



Neutral citation number: [2023] UKFTT 563 (GRC)

Case Reference: CA/2021/0013

First-tier Tribunal
(General Regulatory Chamber)
Charity

Heard at Field House, London
Heard on: 9-16 September 2022, 7-8 November 2022
Decision given on: 6 July 2023

Before

TRIBUNAL JUDGE GRIFFIN
TRIBUNAL JUDGE NEVILLE

Between

MERMAIDS

Appellant

and

(1) THE CHARITY COMMISSION FOR ENGLAND & WALES
(2) LGB ALLIANCE

Respondents

Representation:

For the Appellant: Mr M Gibbon KC and Mr T Loveday, counsel instructed by the Good Law Practice

For the First Respondent: Mr I Steele, instructed by the Charity Commission for England & Wales

For the Second Respondent: Ms K Monaghan KC and Ms A Reindorf KC, instructed by Doyle Clayton

Decision: The appeal is dismissed.

REASONS

Introduction

1. We have dismissed this appeal because we have decided that the law does not permit Mermaids to challenge the decision made by the Charity Commission to register LGB Alliance as a charity. We considered the extent of Mermaids' legal rights and whether

they were affected by that decision. Mermaids is a “legal person”, and it is that charity’s legal rights with which we are concerned and not those of the people they support.

2. The topics on which we have heard evidence, and the broader implications both for individuals and society, are important matters of public interest on which strong views are held and publicly expressed. We are conscious that this case was regarded by some as being about the rights of gender diverse people or about the rights of gay, lesbian and bisexual people, but it is not; the focus of this decision is upon a small part of the Charities Act 2011 and what it means, applied in the circumstances of this case.
3. While the hearing took place in a physical courtroom in London, it was made available to observe online. Over 200 members of the public chose to do so. Given that this is a small Tribunal, the limitations of the technology available, and the need for compliance with the relevant legal guidance, we give our sincere thanks to the hard work of the Tribunal’s administrative staff in enabling this exercise in open justice. We are further grateful to all parties, witnesses and counsel for their earnest participation in the hearing. We have found the written and oral submissions of all counsel of great assistance in taking our decision.
4. For the reasons set out at paragraph 15 below, although we were invited to indicate what our decision would have been on the broader issues we have decided not to do so. We also acknowledge the significant delay in providing this decision, to which those matters contributed. We recognise the uncertainty and other difficulties that have no doubt been faced by the parties as a result, and ask that they accept our sincere apologies.

The decision under appeal

5. The Appellant (“Mermaids”), a registered charity, appeals by way of a notice dated 1 June 2021, against the Charity Commission’s decision made on 20 April 2021 (“the Decision”) to register LGB Alliance (“LGBA”) as a charity.
6. The First Respondent (“the Commission”) is the statutory regulator and registrar of charities in England and Wales under the Charities Act 2011 (“the 2011 Act”). LGBA, a company limited by guarantee, has been joined as a Second Respondent with the agreement of Mermaids and the Commission and was initially styled as “Trustees of LGB Alliance”, but this was amended to substitute the name of the company by consent on the first day of the hearing before us.
7. The decision under appeal (“the Decision”) was made by the Commission under section 30 of the 2011 Act. Section 30 requires that every charity must be registered (subject to exemptions and exceptions that are not applicable to this case).
8. A “charity” is an institution which is established for charitable purposes only, and falls under the High Court’s jurisdiction on charities, see sections 1-4 of the 2011 Act.

9. It is relevant to note that section 34 of the 2011 Act requires the Commission to remove from the register any institution which it no longer considers is a charity and any charity which has ceased to exist or does not operate.

Powers of the Tribunal

10. The appeal against the Decision is a full merits appeal. This means that we must consider afresh whether it is appropriate to register LGBA as a charity and we may take into account evidence which was not available to the Commission, see section 319(4) 2011 Act as follows:

“In determining such an appeal, the Tribunal–

(a) must consider afresh the decision, direction or order appealed against, and

(b) may take into account evidence which was not available to the Commission.”

11. The Tribunal’s powers are specified in section 319(5):

“(5) The Tribunal may –

(a) dismiss the appeal, or

(b) if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of Schedule 6.”

12. The relevant ‘corresponding entry’ in column 3 of Schedule 6 gives the Tribunal the following powers if it allows the appeal:

“Power to quash the decision and (if appropriate) –

(a) remit the matter to the Commission

(b) direct the Commission to rectify the register.”

Issues in the appeal

13. There were two issues in the appeal:

- a. Whether Mermaids has the legal right (known as “standing”) to challenge the decision of the Commission to register LGBA as a charity; and
- b. If it does, whether LGBA is a charity as defined by the 2011 Act.

14. It was recognised at an early stage of the appeal that a significant amount of the parties’ evidence would be relevant to both issues. For that reason, on 10 December 2021 Judge McKenna decided that the first issue would not be separately determined as a preliminary issue, and directions were made leading to a hearing.

15. At the hearing before us, all parties expressed their wish that the Tribunal would set out its hypothetical conclusion on the second issue even if it ruled against Mermaids

on the first. We recognise the significant benefits of avoiding a re-hearing of the second issue should our decision on the first be subsequently re-opened. Nonetheless, and notwithstanding significant time being spent on deliberation in trying to do so, the two members of the panel hearing this appeal have been unable to reach agreement on whether, if Mermaids does have standing, LGBA is a charity within the meaning of the 2011 Act. While a mechanism does exist to resolve a situation where a panel is not unanimous¹, it concerns the actual decision to be made by the Tribunal. We are unanimous that this appeal should be dismissed on the issue of standing in any event. In those circumstances we consider it inappropriate to set out our individual reasons on a hypothetical issue.

Standing to bring an appeal

16. Section 319 of the 2011 Act provides that, except in the case of a reviewable matter, an appeal may be brought to this Tribunal against any decision, direction or order mentioned in column 1 of Schedule 6. There is no suggestion that the decision at the heart of this appeal is a reviewable matter.
17. The applicable part of column 1 of Schedule 6 that permits an appeal to be made to this Tribunal reads as follows:

“Decision of the Commission under section 30 or 34—

- (a) to enter or not to enter an institution in the register of charities, or*
- (b) to remove or not to remove an institution from the register.”*

18. Section 319(2) of the 2011 Act provides that an appeal may be brought by (a) the Attorney General or (b) “any person specified in the corresponding entry in column 2 of Schedule 6” of the 2011 Act.
19. In respect of a decision under section 30 to enter an institution in the Register, the entry states:

“The persons are –

 - (a) the persons who are or claim to be the charity trustees of the institution,*
 - (b) (if a body corporate) the institution itself, and*
 - (c) any other person who is or may be affected by the decision”*
20. Mermaids submits that it falls within (c) as “any other person who is or may be affected by the decision”.
21. That phrase also appears in section 36(1) as to the persons who may make objections to registration of an institution or apply for a registered charity to be removed from the register, but it is not defined in the 2011 Act. However, the phrase has been

¹ The First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, Article 8

considered in decisions of this Tribunal and the Upper Tribunal in decisions concerned with applications made under section 34 of the 2011 Act to remove or not to remove a charity from the register.

22. Nicholson v Charity Commission CA/2014/0004, CA/2014/0006 and CA/2014/0007, are the First-tier Tribunal decisions in the litigation that became known as Nicholson (No. 1). In those cases Judge Alison McKenna made a ruling² on the preliminary issue of whether the appellant was a person entitled to appeal to the Tribunal in respect of the Commission's decision of 31 January 2014 not to remove certain charities from the Register of Charities made under section 34 of the 2011 Act. Thus the same part of Schedule 6 applied to regulate who had the right of appeal to this Tribunal about the decision that was made.

23. Judge McKenna was referred to the decision of Lord Carlile of Berriew QC (sitting as a Deputy High Court Judge) in R (on the application of International Peace Project 2000) v Charity Commission for England and Wales [2009] EWHC 3446 (Admin), in which the Charity Commission opposed an application for judicial review on the basis that the alternative remedy of an application to this Tribunal was available to the claimant. It concerned the provisions of the Charities Act 1993, which included a similar provision to that with which we are concerned in the 2011 Act. As Lord Carlile stated in paragraph 21:

"The persons who may apply to the Tribunal, include ... "(c) any other person who is or may be affected by the decision". The decision, of course, is the decision of the Charity Commission to remove or not to remove an institution from the Register."

24. On the issue of whether the claimant would be able to apply to the Tribunal in the circumstances of that case, Lord Carlile commented that were he required to finally determine the point he would adopt the submission of the Commission and find that:

"A person who is or may be affected, in my judgment, means someone who has an interest that is materially greater than, or different from, the interests of an ordinary member of the public."

25. Lord Carlile went on to say that this is a question of fact and not law and that, in his view, and although it would be a matter for the Commission to decide, in the case he was considering the claimant was not a person who is or may be affected by the decision. The claimant happened to be interested in the subject area and objects of the charity in question, and did not agree with the Commission's conclusion, but this was insufficient to bring the claimant within the category of those who are or may be affected.

26. In the appeals she was considering (Nicholson No. 1), Judge McKenna decided she was not persuaded that, by virtue of being taxpayers, the appellants were persons who have "an interest that is materially greater than, or different from, the interests of an ordinary member of the public" in the decision which they sought to appeal. Judge McKenna concluded that a person who disagrees with the views or actions of

² Judge McKenna's decision is published at <http://charity.decisions.tribunals.gov.uk/>

a charity is not “affected” by its continued registration so as to pass the threshold for having standing in the Tribunal. As Judge McKenna pointed out, the key issue in column 2 of Schedule 6 to the 2011 Act is the relationship of the person who appeals to the decision itself.

27. In the case before Judge McKenna, Mr Nicholson had been in correspondence with the Commission about whether the registration of the charity should be removed and argued that he had standing based on being an “addressee” to whom the Charity Commission’s Decision was sent.
28. Judge McKenna gave permission to appeal her decision in Nicholson (No. 1) and it was considered by the Upper Tribunal in Nicholson v Charity Commission [2016] UKUT 198 (TCC), a decision of Asplin J (as she then was).
29. Having considered the context in which Lord Carlile adopted the test referred to above³ the Upper Tribunal went on to consider two other decisions of the First-tier Tribunal: Lasper v Charity Commission CA/2010/0006, a decision of Judge Rose (as she then was), and a further decision of Judge McKenna, Colman v Charity Commission CA/2014/0001 and CA/2014/0002.
30. In Lasper, Judge Rose decided that a person to whom a decision of the Commission was addressed was a person affected by the decision because “To hold otherwise would risk creating a category of decisions in which the Commission can make important findings of fact and law but which are effectively not open to challenge before the Tribunal.” She went on to indicate that in her judgement the threshold for establishing sufficient standing to bring a judicial review might well be a lower threshold than that required by the 2011 Act.
31. In Colman, Judge McKenna held that the question of whether a person is or may be affected by a decision of the Commission is highly fact sensitive, dependent on the nature of the decision made and the person’s relationship to the decision. She went on to indicate that “perceived risks” of financial loss and damage to reputation were “in principle” matters which could give a person an interest in a decision that was greater than that of an ordinary member of the public. Judge McKenna concluded that:

“in order for a person to be affected by a decision of the Charity Commission in the sense identified by Lord Carlile, there must be an identifiable impact upon that person’s legal rights at the time the order is made so as to merit a right of redress in the Tribunal. In order to be a person who “may” be affected by a decision of the Charity Commission, it seems to me that there would have to be an identifiable impact on that person’s legal rights which is sufficiently likely to occur to make it fair to allow them a right of appeal. In the particular circumstances of this case, I do not consider that the Appellant falls into either category.”

³ That is: whether the Appellants are persons who have “an interest that is materially greater than, or different from, the interests of an ordinary member of the public” in the decision which it is sought to appeal.

32. It is in this decision of Judge McKenna that the need for an identifiable impact on a person's 'legal rights' is first identified as necessary for a person to be "affected".
33. Considering the conflicting First-tier Tribunal decisions, Asplin J applied a purposive approach to the construction of the phrase "a person ... affected by the decision". She agreed with Judge McKenna's conclusions in Mr Nicholson's case that he could not be "a person ... affected by the decision" for the purposes of the 2011 Act as a result of being an addressee of the Commission's Registration Decision alone or in combination with the other matters upon which he relied. The case of Lasper was not approved.
34. From the judgment of Asplin J we therefore extract the following principles to be applied in relation to decisions whether a person is within the category of persons who have standing pursuant to paragraph (c) of the entry in column 2 of Schedule 6, or in other words, a "person who is or may be affected by the decision":
 - a. The category of persons in question in each case is not prone to a "definitive definition" and should be construed to connote circumstances in which the decision in question has a direct, or the potential for a direct, effect upon a person's legal rights.
 - b. The question is fact sensitive and must be considered in each case in the light of all the relevant circumstances.
 - c. In order to be a person affected by the decision, the Commission's decision itself must relate to the person in some way.
 - d. To be a person who has been affected the person's legal rights must have been impinged, altered or affected by the Commission's decision.
 - e. To be a person who "may" be affected, there must be an identifiable impact on the person's legal rights which is likely to occur.
 - f. It is insufficient that a person disagrees with the decision emotionally, politically or intellectually and as a result is affected emotionally and/or socially, however sincere their concerns.
 - g. The Attorney General has standing and is in a position to bring an appeal in the public interest but there is no public interest test encompassed with the statutory phrase, no matter what the public importance of determining whether a charity is in fact charitable.
 - h. The extent of a person's engagement in the Commission's decision-making process is not relevant to the question of whether they are or may be affected by the decision.
 - i. The fact that neither the Attorney General nor any other person with standing has challenged a decision is not relevant to the question of whether another

person has standing, whether or not they challenge the decision solely on their own behalf or as a “representative” of a broader section of the public.

35. The decision of Asplin J in Nicholson (No. 1) has been followed by this Tribunal in a later case brought by Mr Nicholson, not only in his own name but also in the names of Kholoud Al Ajarma and Annie O’Gara. The case of Nicholson and others v Charity Commission CA/2018/0011, 24 April 2019 has become known as Nicholson (No. 2).
36. In Nicholson (No. 2), Judge Holbrook considered each of the appellants’ standing to bring the case challenging a decision of the Commission not to remove the same charity from the register, as had been the subject of Nicholson (No. 1). In doing so he applied Nicholson (No. 1), which he described as having “clarified” the meaning of the expression “a person who is or may be affected by the decision”.
37. We are bound to consider whether Mermaids’ legal rights have been or may be impinged, altered or affected by the decision. Although the subject of some discussion, we were not directed to any definition of “legal right” in this context. All parties agreed that it would not be necessary to demonstrate an existing or potential cause of action, which would be the clearest indication that a person had or may have a legal right that had been impinged, altered or affected by the decision.
38. Judge McKenna’s comments in Colman to the effect that “perceived risks” of financial loss and damage to reputation were “in principle” matters which could give a person an interest in a decision that was greater than that of an ordinary member of the public must be regarded in the context of the case she was considering (see paragraph 17 of Colman) where she held that such risks as there were would exist regardless of the Commission’s decision in that case. The important factor is that it is the decision that creates the effect on the person’s legal rights.

The facts

39. While the Commission initially sought to defend the factual basis of its decision, by the time of the hearing it had decided to take a neutral view. Mermaids and LGBA each called witnesses. We have carefully considered their witness statements which stood as evidence in chief, with exhibits, and also the evidence given orally during the hearing. We are grateful to the parties for having arranged, and provided the Tribunal with, a transcript of the evidence. It is not possible, nor necessary, to set out a comprehensive account of that evidence, all of which has helpfully been disclosed by the parties into the public domain. The following summary is intended to provide an overview of the evidence we received and the findings of fact that we have made, relevant to our decision on standing, based on all the evidence we heard and the parties’ submissions.
40. Mermaids called Paul Roberts, the Chief Executive of LGBT Consortium, itself a registered charity. Paul Roberts’ evidence described the experience of Consortium, a network of LGBT+ organisations and its members to the effect that they believed that LGBA had always been exclusively concerned with promoting “anti-trans ‘gender critical’ beliefs”, lobbying for legal change in favour of their views and pushing back

against organisations who advocate for “trans-equality” and directed our attention to examples.

41. John Nicolson MP gave evidence for Mermaids, describing LGBA's political campaigning and the behaviour of LGBA and some of its supporters towards people who support trans rights. We should clarify that he is not the John Nicholson who brought the appeals in Nicholson (No. 1) and Nicholson (No. 2).
42. Dr Belinda Bell has been the Chair of Trustees at Mermaids since May 2019, the charity having been founded in 1995. Dr Bell described the objects of Mermaids as the relief of mental and emotional stress of all persons aged 19 years and under who are in any manner affected by gender identity issues, and their families, and to advance public education in the same. This work is delivered through partnerships and commercial arrangements with other organisations. Dr Bell described the reasons Mermaids had concerns about the activities of LGBA.
43. LGBA called Bev Jackson, Kate Harris and Eileen Gallagher. These witnesses described how LGBA had come to be created, the reasons for that and activities that had been undertaken since the organisation was established. They disagreed with the characterisation of the activities described by the witnesses called on behalf of Mermaids and drew our attention to other activities undertaken by LGBA, together with their opposition to the concept of gender identity and their belief that children should be unconstrained by gender stereotypes as to modes of dress, activities and personality. LGBA's stated objects include the elimination of discrimination on the grounds of sexual orientation, and Bev Jackson confirmed that LGBA consider this to refer to “same sex sexual orientation”, according to their belief that a person's sex is binary and immutable.
44. Our approach has been to identify the ways in which Mermaids says it has been affected by the decision to register LGBA as a charity.
45. The following chronology is not in dispute:
 - a. 22 October 2019 – There was a meeting in London at which an understanding was reached by the participants to set up LGBA;
 - b. 28 November 2019 – LGBA was registered as a company;
 - c. 13 March 2020 – LGBA applied to the Commission to be registered as a charity;
 - d. 29 April 2021 – The Commission published its decision to register LGBA as a charity.
46. Mermaids submits that the evidence demonstrates that LGBA:
 - a. In public, for example on social media, mischaracterises Mermaids' activities;
 - b. Encourages organisations not to support or work with Mermaids, including challenging their sources of funding;

- c. Makes media attacks on individuals and organisations who support or work with Mermaids.
- d. Has used, or intends to use, its charitable status not only to obtain:
 - i. Funding to further its above activities, whether by grants, donations or gift aid;
 - ii. Greater support and publicity for its programmes;
 - iii. Enhanced credibility for views with which Mermaids profoundly disagrees;

but also by doing so to increase the effectiveness of its activities that primarily seek to stop Mermaids' work and destroy its reputation and sources of funding.

- 47. There was no dispute that LGBA has a social media presence and cultivates its public profile. This activity is described by Mermaids as a campaign against them; LGBA disputes that characterisation and describes their activities in terms of facilitating the public debate in this area, by putting another point of view.
- 48. In our judgement, it is important to distinguish between the activities of LGBA the organisation and the activities of those who simply support its cause. A charity cannot be held responsible for the actions of a supporter, and it will not reflect on the charity unless they have in some way organised, endorsed or actively encouraged any such behaviour. Mermaids drew our attention to the actions of certain supporters, as we set out below.
- 49. It is also important to distinguish between activities by the pre-existing organisation that occurred before the organisation was registered and those after the registration Decision. That is not to say that the former is not capable of illuminating the rationale or motivation for later activities, and whether Mermaids "may be affected", but any alteration in the nature or volume of activities of the newly registered charity as compared to the non-registered organisation may itself demonstrate the effect or potential effect of the Commission's Decision. Indeed, the Commission itself can be seen as concerned that LGBA should alter its social media activities following registration, stating within the Decision itself:

37. *During the course of the registration case, the Commission noted some evidence of social media activity (information that was posted or re-posted on social media) by LGB Alliance and considered that some of the language used may be regarded as inflammatory and offensive. In addition, it was not immediately obvious how some of these postings furthered any of the LGB Alliance's purposes. The Commission was concerned that, although it promoted the rights of some groups, the activity appeared to involve, at times, demeaning or denigrating the rights (recognised by law) of others.*

38. *The Commission raised these concerns with LGB Alliance and in response LGB Alliance reviewed and revised its social media policy. LGB Alliance stated that it intended to adopt a less defensive and confrontational approach to social media engagement. The revised social media policy places a focus on the language and tone of the social media posts and states that staff must never: unlawfully discriminate; make offensive, abusive or threatening comments or harass or bully other people in any way or breach any laws or ethical standards.*

50. Having considered all the evidence, both the oral evidence we have heard and the documents placed before us, in light of the parties' submissions and on the balance of probabilities, we make the following findings of fact:

- a. Throughout their existence as an organisation, both before and after registration as a charity, LGBA has been politically active, being involved in political campaigns in different parts of the United Kingdom whether alone or in partnership with other organisations.
- b. Prior to registration as a charity LGBA used mainstream and social media to promote its views and publicise the work it had been doing. For example:
 - i. On 23 March 2020 LGBA tweeted that the "drive to medicalise gender non-conforming children" was "motivated by homophobia and funded by self-serving individuals, companies and organizations."
 - ii. On 23 April 2020 LGBA shared a tweet arguing that Mermaids "raisin d'etre is over" saying: "Excellent thread. Time to review the Lottery funding of a group which actively promotes transitioning of children under 18?" [BB1/143]
 - iii. On 5 May 2020, LGBA tweeted "Many groups/programmes are involved in the gender propaganda targeting children: Stonewall, Mermaids, Gendered Intelligence, No Outsiders, GIRES, Educate and Celebrate. There is profound homophobia at the heart of gender identity theory."
 - iv. On 10 June 2020 LGBA publicly criticised the actor Emma Watson for donating to Mermaids: "How embarrassing" [BB1/143]
 - v. On 19 June 2020 LGBA tweeted about a BBC Newsnight segment about GIDS saying: "These are the groups that refer kids to GIDS. How many people know that last year e.g. @Mermaids_gender received £500,000 from Nat. Lottery and @LGBTFoundation received £2.1 million in funds, including funds from Manchester & Salford City Council, DeptofHealth & @NHSuk [...] Most people have no idea this is going on. We urgently need to publicise this issue. Please donate to our fundraiser for an ad in a national newspaper. It's really expensive. Thank you!" [BB1/144]

- vi. On 21 June 2020 LGBA shared a letter to the Times which argued that: "The government must now pledge to remove lobby groups such as... Mermaids from children's healthcare and education" [BB1/149]
- vii. On 3 July 2020 LGBA shared on Twitter an article by one of their supporters, Jo Bartosch, which claimed that the trans daughter of Mermaids' CEO, Susie Green, was simply a homosexual boy who she had encouraged to transition, and that "having set her child on the trans path, Green is personally invested in defending juvenile cross-sex transition." [BB1/139]
- viii. On 4 July 2020 LGBA tweeted: "It is bad enough that @Mermaids_Gender continue to promote their trans affirmation model for kids with gender dysphoria, despite the @BBCNewsnight expose revealing that this often comes down to 'transing away the gay' [...] What is much worse, and quite frightening, is that @UKGOV jumps at their demands. Why is this? @10DowningStreet take action. #ListenToOtherVoices" [BB1/150]
- ix. On 4 July 2020, LGBA tweeted: "Mermaids is welcomed as an expert by govt departments. It is a consistent lobbying presence at Tavistock Clinic. In a @BBCNewsnight report of 18 June, the clinic's policy towards gender non-conforming kids is described by former GIDS clinicians as "transing away the gay" [...] It is time for a full parliamentary investigation into the influence of Mermaids on the NHS-funded work of the Tavistock GIDS Clinic, and of the leadership of the clinic where so many young LGB lives are being destroyed." [BB1/151]
- x. On 30 July 2020 LGBA tweeted: "We are pleased that the BBC has dropped Mermaids and other trans groups from its advice line: 'Mermaids advises schools, the police and social workers but has been accused of promoting gender reassignment for children" [BB1/151]
- xi. On 13 August 2020 LGBA tweeted: "We hope you are taking note, @lottery_uk, @Starbucks and all others who pledge support to #Mermaids. There is a scandal brewing here: "transing away the gay" is happening right now in our society and its happening to kids. #LGBIssue? You bet" [BB1/145]
- xii. On 16 October 2020 LGBA tweeted: "Why are @metpoliceuk [the Metropolitan Police] & @NationalHCAW [National Hate Crime Awareness Week] hosting Susie Green from @Mermaids_Gender on hate crime seminar? Grossly irresponsible. Mermaids has been thoroughly discredited for its active promotion of untested drugs on children, yet the police applaud Green's efforts. #FactNotFiction" [BB1/145]

- xiii. On 16 October 2020 LGBA stated (in response to a tweet from LGBT Foundation) that it was “[not] ethical to give children untested drugs & hormone treatment, nor to give girls double mastectomies” [BB1/141]
 - xiv. On 1 December 2020 LGBA criticised the BBC for interviewing Mermaids’ CEO Susie Green about anti-trans discrimination, alleging that she “has a record of spreading disinformation” [BB1/152]
- c. Representatives on behalf of LGBA met with politicians and communicated with them. For example:
- i. On 13 July 2020 Beverley Jackson and Kate Harris met with Kemi Badenoch (Minister for Equalities). A briefing note prepared by the Minister’s staff describe it as an “introductory meeting with the LGB Alliance to listen to their lobbying priorities”, which were: “Relationships and Sex Education guidance in schools, GRA reform, healthcare for young people who are questioning their gender, and diversity of thought on sex and gender identity.” In a section setting out “lines to take” in response, the note recorded that “for many years transgender people have used single-sex spaces in their acquired gender without issue. We have no interest in curtailing or policing this” [JN1/139-143].
 - ii. On 12 October 2020 Beverley Jackson met with the strategic policy adviser to Liz Truss (Minister for Women and Equalities) proposing an agenda which included discussions about “tightening up the provisions on single-sex spaces” and whether Stonewall would continue to be consulted by Government departments given that (according to LGBA) Stonewall “now opposes the policy of HM Gov” [JN1/114].
 - iii. LGBA emailed an official inviting them to a one-year anniversary meeting on 22 October 2020; the event was to feature discussion of the group’s priorities, which included “to lobby against legislation introducing gender self-ID” and “to lobby against the medicalisation of children with gender dysphoria” [JN1/118-120].
 - iv. On or around 11 March 2021, Kate Harris emailed Kemi Badenoch saying that “18 groups who share a niche belief in gender identity theory have set out to confuse the public and present you as being unsupportive of “LGBT” people. We will expose this as the nonsense it is” and assuring her that LGBA “have your back”. LGBA explained that they would be sending a letter to the Times in support of the Minister, and trying to get media coverage for their argument that conversion therapy “simply does not exist as a problem in the UK” other than “the conversion therapy of young LGB people to turn them into trans when they would be perfectly happy as LGB” [JN1/115]. On 12 March 2021 LGBA forwarded the Minister a copy of their letter to the Times, saying

that “we really hope this will put the cat amongst the pigeons and be helpful for the Government” [JN1/121-122].

- v. On 27 March 2021 LGBA emailed Baroness Barran requesting a meeting to discuss online abuse, saying that LGBA “are pleased to be working with GEO [Government Equalities Office], EHRC, the office of the Minister for Equalities and others to put forward our views on the importance of recognising biological sex” [JN1/128-129].
- vi. On 30 March 2021 LGBA wrote to all MPs about “stop transing the gay away”, their campaign to have gender-affirming healthcare classified as “conversion therapy”. The letter said the campaign was focused on the interests of “children and young people, particularly LGB young people” although it also said it concerned “young people who would grow up lesbian or gay”, rather than bisexual [JN1/144-145].
- d. In 2018-19 a group of organisations including LGBA campaigned to have funding removed from Mermaids. This campaign was not successful but resulted in uncertainty and inconvenience to Mermaids.
- e. In April 2020 LGBA responded to a link Mr Nicolson had posted about a young trans constituent. In response he received messages from people who disagreed with his position and also from LGBA who responded on 21 April 2020 by tweeting: “To everyone who is annoyed by the defamatory remarks made about us by the MP (really!) @MrJohnNicolson, who clearly doesn’t have a clue who we are or what we do: please make a donation to us IN HIS NAME and we will tweet out your message” [JN1/149]. This was followed by LGBA sharing a series of tweets from those who had made donations, which were critical of Mr Nicolson. LGBA now recognises that this was an error of judgement.

51. After the Commission’s decision was made on 20 April 2021, LGBA continued its activities:

- a. LGBA tweeted “Message to supporters: charity status changes everything” and “To all those asking how to donate now we’re a charity – please be patient! We’re working through various tasks & as soon as gift aid is enabled we’ll let you know!” [BB1/158]
- b. LGBA has been registered for Gift Aid and soliciting Gift Aided donations [BB1/159].
- c. By 18 August 2021 LGBA had registered with “Amazon Smile”, which allows shoppers to nominate a charity to receive 0.5% of the cost of their purchases [BB1/158].
- d. In October 2021 LGBA wrote to Taiwo Owatemi (Labour’s Shadow Minister for Women and Equalities) that “all the LGBTQ+ groups around the country” were “essentially now homophobic”.

- e. LGBA's Schools Campaign webpage displays Mermaids' name and logo, with the assertion that Mermaids "lobbies hard for the lowering of age limits for children seeking untested puberty blocking medication at the Gender Identity Service, Tavistock Clinic" and adding: "Some see Mermaids' promotion of drug treatment and surgery for "gender diverse" children as a form of child abuse" [BB1/23].
 - f. On its website addressing various "Myths", LGBA states "We are a charity registered with the Charity Commission of England and Wales (number 1194148) and would not be able to be registered if we were a hate group" [BB1/162].
 - g. In October 2021, LGBA had a stall at the Conservative Party conference.
 - h. On 21 October 2021, LGBA held its own conference at a conference centre in central London. A venue that was open to it due to its charitable status.
 - i. On 21 January 2022 LGBA reported attending a meeting with Mike Freer (Equalities Minister) Baroness Stedman-Scott (Women's Minister). In the press release LGBA described an enhanced level of ability to represent "the interests of LGB people, at the highest levels of government".
 - j. On 11 July 2022 LGBA organised a cross party event in support of freedom of expression at the House of Lords.
52. Ms Gallagher, Chair of the Trustees at LGBA, described initiatives that they had aimed to progress. We find that these activities were progressed only to a limited extent since the Commission's decision. It is not necessary for us to make a definitive finding, but we note LGBA's evidence that this was due to both the devotion of time and resources to these proceedings, and what Bev Jackson described as a prior need to "secure" their position by "preventing ... self-ID [legislation] being imposed on the public without due reflection and consultation". This was a reference to the Gender Recognition Reform (Scotland) Bill.
53. The initiatives described by Ms Gallagher include:
- a. The creation of a community building initiative, Friends of LGB Alliance as a way for people to connect over shared interests, through regional hubs;
 - b. A book club;
 - c. A series of webinars on subjects such as tackling a rise in international homophobia, financial planning for LGB people and understanding gender dysphoria and produced an election special;
 - d. In lockdown, a panel of comedians for a pub quiz that people could play along with at home;
 - e. A newsletter sent to c.5,000 subscribers;

- f. A survey sent to those subscribers to identify service needs;
 - g. A film fund to provide small grants to filmmakers, including seeking funding for a project to mark the jubilee of Her Late Majesty Queen Elizabeth II;
 - h. A report on the experiences of lesbian, gay and bisexual (“LGB”) staff working within the NHS, the first of a series of intended reports;
 - i. Submissions to the Law Commission and others, over 30 in total on a range of issues;
 - j. Campaigning, including in relation to pharmaceutical companies who manufacture puberty blockers;
 - k. Planning for a helpline and online support for young LGB people, at the scoping stage;
 - l. Counselling and advice by way of answering letters and emails from people who write with questions or concerns.
54. LGBA are proud of their charitable status and acknowledge that it has been of “significant assistance” to them. This is set against a long history of activism and campaigning for gay and lesbian rights on the part of Ms Jackson and Ms Harris stretching back to the 1970s.
55. LGBA submit that they have been subject to criticism and a campaign of disinformation in which views have been ascribed to them that are not held or promoted by the organisation. There was, for example, the withdrawal of an offer of funding for the LGBA jubilee film project as a result of questions being raised as to their charitable status and not being reinstated, despite the intervention of Damian Green MP at a Department of Culture, Media and Sport parliamentary committee.
56. In addition to the messages above, supporters of LGBA were active in their use of personal social media accounts both before and after the Commission’s Decision. These supporters included people who were prominent in LGBA’s activities, however their actions and communications were in their personal capacity rather than purporting to be on behalf of LGBA. We do not impute the actions of others to the LGBA except where we have concluded that their actions were on behalf of LGBA as set out in this decision.

Analysis and conclusions

57. It is accepted by all parties that the decision of Asplin J sitting in the Upper Tribunal is binding upon us. The issue is how that decision should be applied on the facts of this case.
58. Mermaids submits that the application of Nicholson (No. 1) to the facts of this case leads to the conclusion that Mermaids is or may be affected by the decision. The grounds that underpin this submission are as follows:

- a. The facts of Nicholson (No. 1) differ from the present case in that the charities in that case “had not been established to target Mr Nicholson personally, to interfere with his daily activities or to seek to deprive him of his finances. There was no evidence of any loss to him caused by the registration. In short, there was no nexus between Mr Nicholson and those charities akin to the one between LGB Alliance and Mermaids”. It is submitted that Mermaids has suffered, and continues to suffer, real harm as a result of the decision.
 - b. Nicholson (No. 1) should not be read as if it were a statute. As Asplin J acknowledged, she was not laying down a definitive definition, and therefore her comments should not be read as detracting from the wording of Schedule 6. Among other things, Asplin J’s choice of expression “likely to occur” at [44] does not replace the statutory test “may”. The term “likely” could create confusion: it can have a wide range of meanings, ranging from “possible” to “more probable than not”. The latter cannot apply here; it would impermissibly upgrade the threshold from “may be affected” to “will be affected” (on the civil standard of proof). The phrase “may be affected” is simple and does not require any gloss. As the Divisional Court put it in Green v Turkington [1975] R.T.R. 322 (in the context of a magistrate who had construed “may suggest” as “reasonably likely to suggest”): “when you have simple statutory language such as that comprised in the two simple English words ‘may’ and ‘suggest’, I think that one must set about construing those words and not set up alternatives as a possible meaning for the phrase.”
 - c. Asplin J’s emphasis on the need for caution should (like International Peace Project) be understood in the context of a decision not to deregister charities under s.34. Such challenges are uniquely disruptive to charities and the integrity of the register, especially if they are combined with third-party requests to deregister the charity under s.36. With around 168,000 charities on the register, there are good grounds for concern about the ‘floodgates’ opening if too many people can bring challenges under s.34. That rationale does not necessarily carry across to other types of challenge, a point made by B. Crumley and J. Picton, “*Still Standing?*”: *Charitable Service-Users and Cy-Pres in the First-tier Tribunal (Charity)* (2018) 82 Conv 262 (“*Crumley and Picton*”). With challenges under s.30, there is less concern about upsetting the status quo since the institution is newly registered. Disruption is minimised by need to bring an appeal within 42 days of the decision or its publication (see r.26(1) of the GRC Rules). So any analogy with ‘non-deregistration’ cases is limited.
 - d. Fourth, there are good policy reasons in favour of promoting access to the Tribunal in appropriate cases.
59. We disagree with Mermaids’ submissions that the decision in Nicholson No.1 is distinguishable because it is concerned with the appeal rights challenging a decision not to remove from the register under section 34 and thus, it is argued, we are entitled to define and apply a different approach given this appeal arises from a decision made under section 30. In our view the question of whether an institution is a charity and should therefore be registered under section 30 or whether an institution has

ceased to be a charity and should therefore be removed from the register under section 34 are two sides of the same coin.

60. Mermaids' submissions, if accepted, would result in different "glosses" or meanings being attributed to the same words that define the scope of those who may appeal decisions that Parliament has decided should be coupled together within the Schedule. In our view this cannot have been the intention of Parliament, and no other situation where that happens has been brought to our attention. It would be surprising if Parliament had intended a materially different test for standing to be applied in the closely analogous contexts of section 30 and section 34, not least in circumstances where Parliament included a single entry in Schedule 6 to the 2011 Act to address both section 30 and section 34 decisions.
61. Parliament coupled the two appeal rights together in setting out the description of those who have standing to appeal the Commission's decisions. There is a single statutory test applicable to appeals against decisions made under sections 30 and 34. Had Parliament intended different criteria to apply or for the criteria to be applied in different ways, it would have said so.
62. Mermaids suggests that there is a different level of disruption caused by challenging a refusal to remove from the register, as opposed to challenging a decision to register and therefore two different tests are required. This may be right in a practical, predictive sense, but falls well short of justifying an inferred Parliamentary intention for the single statutory test to mean something different in each situation.
63. Furthermore, whether or not the Attorney General chooses to exercise her right of appeal is irrelevant to the proper interpretation of the 2011 Act, and any reluctance on the part of the Attorney General to challenge a decision (whether real or perceived) cannot alter the meaning of the statutory provision or extend the pool of those otherwise entitled to appeal in the absence of clear words to that effect within the legislation.
64. We do agree that Asplin J did not intend the phrase "may be" to be understood as meaning "more likely than not". This would render it redundant, given that a court or tribunal would already approach the alternative "is" question on the balance of probabilities. It underlines a requirement that a putative appellant demonstrate a degree of likelihood of being personally affected by the registration decision, but not that the likelihood exceeds 50%. Beyond that, we simply approach the threshold according to the plain meaning of the statute. This clearly requires a causal relationship between the decision to register and the effect claimed.
65. The height of the factual case put on behalf of Mermaids is summed up in the following paragraphs within Dr Bell's witness statement:
 68. *An inevitable consequence of LGB Alliance's charitable registration is that its false claims about Mermaids ... are being taken more seriously, including by those in positions of power and by our potential supporters/partners. Its ability to damage*

our reputation by making false claims has increased materially, as has its ability to lobby against our work.

69. *Even people who are sceptical about LGB Alliance's claims might well think twice about publicly supporting us, working with us, or applying for jobs with us, given the climate LGB Alliance has created. We have been contacted prior to delivering training or corporate engagement talks on several occasions recently to be asked whether certain allegations detailed above are true; on each occasion it has taken up staff time explaining the true position. On most occasions we have been able to reassure them, but one recent event was recently pulled on the instruction of the organisation's senior management. All of this takes us away from focusing on our core work – supporting children and their families to be happy and healthy.*

70. *Accordingly the registration of LGB Alliance as a charity has caused significant interference with our work, consequences for our reputation, and potential financial cost to us. As it is less than a year on from the registration decision it is hard to measure these effects precisely, but they are real, and I believe that they will become increasingly severe if its charitable status is upheld by the Tribunal."*

66. Charitable status does not come with any guarantees of funding nor any freedom from criticism or debate. It is no part of the Commission's function (nor of this Tribunal) to tell people what to think, or to regulate public debate in a context where there are deeply held, sincere, beliefs on all sides of the discussion.

67. We are reminded of the dicta of Lord Bingham of Cornhill who pointed out, (in considering the extent of the protection afforded by Article 10 ECHR, (see R. (Animal Defenders International) v DCMS [2008] UKHL 15) that freedom of thought and expression is an essential condition of an intellectually healthy society. These were sentiments echoed by Sharp P in Miller v The College of Policing [2021] EWCA Civ 1926.

68. The free communication of information, opinions and argument about the laws which a state should enact and the policies its government at all levels should pursue is an essential condition of truly democratic government. We respectfully agree with Lord Bingham that the fundamental rationale of the democratic process upon which our society is founded is that when competing views, opinions and policies are publicly debated and exposed to public scrutiny, the good will over time drive out the bad and the true will prevail over the false. Only when differing views are expressed, contradicted, answered and debated will the legislature be able to obtain the fullest picture of the views held by those they represent in order to create laws that are reflective of and required by society as a whole. We also acknowledge that views change on an individual basis and the consensus held by society on any particular topic will evolve as new voices enter the debate and challenge the established position.

69. We agree with Sharp P that it is just as important when considering the rights of private citizens to express their views within the limits of the law, including and in

particular, on matters of public interest where the debate is complex, multifaceted and important.

70. All the above applies equally to charities as it does individuals. Mermaids submits that LGBA has gone beyond the boundaries of civilised debate. In the registration Decision as extracted above, the Commission can be seen to have had similar concerns. In light of the evidence, we consider that these were well-founded. However, it is important to recognise:
- a. Where those actions were taken by LGBA, rather than by those who support or concur with their beliefs but do not speak on its behalf; and
 - b. Where those actions were taken before the decision was taken, and have since ceased.
71. LGBA's activities prior to the application for registration, throughout the period awaiting registration and post registration, taken together with the evidence we heard, demonstrate clearly to us that LGBA is determined to present its view to the public and to challenge those it disagrees with, regardless of registration. Mermaids has therefore failed to establish the causal relationship claimed between the registration Decision and the effect of LGBA's activities on Mermaids.
72. It is unlikely that in any sphere of public debate all the stakeholders will hold the same opinions. Where a debate concerns fundamental aspects of what it means to be a human we may all have an opinion, we may decide to align ourselves with others of similar views, and we may choose to dispute the position taken by those we disagree with. One charity may, in principle, publicly object to the way in which another charity chooses to achieve its charitable objects. Mr Nicolson described in his statement how he felt the debate had gone beyond civilised boundaries. In her statement Ms Harris described a similar sentiment, describing the situation as vitriolic. Such debate is circumscribed by the law in the way views are expressed and, in recognition of the specific position of charities, regulation by the Commission. However, there is no legal right to be free from criticism by those who disagree with you or to prevent those who hold beliefs that the law recognises as protected from expressing themselves or seeking to persuade others to their point of view.
73. To be a person who "may" be affected, there must be an identifiable impact on Mermaids' legal rights which is likely to occur. Mermaids' arguments can be divided into two. First, it argues that the decision gives LGBA access to funds that will make its activities more effective, in particular as regards interference with Mermaids' endeavours. We have found that Mermaids has no legal right to operate free of criticism, or from having it said that it is undeserving of public money in comparison to another charity. Public scrutiny, together with prompt and effective regulation by the Commission, will, we find, deter LGBA from crossing the line into what is inconsistent with the law or the regulatory regime in which all charities must operate. There is no legal right to funding, to donations or access to grant holding bodies. If LGBA's activities operate to deprive Mermaids of those opportunities then this is either a legitimate and protected function of their freedom of speech or, if a

consequence of behaviour that is unlawful or unacceptable for a charity, will give Mermaids a cause of action or grounds for complaint to the Commission.

74. The second way in which Mermaids put its case on the effect of LGBA's activities was to simply point to greater competition for funds in relation to the subject matter of its objects. In deciding whether to register a charity the Commission has no quota or restriction upon the number of charities that may be registered for any particular charitable purpose. The aims of many charities overlap, such as those researching treatments for cancer in all its forms, and thus there is inevitable competition between them for funds to pursue their work.
75. Moreover, in order for Mermaids to be a person affected by the decision, the Commission's decision itself must relate to Mermaids in some way. The decision under appeal in this case does not relate to Mermaids, it is not about Mermaids nor its work. The decision is about LGBA and although Mermaids was interested in the outcome of the registration process, like Mr Nicholson in the cases he brought, such an interest or even engagement in the process does not vest Mermaids with a right to challenge the decision. The extent of Mermaids' engagement in the Commission's decision-making process is not relevant to the question of whether they are or may be affected by the decision.
76. It is very clear to us that Mermaids profoundly disagrees with the Commission's Decision emotionally, politically and intellectually. We acknowledge that this disagreement is sincere, as are the concerns that have been voiced before us. Furthermore, it is apparent to us that many of those that support the work of Mermaids or those it supports also strongly disagree with the Decision. As noted by the Commission, they may well have had valid cause for complaint as to what LGBA and its activists have said in the past. However, applying the facts to the actual legal issue before us, the fact that Mermaids and those they support have been affected emotionally and/or socially is insufficient to provide them with standing to bring this appeal, no matter the depth of the feelings resulting from the Decision or the strength of their disagreement.
77. For these reasons we conclude that Mermaids is not a person who is or may be affected by the Decision and accordingly we dismiss the appeal.

Signed

Date:

Judge Griffin

6 July 2023