9(2) states that the right to manifest religion or beliefs "shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society" for, inter alia, "the protection of the rights and

freedoms of others". It is clear that the rights protected by the article are qualified, and that it is only beliefs which are "worthy of respect in a democratic society and are not incompatible with human dignity" which are protected: *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, para 36. As Lord Hoffmann put it in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, para 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."

55. This appears to me to support the view that Ms Ladele's proper and genuine desire to have her religious views relating to marriage respected should not be permitted to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community. This assessment of the assistance to be obtained from article 9 in the present case is reinforced if one looks a little more closely at decisions of the Strasbourg court.

56. In *Pichon and Sajous v France*, Reports of Judgments and Decisions, 2001-X p 371 the Strasbourg court pointed out: "the main sphere protected by article 9 is that of personal convictions and religious beliefs" although it "also protects acts that are closely linked to these matters such as acts of worship or devotion forming part of the practice of a religion or a belief."

Accordingly, the article did not protect pharmacists who claimed that their "religious beliefs justified their refusal to sell contraceptive pills" as "the sale of contraceptives is legal and occurs … nowhere other than in a pharmacy", and the pharmacists could "manifest [their] beliefs in many ways outside the professional sphere".

57. This seems consistent with *C v United Kingdom* (1983) 37 DR 142 where the Commission declared inadmissible a claim by a Quaker that he should not be required to pay tax in so far as it was used to finance weapons research, on the grounds that it would infringe his article 9 rights. The Commission said, at p 147, that the article "primarily protects the sphere of personal beliefs and religious creeds, i e, the area which is sometimes called the *forum internum*". Accordingly, as it went on to explain, article 9 "does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief".

58. Accordingly, in *Sahin v Turkey* (2005) 44 EHRR 99 the Grand Chamber held that there had been no violation of article

> 9 when a university refused admission to lectures or tutorials, and refused enrolment on courses, to students with beards or Islamic headscarves. In para 108, the Grand Chamber said that the need "to maintain and promote the ideals and values of a democratic society", in that case "the principle of secularism" (para 116), can properly lead to "restrict[ing] other rights or freedoms … set forth in the Convention" (in that case the wearing of beards and headscarves for religious reasons). In para 105, the Grand Chamber endorsed the proposition that "article 9 does not protect every act motivated or inspired by a religion or belief …" Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.
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> 59 By contrast, decisions of the Strasbourg court such as *Salgueiro da Silva Mouta v Portugal* (1999) 31 EHRR 1055 and *EB v France* (2008) 47 EHRR 509 emphasise, to quote from para 91 in the latter case: 'Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within article 8 …' It is not suggested that, by permitting Ms Ladele not to officiate at civil partnerships, Islington would have infringed anyone's rights under the Convention, but observations such as these demonstrate the importance which the Convention should be treated as ascribing to equality of treatment irrespective of sexual orientation."

296. In *Eweida v United Kingdom* (2013) 57 EHRR 8, [81]-[82], which concerned the visible wearing of a cross at work by an airline employee, the Strasbourg Court said:

> "The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see *Bayatyan v. Armenia* [GC], no. 23459/03, § 110, ECHR 2011; *Leela Förderkreis e.V. and Others v. Germany*, no. 58911/00, § 80, 6 November 2008; *Jakóbski v. Poland*, no. 18429/06, § 44, 7 December 2010). Provided this is satisfied, the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (see *Manoussakis and Others v. Greece*, judgment of 26 September 1996, Reports 1996-IV, p. 1365, § 47; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos 41340/98, 41342/98, 41343/98 and 41344/98, § 1, ECHR 2003-II).
>
> 82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act

> which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1 (see *Skugar and Others v. Russia* (dec.), no. 40010/04, 3 December 2009 and, for example, *Arrowsmith v. the United Kingdom*, Commission's report of 12 October 1978, Decisions and Reports 19, p. 5; *C. v. the United Kingdom,* Commission decision of 15 December 1983, DR 37, p. 142; *Zaoui v. Switzerland* (dec.), no. 41615/98, 18 January 2001). 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 (see *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, §§ 73-74, ECHR 2000-VII; *Leyla Şahin,* cited above, §§ 78 and 105; *Bayatyan*, cited above, § 111; *Skugar*, cited above; *Pichon and Sajous v. France* (dec.), no. 49853/99, *Reports of Judgments and Decisions* 2001-X)."

297. This passage makes clear that whether there is sufficiently close nexus between the act in question and the religious belief is one of fact. On the facts of this case, I do not find that nexus made out. 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.

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).

302. But if I am wrong about that, 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.

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.

304. If I am wrong about that, then I accept that the requirement imposed by Ofsted is an interference with Cornerstone's Article 9(1) rights. The question, then, is whether the

interference is justified by Article 9(2). There is no doubt the requirement in question was done in pursuance of a legitimate aim, namely the protection of the rights and freedoms of gay men and lesbians. The central question is whether this requirement is necessary in a democratic society, ie, whether it is proportionate.

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 [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, [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 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.

306. For the same reasons, I reject Cornerstone's claims under Articles 10, 11 and 14, to the extent that Ofsted's Report engaged them. In relation to religious discrimination, there has not been any interference on the facts. In respect of sexual orientation, any interference is justified and proportionate under Articles 10(2) and 11(2). Article 14 was only faintly relied upon and not really pleaded out by Cornerstone, but to the extent it is engaged then I find that any discrimination is proportionate for the reasons that I have given.

Did the Report breach Ofsted's Guidance (SCCIF) ?

307. I turn to Cornerstone's final ground of challenge. It contends that Ofsted failed to have regard to, and did not act in accordance with, the guidance in the SCCIF (Skeleton Argument, [142-143]). I do not consider there is anything in this point.

308. The SCCIF provides in [13.1]:

> "… [w]hen imposing a requirement, inspectors must ensure that there is sufficient evidence to support the breach and that they are able to show that this is having an impact, or is likely to have an impact, on children's experiences and progress… In deciding whether to impose a requirement, the inspector must assess the extent of the impact, or potential impact, on the experiences and progress of children …"

309. Cornerstone's point is that the Report noted that the impugned recruitment policy:

> "… had not directly impacted on the experience and progress of children and young people in the cases seen, [but did not] ensure that prospective carers are considered without prejudice and with appropriate emphasis on their capacity to care for children."

310. Thus, Cornerstone argues, the requirements imposed by Ofsted were not justified. It points to the Report's conclusions that Cornerstone's Christian ethos was 'highly beneficial'. It also notes the Report's observation that the impugned recruitment policy:

> "… had not directly impacted on the experience and progress of children and young people in the cases seen … [but did not] ensure that prospective carers are considered without prejudice and with appropriate emphasis on their capacity to care for children."

311. Ofsted accepts that it is bound to follow SCCIF, as a national policy, unless there is good reason not to do so: cf *R(Ali) v London Borough of Newham* [2012] EWHC 2970 (Admin), [39-41]. Here, Ofsted considers that an important regulatory principle, namely non-discrimination in the activities carried out by an IFA, is pursued by the imposition of the requirements in the Report, notwithstanding the lack of direct impact on the children.

312. I accept Ofsted's submission on this point. Notwithstanding the lack of direct effect on children and young people, Ofsted was entitled to conclude that the need to ensure lack of discrimination in the recruitment of carers necessitated the recommendations that it made (subject to its wrong conclusion on the HRA 1998 and religious discrimination). Whether this concern amounted to a good reason for departing from SCCIF was a matter for Ofsted's judgement as the expert regulatory body, and I am unable to say that its decision was wrong or irrational. I therefore reject this ground of challenge.

Conclusions

313. I can therefore summarise my principal conclusions as follows:

    a. Ofsted did not dispute that Cornerstone's recruitment policy *is not* unlawfully discriminatory under the EA 2010 on the grounds of religious belief. Cornerstone is permitted to exclusively recruit evangelical Christian carers because of the exemption in [2] to Sch 23 to the EA 2010 for religious organisations.

b. Cornerstone's recruitment policy *is* unlawfully discriminatory in breach of s 29(1) of the EA 2010, alternatively, s 29(6), in both cases read with s 13 and/or s 19, insofar as it requires applicants to refrain from 'homosexual behaviour'. The policy unlawfully discriminates, directly or indirectly, against gay men and lesbians. The disapplication of the general exemption in [2(3)] of Sch 23 provided by [2(10)] applies because Cornerstone performs functions on behalf of public authorities pursuant to contract.

c. Cornerstone's recruitment policy *does not* violate Article 14 of the Convention read with Article 8, as given effect by s 6 of the HRA 1998, insofar as it requires carer applicants to be evangelical Christians.

d. Cornerstone's recruitment policy *does* violate Article 14 of the Convention read with Article 8, as given effect by s 6 of the HRA 1998, insofar as it requires carer applicants to be heterosexual. Its policy unlawfully discriminates against gay men and lesbians.

e. Ofsted's Report *does not* violate Cornerstone's Convention rights under Articles 9 – 11 and Article 14 of the Convention.

f. Ofsted's Report is not unlawful as being in breach of SCCIF.