Appeal number: CA/2013/0013

FIRST-TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER

THE HUMAN DIGNITY TRUST **Appellant**

- and -

THE CHARITY COMMISSION FOR ENGLAND AND WALES **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA
Ms. SUSAN ELIZABETH

Sitting in public at Victoria House London WC1 on 5 and 6 June 2014

Michael Beloff QC, Robert Pearce QC and Emma Dixon of counsel for the Appellant, instructed by Bates Wells and Braithwaite London LLP

Kenneth Dibble, Chief Legal Adviser and Head of Legal Services, Charity Commission, for the Respondents

DECISION

1. The appeal is allowed and the Tribunal directs the Charity Commission to rectify the register of charities so as to include the Human Dignity Trust.

REASONS

Introduction

2. The Appellant ("HDT") appeals against the Charity Commission's decision of 3 October 2013 to refuse to enter it into the Register of Charities. The Charity Commission's decision was made under s. 30 of the Charities Act 2011 ("the Act"), which gives rise to a right of appeal to this Tribunal.

3. The Charity Commission's reasons for refusing to register HDT were, in summary, that its objects were too vague and uncertain for the Commission to be certain that it was established for charitable purposes only and further that it has a political purpose, namely that of seeking to change the law of foreign states, which precludes charitable status. It is important to record that the Charity Commission made clear in its decision, and indeed in its submissions to the Tribunal, that its objections to the registration of HDT were technical legal ones and that it recognised HDT's valuable philanthropic work in the field of human rights. HDT's grounds of appeal, in summary, were that its objects were not vague and uncertain and further that the Charity Commission's decision demonstrated a fundamental misunderstanding of the nature of a constitutional human rights challenge, because litigation aimed at upholding a citizen's constitutional rights does not seek to change the law of the relevant jurisdiction but rather enforces and upholds the superior rights guaranteed by that country's constitution.

4. The hearing on 5 and 6 of June 2014 consisted mainly of legal submissions. The evidence as to fact from HDT comprised witness statements from Timothy Otty QC and Jonathan Cooper OBE. HDT also relied upon its expert witness report. The Charity Commission's evidence consisted of its expert witness report only. Jonathan Cooper OBE (HDT's Chief Executive) was the only witness required to attend for cross-examination.

5. We would like to thank Mr Beloff and Mr Dibble for their oral submissions and to thank them and their respective legal teams for the detailed and helpful skeleton arguments. We are grateful to the two expert witnesses, Professor Christine Chinkin (instructed by HDT) and Professor Geraldine Van Bueren QC (instructed by the Charity Commission) for their reports, which provided invaluable assistance to the Tribunal in the complex field of human rights law.

Background

6. HDT is a company limited by guarantee, incorporated on 16 December 2010. Its objects are:

> *2. The objects of the company are for the public benefit:*
>
> *2.1 to promote and protect human rights (as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) throughout the world, and in particular (but without limitation):*
>
> *2.1.1 the rights to human dignity and to be free from cruel, inhuman or degrading treatment or punishment;*
>
> *2.1.2 the right to privacy and to personal and social development; and*
>
> *2.1.3 to promote the sound administration of the law.*

7. HDT has powers which may be exercised only in furtherance of the objects, including power to:

> *3.1 provide and assist in the provision of legal advice and legal representation before courts and tribunals;*
>
> *3.2 bring and assist in bringing legal challenges and judicial review proceedings before courts and tribunals.*

8. HDT's evidence to the Tribunal was that it was established to support people whose human rights are violated by the criminalisation of private, adult, consensual homosexual conduct ("relevant conduct"), including by assisting them and their lawyers to bring litigation: (a) in domestic courts and tribunals of a state, in relation to rights that are justiciable under the domestic law of that state; and/or (b) against a state before international courts and tribunals, the jurisdiction of which has been accepted by the state against which a remedy is sought.

9. The litigation with which HDT becomes involved is conducted by a panel of international law firms and barristers specialising in constitutional and international law. HDT's evidence was that the panel members have agreed to work with HDT only on the basis that the cases are limited to upholding human rights and constitutional law in cases involving the purported criminalisation of relevant conduct. HDT's panel members include some of the largest law firms in the world.

10. In addition to its involvement in strategic litigation, HDT carries out a number of educational activities including joint research programmes with academic institutions and the organisation of public educational events. It has an acknowledged reputation for expertise in its field of operation and has contributed to national and international conferences, including the Commonwealth Lawyers Association Conference in 2013.

The Scope of this Appeal

11. The definition of "charity" in s. 1 of the Act refers to an "institution" established for charitable purposes only. Section 30 of the Act refers to the registration of a "charity". In this case, the "institution" which applied for registration was HDT as incorporated, with the objects shown at paragraph [6] above. The Charity Commission's letter of 3 October 2013 also commented upon a revised set of draft objects which had been submitted by HDT, but we take the view that those comments

did not fall within the scope of the statutory decision-making power which the Charity Commission was then exercising. As there was no "institution" which had adopted the draft objects and applied for registration in respect of them, no decision under s.30 of the Act could be made in respect of them and no appeal can follow. Accordingly, in deciding HDT's appeal, we have confined our considerations to the decision about HDT's formal registration application only.

12. The Tribunal's role in this matter is to "consider afresh" the Charity Commission's decision (s.319 (4) (a) of the Act). This means that we are not concerned to identify errors in the Charity Commission's decision but rather to decide the issue of HDT's eligibility for charity registration for ourselves. If the Tribunal allows the appeal it has discretionary powers to quash the Charity Commission's decision, remit the matter to the Charity Commission and/or to direct the Charity Commission to rectify the register of charities (Schedule 6 to the Act). In determining HDT's appeal, the Tribunal can consider evidence which was not before the Charity Commission when it made its decision (s. 319 (4) (b) of the Act). The Tribunal may admit evidence whether or not that evidence would be admissible in a civil trial (rule 15 (2) (a), Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended).

The Issues in the Appeal

13. The parties helpfully agreed a list of issues to guide the Tribunal's determination of this appeal. The full list of issues is set out at appendix 1 to this decision. We have summarised the submissions and the evidence (if any) presented to us and reached a conclusion in relation to each issue, before setting out our final conclusion about the appeal at paragraph [112] below.

Issue 1: The Issue for the Tribunal

(i) submissions

14. It was agreed by the parties that issue 1 sets out the correct legal test for determining whether an institution is capable of registration as a charity, with reference to sections 1 to 4 of the Act, as interpreted by the Upper Tribunal in *ISC v Charity Commission* [2011] UKUT 421 (TCC) (*"ISC")*.

(ii) evidence

15. No evidence was presented in relation to issue 1.

(iii) conclusion

16. We agree with the parties that issue 1 sets out the substantive question for determination by the Tribunal. We note that the statutory framework may be summarised as follows. Section 1 (1) of the Act defines "charity" as an institution which is (a) established for charitable purposes only and is (b) subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. Section 2 (1) of the Act defines a "charitable purpose" as one which falls within section 3 (1) of

the Act and is for the public benefit. Section 3(1) of the Act sets out a list of 13 descriptions of charitable purposes of which s. 3 (1) (h) is *"the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity"* and s. 3 (1) (m) (i) is any other purposes *"that are not within paragraphs (a) to (l) but are recognised as charitable purposes…under the old law"*. Section 3 (3) provides that if any term used in the descriptions of purposes has a "*particular meaning*" under charity law then it retains the same meaning. A charitable purpose must be for the public benefit. Section 4 of the Act provides that there is to be no presumption that a purpose of any particular description is for the public benefit and that any reference to public benefit is a reference to public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

17. We also take account of the Upper Tribunal's decision in *ISC*, in which it was held at [82] that, when applying the statutory test, the starting point is to identify the *particular purpose(s)* of the institution. The *particular purpose* is charitable if it falls within any of the categories listed in s. 3(1) of the Act and is for the public benefit. We also note that the Upper Tribunal commented at paragraph [23] that the concept of what is for the public benefit is not fixed but necessarily changes over time and at paragraph [15] that its comments about public benefit in that case were applicable to the charitable purpose of advancing education only, as the law on public benefit has developed differently in relation to each if the different heads of charity.

Issue 2: Determination of the Appellant's purposes

(i) submissions

18. The Charity Commission submitted that, when making a decision whether to register an institution, the Tribunal should consider whether the purposes of the institution are clear and unambiguous and whether they have a "particular meaning" under charity law. If the purposes are not clear and unambiguous then the Tribunal should look to extrinsic evidence to help construe them. The Charity Commission submitted that, in the case of an institution established to promote human rights, it would generally be necessary to consider extrinsic evidence (including evidence about the nature of its activities or proposed activities) because, firstly, there is as yet no "particular meaning" in charity law of the term "human rights" and secondly, the promotion of human rights is a broad concept which could include non-charitable activities. The Charity Commission acknowledged that the courts have generally adopted a "benignant" approach to the construction of charitable purposes, but submitted that this approach originated in a trust law context so that it was far from clear whether charitable companies were entitled to benefit from benignant construction.

19. HDT on this last point referred the Tribunal to Peter Luxton's book *The Law of Charities* at page 204, which suggested that the principle of benignant construction should be extended to corporate bodies where charitable status is at issue, citing the House of Lords' decision in *Guild v Inland Revenue Commissioners* [1992] 2 AC 310.

20. The Charity Commission submitted that HDT's objects as set out in its governing document (see paragraph [6] above) were insufficiently clear for the Tribunal to be satisfied that HDT's *particular purpose* falls within any of the categories listed in s. 3 (1) of the Act and is for the public benefit. The Tribunal was therefore invited to consider extrinsic evidence in order to construe HDT's purposes. The existing objects were said to be uncertain because firstly, clause 2.1.3 should have been set out as an object in its own right and not expressed as a means of promoting human rights; secondly, that the scope of the human rights to be promoted (with reference to the Universal Declaration and subsequent conventions) is too wide and uncertain and insufficiently particularised; thirdly, that the provenance of the rights described at clauses 2.1.1 and 2.1.2 is unclear; and fourthly, that the objects as drafted do not confine the promotion of human rights to only those states where human rights are justiciable and so they cannot be regarded as exclusively charitable or as meeting the public benefit requirement.

21. HDT's submission about the alleged lack of clarity in the objects was that clause 2.1.3 had simply been mis-described as such and should clearly have been numbered 2.2. In all other respects, HDT submitted, the objects were clear and unambiguous and charitable on their face. If the Tribunal were persuaded to look at extrinsic evidence to construe the objects, HDT submitted that the witness evidence it had submitted addressed the background to the company's formation and its post-formation activities. HDT also submitted that, as a matter of construction, the *particular purpose* is stated at clause 2.1 and the provisions at 2.1.1 and 2.1.2 are subject to that provision and do not enlarge it. HDT submitted that its objects are broad but that it has pursued them in a narrower sphere and that this was not objectionable.

22. Turning to the question of what types of extrinsic evidence were relevant and admissible (if indeed they fell to be considered) the Charity Commission referred the Tribunal to the Upper Tribunal's decision in *Helena Partnerships Limited v Revenue and Customs Commissioners* [2011] UKUT 271 (TCC). The Upper Tribunal had reviewed the principles established by the courts as to when extrinsic evidence may be taken into account in ascertaining the purposes of an institution. The Upper Tribunal found in that case that the motives and intentions of the founders of an institution were not relevant to that exercise, and neither generally were the post-formation activities of the institution, although where there was doubt or ambiguity the court could consider the institution's activities, not for the purpose of construing the governing document, but rather for the purpose of assessing whether the implementation of the objects would achieve a charitable end result. This approach relied in turn upon Buckley LJ's judgment in *Incorporated Society of Law Reporting for England and Wales v AG* [1972] Ch 73 and Scott J's judgment in *AG v Ross* [1986] 1 WLR 252, in which it was stated that in a case where the real purpose for which an organisation was formed was in doubt, it may be legitimate to take into account the nature of its activities post-formation. (The Tribunal notes that the Upper Tribunal's decision in *Helena* was subsequently upheld by the Court of Appeal (see [2012] EWCA Civ 569) but without specific approval of this passage).

23. The extrinsic evidence which the Charity Commission submitted that the Tribunal should have regard to in construing HDT's *particular purpose* were: the powers contained in its governing document (see paragraph [7] above); the factual background to the formation of HDT as described by Timothy Otty QC in his witness statement (see paragraph [25] below); and the activities of HDT as described by Jonathan Cooper in his witness statement and oral evidence to the Tribunal (see paragraphs [26] and [27] below).

24. The Charity Commission submitted that, having taken those matters into account, the Tribunal should find that HDT's *particular purpose* is in fact that of seeking to change the law in those states in which it brings strategic litigation; further, that this real objective could not be construed as ancillary to the promotion of a charitable purpose but should rather be seen as a (political) purpose in its own right.

(ii) *evidence*

25. The evidence before the Tribunal with regard to the background to the formation of HDT was contained in Timothy Otty's witness statement as follows. Mr Otty QC is a practising barrister specialising in human rights law. He was the founder of HDT and is Chair of its board of trustees. He explains that in 2010 he worked with other lawyers to provide an opinion for the Commonwealth Lawyers Association ("CLA") about the draft Anti-Homosexuality Bill in Uganda (that opinion was before the Tribunal). He goes on:

> "*As a result of my work in connection with the CLA advice I was struck by the unique nature of the purported criminalisation of private consensual homosexual conduct as a human rights issue. As the CLA advice sets out, there is a powerful body of jurisprudence indicating that such criminalisation is contrary both to international human rights law and domestic constitutional law norms, yet criminalisation remains prevalent not only in countries with traditionally poor human rights records and without strong constitutional instruments, but also in Commonwealth countries with written constitutions which purport to protect rights to privacy equality and dignity.*
>
> *…there are clear and accepted domestic and international legal mechanisms through which this state of affairs could be addressed. Those mechanisms were litigation before domestic courts seeking to uphold individuals' constitutional rights and litigation before international courts and tribunals where a relevant State had submitted to the jurisdiction of the court or tribunal in question. Domestic litigation would establish the correct interpretation of any relevant law and would involve the upholding of constitutionally protected fundamental rights potentially providing a remedy to those affected either by establishing how particular provisions were to be construed or declaring them void. International litigation would clarify the extent of the relevant State's obligations in international law and, if a breach of those obligations were upheld, would lead at least to declaratory relief. Judgments at the international level would not ordinarily be directly enforceable, and, in the event of an adverse*

judgment, it would then be for the relevant State to consider whether, and how, to respond.

[HDT] would…work in conjunction with local lawyers and human rights groups to uphold the legally protected human rights of persons affected by the purported criminalisation of private consensual homosexual conduct. This deliberately measured approach is reflected in the composition of our board of patrons…which comprises…leading jurists.

Although the Trust was able to commence its work in February 2011 it was not until November 2011 that we had our formal launch at the House of Lords…"

26. The evidence before the Tribunal about HDT's activities was contained in the witness statement and oral testimony of Jonathan Cooper OBE. Mr Cooper is a barrister specialising in human rights law and HDT's Chief Executive. He was awarded an OBE for his services to human rights in 2007. Mr Cooper's evidence was that in carrying out its work, HDT's goal was to promote and protect the human rights of those affected by the purported criminalisation of relevant conduct throughout the world, and to promote the sound administration of the law. He explained that penal provisions criminalising relevant conduct have extremely serious and wide-ranging consequences for those affected, and that these consequences have been recognised by the United Kingdom Supreme Court, the European Court of Human Rights, the Constitutional Court of South Africa and the United States Supreme Court in the judgments to which he referred us. Mr Cooper also referred us to the 2010 report of the United Nations Special Rapporteur and the report of the 2011 Commonwealth Eminent Persons Group, both of which identified the criminalisation of relevant conduct as an obstacle to an effective response to the threat posed by HIV infection. Mr Cooper recounted the personal stories of individuals with whom HDT is in contact in Uganda, Jamaica, Belize and Cameroon and gave examples of litigation with which it had become involved in Belize, Singapore, Jamaica and Northern Cyprus.

27. Mr Cooper's evidence was that, in carrying out its work, HDT is sensitive to local circumstances and only gets involved in litigation after carrying out a rigorous assessment of the law, the constitution and the international human rights obligations of the country concerned. He told the Tribunal that HDT's core work relates to the upholding of fundamental rights through enforcing the law before domestic courts and international tribunals and this has, to date, seen HDT involved in providing substantive support to those affected by the criminalisation of relevant conduct in a number of different jurisdictions. In each case, HDT seeks to eliminate human rights abuses, and seek redress for the victims of such abuses, by upholding the applicable law and by utilising the remedies which have either been embedded in domestic constitutions or accepted by the relevant State as a result of its submission to the jurisdiction of the relevant international tribunal.

(iii) conclusion

28. We conclude that HDT's *particular purpose(s)* are clearly set out in its objects clause (see paragraph [6] above), being firstly, "*to promote and protect human rights*

(as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) throughout the world…" and secondly, "*to promote the sound administration of the law"*. We consider below whether those purposes are charitable.

29. We are not persuaded that HDT's purposes are unclear or ambiguous, as submitted by the Charity Commission, and in those circumstances we have not found it relevant to have regard to extrinsic evidence in order to determine HDT's purposes. Accordingly, we need say nothing about the type(s) of extrinsic evidence which might have been relevant and admissible for the task had we found it necessary to consider them. It is also unnecessary in the circumstances for us to say anything about the availability of benignant construction to a corporate body seeking charitable status.

30. We are satisfied on the basis of the expert evidence (see paragraph [41] below) that the scope of the human rights to be protected and promoted is clear and sufficiently well particularised. As a matter of construction, we agree with HDT that clauses 2.1.1 and 2.1.2 serve merely as particular examples of those human rights which are defined in "*the Universal Declaration of Human Rights and subsequent declarations and conventions*". On this basis, we conclude that the objects do not permit HDT to promote and protect any rights (including those in 2.1.1 and 2.1.2) unless by doing so it would thereby be advancing the human rights defined in the instruments referred to in clause 2.1. We accept that clause 2.1.3 as drafted should be understood to be a discrete object and not a means of advancing the purpose at clause 2.1.

31. We are not persuaded that HDT's activity of conducting and supporting litigation of the type described in the witness evidence amounts to a parallel purpose of the institution. We are satisfied on the basis of Jonathan Cooper's evidence (see paragraphs [26] and [27] above) that the conduct of such litigation is a means of promoting and protecting human rights rather than an aim of HDT in itself.

32. We have considerable sympathy with the Charity Commission's stated intention that a charitable institution's purposes and activities should be immediately clear to any casual reader of the Register of Charities. However, whilst this might be a desirable aim, we find nothing objectionable in principle about an institution which declares wide purposes but, in practice, confines itself to a smaller area of operation than that permitted. Insofar as the objects do not confine HDT's area of operation to those states where the relevant constitutional arrangements exist, we are satisfied that HDT's objects, properly construed, only allow it to operate in such states because of the limitation of its purpose to the protection and promotion of only those human rights defined in the Universal Declaration on Human Rights and subsequent instruments. We return to this point later in this decision.

Issue 3: *The scope of 'human rights' in s. 3(1)(h) of the Charities Act 2011*

(i) submissions

33. The Charity Commission reminded the Tribunal that the description of the purpose of "the advancement of human rights" in the Act has no definition clause (although s. 3 (2) of the Act does contain definitions of some of the other terms used in the descriptions of charitable purposes) and that there is no material in the *Hansard* reports which could assist the Tribunal in identifying Parliament's intention when including this term in the list of descriptions of charitable purposes. The Charity Commission accepted the promotion of human rights as a charitable purpose prior to its appearance in statute, and had in January 2005 published non-statutory guidance on the subject, prior to the inclusion of that term in the Charities Act 2006 (which was later consolidated into the Act). This guidance, known as *RR12*, listed a number of ways in which a charity might promote human rights, including "*obtaining redress for victims of human rights abuse"* and "*eliminating infringements of human rights"*. HDT drew the Tribunal's attention to paragraph [32] of *RR12,* which includes the following statement :

> *"…We have accepted that it is charitable "to procure the abolition of torture by all lawful means" and to procure the abolition of torture, extra-judicial killing and 'disappearance'. We have also registered as charities organisations concerned with the elimination of slavery, the slave trade and other forms of unlawful forced labour. Infringements of human rights of this kind are, almost by definition, contrary to the domestic law of the country in which they take place (particularly when considered in the context of its international treaty obligations) and hence trying to eliminate them will not generally involve trying to change domestic law…."*

34. HDT reminded the Tribunal of the policy background to the Charities Act 2006 and that the inclusion of "the advancement of human rights" in the statutory list followed a recommendation in the Prime Minister's Strategy Unit Report *Private Action, Public Benefit* in 2002. The Report had commented at [4.40] that :

> *"Including the promotion of human rights as one of the ten charitable purposes would confirm that the promotion of human rights – adopting either the definition in the European Convention, or that in the UN's International Bill of Human Rights – is a charitable purpose. It would be for organisations themselves to define which 'human rights' they were concerned to promote, and where. …*
>
> *This will allow charities to play their full part in the vital tasks of protecting human rights both in the UK and overseas …".*

35. The Government's response to the Report had commented that the proposed list (including human rights) had identified purposes which needed to be confirmed as charitable with greater certainty, and in due course the Charities Act 2006 was passed, containing the provision which is now to be found at s. 3 (1) (h) of the Act.

36. The Charity Commission submitted that the term "human rights" used in the Act could be interpreted in a number of ways, as human rights is an evolving concept and has no settled meaning in law. It was submitted that the Tribunal could either adopt an interpretation of the term "human rights" which was consistent only with the law applicable in England and Wales, or adopt a broader definition with reference, for

example, to the Universal Declaration on Human Rights. The Charity Commission's view was that the only human rights which it would be charitable to advance would be those "accepted" under the law of England and Wales.

37. HDT's primary submission was that the term "human rights" in s. 3 (1) (h) of the Act is properly to be understood as having a "particular meaning" in charity law under s. 3 (3) of the Act, that meaning being the one which, prior to the enactment of the legislation, was adopted and published by the Charity Commission in *RR12*. That Guidance defines "human rights" as:

> *"… rights which:*
>
> *- are fundamental in the sense of being essential to our humanity or to our functioning as human beings;*
>
> *- accordingly have a moral dimension;*
>
> *- extend to everyone; and*
>
> *- prescribe what the State must do for us, and what it must not do (or allow others to do) to us."*

38. HDT's alternative submission was that "human rights" is to be given its ordinary and natural meaning and that Parliament should be taken to have been aware that that this concept might evolve to embrace different matters at different times. In other words, that the words used are flexible by design. The Tribunal was referred to HDT's expert evidence which confirmed that the term encompassed the rights recognised by the Universal Declaration on Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR"). It further submitted that the Charity Commission's suggested definition was not warranted by the language used in the Act and would be unworkable in practice. In any event, if the Tribunal found that the Charity Commission was correct, the criminalisation of relevant conduct would represent a breach of the European Convention on Human Rights ("ECHR") which has been incorporated into domestic law by the Human Rights Act 1998, so HDT's objects and activities would in any event fall within the Charity Commission's suggested definition.

(ii) evidence

39. Professor Geraldine Van Bueren QC provided the Tribunal with her expert report, on the instructions of the Charity Commission. She is Professor of International Human Rights Law at Queen Mary, University of London. Her evidence was that "human rights" is a very broad concept and one which is rapidly evolving. She explained that the human rights set out in treaties are not set in stone as their content evolves so as to be consistent with developments in law, society and science. The "living instrument" approach which she describes has, she explained, been used increasingly in recent years to recognise the rights of LGBT[1] people and of older people. She explains that

[1] Lesbian, Gay, Bisexual and Transgender

> *"…in recent years there has been an increasing number of international legal standards, measures and interpretations being formulated concerning equality and sexual orientation and gender identity. These international standards include an express treaty obligation in article 21 of the European Union Charter of Fundamental Rights that '[a]ny discrimination based on…sexual orientation shall be prohibited' and the first United Nations Resolution on sexual orientation and gender identity, expressing 'grave concern' at violence and discrimination against individuals based on their sexual orientation and gender identity. Both of these had the support of the United Kingdom".*

40. Professor Van Bueren's evidence describes the rights accepted under the law of England and Wales, with reference to those rights which arise through international treaty obligations, those which have been incorporated into domestic law, and those which have been ratified but not incorporated. She also describes how some treaties not directly ratified by the United Kingdom are nevertheless binding as a result of its membership of the European Union or because they may constitute a "peremptory norm" of international law, or an international customary rule which will be binding on the United Kingdom so long as it has not objected to be bound by it. She explained that a peremptory norm is defined by the Vienna Convention on the Law of Treaties 1969 as a norm which is

> *"accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".*

41. Professor Chinkin provided the Tribunal with an expert report on the instructions of HDT. She is Professor of International Human Rights Law at the London School of Economics. Her evidence was that the term "human rights" applies to the core civil and political, economic and social rights contained in the widely recognised and adopted human rights instruments, including the UDHR, the ICCPR and the ECHR. Her evidence was that the right to human dignity is the explicit underlying principle of all the rights in the UDHR and the ICCPR. She referred the Tribunal to the "*substantial body of law*" identifying the right to dignity as both a justiciable right in and of itself and a fundamental value underlying and informing the correct interpretation and protection of all other human rights. Professor Chinkin explained that constitutional courts all over the world have found that the criminalisation of relevant conduct contravenes human rights norms, whether such laws are enforced or not, as they breach rights to dignity, privacy, equality and non-discrimination.

(iii) conclusion

42. The Tribunal's conclusions on issue 3 are that the term "human rights" in s. 3 (1) (h) of the Act has no "particular meaning under the law relating to charities in England and Wales" for the purposes of s. 3 (3) of the Act. We are not persuaded that the Charity Commission's own non-statutory guidance, issued prior to the inclusion of

the term in legislation, has the status of a "particular meaning", as we understand that term to refer to previous (binding) decisions of the court rather than to guidance issued by a regulator. Whilst we were not persuaded by HDT's primary submission to this effect, we do agree with HDT that Parliament must be taken to have been aware of the Charity Commission's *RR12* guidance and it seems likely that the adoption of the broad, undefined description of a purpose in the Act was intended to build upon the valuable work already undertaken by the Charity Commission in this area.

43. We accept HDT's submission that the term "human rights" is to be given its ordinary natural meaning and that there is no authority for the Charity Commission's view that it is to be understood only as referring to those human rights accepted by the law of England and Wales. It seems to us that the Charity Commission's suggested approach would complicate matters further, involving as it would an inquiry into the status and enforceability arrangements for any particular human rights instrument and a further requirement to define the concept of "accepted by the law of England and Wales". As Professor Van Bueren explained, there are numerous mechanisms by which the UK may be bound by international treaties: do all of these mechanisms constitute "acceptance"? We prefer Mr Beloff's description of human rights as "axiomatically trans-national" and conclude that the "human rights" referred to in s. 3 (1) (h) of the Act are those core rights referred to by Professor Chinkin (see paragraph 41 above) as widely recognised by the international community.

44. We accept Professor Van Bueren's evidence (see paragraph 39 above) that "human rights" is a broad and rapidly evolving concept, and necessarily so in order to take account of developments in law, society and science. We conclude that Parliament must have had the "living instrument" approach in mind in leaving the term "human rights" undefined in the Act. It follows that the scope of the rights falling within the description of charitable purposes in the Act may evolve and change from time to time.

45. We are satisfied on the basis of the evidence of Professor Chinkin (see paragraph 41 above) that the term "human rights" used in the description of charitable purposes in the Act extends to the rights set out in the UDHR, the ICCPR and the ECHR.

46. *Issue 4*: *Do the purposes fall within the descriptions of purposes in s. 3(1)(h) of the Charities Act 2011?*

(i) submissions

47. The Tribunal noted that the phrase used in s. 3(1) of the Act was "the advancement of human rights" whereas HDT's objects were "to promote and protect human rights" and asked the parties' representatives to clarify whether there was any significance in the difference. HDT submitted that its objects were therefore narrower than the scope of the wide description adopted by Parliament. The Charity Commission submitted that the significance of the wording would flow from the activities of institutions with either formulation.

48. The Charity Commission submitted that there was considerable doubt that the purposes of HDT fall within the description of purposes in s. 3 (1) (h) of the Act because the human rights mentioned in HDT's objects clause were too broad and uncertain. The Charity Commission's expert described the "right to human dignity" as one which is "*the grundnorm of human rights, but is not often found in human rights treaties as an express enforceable right"* and the Charity Commission relied upon this evidence in submitting that there is insufficient certainty as to the status of human dignity as a right for it to fall within the statutory scheme.

49. HDT referred the Tribunal to the Charity Commission's Guidance *RR12* in which the model objects for a charity promoting human rights refers to the promotion of human rights "*as set out in the UDHR and subsequent United Nations conventions and declarations) throughout the world*". HDT submitted that it had adopted this formula in reliance on the Charity Commission's guidance. HDT submitted that the Charity Commission's suggested interpretation of s. 3 (1) (h) of the Act was unnecessarily restrictive and, if correct, would represent a retrograde step when compared with the pre-legislative guidance.

(ii) evidence

50. Professor Van Bueren confirmed that there was a right to be free from cruel, inhumane or degrading treatment or punishment in both the ECHR and the ICCPR, which were binding on the UK in both international and domestic law. She also confirmed that the right to privacy was recognised in ECHR and ICCPR (although enforced differently).

51. Professor Chinkin's evidence confirmed that the right to privacy encompasses the right to personal and social development, so that it is at least part of a freestanding right and that the right to human dignity underlies all of the rights in UDHR and ICCPR and is justiciable in its own right.

52. Professor Chinkin's evidence was that the UDHR recognises in its Preamble the "inherent dignity" and the "equal and inalienable rights of all members of the human family" and "the dignity and worth of the human person". Her evidence was that the dignity of all human persons is expressly enumerated in Articles 1 and 22 of UDHR . Professor Van Bueren describes the right to dignity as the "*grundnorm*" of human rights, which is an express enforceable right in some treaties but not others.

(*iii) conclusion*

53. The Tribunal's conclusion on issue 4 is that HDT's objects, properly construed as set out above in our conclusions to issue 2, fall within the descriptions of purposes set out in s. 3(1) (h) of the Act, as construed under issue 3. HDT's purposes are limited to the protection and promotion of the rights which are set out in the UDHR and the subsequent treaties (which includes the ICCPR). However, where these rights are particularised in clauses 2.1.1 and 2.1.2 of the objects clause, we also find, in reliance upon the expert evidence from both witnesses (see paragraphs 50 to 52 above) that the rights to human dignity, to be free from cruel, inhuman or degrading

treatment or punishment, the right to privacy and to personal and social development fall within the meaning of the term "human rights" that we have adopted in answer to issue 3 above.

54. As we have found that HDT's strategic litigation activities do not constitute a separate purpose, it is not necessary for us to consider whether such a purpose would fall within the meaning of "human rights" in s. 3 (1) (h) of the Act.

Issue 5: The promotion of the sound administration of the law

(i) submissions

55. As noted above, HDT submitted that clause 2.1.3 should have been numbered as clause 2.2, so that it was a second object. The Charity Commission accepted that, if HDT may be properly understood to have included the sound administration of the law in its objects as a purpose in its own right, then this would appear to fall within the description of charitable purposes set out at s. 3 (1) (m) (i) of the Act. However, it also submitted that, although this purpose had been recognised under the "old law" so as to fall within s. 3 (1) (m) (i) of the Act, the scope of such a purpose had not been well-defined and that the case law was so factually-specific that it was difficult to distil general principles from it. The Charity Commission submitted that the previous authorities recognised a description of a purpose only so that the method of achieving it would be critical in every case. When asked by the Tribunal if the description of such a purpose could include strategic litigation, Mr Dibble said that he would not rule it out but that the issue required more thought, especially in the context of a foreign jurisdiction.

56. The Charity Commission referred the Tribunal to the decision in *Incorporated Council of Law Reporting for England and Wales v AG* [1972] Ch 73 in which the production of law reports was found to promote the charitable purpose of the sound administration of the law and to *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 in which promoting the efficiency of the police and consequently enforcing the law generally was held to be charitable.

57. HDT submitted that the purpose of promoting the sound administration of the law had been recognised as a charitable purpose in its own right and that these cases provided examples only of instances where it had been recognised by the courts. We were also referred to *Re Vallance* [1876] 2 Seton's Judgements (7^{th} edn) 1304 and to *Re Herrick* [1918] 52 ILT 213 in which trusts to promote prosecutions for cruelty to animals and to reward policemen for doing their duty were, respectively, held to be charitable. HDT relied on these analogous purposes. The Charity Commission replied that, whilst seeking to have the current law enforced may have been recognised as charitable, it was important to bear in mind that the purpose of reforming the law had been found not to be charitable in *Bowman v Secular Society* [1917] AC 406.

58. The Charity Commission also submitted that the promotion of the sound administration of the law in a foreign jurisdiction could be charitable only if the

means used to attain that object were not contrary to UK public policy and could be demonstrated to be for the public benefit. Furthermore, that whilst it might be charitable to provide legal advice and assistance to those unable to afford it, the absence of a restriction in HDT's objects requiring it to assist only those without means would allow for the furtherance of non-charitable activities. Jonathan Cooper's evidence on this point was that none of the individuals assisted by HDT could have afforded to pay their local lawyers and none could have afforded to take the financial risk of unsuccessful litigation. HDT also referred the Tribunal to paragraphs [178] to [222] of *ISC* and emphasised that HDT did not exclude the poor from access to its benefits, which it submitted was the relevant legal test.

59. The Charity Commission submitted that that there was doubt that the conduct and support of litigation "with the relevant aim" could be a proper means of pursuing the promotion of the sound administration of the law for the public benefit because it was implicit in HDT's purposes and activities that it did not seek to promote the sound administration of the law as it stood but rather to challenge it on the basis that it was void, unlawful or unenforceable.

60. HDT's final submission on this issue was that, in common with other human rights organisations registered as charities in England in Wales, the majority of its activities were carried out abroad but there was no reason of law or policy to say that it should not be a charity simply because its benefits were provided to the citizens of a foreign country.

(ii) evidence

61. Mr Dibble put to Mr Cooper in cross examination that HDT was permitted under its objects to operate in countries where human rights were not justiciable on a constitutional basis. Mr Cooper replied that that was not, and never had been, HDT's intention and that HDT had offered to amend its objects to make this clear to the Charity Commission. His evidence was that, as the objects refer specifically to the UDHR, HDT could only lawfully operate where that provision applied and thus a case could only be brought in a court competent to decide a constitutional challenge in relation to that treaty.

62. Professor Chinkin's evidence was that the vast majority of countries in the world have a national constitution which constitutes the superior law of the land and to which all other internal laws and government actions must conform. She also stated that, of the 82 countries which criminalise relevant conduct, all but 9 have some form of constitutional supremacy clause. She produced for the Tribunal a helpful table setting out which countries have legislation which purports to criminalise relevant conduct, what their international treaty obligations are and what mechanisms of enforcement are applicable in each state.

(*iii) conclusion*

63. The Tribunal's conclusion on issue 5 is that clause 2.1.3 clearly identifies a discrete purpose and we accept that it has merely been mis-numbered in the objects

clause as drafted. We express the hope that HDT will take the necessary steps to correct this drafting error as soon as possible.

64. We find that "promoting the sound administration of the law" was recognised as a description of a "fourth head" charitable purpose under the "old law" i.e. prior to 1 April 2008 (see s. 3 (4) of the Act) so that it now falls within s. 3 (1) (m) (i) of the Act. There is no legal authority to support the view that the conduct of strategic litigation before a competent constitutional court is a proper means of advancing the sound administration of the law, but equally we have not been referred to any authority which suggests that it is not an acceptable means of advancing such a charitable purpose. We take the view that the conduct of the very particular form of litigation supported and engaged in by HDT is an acceptable means of advancing the charitable purpose of promoting the sound administration of the law. We draw an analogy (to the extent necessary) with the accepted charitable activities of promoting prosecutions for cruelty to animals and rewarding policemen for doing their duty, although, as appears from our findings in relation to issue 7 below, we regard HDT's human rights litigation as fundamentally different in nature from the authorities concerning domestic law.

65. We consider that the public benefit requirement and the question of whether there is any risk to foreign policy from such a purpose falls to be addressed in relation to s. 4 of the Act and that we should be careful not to merge it into our consideration of the definition of a description of a charitable purpose, as the Charity Commission's submissions seem to suggest that we should. In any event we find (as set out in greater detail below under issue 7) that the particular type of constitutional litigation supported and conducted by HDT is fundamentally different in nature from the activities found to be objectionable as political in *McGovern v AG* [1982] Ch 321.

66. We are satisfied on the basis of Jonathan Cooper's evidence (see paragraph 61 above) that HDT's objects, properly construed, only allow it to operate in countries where the UDHR and subsequent treaties apply and where there is a constitutional court competent to hear the relevant case. We accept Professor Chinkin's evidence that there is a tiny minority of states which do not have the relevant constitutional supremacy clause, so the scenario put to Mr Cooper in cross-examination (that HDT could pursue its litigation activities in states which do not have the relevant constitutional provisions) is not, it seems to us, one that is remotely likely even if it were practically possible. Indeed, it seems to us that if HDT did decide to bring constitutional challenges in states which had not recognised the UDHR and so where there was no competent constitutional court that this activity would be in breach of trust.

67. We accept HDT's submission that the Upper Tribunal in *ISC* dealt with the issue of when charities not established for the relief of poverty might confer benefits on those able to afford them and note that, whilst the poor may not be excluded from charitable benefits, the "poverty" of a beneficiary may be regarded as relative to the nature of the charitable endeavour. We find that even if the persons assisted by HDT were reasonably well off by the standards of their country, the cost of bringing a human rights challenge in a constitutional court in which the Government was a party,

and the risk of an adverse costs order if unsuccessful, would be well beyond the means of such a person. We also note that in countries where the LGBTI[2] community is criminalised and discriminated against it is less likely that its members would be thriving financially. For all these reasons, we do not consider that HDT's failure to apply a means test to those to whom it offers support and assistance is a bar to its charitable status.

Issue 6: What is the proper test for determining whether the Appellant's purposes are for the public benefit, insofar as they are to be carried out outside England and Wales?

(i) submissions

68. The Charity Commission's primary submission on this issue was that the question of public benefit falls to be decided on the basis of evidence before the Tribunal. The public benefit must not be remote or intangible and the intentions of the founders of HDT were not relevant in assessing public benefit. The Charity Commission referred to the Upper Tribunal's decisions in *ISC* and the "*Poverty Reference*", reported at [2012] UKUT 420 (TCC), in both of which cases it was emphasised that the case law provides examples only of cases where the public benefit requirement was or was not satisfied and that the decided cases do not provide a comprehensive statement of how the public benefit requirement is to be met.

69. The Charity Commission submitted that, in considering the public benefit of an organisation which would be operating entirely outside of England and Wales, the Tribunal should consider whether the purposes of that organisation were for the public benefit as understood in accordance with the law of England and Wales. That requires, firstly, that the public benefit must accrue to the community in the UK and secondly, that it must accrue to the community in the relevant foreign jurisdiction. Whilst satisfaction of the first category would generally satisfy the second, a UK public policy reason could serve to negate the public benefit arising in the foreign jurisdiction. HDT differed from the Charity Commission on this point and submitted that in order for an institution operating outside England and Wales to be recognised as a charity, it was not necessary for it to demonstrate that its purposes were for the benefit of the public in the UK. HDT submitted that (a) a purpose which benefits the public (or some section of the public) abroad will be presumed to be charitable if the same purpose would be considered charitable in the case of an institution confining its operations to the UK but (b) there may be some purposes which, although satisfying the test in (a), will not be recognised for public policy reasons – for example because they are inimical to the UK's interests.

70. The Tribunal was referred by the Charity Commission to *Camille and Henry Dreyfus Foundation Inc v IRC* [1954] Ch 672, in which Sir Raymond Evershed MR referred to the desirability of considering United Kingdom public policy in relation to certain charitable activities in foreign jurisdictions. The Charity Commission referred

[2] Lesbian, Gay, Bisexual, Transgender and Intersex

us also to *McGovern v AG* [1982] Ch 321, in which Slade J had referred to this earlier decision and stated (at page 338F) that, even if the correct approach is to consider the public benefit accruing to the community in the UK, the court would still be bound to take into account "*the probable effects of attempts to procure the proposed legislation, or of its actual enactment, on the inhabitants of the country concerned*", which, he posited, would doubtless have a history and social structure quite different from the UK.

71. The Charity Commission submitted that the crucial questions for the Tribunal in relation to HDT were therefore: "(1) whether there is a benefit (2) whether an English court has sufficient evidence of the benefit which it can assess and (3) whether an English court could if necessary be competent to control or reform the institution and it would not be inappropriate for it to do so". In relation to the final point the Tribunal was referred to Slade J's comments in *McGovern*, regarding a hypothetical trust of which the main object was to secure the alteration of the laws of a foreign country. Slade J had considered, in relation to this example, the impossibility for an English court of assessing whether a change in the law of a foreign country would be for the public benefit.

72. HDT submitted that there is an obvious public benefit in promoting human rights, for the reasons recognised in the Charity Commission's publication *RR12*. These are:

> *"The concept of human rights is virtually unanimously endorsed by the countries of the world (even if strict observance of these rights is intermittent).*
>
> *There is an obvious public benefit in promoting human rights. For individuals whose human rights are thereby secured, the benefit is immediate and tangible. There is also a less tangible, but nonetheless significant, benefit to the whole community that arises from our perception that the fundamental rights of all members of the community are being protected. That provides sufficient benefit to the community to justify treating the promotion of human rights as a charitable purpose in its own right."*

(ii) evidence

73. Jonathan Cooper's evidence was that there was no detriment to the public interest abroad arising from HDT's activities given that (i) the public interest cannot be served by the law remaining unenforced or unclear; (ii) HDT only becomes involved in supporting litigation where this is the desire of those affected in a particular jurisdiction and after a careful risk analysis having regard to (inter alia) the unanimity of views within the LGBTI community in the particular jurisdiction; the independence of the judiciary; the risk of a backlash and any risk to the physical safety of those involved; (iii) this is to be weighed against the gravity of the situation on the ground in terms of adverse consequences if criminalisation is allowed to remain unchallenged and the benefits of addressing the issues before a judicial tribunal; (iv) the domestic legislation at issue is largely the result of an export of colonial era laws imposed on local populations by British rule rather than of local

tradition or culture; (v) in any event local tradition cannot justify the denial of basic human rights.

74. HDT's expert evidence was that:

> "*A domestic provision purporting to criminalise relevant conduct is a serious contravention of international human rights law. In particular, such a provision involves a serious breach of each of (i) the UDHR, (ii) the ICCPR and (iii) the ECHR as well as of other instruments including the African Charter."*

75. Jonathan Cooper's evidence was also that that there is no detriment to the domestic public interest since HDT's work is in line with the anti-criminalisation and pro-human rights stance adopted by the UK internationally and by all political parties within the UK. In his oral evidence Mr Cooper suggested that HDT's activities might also be of benefit to the community in England and Wales because decriminalisation of same sex relationships might reduce the number of LGBTI individuals forced to seek asylum in the UK.

(*iii) conclusion*

76. The Tribunal's conclusion on issue 6 is that it is sufficient to demonstrate (i) that the purpose benefits the public (or a section of the public) abroad; and (ii) that the same purpose would be considered charitable in the case of a body confining its operations to England and Wales (provided that (iii), there is no reason of public policy not to recognise the purpose as charitable). We note that this was the generally accepted test before the Court of Appeal's decision in *Camille and Henry Dreyfus Foundation Inc v IRC* [1954] Ch 672, which introduced the idea that in the case of a charity operating abroad there must also be an identifiable benefit to the community in the United Kingdom.

77. We note, however, that Sir Raymond Evershed MR was concerned in the *Dreyfus* case with the entitlement to UK tax reliefs of a foreign educational charity. We remind ourselves that the test for public benefit was held in *ISC* to be specific to each head of charity and not one of general application. Clearly we are dealing with a different purpose here, and one which had not been recognised as charitable in 1954 when *Dreyfus* was decided. We also note that Lord Evershed's comments on this point in *Dreyfus* may be thought to be *obiter*[3] in any event.

78. In the circumstances, we are not satisfied that it is necessary for HDT to demonstrate that there will be a benefit to the public in England and Wales arising from its activities abroad. However, if we are wrong on that point, we conclude that there is ample evidence before us of the public benefit to the community in the UK flowing from HDT's activities, for the reasons set out in the Charity Commission's publication *RR12* (see paragraph 72 above) and the reasons given by Jonathan Cooper (paragraphs 73 and 75 above). We accept Professor Chinkin's evidence (paragraph 74 above) that the criminalisation of relevant conduct represents "*a serious*

[3] i.e. it is said in passing and does not form a necessary part of the Court's conclusion in that case.

contravention of international human rights law" and, accordingly, we conclude that it is for the public benefit of the community in England and Wales (and, indeed, the UK), as well as in the country where such a contravention occurs, for this situation to be addressed and for the human rights standards recognised by the international community to be promoted and protected. Although we were not addressed on this point, we also consider that there may be an identifiable public benefit to the community in the UK if HDT's activities may be seen to contribute to the development of effective measures to tackle the spread of HIV infection worldwide. We note the evidence before the Tribunal (see paragraphs [26] above [92] below) that the criminalisation of relevant conduct has been recognised by the international community as representing a significant impediment to such public health initiatives.

79. We accept that there may be some purposes which, although satisfying the public benefit test in principle, should not be recognised for public policy reasons – for example because they are inimical to the UK's interests. However, there is no evidence before us to suggest that HDT's activities have in the past, or do now, cause any concern to the UK Government. On the contrary, we note Professor Van Bueren's evidence at paragraph **[**39] above that the UK Government has supported recent international human rights initiatives aimed at supporting the rights of the LGBTI community.

Issue 7: Are the Appellant's purposes political?

(*i) submissions*

80. The Charity Commission firstly referred the Tribunal to the legal authorities in support of the proposition that it is not charitable to seek to change the law in this country. These are both decisions of the House of Lords: *Bowman v Secular Society* [1917] AC 406 and *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31. That rule was effectively extended by Slade J in *McGovern.* Following the decision in *McGovern,* it has been accepted that a political purpose is one which (i) furthers the interests of a political party; (ii) seeks to procure changes in the laws of this country; (iii) seeks to procure changes in the law of a foreign country; (iv) seeks to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) seeks to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country. Slade J's formula (which he said was not intended to be exhaustive) was later adopted by the Court of Appeal in *Southwood v AG* [2000] EWCA Civ 204.

81. The rationale for the decision in *McGovern* is, in the Charity Commission's submission, highly relevant to HDT's application. The Tribunal was referred to the passage of Slade J's judgment at page 338 which confirms that (i) when dealing with a foreign law, there is no obligation on the court to decide that the law is right as it stands and it is not obliged to blind itself to what it may regard as the injustice of a foreign law but (ii) that the court would have to consider the probable effects of the proposed legislation on the inhabitants of the country concerned but would have no satisfactory means of judging those probable effects and (iii) that the court would

have to consider the risk of prejudice to the relations between this country and the foreign country concerned but would have no means of assessing that risk, as it would not be capable of being dealt with by evidence and would involve the application of political rather than legal judgment.

82. We were also referred to the passage at page 339G, where Slade J illustrates his point by giving the example of a hypothetical trust with the object of securing the abolition of the death penalty for adultery in Islamic countries:

> *'It appears from the Amnesty International Report (1978, p 270) that Islamic law sanctions the death penalty for certain well-defined offences, namely murder, adultery and brigandage. Let it be supposed that a trust were created of which the object was to secure the abolition of the death penalty for adultery in those countries where Islamic law applies and to secure a reprieve for those persons who have been sentenced to death for this offence. The court, when invited to enforce or to reform such a trust, would either have to apply English standards as to public benefit, which would not necessarily be at all appropriate in the local conditions, or it would have to attempt to apply local standards of which it knew little or nothing. An English court would not, it seems to me, be competent either to control or reform a trust of this nature and it would not be appropriate that it should attempt to do so.'*

83. The Charity Commission's submission was that HDT's purposes and activities are directed towards changing the law in a foreign state in the same way as the hypothetical trust discussed by Slade J. It submitted that the activity of seeking a declaration that part of the existing legislative framework was void, invalid or unenforceable amounted to changing the law and that, as HDT starts from the position of seeking to decriminalise homosexuality, its purpose is political within the meaning given to that term by *McGovern* in that it seeks to change the law and to challenge government policy in the foreign state concerned.

84. HDT's submissions emphasised that its work involved upholding human rights law and that it does not seek to change the law. It submitted that the activity of upholding human rights law had been recognised by the Privy Council as one which respected the different roles of the legislature and the courts, and referred the Tribunal to Lord Bingham's judgment in *Reyes v The Queen* [2002] 2 AC 235. The Privy Council considered in that case the mandatory death sentence for murder in Belize and Lord Bingham explained at [25] and [26] that

> *"In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal…the ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted…*
>
> *When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue…about the meaning of the enacted law the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is*

> *incompatible or not…The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society. …In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion…"*

85. HDT also submitted that, as had been recognised by Slade J in *McGovern*, if the main objects of an institution were exclusively charitable, the fact that the trustees had the power to employ political means for their furtherance would not deprive the institution of its charitable status. HDT referred the Tribunal to the Charity Commission's publication CC9: *Guidance on Campaigning and Political Activity by Charities,* which confirms that a charity may choose to focus most or all of its resources on political activity (including, for example, campaigning for a change in the law at home or abroad) for a period, provided that is an appropriate means of supporting or contributing to the achievement of its charitable purposes.

86. HDT referred the Tribunal to page 248 of Hubert Picarda QC's book *The Law and Practice Relating to Charities* in which there is reference to American and Canadian authority for the proposition that a trust to promote the enjoyment of existing civil rights (as opposed to securing new ones) is charitable. HDT produced the relevant authorities (*Re Lewis's Estate* 25 A 878 (1893) and *Lewis v Doerle* (1898) 25 OAR 206) for the Tribunal but were unable to assist the Tribunal with its enquiry as to whether these cases had been considered by a superior court in the century or so since they were decided. Mr Beloff asked the Tribunal to assume that they are still good law and Mr Dibble did not dissent from this view.

87. HDT submitted that it is inherent in human rights litigation that challenges to the lawfulness of governmental conduct will be required and that Parliament cannot have intended the advancement of human rights to be charitable only when popular and unopposed. HDT submitted that the purpose of protecting human rights necessarily involves protecting the rights of those who are in a minority or who are oppressed against the will of the majority and/or against the power of the State. Further, that the purpose of international and constitutional human rights instruments is, as the Charity Commission's expert puts it:

> "*…to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. [Human rights] … may not be submitted to vote; they depend on the outcome of no elections*."

So, in HDT's submission, it follows that human rights litigation, whether domestic or overseas, is and has always been, a core component of promoting human rights. Its case is that it is inherent in the purpose of advancing human rights for the public benefit that an organisation may need to address the policies of a government which are (or are arguably) at odds with the State's legal obligations with respect to human rights. This is the means by which the task of constitutional interpretation is undertaken.

88. Finally, HDT emphasised that it is not a campaigning organisation and that it does not seek to change the law so that it can be distinguished from the institution considered by Slade J in *McGovern*. It referred the Tribunal to the Charity Commission's *RR12* guidance (see paragraph [33] above) to the effect that the activity of seeking to eliminate serious infringements of human rights which are contrary to the domestic law of the country in which they take place (taken alone or considered in the context of its international treaty obligations) does not generally amount to trying to change domestic law. As Mr Beloff put it, if a domestic law is rendered void by the constitution then there is actually no law to change. HDT's case was that litigation in a domestic court or tribunal, aimed at enforcing and upholding the human rights guarantees set out in binding constitutional law, is an activity which seeks to uphold the law not to change it, so that there is no infringement of the doctrine of the separation of powers in its activities. Further, that unlike the association in *McGovern*, HDT is not concerned with procuring the reversal of lawful government policies and decisions. It is concerned only with reversing decisions and policies which are unlawful by virtue of binding, justiciable, superior constitutional law or applicable human rights law.

(ii) evidence

89. Professor Chinkin's evidence was as follows:

> *"As a general proposition, States that are bound by any particular norm of international law have a legal obligation to ensure their domestic law conforms to that norm of international law…where domestic laws do not conform, aggrieved parties can seek recourse through domestic legal channels and/or international tribunals depending on the provisions of domestic constitutional law and the availability of international (or regional) mechanisms.*
>
> *...a person who brings a challenge in the courts for a declaration that her or his constitutionally entrenched fundamental rights have been violated by a domestic law or other action of the State is by definition seeking to uphold superior constitutional law. If the Court does find the impugned law or government action in contravention of the constitution, for example where a law is found to violate a provision of the constitution it may hold it to be void (or invalid, or unenforceable) by virtue of its inferior legal status to the constitution. Indeed, whatever the outcome of the particular challenge, the law is upheld through the court's constitutional scrutiny of the impugned act, which is clarified for the benefit of all.*
>
> *Similarly, in a constitutional system with interpretive provisions, a challenge seeking an interpretation consistent with fundamental rights of a domestic provision purporting to criminalise relevant conduct (by e.g. ensuring that it is not interpreted as applying to private acts between consenting adults) seeks to attain a correct interpretation of that domestic provision and, once again, seeks to clarify and uphold the law rather than to change it."*

90. Professor Chinkin explained that under the Vienna Convention on the Law of Treaties, a party to a treaty may not invoke the provisions of its internal law as

justification for its failure to perform a treaty obligation and that this is illustrative of the relative legal hierarchy of international treaty law and domestic or internal laws – "*the latter must comply with the former and not the other way around"*. She further explained that in countries following a "monist" theory of law, international human rights treaties automatically become part of domestic law upon ratification or accession and can be applied or enforced directly by the domestic courts. In those countries following a "dualist" theory (such as the United Kingdom), a treaty only becomes directly enforceable through the domestic courts once it has been incorporated into domestic law by the legislature. In both cases, there is a binding obligation on the State in international law to give effect to its treaty obligations.

91. Timothy Otty's evidence was that even where laws purporting to criminalise relevant conduct are not enforced, they can bring misery by creating an 'underclass' of individuals deemed criminal by virtue of no more than one aspect of their identity. Such laws can lead to severe, inhumane punishments and can foster extremism and intolerance. Further, they can give rise to very grave public health issues by making the fight against HIV far more complex.

92. Jonathan Cooper's evidence was that in 2013 over 80 countries continued to have laws which purported to criminalise private, consensual homosexual acts between adults, making the expression of their identity illegal and punishable by imprisonment or even death. His evidence was also that these penal provisions have extremely serious and wide-ranging consequences for the everyday lives of gay men and others. For example, he referred the Tribunal to a UNAIDS report published in 2008, which showed that the rate of HIV infection amongst gay men was 1 in 15 in countries where same sex relationships were legal, but rose to 1 in 4 in countries criminalising such relationships.

93. The Charity Commission had submitted that local laws against same sex relationships represent deeply-embedded cultural views which must be taken into account, however it produced no evidence to support this submission. Mr Dibble asked the Tribunal to take judicial notice of this. Jonathan Cooper's evidence was that there is an inherent fallacy in this argument in circumstances where the legislation in issue was very largely the result of an export of colonial era laws imposed on local populations by British rule. He referred the Tribunal to an academic report which had reached this conclusion and produced it in evidence to the Tribunal.

94. HDT's expert Professor Chinkin, whose evidence was not challenged by the Charity Commission, concluded that a domestic provision purporting to criminalise same sex relationships constituted a "*serious contravention of international human rights law*", in particular a breach of the UDHR, the ICCPR and the ECHR. Professor Van Bueren's evidence was that "*it is the universality of human rights, as fundamental to our sense of being human, which distinguishes human rights law from other areas of law"*.

(iii) conclusion

95. The Tribunal's conclusions on issue 7 are as follows. Firstly, we find as a fact on the evidence before us that HDT's purposes and activities do not fall within any of the categories (i) to (v) identified in Slade J's "Summary of Conclusions" at page 340B in *McGovern.* Slade J was concerned with an association which (as he found) sought to change valid, but arguably unjust, domestic laws. We find on the evidence before us that HDT is concerned with the promotion of human rights by establishing whether particular laws are valid, through a process of constitutional interpretation. We find that this process falls entirely outside the categories of activity considered by Slade J in *McGovern.* However, as Slade J indicated that his fivefold list was not intended to be exhaustive, we have gone on to consider whether HDT's purposes and activities might be considered "political" for other reasons, for example because they offend the underlying principles identified by Slade J.

96. We understand Slade J's analysis in *McGovern* to be limited to the consideration of a specific constitutional context in which there is a separation of powers with Parliamentary supremacy. His concern about the court usurping the role of the legislature was entirely understandable in that context. However, we find on the basis of the evidence before us (see paragraph [89] above) that HDT's activities take place in a markedly different context, where there is constitutional supremacy and a legitimate role for the court in interpreting and enforcing superior constitutional rights where the domestic law is thought to be in conflict with those rights. We note that constitutional interpretation can only take place where the state concerned has implemented the relevant treaty obligations so as to provide for a competent domestic constitutional court to be empowered to undertake this role, or for referral of the issue to an international tribunal, the legitimacy of which has been recognised by the state concerned. We are guided by Lord Bingham's explanation in *Reyes v The Queen (*see paragraph [84] above*)* of why that process does not offend the separation of powers in the country concerned. In the circumstances, we do not consider that HDT's purposes or activities so offend the principles identified in *McGovern* that they should be regarded as forming the basis of a sixth category of political purposes.

97. We conclude that Slade J's comments about the need to consider the impact of a charity's activities on the local community should not be understood to refer to the consideration by a tribunal or court of the range of public opinion about the policy area concerned. This comment was made in the narrow context of assessing the public benefit of legislation. At page 338F Slade J considers only the situation where "*the court …would still be bound to take account of the probable effects of attempts to procure the proposed legislation, or of its actual enactment, on the inhabitants of the country concerned"*. As we have found that HDT does not seek to promote legislation in a foreign state, we do not find it necessary to our considerations to ask whether the local community might or might not support the domestic legislation which criminalises relevant conduct. There is, in any event, no evidence before us about that issue either way and we feel unable to take judicial notice of the views of the public in a foreign country as suggested by Mr Dibble, as we do not find that this is a subject "so notorious or clearly established that evidence of its existence is deemed unnecessary" (see *Phipson on Evidence, 17th Edition, paragraph 1 -18).* We note Professor Van Bueren's evidence that human rights considerations exist outside the realm of politics and elections and we accept HDT's submission that the

advancement of human rights may necessarily involve protecting the minority against the majority.

98. We accept the evidence of Professor Chinkin (see paragraph 94 above) that a law which purports to criminalise relevant conduct is a serious breach of the human rights recognised by the UDHR, the ICCPR and the ECHR. We also accept her evidence (see paragraph 89 above) as to the remedies which may be granted where a domestic legislative provision is found to be in conflict with a superior binding constitutional provision or international treaty obligation.

99. We are not satisfied that the litigation supported and conducted by HDT may be described as seeking to change the law. It seems to us that the constitutional process involved in interpreting and/or enforcing superior constitutional rights might, on one analysis, be seen as upholding the law of the state concerned rather than changing it, but it also seems to us that the paradigm of changing/upholding the law is one more suited to an analysis of domestic provisions than it is to the arena of constitutional rights. We prefer to characterise HDT's activities as engaging in a legitimate constitutional process which occupies a different space from that occupied by the domestic law, although we accept that the outcome of that process may have implications for the domestic law. We find that it is intrinsic to the process with which we are concerned that the relevant state's legislature has agreed to subjugate itself to the outcome of this constitutional process so that its role is not usurped by the court.

100. We are attracted by the American and Canadian authorities (see paragraph [86] above) to the effect that it is charitable (and presumably would not be found to be political) to promote the enjoyment of a citizen's existing constitutional rights, although we hesitate to rely on authorities of which the precedent value is unknown. We express the hope that the Charity Commission will investigate this issue further if and when it reviews its guidance on the promotion of human rights, as it seems to us to be an important point.

101. In conclusion, for the reasons above we are satisfied that the promotion and protection of human rights (a) by means which include the support or conduct of litigation which is (b) aimed at securing the interpretation and/or enforcement of superior constitutional rights (c) in a foreign country which has given effect to the relevant treaty obligation so as to enable that process - is not a political purpose, and neither is it in our view a political activity. We accept that there is no prior authority for that view because the promotion of human rights through the conduct of such litigation has not previously been considered by the courts or by this Tribunal. In reaching our conclusion we have in mind the "living instrument" approach to human rights described by Professor Van Bueren and her evidence that the ambit of human rights has evolved in recent years, particularly in relation to the human rights of the LGBTI community. It seems to us that a human rights instrument may only evolve in this way if it is tested from time to time and that, in including "the advancement of human rights" in its list of descriptions of charitable purposes in the Act, Parliament must be taken to have understood that those rights would evolve by being interpreted,

clarified and enforced in ways which include the constitutional mechanisms with which HDT is involved.

Issue 8: Are the Appellant's purposes for the public benefit?

(i) submissions

102. The Charity Commission submitted that the onus of proof fell on HDT to satisfy the Tribunal that its purposes are directed to benefitting the public in a way that is recognised as charitable. It submitted that, because HDT's purposes and activities should properly be understood as being directed towards changing the law in a foreign state, they could not meet the public benefit requirement for the reasons given by Slade J in *McGovern*, namely that the court is unable to judge whether the reform of law in a foreign jurisdiction is for the public benefit and the court is not competent to control a charity with such purposes.

103. HDT submitted that, if an English court were required to control HDT, it would not be necessary for it to decide upon the question of the lawfulness of the foreign law concerned, but only whether the particular litigation in which HDT was involved was for the public benefit. HDT relied upon a note prepared by its lawyers for the Charity Commission prior to the appeal, but produced to the Tribunal, where this issue was put thus:

> "*Common sense and judicial comity would cause the English court to refrain from seeking to decide the question the domestic court or international tribunal would be asked to decide. It would simply, as already stated, decide whether supporting litigation referable to justiciable rights was for the public benefit…The English court would likewise be able to take account of any suggested reasons why it would not be in the interests of the United Kingdom for a charity to support the litigation; but it is again very difficult to imagine circumstances in which it could realistically be said that support by an English charity, a non-governmental body, for litigation over an issue which was justiciable in a domestic court of a country, or an international tribunal to whose jurisdiction the country had submitted, would be so damaging to the United Kingdom's national interest that it would not be for the public benefit for such support to be given ".*

104. HDT reminded the Tribunal that public benefit had been held by the Upper Tribunal in *ISC* to have two aspects: firstly, a requirement that the purpose must be beneficial and, secondly, that it must benefit the public in general or a sufficient section of it. HDT referred the Tribunal to the Charity Commission's published guidance on the first aspect of public benefit, which recognised that whilst the benefit of a particular purpose must, in principle, be capable of being established by evidence, the courts will regard some benefits as too obvious to require formal proof, in particular where a purpose is obviously beneficial to the community. HDT submitted that the eradication of human rights abuses is obviously beneficial to the community and that this is recognised in the Charity Commission's publication *RR12* as follows:

> *"The concept of human rights is virtually unanimously endorsed by the countries of the world (even if strict observance of these rights is intermittent).*
>
> *There is an obvious public benefit in promoting human rights. For individuals whose human rights are thereby secured, the benefit is immediate and tangible. There is also a less tangible, but nonetheless significant, benefit to the whole community that arises from our perception that the fundamental rights of all members of the community are being protected. That provides sufficient benefit to the community to justify treating the promotion of human rights as a charitable purpose in its own right."*

105. In concluding its submissions, the Charity Commission acknowledged that HDT would probably be charitable if its activities were confined to the UK. It referred to the changed landscape since the handing down of many of the judgments to which the Tribunal had been referred, including the passing of the Human Rights Act 1998 which incorporated the European Convention on Human Rights into domestic law, the protection from discrimination afforded to the LGBTI community by the Equality Act 2010, and the inclusion of "the advancement of human rights" as a description of a charitable purpose in the Charities Act 2006. However, in its submission, the public benefit requirement placed a severe restriction on the acceptance as a charity of an organisation whose purposes offended the rule that political purposes are not charitable and it invited the Tribunal to dismiss the appeal.

(*ii) evidence*

106. Jonathan Cooper's evidence was that there were five identifiable benefits flowing from HDT's work These were (i) the immediate and tangible benefit for the LGBTI individuals concerned, whose human rights are protected and for whom redress is sought; (ii) a wider benefit to the whole community in the jurisdiction in question arising from the effect of protecting the fundamental rights of all of its members; (iii) the example of individuals being shown to be able to protect their rights and seek redress is capable of having important and far-reaching significance for the rule of law and can empower the LGBTI community; (iv) HDT's model of partnership between international law firms and local lawyers forges strong professional relationships which are beneficial to the rule of law; and (v) the benefit to the public in England and Wales of securing the fundamental rights of citizens in the relevant overseas jurisdiction, which in turn means that fewer individuals will need to resort to the international community to protect them from persecution.

(iii) conclusion

107. In considering issue 8, we note once again that the public benefit requirement has to be considered with reference to each description of purpose and that it is not a general concept that spans each description. We note that, in assessing the public benefit requirement, the courts in *Bowman*, *National Anti-Vivisection Society* and *McGovern* were all concerned with different descriptions of charitable purposes than those for which HDT is established.

108. As "the advancement of human rights" is a description of a charitable purpose for which there is not as yet any legal authority, we have followed the approach of the Upper Tribunal in *ISC* and have considered whether HDT's litigation activities in furtherance of its purposes may be found to be beneficial and, secondly, whether any benefit accrues to the public as a whole or to a sufficient section of it. Both of these questions must be answered on the basis of the evidence before the Tribunal.

109. In relation to the first aspect of public benefit, we conclude from the evidence that HDT's support and conduct of they type of litigation which takes place in the very particular context which we have described in this decision is beneficial. We have already concluded that the conduct of such litigation is not a purpose in its own right and is not political, and that, because the purported criminalisation of relevant conduct represents a serious breach of human rights norms, there is a public benefit in seeking to interpret, clarify and protect superior constitutional rights. Jonathan Cooper's evidence (see paragraph 106 above) identifies a particular benefit to those individuals whose human rights are promoted and protected by this means and also a wider benefit to the community at large from having such rights interpreted, clarified and enforced in a process to which their country has assented. We are satisfied by the evidence on this point.

110. It was not in dispute before us that the benefit accrues to the whole community or a sufficiently appreciable section of it and we find that this is the case.

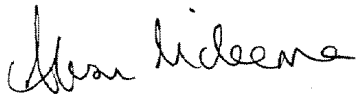
111. We have not been presented with any evidence to the effect that there is a detriment arising from HDT's activities and, for the reasons given at issue 7 above, we have concluded that HDT's purposes and activities are not political. We accept HDT's submission that an English court could assess the public benefit arising from the particular litigation activities with which HDT is involved, without needing to decide whether reform of a foreign domestic law was for the public benefit.

Conclusion

112. For the reasons set out under each of the relevant issues above, we are satisfied that HDT is established for the purposes of (i) promoting and protecting human rights as set out in the UDHR and subsequent United Nations conventions and declarations throughout the world, and in particular (but without limitation) the rights to human dignity and to be free from cruel, inhuman or degrading treatment or punishment and the right to privacy and to personal and social development; and (ii) promoting the sound administration of the law. We are satisfied that these purposes are exclusively charitable because they fall within the descriptions of charitable purposes in section 3 of the Act (sections 3 (1) (h) and 3 (1) (m) (i) respectively). We are also satisfied that they are for the public benefit. Accordingly, we allow this appeal and direct rectification of the register.

113. Finally, we are aware that certain views have been expressed in the press and elsewhere about the potential affect of this decision on other human rights organisations seeking charitable status and also on those charities already operating in the field of human rights. In the circumstances, it may be helpful for us to clarify here

that as a matter of law this decision is confined to its own facts and does not establish a legal precedent for the registration of other prospective charities. This decision also has no legal effect upon charities already registered as such and operating in the field of human rights. It does not supersede the Charity Commission's published guidance or the decisions of superior courts in this area.



PRINCIPAL JUDGE
9 July 2014

Appendix 1: Agreed List of Issues

1. ***The issue for determination is whether the Appellant is a charity, which involves determination of the following****:*

(i) For what purposes is the Appellant established?

(ii) Are the purposes for which the Appellant is established exclusively charitable?

(i) Do the purposes fall within the descriptions of charitable purposes in section 3 of the Charities Act 2011?

(ii) Are the purposes for the public benefit?

2. ***Determination of the Appellant's purposes***

(i) What are the Appellant's purposes?

(ii) To what (if any) evidence other than the Appellant's articles of association should regard be had to ascertain the purposes for which the Appellant is established?

(iii) Are the activities which the Appellant has carried out, or intends to carry out, relevant to the determination of the Appellant's purposes?

(iv) Is the Appellant's activity of conducting and supporting litigation with the relevant aim (as set out in paragraph 28 (1) of the Grounds of Appeal) a purpose of the Appellant?

(v) If it is a purpose, does conducting and supporting litigation with the relevant aim fall within the descriptions of purposes in s.3(1) of the Charities Act 2011?

3. ***The scope of 'human rights' in s.3(1)(h) of the Charities Act 2011***

(i) Does the term 'human rights' in s.3(1)(h) have a "particular meaning under the law relating to charities in England and Wales", for the purposes of section 3 (3) of the Charities Act 2011?

(ii) If so, what is that meaning?

(iii) Are 'human rights' in s.3(1)(h) limited to rights accepted under, or defined by reference to, the law of England and Wales?

(iv) Do the 'human rights' in s.3(1)(h) extend to the rights set out in (i) the UDHR; (ii) subsequent United Nations conventions and declarations including the ICCPR; (iii) the ECHR?

4. ***Do the purposes fall within the descriptions of purposes in s.3(1)(h) of the Charities Act 2011?***

(i) Do the objects set out in article 2 of the Appellant's articles of association, as properly construed, fall within the descriptions of purposes in s.3(1) (h) of the Charities Act 2011?

(ii) In particular:

(i) are the following 'human rights' within the meaning of s.3(1)(h): the right to human dignity; the right to be free from cruel, inhuman or degrading treatment or punishment; the right to privacy; the right to personal and social development?

(ii) if any of the rights in (i) is not a 'human right' within the meaning of s.3(1)(h), are the Appellant's objects nevertheless limited, as a matter of construction, to the promotion and protection of rights falling within s.3(1)(h)?

(iii) Can purposes which authorise the intervention by the Appellant in the legal processes of the courts of a foreign jurisdiction contrary to the position adopted by the foreign state be purposes falling within the description of purposes in s.3(1)(h) of the Charities Act 2011?

5. ***The promotion of the sound administration of the law***

(i) Is the object set out in article 2.1.3 of the Appellant's articles of association, as properly construed, an exclusively charitable purpose?

(ii) In particular, is that object prevented from being an exclusively charitable purpose by reason of its not being expressly limited to the provision of legal advice and assistance to person otherwise unable to afford them?

(iii) Is the conduct and support of litigation with the relevant aim a proper means of pursuing, for the public benefit, the promotion of the sound administration of the law?

6. ***What is the proper test for determining whether the Appellant's purposes are for the public benefit, insofar as they are to be carried out outside England and Wales?***

In particular:

(i) Is it sufficient to demonstrate (i) that the purpose benefits the public (or a section of the public) abroad; and (ii) that the same purpose would be considered charitable in the case of a body confining its operations to England and Wales (provided that (iii) there is no reason of public policy not to recognise the purpose as charitable); or

(ii) Is it necessary additionally to demonstrate that there will be a benefit to the public in England and Wales.

7. ***Are the Appellant's purposes political?***

Whether the Appellant's purposes are in whole or part political, and hence not charitable, in the circumstances of this case, in particular having regard to:

(i) The criminalisation of consensual homosexual conduct:

Is a law that purports to criminalise private, consensual, non-violent homosexual acts between adults ('relevant conduct') a breach of the human rights recognised by any (or all) of the following:

(i) The Universal Declaration of Human Rights ('UDHR'); and/or

(ii) The International Covenant on Civil and Political Rights ('ICCPR'); and/or

(iii) The European Convention on Human Rights ('ECHR')?

(ii) The scope of remedies:

(i) What remedies may be granted where a court finds that a legislative provision is inconsistent with a binding constitutional provision or a binding provision of international law?

(ii) In particular, in the context of this case, may such a court declare a legislative provision criminalising relevant conduct to be (a) void and/or (b) invalid and/or (c) unenforceable to the extent of any inconsistency with superior provisions of binding constitutional and/or international law?

(iii) Whether the purposes are seeking to change the law:

(i) If a court declares a legislative provision criminalising relevant conduct to be (a) void and/or (b) invalid and/or (c) unenforceable to the extent of any inconsistency with superior provisions of binding constitutional and/or international law, does the court uphold or change the law?

(ii) In particular, does litigation having the relevant aim (as set out in paragraph 28 (1) of the Grounds of Appeal) seek to change the law?

8. ***Are the Appellant's purposes for the public benefit?***

Applying the necessary test of public benefit:

(i) So far as it is a purpose, is conducting and supporting litigation with the relevant aim for the public benefit?

(ii) So far as it is not a purpose, is the conduct and support of litigation with the relevant aim a proper means of pursuing, for the public benefit, a charitable purpose falling within ss.3(1)(h) or 3(1)(m) of the Charities Act 2011?

(iii) Are the Appellant's purposes for the public benefit?

In the sense that (i) the purposes are beneficial and (ii) any detriment or harm resulting from them does not outweigh the benefit.

(iv) Are the Appellant's purposes in whole or in part political, and for that reason not for the public benefit?