Neutral Citation Number: [2013] EWHC 651 (Admin)

Case No: CO/7284/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2013

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

Between:

CORE ISSUES TRUST	**Claimant**
- and -	
TRANSPORT FOR LONDON	**Defendant**

Paul Diamond (instructed by **Andrews Law Solicitors**) for the **Claimant**
Nigel Pleming QC and Catherine Dobson (instructed by **Transport for London Legal**) for the **Defendant**

Hearing dates: 28th February & 1st March 2013

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE LANG DBE

MRS JUSTICE LANG:

1. Core Issues Trust ("the Trust") seeks judicial review of the decision made by Transport for London ("TfL"), on 12th April 2012, not to allow an advertisement placed by Anglican Mainstream placed on behalf of the Trust to appear on the outside of its buses.

2. The wording of the proposed advertisement was:

> "NOT GAY! EX-GAY, POST-GAY AND PROUD. GET OVER IT!
>
> www.anglican-mainstream.net www.core-issues.org"

3. It was intended to be a response to an advertisement by Stonewall which had earlier appeared on the outside of TfL's buses stating:

> "SOME PEOPLE ARE GAY. GET OVER IT!"

4. The reason given for the refusal was that the advertisement was contrary to TfL's Advertising Policy.

5. On 19th October 2012, Kenneth Parker J. ordered that the application for permission was to be listed to be heard at the same time as the substantive hearing for judicial review, as a "rolled up hearing".

Standing

6. At the outset of the hearing, I ruled that the original Claimant, Dr Michael Davidson, did not have standing to bring the claim and so, with the consent of both parties, Core Issues Trust was substituted as Claimant.

7. A person only has sufficient interest to bring a claim under section 7 of the Human Rights Act 1998 ("HRA 1998") if he is a "victim" of an unlawful act, within the meaning of article 34 of the European Convention on Human Rights ("ECHR"). It is established Convention law that a claim cannot be brought unless the claimant has been directly affected. Class actions are not permitted.

8. In this case, the 'persons' directly affected were Core Issues Trust and Anglican Mainstream, which placed the order on behalf of both organisations. Dr Davidson was not directly affected in his individual capacity, and the fact that he is the voluntary Director of Core Issues Trust did not give him sufficient standing to bring the claim.

9. Although the test for standing in judicial review claims under CPR Part 54 is more liberal than under the ECHR, the human rights claim was at the core of this judicial review, and so the Claimant had to establish standing under the HRA 1998.

The Legislative and Regulatory Framework

10. TfL is a statutory body established by Parliament under section 154 of the Greater London Authority Act 1999 ("GLAA 1999"). By Schedule 10, paragraphs (2) and (3), members of TfL are appointed by the Mayor, and the Mayor acts as Chairman.

11. TfL is required by section 154(3) to exercise its functions:

    a) in accordance with such guidance or directions as may be issued to it by the Mayor;
    b) for the purpose of facilitating the Greater London Authority's ("GLA") duty to secure the provision of transport facilities, and
    c) for the purpose of securing or implementing the Mayor's Transport Strategy.

12. By section 155, the Mayor may issue guidance, and either general or specific directions to TfL on the exercise of its functions. Such guidance or directions must be issued in writing and notified to the nominated officer of TfL.

13. Paragraph 1(3) of Schedule 10 to the GLAA 1999 empowers TfL "to do such things and enter into such transactions as are calculated to facilitate, or are conducive or incidental to, the discharge of any of its functions".

14. Under this power, TfL maintains an Advertising Policy. Section 1.1 explains that the purpose of the policy is "to set out high level principles, together with the decision making framework and criteria, governing the approval of advertisements which appear on TfL's services and information campaigns undertaken by TfL and to ensure TfL's compliance with its obligations in section 404 of the GLA Act."

15. Section 1.2 makes clear that "TfL will ensure that advertisements which appear on TfL's services and information campaigns undertaken by TfL are consistent with the obligations in section 404 of the GLA Act".

16. Paragraph 3.1 of the "Required Standards" in its Advertising Policy provides that "advertisements will not be approved for, or permitted to remain on TfL's services, if, in TfL's reasonable opinion, the advertisement falls within any of the categories set out, which include, among other matters:

> "(a) The advertisement does not comply with the law or incites someone to break the law.
>
> (b) The advertisement does not comply with the British Code of Advertising, Sales Promotion and Direct Marketing.
>
> (c) The advertisement is inconsistent with the obligations in section 404 of the GLA Act 1999.
>
> (d) The advertisement is likely to cause widespread or serious offence to members of the public on account of the nature of the product or service being advertised the wording or design of the advertisement or by way of inference.

> (e) The advertisement depicts men, women or children in a sexual manner ….
>
> (f) The advertisement depicts or refers to indecency or obscenity or uses obscene or distasteful language.
>
> (g) ….
>
> (h) The advertisement depicts direct or immediate violence to anyone shown in the advertisement.
>
> (i) The advertisement condones or provokes anti-social behaviour.
>
> (j) …..
>
> (k) The advertisement contains images or messages which relate to matters of public controversy and sensitivity.
>
> (l) – (o) …
>
> (p) The advertisement relates to a political party or parties or a political cause.
>
> (q) – (r). ”

17. Section 404 of the GLAA Act 1999 was repealed on 5 April 2011 with the entry into force of section 149 of the Equality Act 2010. As a public body, TfL must now exercise its powers in accordance with section 149 of the Equality Act. Sections 1.1 and 1.2 and section 3(1)(c) of TfL’s Advertising Policy should therefore be read as referring to the obligations set out in section 149 of the Equality Act 2010.

18. The public sector equality duty in section 149 of the Equality Act 2010 provides, so far as is material:

> “(1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> [….]
>
> (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic

> and person who do not share it involves having due regard, in particular, to the need to –
>
> (a) tackle prejudice, and
>
> (b) promote understanding.
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are –
>
> age
>
> disability
>
> gender reassignment
>
> pregnancy and maternity
>
> race
>
> religion or belief
>
> sex
>
> sexual orientation."

19. Section 12(1) of the Equality Act 2010 provides:

> "sexual orientation means a person's orientation towards-
>
> (a) persons of the same sex,
>
> (b) persons of the opposite sex, or
>
> (c) persons of either sex."

20. Direct and indirect discrimination on the grounds of a protected characteristic is prohibited by sections 13 and 14, Equality Act 2010.

The facts

21. The Trust is a company limited by guarantee and a registered charity, based in Northern Ireland, whose objects are "the advancement of religion" and "the promotion of the Holy Scriptures", in particular "to uphold the view that any sexual relationship outside marriage is inconsistent with the Biblical view of "one flesh" relationships (Genesis 2.24), and the Divine pattern for family life, premised on marriage between one man and one woman".

22. In its Statement of Belief the Trust declares that:

> "the Church of Jesus Christ, when true to the Scriptures, properly provides a spiritual home and sensitive support for believers and seekers who struggle with issues of sexual brokenness, including homosexuality."

23. Its "Core 'Change' Statement" states:

> "All human sexuality is fallen and is in need of the sanctifying work of God to restore it to its intended wholeness and divine purpose. There is a growing body of research evidence indicating that sexual preference is neither immutable, innate nor chosen. As a consequence of our basic sinfulness we all have desires that we do not choose to have but we do have choices with respect to what we do about them. As a consequence our sexual identity can be reinforced or altered by either gender-affirming or gay-affirming lifestyles or therapies. CORE works with people who voluntarily seek to change from a "gay" lifestyle to a gender-affirming one. This is sometimes referred to as a "sexual re-orientation" process."

24. Anglican Mainstream, which is a company limited by guarantee and a registered charity, describes itself as a community within the Anglican communion, committed to promote, teach and maintain the Scriptural truths upon which the Anglican Church was founded. It took no part in these proceedings.

25. Anglican Mainstream and the Trust planned the advertisement as a response to an earlier advertisement which appeared on the outside of TfL's buses stating:

> "SOME PEOPLE ARE GAY. GET OVER IT!"

That advertisement was placed by Stonewall, a campaigning organisation which seeks to promote equality and justice for lesbians, gay men, bisexual and transgender individuals, commonly abbreviated to "LGBT". Anglican Mainstream and the Trust deliberately copied the design, colour and wording of Stonewall's advertisement, to make it clear that it was a response.

26. TfL makes provision for London bus services through contractors, known as bus operators. Under TfL's "operators framework", bus operators are permitted to accept commercial advertising on buses, subject to certain conditions. These conditions include a requirement that advertisements will not be acceptable if they do not comply with TfL's advertising policy and the British Code of Advertising, Sales Promotion and Direct Marketing. They state that advertisements will not be acceptable if, inter alia, they are likely to cause "widespread or serious offence to members of the public" or "are of a political nature calling for the support of a particular viewpoint".

27. Advertising is managed by external contractors who enter into arrangements with bus operators. The advertising contractor in this case was CBS Outdoor UK ("CBSO").

28. TfL has previously permitted controversial and potentially offensive advertisements on its transport system, notably an advertisement on the outside of London buses placed by the British Humanist Association which read "There's probably no God".

29. On 4th April 2012, Anglican Mainstream submitted an order form for the advertisement to CBSO. It was to run on the sides of 25 buses between 16th and 29th April 2012.

30. On 5th April 2012, CBSO submitted the advertisement to the Committee of Advertising Practice ("CAP") for consideration.

31. The CAP is an industry-created Committee which writes and maintains the British Code of Advertising, Sales Promotion and Direct Marketing, known as the CAP Code. The CAP offers advice on compliance with the CAP Code but its views are not binding on the Advertising Standards Authority, which is an independent body that administers the Codes and investigates complaints.

32. On 10th April 2012, CAP notified CBSO that:

> "… the advertising copy you submitted seems to comply with the British Code of Advertising, Sale Promotion and Direct Marketing (the CAP Code). We have looked at your copy in light of existing ASA adjudications and believe that the ASA is unlikely to uphold complaints against it".

33. On 12th April 2012, CBSO confirmed the order and entered into a contract with Anglican Mainstream. Clause 15 of CBSO's standard terms and conditions provided:

> "If the landlord at any time in its absolute discretion requires the display of Advertisement Copy at this property to be interrupted or discontinued then the Contractor may interrupt or discontinue such display of Advertisement Copy without prior notice to the Principal and upon any such action of the Landlord the Contractor may terminate the Agreement whether wholly or in part notwithstanding anything therein contained, In the event of such termination, the Contractor's liability is limited as outlined in Clause 9.4 above."

34. In the early afternoon of 12th April 2012, CBSO sent three emails to Tfl. The first email attached the advertisement, saying:

> "This has been approved by ASA/CAP... We are accepting this, but wanted to let you know. My fear was that if we said no – we have no legal grounds upon which to turn this down (nor within our bus contracts) My personal fear is that there would be an awful lot more PR for this if turned down (particularly with no grounds to do so)."

35. The second email said "...the Guardian newspaper is sniffing around asking if we are running this – are you comfortable with us running this – we really need to know as

soon as we can?" The third email said "ignore previous email – the first one stands – it will be run, but just wanted to let you know."

36. Later that same afternoon, at 4.27 pm, the Guardian newspaper published an article on its website about the advertisement, stating that it was due to run on buses the following week. It reported "an angry response from gay rights campaigners", including Stonewall, and a response from Anglican Mainstream, saying "*because [the] group adheres to scripture that all fornication outside marriage is prohibited, it believes that homosexuals are "not being fully the people God intended us to be*".

37. The article also stated:

> "Attempts to "treat" or alter sexual orientation have been strongly condemned by leading medical organisations. The Royal College of Psychiatrists has warned that "so-called treatments of homosexuality create a setting in which prejudice and discrimination flourish" and concluded in 2010 that "there is no sound evidence that sexual orientation can be changed". The British Medical Association has also attacked "conversion therapy", a related field to reparation therapy, passing a motion asserting that it is "discredited and harmful to those 'treated'…..
>
> In a statement, Anglican Mainstream and Core Issues said Stonewall's slogan is "merely another attempt to close down the critical debate about being gay and marriage 'equality'. They accused Stonewall of riding roughshod over individuals who choose to "move out of homosexuality".
>
> The statement continued "Both organisations recognise the rights of individuals to identify as gay, and to live according to their own values. But, by the same token, they believe individuals – such as married men and women unhappy with their homosexuality – should be supported in developing their heterosexual potential where this is the appropriate life choice for them… Current scientific research says there is no gay gene and that sexuality is far more fluid than has hitherto been thought."

38. The Guardian article triggered a large number of posts on the Guardian website, on Twitter and elsewhere, objecting to the advertisement.

39. TfL received a large number of complaints, as well as several expressions of support for the advertisement.

40. At 4.38 pm, the emails from CBSO were forwarded to Mr Everitt, Managing Director of Marketing and Communications at Tfl. He responded in an internal email at 4.45 pm saying:

> "We might not have a legal reason to block it, but how does this meet our criterion for avoiding issues of public

> controversy? I find it pretty hard to reach a judgment about these things without someone having done some sort of analysis as to how this meets or fails to meet our advertising policy. It is also not very helpful being asked to exercise that judgment in isolation without some sort of analysis of precedent – i.e. what have/haven't we allowed in this area previously. Can CBSO or someone here answer please to help us reach a conclusion?"

41. Just after 5.00 pm, Mr Everitt received an email from the Mayor of London's Office, in response to the Guardian article, asking "*is this happening*", to which Mr Everitt replied "*I've just been alerted to the fact that our ad agency has accepted it. The ads standards people have cleared it. I don't like it. Shall I get it pulled? The only thing is that banning it now will create a splash, but that may be better than this being paraded around London*. " Mr Everitt explained that he was asking the Mayor's Office for its views because "*as a matter of routine, TfL and GLA exchange views on our public positions.*"

42. At 5.20 pm Mr Everitt sent an internal email asking for a statement to be drafted along the lines of '*Our advertising agency CBSO manages ads on our network. They have checked this ad with the advertising standards authorities who have confirmed that the ad does not infringe any UK advertising rules.*' He concluded "*We must have a statement that shows we are not making judgments about every ad which goes up.*"

43. At 6.28 pm, Mr Weston, Operations Director for London Buses at TfL, sent an email to Mr Everitt confirming that he had spoken to CBSO "who have confirmed that the advert will NOT be posted".

44. At 6.01 pm, Tfl issued a press statement in the following terms:

> "This advertisement has just been brought to our attention by our advertising agency, CBSO and we have decided that it should not run on London's bus or transport networks. We do not believe that these specific ads are consistent with Tfl's commitment to a tolerant and inclusive London. The adverts are not currently running on any London Buses and they will not do so.
>
> **For info:**
>
> The Mayor was strongly of the view that this ad should not be run….."

45. Mr Everitt, in his witness statement, at paragraph 32, said "*although the Mayor had made his views clear and I was aware of them, I made the decision.*" The Court was not told of the terms in which the Mayor made his views known to Mr Everitt.

46. By way of explanation for his decision, Mr Everitt said, at paragraphs 29 to 31 of his witness statement:

> "29. During the afternoon of 12 April, TfL became aware of growing public reaction and further press coverage, which supported the view that the underlying message behind the advertisement (even if this is characterised as no more than suggesting some recovery from or reversal of homosexuality) was causing offence or was controversial, or at the very least that it had the potential to do so. For example, there were over 800 comments in response to the Guardian story … before this facility was closed and TfL received 37 complaints. Comments on social media also reflected intense public concern and offence, with around 1500 Twitter comments revealed by our social media monitoring engine and a dedicated Face book page set up against the advertisement. Although there was some correspondence in support of the advertisement going ahead, the vast majority expressed concern – and even on occasion outrage – about the advertisement and/or suggested that it should not proceed. This reinforced my own concerns.
>
> 30. In the circumstances, including the principally negative public reaction, I was concerned that the advertisement did not meet paragraph 3.1(d) of TfL's advertising policy.
>
> 31. I (rather than the relevant custodian under the advertising policy, who was in the process of leaving TfL) decided that the advertisement should not run given that it did not appear to meet TfL's advertising policy, in relation to paragraph 3.1(d) and (k)."

47. Anglican Mainstream was not consulted before the decision to refuse the advertisement was made. Dr Davidson first heard when reporters contacted him for a comment in the early evening of 12th April 2012, saying that "Boris Johnson had banned the advert in his role as Chairman of TfL" (witness statement paragraph 5).

48. On 13th April 2012, CBSO sent an email to Anglican Mainstream stating that TfL had decided not to allow the advertisement to run, but without giving any reasons.

49. On 16th April 2012, Mr Weston confirmed in writing his verbal instruction to CBSO not to allow the advertisement. The letter stated:

> "Although CBS Outdoor did not seek TfL's approval in line with TfL's Advertising Policy dated 4th October 2009, the advertisement is not approved for posting on the TfL network as, in TfL's opinion, it falls within the following categories set in paragraph 3.1 of the Advertising Policy:
>
> - The advertisement is likely to cause widespread or serious offence to members of the public on account of the nature of the product or service being advertised the

> wording or design of the advertisement or by way of inference; and/or
>
> - The advertisement contains images or messages which relate to matters of public controversy and sensitivity."

These reasons were not forwarded to Anglican Mainstream.

50. On 30th April 2012, Anglican Mainstream and the Trust wrote to CBSO asking for the advertisement to be reinstated in accordance with the contract and their human rights. On 11th May 2012, CBSO replied explaining that it had to terminate the contract in compliance with clause 15 of the contract.

51. On 31st May 2012, Anglican Mainstream and the Trust wrote jointly to the Mayor of London requesting "reasons as to why the advertisement was rejected". The letter was received by the GLA and passed to TfL to respond.

52. Mr Everitt responded on behalf of TfL by letter dated 4th July 2012. The letter stated:

> "The advertisement was not approved for posting on the TfL network as, in TfL's opinion, it fell within the following categories set in paragraph 3.1 of the Advertising Policy:
>
> The advertisement is likely to cause widespread or serious offence to members of the public on account of the nature of the product or service being advertised, the wording or design of the advertisement or by way of inference; and/or
>
> The advertisement contains images or messages which relate to matters of public controversy and sensitivity."

Abuse of power

53. The Trust submitted that TfL had abused its statutory powers for an improper purpose.

54. The Trust submitted that the real reason that TfL banned the advertisement was because the Mayor (Boris Johnson) disagreed with the views expressed and considered that the advertisement could be a liability in his bid to be re-elected as Mayor of London. The Mayoral election was on 3rd May 2012 and this episode occurred during the election campaign, some three weeks before polling day. Because of the press coverage indicating that the Mayor had made the decision, this claim was initially issued against the Mayor and the Greater London Authority, not TfL. TfL was later substituted as Defendant by consent.

55. In the hearing before me, Mr Pleming QC insisted that the decision had been made solely by Mr Everitt on behalf of TfL, not by Mr Johnson. I accept that the decision was made by Mr Everitt, on behalf of TfL, but the conclusion I reached, on the evidence, was that Mr Johnson influenced Mr Everitt's decision. The emails revealed that Mr Everitt consulted the Mayor's Office on the course of action he should take. Regrettably, the response from the Mayor's office was not in evidence. However,

Tfl's press release stated "*The Mayor was strongly of the view that this ad should not be run...*".

56. Apparently the Mayor's Office also issued a press release, but this was not made available to the Court. The Mayor was reported in the media as having made the decision, for example:

> "Mr Johnson used his powers as chairman of Transport for London to instruct the body to ditch the campaign.
>
> He said yesterday: 'London is one of the most tolerant cities in the world and intolerant of intolerance'.
>
> 'It is clearly offensive to suggest that being gay is an illness that someone recovers from and I am not prepared to have that suggestion driven around London on our buses.'" (**Daily Mail online**)
>
> He said that he made his decision not only because he thought an advert which suggested that gay people could be cured was likely to cause "great offence", but also because of the possible reverberations for London's Christian community. "The job of mayor is to unite, the job is to stop prejudice, and actually the backlash would be so intense it would not have been in the interest of Christian people in this city," he said. (**Guardian online**)
>
> The **Evening Standard** said he told the audience: "The job of mayor is to unite, to stop prejudice. "The backlash would be so intense it would not have been in the interest of Christian people in this city."
>
> Ken Livingstone agreed with Mr Johnson's decision to pull the adverts, saying: "In my view Boris was right to pull them". (**Pink News online**)

57. As can be seen from the press comment above, the rival candidate, Ken Livingstone, supported the ban.

58. The appointment of the Mayor as Chairman of TfL, with power to appoint Board members, and to give directions to TfL, creates a potential conflict of interest between the Mayor's different roles which the Mayor has to be careful to avoid. In my judgment, it was perfectly proper for Mr Johnson, as Chair of TfL, to be involved in the decision-making process on this issue and to express his views to Mr Everitt. But if the motive for the decision was to advance Mr Johnson's election campaign, at the expense of a proper exercise of TfL's powers and duties, this would call into question the lawfulness of the decision. In my view, such unlawfulness has not been established on the evidence. TfL acted in its own interests to avoid causing offence to a section of the public and to avoid criticism and controversy. Its interests coincided with those of Mr Johnson, who also wished to avoid causing offence and avoid

criticism which might damage his election campaign. The overlap in interests did not render the decision unlawful.

Unfair decision-making process

59. The Trust criticised the decision-making process, arguing that it demonstrated procedural unfairness and a lack of proper consideration of the relevant issues. I agree.

60. The advertisement had been approved by CAP, under its Code, and CBSO had confirmed the order and entered into a contract with Anglican Mainstream. Yet the contract was cancelled without any consultation with Anglican Mainstream and without giving it (and through it, the Trust) an opportunity to modify the wording of the advertisement so as to make it acceptable. Clause 4.4 of the Advertising Policy makes express provision for the TfL "custodian" (a named official) to invite the applicant to put forward reasonable variations to the advertisement to achieve compliance but there is no indication that this course of action was even considered.

61. Mr Everitt's initial instincts were sound. He said in his email at 4.45 pm that he needed assistance since it was hard to reach a judgment without an analysis of how the advertisement met or failed to meet TL's advertising policy and without an analysis of precedent, to see what advertisements TfL had or had not allowed previously. In my view, this was the correct approach to adopt, particularly since TfL had allowed other campaigning advertisements.

62. For reasons which are not clear from the incomplete evidence before me, but might have been explained by the missing evidence from the Mayor's Office, it appears that Mr Everitt went ahead and made the decision that the advertisement should not run about an hour later, without the benefit of the analysis of TfL's advertising policy and past practice which he had previously asked for. He did not consider whether the earlier decisions to allow controversial, sensitive and potentially offensive advertisements from Stonewall and the British Humanist Association, contrary to the terms of the Advertising Policy, meant that this advertisement should also be approved. There was no suggestion in the evidence that he had sought legal advice nor given any consideration to a possible breach of human rights. There was no mention of the Equality Act duty, now relied upon by TfL's representatives, in the contemporaneous emails or the reasons given for the decision in the letter of 4th July 2012.

63. TfL sought to justify the haste with which the decision was made on the basis that the advertisement was due to run the following week and a prompt decision was required. I do not find this plausible, as the CBSO could have been instructed to postpone the advertisement for a week, while TfL considered the position. Judging from the evidence, I consider the more likely reason for the haste was to avoid unwelcome criticism and publicity, both for TfL and the Mayor. The story had already been leaked to the Guardian newspaper, and hundreds of complaints had been received.

64. TfL informed the press immediately, so the representatives of Anglican Mainstream and the Trust were placed in the invidious position of only learning of the decision when asked to comment upon it by the press.

65. CBSO informed Anglican Mainstream by email on the following day, 13th April 2012, that TfL had decided not to allow the advertisement to run but gave no reasons. Reasons were only provided by TfL on 4th July 2012, nearly 3 months after the decision was made, despite written requests from Anglican Mainstream and the Trust.

66. In my view, TfL was in breach of clauses 4.3 and 4.5 of the Advertising Policy which provide that the TfL custodian shall notify the applicant in writing as soon as reasonably practicable whether the advertisement is approved or rejected and, if rejected, the reasons why the custodian considered that the advertisement did not comply with the standards contained in the policy.

67. In my judgment, TfL's decision-making process fell below the standards to be expected of a responsible public body. The Trust does not challenge the legality of the decision on free-standing procedural grounds. However, the Trust does contend that the manner in which the decision was made demonstrates that it was an over-hasty reaction to press criticism made without proper consideration of the human rights of Anglican Mainstream and the Trust. I turn now to consider the human rights grounds.

Human Rights Act 1998

68. It is unlawful for TfL, as a public authority, to act in a way which is incompatible with a Convention right, unless prevented from doing so by legislation: section 6(1) Human Rights Act 1998 ("HRA 1998"). By section 3(1), TfL is required to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights.

69. As the Court is itself a public authority for the purposes of the Human Rights Act 1998 ('HRA 1998'), it is subject to the duty in section 6 not to act incompatibly with Convention rights. It must also ensure that other public authorities, such as the Defendant, do not act incompatibly with Convention rights. This is an essential part of the way in which the ECHR is enforced in domestic law, see Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 1 AC 167, at [8].

Article 10 ECHR

(1) General principles

70. Article 10 protects the human right to freedom of expression. It provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of

> national security, territorial integrity or public safety, for the prevention of disorder and crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

71. Consideration of Article 10 requires a staged approach:

    a) a claimant must establish that his right to freedom of expression has been interfered with by a public authority;
    b) the public authority must establish that the interference is:
        i) prescribed by law;
        ii) in furtherance of a legitimate aim; and
        iii) necessary in a democratic society i.e. justified by a 'pressing social need' and proportionate to the legitimate aim relied upon.

(2) Is Article 10(1) engaged?

72. It was common ground before me that corporate bodies as well as individuals have a right to freedom of expression within the scope of Article 10.

73. TfL submitted that the ban on the Trust's advertisement did not engage Article 10(1) at all because there was no human right to express its views by advertising on TfL buses. The Trust could exercise its Article 10 rights in other ways.

74. In support of its submission, TfL relied on *R (ProLife Alliance) v BBC* [2004] 1 AC 185, in which the House of Lords upheld (by a majority of 4 to 1) the BBC's ban on a party political broadcast containing graphic footage of an abortion. There was no challenge to the provision in the Broadcasting Act 1990 which prevented broadcasters from showing programmes that offend against good taste or decency; the challenge was confined to the decision made by the BBC in the particular case.

75. Lord Hoffmann explained at [20] – [21] that the powerful and intrusive nature of broadcasting justified the restriction on grounds of taste and decency. He went on, at [56] – [57] to say that Article 10 was not engaged in the ProLife case:

> "56. In the present case, that primary right [under Article 10] was not engaged. There was nothing that the Alliance was prevented from doing, It enjoyed the same free speech as every other citizen. By virtue of its entitlement to a [Party Election Broadcast] it had more access to the homes of its fellow citizens that other single-issue groups which could not afford to register as a political party and put up six deposits.
>
> 57. There is no human right to use a television channel..."

76. However, he acknowledged that Article 10 would potentially be engaged if access to broadcasts was unfairly denied:

> "58. The fact that no one has a right to broadcast on television does not mean that article 10 has no application to such broadcasts. But the nature of the right in each case is different. Instead of being a right not to be prevented from expressing one's opinions, it becomes a right to fair consideration for being afforded the opportunity to do so; a right not to have one's access to public media denied on discriminatory, arbitrary or unreasonable grounds."

77. Lord Nicholls, with whom Lord Millett agreed, held at [16] that Article 10 was not engaged because there was no challenge to the "offensive material restriction" imposed by Parliament. The Court of Appeal had erred in carrying out a balancing exercise under Article 10(2) since Parliament had already struck the balance between the competing rights. However, he held that Article 10 was engaged where access to an important medium of communication was denied, saying at [8]:

> "Article 10 does not entitle ProLife Alliance or anyone else to make free television broadcasts. Article 10 confers no such right. But that by no means exhausts the application of article 10 in this context. In this context the principle underlying article 10 requires that access to an important public medium of communication should not be refused on discriminatory, arbitrary or unreasonable grounds. Nor should access be granted subject to discriminatory, arbitrary or unreasonable condition. A restriction on the content of a programme ... must be justified. Otherwise it will not be acceptable. This is especially so where, as here, the restriction operates by way of prior restraint. On its face prior restraint is seriously inimical to freedom of political communication."

78. I do not accept TfL's submission that Article 10(1) is not engaged in this case.

79. TfL had licensed a commercial advertising operation on its bus operators' buses to raise revenue, and its contractor had entered into a contract with the Trust to provide advertising space for a fee. The contract was then cancelled because TfL objected to the content of the advertisement. Advertising is a medium which is, in principle, protected by Article 10, although it may legitimately be subject to restrictions: *Casado Coca v Spain* (1994) 18 E.H.R.R. 1. This principle has already been applied to advertising on London buses in *R (North Cyprus Tourism Centre Ltd & Anor v Transport for London* [2005] EWHC 1698 (Admin). Here, TfL "interfered" with the Claimant's right to express its message via its advertisement, contrary to Article 10(1).

80. In my judgment, this case is distinguishable from *Pro Life* on the facts in several respects.

81. First, this case does not concern broadcasting, to which, according to the House of Lords, special considerations apply, and in respect of which Parliament has already legislated. TfL's advertising policy does not enjoy the same status as an Act of Parliament. Secondly, the policy was directly challenged in this case, as a breach of

Article 10(1), whereas ProLife did not contend that the Broadcasting Act was incompatible with the Convention.

82. Thirdly, unlike ProLife, the Claimant in this case did argue that its access to the advertising space was refused on discriminatory, arbitrary and unreasonable grounds, which both Lords Nicholl and Hoffmann agreed would engage Article 10(1). The Claimant contended that TfL accepted controversial, sensitive advertisements, which were offensive to many Christians, from Humanists and Stonewall, despite its written policy against such advertisements.

(3) Prescribed by law

83. An interference will be prescribed by law where:

a) the interference has a legal basis in national law;

b) the law is accessible;

c) the law is sufficiently precise for the individual to be able to regulate his conduct in accordance with the law and foresee the consequences of his actions, to a degree that is reasonable in the circumstances.

84. The Claimant submitted that the interference was not prescribed by law because the criteria applied by TfL to refuse advertisements were too vague and imprecise, and gave rise to arbitrary and discriminatory decision-making.

85. TfL's Advertising Policy was adopted pursuant to TfL's general powers under paragraph 1(3) of Schedule 10 to the GLAA 1999. TfL relied upon paragraph 3.1 of the "Required Standards" in its Advertising Policy which provides that "advertisements will not be approved for, or permitted to remain on TfL's services, if, in TfL's reasonable opinion, the advertisement falls within any of the categories set out. The categories relied upon by TfL to justify the cancellation of the advertisement in this case were:

> "(c) The advertisement is inconsistent with the obligations in section 404 of the GLA Act 1999.
>
> (d) The advertisement is likely to cause widespread or serious offence to members of the public on account of the nature of the product or service being advertised the wording or design of the advertisement or by way of inference.
>
> (k) The advertisement contains images or messages which relate to matters of public controversy and sensitivity."

86. In my judgment, an advertising policy adopted by a public body, in the exercise of its statutory powers, has a basis in domestic law. The policy was accessible, on the internet, and would have been available for the claimant to check before placing its advertisement. In my view, it is inevitable in a policy of this nature that TfL will have to exercise its judgment in any particular case to decide whether the advertisement

falls within the scope of any of the prohibited categories. This does not render the policy too vague or imprecise to meet the requirement of legal certainty.

87. The ECtHR has accepted that, in certain situations, laws must be generally worded, and a discretion afforded to the body entrusted with enforcement. In *Müller v Switzerland* (1988) 13 EHRR 212, the Court held that obscenity laws were sufficiently precise and foreseeable, saying, at [29]:

> "The Court has, however, already emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. Criminal law provisions on obscenity fall within this category."

88. In *Wingrove v UK* (1996) 24 EHRR 1, the appellant argued that the law of blasphemy was so uncertain that it was not possible to establish in advance whether a particular publication would be the subject of prosecution or conviction. The ECtHR held, at [40] to [42]:

> "40. The Court reiterates that, according to its case law, the relevant national "law", which includes both statute and common law, must be formulated with sufficient precision to enable those concerned—if need be, with appropriate legal advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference. "
>
> 41. …
>
> 42. The Court recognises that the offence of blasphemy cannot by its very nature lend itself to precise legal definition. National authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence. "

89. Applying these principles to the TfL policy, I find that it met the requirement for legal certainty, and was prescribed by law.

(4) Legitimate aim

90. TfL submitted that its policy was intended to ensure that material which would cause widespread or serious offence or which related to matters of public controversy and sensitivity was not displayed on the TfL network. This aim was legitimate under Article 10(2) for the protection of "morals". TfL cited obscenity cases such as *Müller v Switzerland* (1988) 13 EHRR 212 and *Handyside v United Kingdom* (1976) 1 EHRR 737, concerning a ban on a children's book containing a chapter on sex.

91. Although there are parts of TfL's policy which might well raise moral issues (e.g. prohibition on obscenity, sexual images), I am not satisfied that the protection of "morals" was the primary basis upon which TfL applied its policy on this occasion. In my judgment, TfL's aim was to protect the "rights of others" who might be adversely affected e.g. gays who would be offended or upset by it; or who might be prejudiced by the promotion of an anti-gay message. Advertising which promotes anti-gay views may interfere with the right to respect for the private and family life of gays, contrary to Article 8(1). As a public body, subject to the equality duty, TfL was under a positive obligation to protect the rights of gays. In my judgment, this was a legitimate aim under Article 10(2).

92. An analogous case is *Murphy v Ireland* (2004) 38 EHRR 212, where the Irish Faith Centre, a bible-based Christian ministry in Dublin, was prevented from broadcasting an innocuous advertisement for a video about "the historical facts about Christ" and "evidence of the resurrection", because of a statutory prohibition on advertisements "directed towards any religious or political end". The Court held, at [63], that the prohibition sought to ensure respect for the religious doctrines and beliefs of others and thus the legitimate aim under article 10(2) was to protect the rights and freedoms of others, as well as public order and safety.

(5) Necessary in a democratic society

(a) Submissions

93. The Trust challenged the breadth of the restrictions in TfL's advertising policy, submitting that the ban on advertisements which are "likely to cause widespread or serious offence" or which "relate to matters of public controversy or sensitivity" represented an unwarranted and disproportionate interference with freedom of expression. The Trust had a "right to buy" in a publicly owned space, which had been made available for commercial advertising, and it had a "right to counter" the advertisement placed by Stonewall.

94. TfL submitted that it was legitimate and proportionate to restrict advertisements on grounds of morality, decency and in order to protect sections of the public who might be offended or harmed. It pointed to similar restrictions in broadcasting (Communications Act 2003 and the Ofcom Broadcasting Code), and the CAP Code. Advertisements on London buses were highly visible and could not easily be avoided either by passengers or onlookers. The Trust was able to promote its message by other less intrusive means, for example, leafleting, printed articles or on its website.

95. TfL also submitted that its statutory duty under section 149 of the Equality Act 2010 required it to have regard to the need to eliminate discrimination against gays and promote and foster understanding between gays and heterosexuals.

96. The Trust also challenged the inconsistent and partial manner in which the policy was applied by TfL which permitted advertising on controversial and sensitive topics such as atheism and homosexuality, thus causing offence to many Christians, but then prevented Christians from responding with their views.

97. TfL submitted that the grounds upon which TfL allowed the British Humanist Association and Stonewall to run its advertisements were outside the scope of the case currently before the Court, and declined to provide any evidence about its earlier decisions. It justified the Stonewall advertisement on the grounds that it furthered TfL's objectives under section 149, Equality Act 2010, whereas the Trust's advertisement was contrary to the objectives of section 149.

(b) Case law

98. I accept the Trust's submission that freedom of expression is a primary right in a democratic society. In *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, Lord Steyn said, at 126:

> "freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more likely to accept decisions that go against them if they can in principle seek to influence them, it acts as a brake on the abuse of power by public officials, it facilitates the exposure of errors in the governance and administration and justice of the country..."

99. These observations echo the arguments in favour of free speech by the celebrated philosopher J.S. Mill (*On Liberty*, 1859) and more recently, the late Ronald Dworkin in the foreword to *Extreme Speech and Democracy* ed. Hare and Weinstein (2009), cited to me by Mr Diamond. Dworkin also warned against censorship on anti-discrimination grounds, saying:

> "The strong conviction that freedom of speech is a universal value is challenged today not only by freedom's oldest opponents (the despots and ruling thieves who fear it), but also by new enemies who claim to speak for justice not tyranny. These new enemies point to other values we respect, including self-determination, equality, and freedom from racial hatred and prejudice, as reasons why the right of free speech should now be demoted to a much lower grade of urgency and importance."
>
> "These calls for censorship will strike many people as reasonable and signal, just for that reason, a new and particularly dangerous threat to free speech, for we are more likely to relax our defence of that freedom when our betrayers are foreign, or when the speech in question seems worthless or

> even vile. But if we do, then the principle is inevitably weakened, not just in such cases, but generally."

100. The Trust invited the Court to adopt the approach of the Canadian Supreme Court in *Greater Vancouver Transportation Authority v Canadian Federation of Students and British Columbia Federation of Teachers* [2009] 2 RCS 295, where it struck down a total ban by the transit authority on political advertisements and posters likely to cause offence/controversy on its buses, as unnecessarily broad and unjustifiable. It did not constitute a "minimal impairment" of freedom of expression so as to be permitted under the Charter. Deschamps J. held, at [42] – [46], [77], [80], that the decision to rent space on the sides of buses created a valued means of expression and it had become a public space in which there was an expectation of Constitutional protection.

101. I am unable to adopt this approach. The Canadian Supreme Court has adopted a more liberal approach to freedom of expression than the ECtHR or the UK courts, and has applied concepts of a "public place" and "minimal impairment" which are not reflected in the ECHR or UK domestic law which binds me. Unlike this case, the Supreme Court was not considering an advertisement which was potentially offensive. The Supreme Court accepted, at [78] - [79], that limits could be imposed on advertising which was not appropriate for a particular location, and there could be "*limits on discriminatory content or on ads which incite or condone violence or other lawful behaviour*". This suggested that, even in Canada, an advertisement which was anti-homosexual might fall foul of equality principles, though I heard no detailed submissions on the point.

102. The Trust submitted that the correct approach for the court to adopt under the ECHR was that of the High Court in Northern Ireland in the case *of Re Sandown Free Presbyterian Church* [2011] NIQB 26, where a church was prohibited from publishing a one page advert in a national newspaper condemning homosexuality. As well as stating that "*the act of sodomy is a grave offence"* and "*an abomination*", the banned advert had encouraged people to peacefully protest at a forthcoming 'Gay Pride' parade. The High Court found that the ban was disproportionate under Article 10(2), citing the importance of freedom of expression as outlined in *Handyside v. United Kingdom* (1979-80) 1 E.H.R.R. 737, saying, at [73]:

> "The applicant's religious views and the biblical scripture which underpins those views no doubt cause offence, even serious offence, to those of a certain sexual orientation. Likewise, the practice of homosexuality may have a similar effect on those of a particular religious faith. But Art 10 protects expressive rights which offend shock or disturb... the respondent has failed to convincingly establish the necessity for such restriction which, in my view, disproportionately interferes with the applicant's freedom of expression. In making this assessment I have taken into account the very particular context in which the advertisement was placed, the fact that the advertisement did not condone and was not likely to provoke violence, contained no exhortation to other improper or illegal activity, constituted a genuine attempt to

> stand up for their religious beliefs and to encourage others to similarly bear witness and did so by citing well known portions of scripture which underpinned their religious faith and their call to bear witness..."

103. The Trust also warned against the development of the "heckler's veto", a concept from US law, which was referred to in *Vajnai v Hungary* (2010) 50 EHRR 44, in which the applicant wore a red star which was proscribed because of its association with communism. The ECtHR held at [44]:

> "… a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary - cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the 'heckler's veto'. "

104. The ECtHR has repeatedly confirmed the principles it first outlined in the case of *Handyside v. United Kingdom* (1979-80) 1 E.H.R.R. 737, at [49]:

> "The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means … that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

105. The ECtHR has acknowledged that prior restraint is the most stringent form of restriction of freedom of expression and thus requires "most careful scrutiny" (*Observer v UK* (1992) 14 EHRR 153, at [60]).

106. However, in practice, the ECtHR has readily upheld bans on freedom of expression where these are likely to cause offence, particularly on religious grounds. In *Handyside* itself, the Court upheld the ban on "The Little Red Schoolbook", which contained a chapter on sex aimed at children, as being necessary for the protection of morals.

107. I have already referred to the case of *Murphy v Ireland* (2004) 38 EHRR 13, where the ECtHR upheld a ban on an innocuous advertisement for a video about "the historical facts about Christ" and "evidence of the resurrection", because of a

statutory prohibition on advertisements "directed towards any religious or political end". The Court held at [65]:

> "The Court recalls that freedom of religious expression constitutes one of the essential foundations of a democratic society. As paragraph 2 of Art. 10 expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Art. 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane."

108. The same principle had earlier been applied in *Otto Preminger Institut v Austria* (1995) 19 EHRR, where the Court upheld the seizure and forfeiture of an obscene film about God, Christ and the Virgin Mary. The film was to be shown in a private cinema to an adult-only audience all of whom would have to purchase a ticket to see the film. The Court found the film *"gratuitously offensive"* to the religious feeling of others.

109. However, the ECtHR has found breaches of Article 10 in a number of cases where a public interest in publication was identified.

110. In *Jersild v Denmark* (1995) 19 EHRR 1, the ECtHR found that the conviction of a journalist, who conducted a television interview with members of a youth group who made offensive racist remarks, was in breach of Article 10. News reporting enabled the press to play its vital role of public watchdog.

111. In *Giniewski v France* (2007) 45 EHRR 23, the applicant was convicted of public defamation towards the Christian community on the basis of an article suggesting that Catholicism contained the seeds of the Holocaust. The ECtHR held that, while the article may have shocked and offended, it was a genuine contribution to an historical debate. It was not "*gratuitously offensive*". The conviction was held to be a breach of Article 10.

112. In *VGT Verein Gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4, an animal welfare campaigning organisation was prohibited from broadcasting an advertisement taking issue with the conditions in which pigs were reared. The ECtHR found that the ban was in breach of Article 10 as it related to a topic of public interest and the ban effectively prevented it from reaching all of the country with its message.

113. In *Murphy* (above) the ECtHR distinguished *VGT* on the basis that it raised issues of public interest to which a reduced margin of appreciation applied (at [67]). It explained that the Court has accorded a wide margin of appreciation to the judgment of contracting states under Article 10(2) in relation to matters deemed liable to offend personal convictions. The Court's rationale is that what is likely to cause substantial offence to others, and so justify restriction, will vary significantly from place to place and so state authorities are in a better position than the Court to assess what is necessary in a democratic society.

114. In my view, the result of the Court's non-interventionist approach is that its decisions in this area are highly fact-sensitive. Of course, the concept of the margin of appreciation does not apply when a domestic court is determining whether a domestic body has acted in breach of the ECHR, although the domestic court must consider what weight to give to the judgment of the authorised decision-maker.

115. Turning to the domestic case law, I have already referred to the case of *Pro Life* in which the BBC's ban on a party political broadcast containing graphic footage of an abortion decision was upheld by the House of Lords. Lord Hoffmann observed at [21] that "[t]he power of the medium is the reason why television and radio broadcasts have been required to conform to standards of taste and decency which, in the case of any other medium, would nowadays be thought to be an unwarranted restriction on freedom of expression".

116. The House of Lords considered the *VGT* case and *Murphy* in *R(Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] 1 AC 1312, where a television advertisement by an animal rights organisation had been refused on the grounds that it amounted to political advertising. The House of Lords held that the singling out of broadcast media for special control of political advertising was a proportionate interference with freedom of expression to prevent a distortion of the democratic process by powerful interest groups. The judgment of Parliament on the issue of political advertising was afforded great weight.

117. However, in *TV Vest v Norway* [2009] 48 EHRR 51, the ECtHR took a different view, holding that an absolute ban on political advertising was in breach of Article 10. In the views of the Court, the ban prevented smaller parties from publicising their view effectively since paid advertising was the only way in which they could achieve media coverage.

118. In relation to the allegation that TfL was inconsistent and partial in the application of its policy, in *ProLife* the House of Lords referred to the right not to have access to public media denied on discriminatory, arbitrary or unreasonable grounds (see paragraphs 76, 77 above). In *X and Z v UK* CD 4515/70, the Commission observed that an issue would arise under Article 10, in conjunction with Article 14, if one political party was excluded from broadcasting facilities at election time. In *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria* (1994) 20 EHRR 55, the ECtHR held that the army had made a disproportionate decision, in breach of Article 10, when it refused to distribute a magazine which was critical of army life, but distributed all other similar military publications.

(c) Conclusions

119. Earlier in my judgment, I referred to the unsatisfactory manner in which TfL took its decision, in great haste, and without apparently considering the Trust's rights under Article 10, nor its past practice in allowing other controversial advertisements. TfL's decision-making process is not my primary consideration when deciding whether the refusal was justified under Article 10(2). As Baroness Hale explained, in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, at [31]:

> "The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial

> review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account."

120. The decision-making process is, however, relevant to the question of what weight I should accord to TfL's judgment. In *Huang*, Lord Bingham explained that the court should not defer to the decision-maker's judgment, but should instead accord 'appropriate weight" to it, saying at [16]:

> "The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

121. In *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, Lord Wilson cited with approval Lord Bingham's formulation in *Huang* (at [46]) and Baroness Hale said at [63]:

> "where delicate and difficult judgments are involved ... this court will treat with appropriate respect the views taken by those whose primary responsibility is to make the judgments in question. But those views cannot be decisive. Ultimately, it is for the courts to decide whether or not the Convention rights have been breached: *R (SB) v Denbigh High School* [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420."

122. In this case, I have to consider two separate exercises of judgment by TfL. First, its decision to adopt its Advertising Policy prohibiting advertisements which are "likely to cause widespread or serious offence" or which "relate to matters of public controversy or sensitivity". Second, its decision not to approve the Trust's advertisement on 12th April 2012.

123. TfL is a statutory body, which is required by section 154 GLAA 1999 to facilitate the GLA's duty to secure the provision of transport facilities in Greater London. Pursuant to the broad powers in paragraph 1(3) of Schedule 10 to the GLAA 1999, it allows advertising on its premises, and on the trains and buses operated on its behalf. Its current Advertising Policy was adopted in 2009. I set out its key terms in paragraphs 13 to 15 above.

124. I see from the earlier litigation involving the *North Cyprus Centre* that a policy in very similar terms was in existence in 2004. Newman J. found, in 2005, that TfL had "*a very high profile in London and carries a large proportion of all commercial advertising in the Greater London area*". I can assume that, at least from the date of

Newman J's judgment in 2005, TfL was aware that Article 10 applied to its Advertising Policy and decisions made under it.

125. In my judgment, since TfL is a public body, with experience in operating a major city transport system, with a large and high profile advertising presence, it is appropriate for the Court to accord due weight to TfL's judgment in adopting an Advertising Policy with restrictions. The restrictions are consistent in character with the restrictions in the Ofcom and CAP Codes (although they are more comprehensive). On my interpretation, the aim of the Policy is that advertising on TfL premises, trains and buses should be neutral, uncontroversial and avoid causing offence to the London public.

126. I accord very limited weight to TfL's decision on 12th April 2012 because it does not appear that the requirements of Article 10 were considered, properly or at all. There was no suggestion in the evidence that TfL sought legal advice nor gave consideration to a possible breach of human rights. There was no mention of the Equality Act duty, now relied upon by TfL's representatives, in the contemporaneous emails or the reasons given for the decision in the letter of 4th July 2012. The decision was made too hastily, without hearing the advertisers' point of view, and without careful consideration of the argument that Christian groups should be permitted to advertise in the same way as Stonewall and the British Humanist Association. Although Mr Everitt asked at 4.45pm for an analysis of how the advertisement met or failed to meet the policy, and for an analysis of past precedent, there was no evidence that any such analysis was provided. In just over an hour, by 6.01 pm, the Press Office had issued a statement announcing its decision.

127. I now turn to consider whether TfL has established that the interference with the Trust's freedom of expression is necessary in a democratic society i.e. justified by a 'pressing social need' and proportionate to the legitimate aim relied upon. Proportionality involves two concepts. First, whether the means employed are proportionate to the legitimate aim pursued. Second, whether a fair balance has been struck between the interests of the community and the protection of the individual's rights.

128. In my judgment, the restriction in TfL's Advertising Policy on advertisements which are "likely to cause widespread or serious offence" or which "relate to matters of public controversy or sensitivity" is necessary in order to meet the legitimate aims identified under Article 10(2). In reaching this conclusion, I accord due weight to the judgment of TfL, as an experienced operator in the field.

129. The location of the proposed advertisement is highly significant. I consider that advertising on the side of London buses is extremely intrusive. The advertisements are large and prominent: 6 metres long, ten feet in the air, facing the pavement. Buses dominate the streets of London. Millions of people who live in, or visit, London will be confronted by advertisements on buses, whether they are pedestrians, cyclists or motorists, and they will not be able to avoid them, even if they find them deeply offensive. Unlike posters, these advertisements do not remain in one place, and so cannot be avoided by a detour. Parents cannot protect their children from an inappropriate message. Although the courts have emphasised the intrusive nature of television and radio, at least the television and radio can be switched off. Not so with advertisements on buses.

130. The advertisements are particularly intrusive for people who travel by bus, and are waiting at bus stops - on an average day there are 5.8 million journey stages by bus in London. Many people have no choice but to travel on a particular bus route in the course of their daily life, or even to drive the bus, and so may be forced to ride in a bus carrying a message which is contrary to their beliefs and personal identity; e.g. an anti-Gay or anti-Christian slogan.

131. In order to give effect to the primary right of freedom of expression in a democratic society, those who wish to promote an offensive or controversial message should be entitled to do so. In my view, it is proportionate to ask those people to express those views in a way other than by advertising on buses in a major city. Posters, leaflets, articles, meetings and the internet all provide an alternative vehicle for expression of these views.

132. An advertisement may raise an issue of legitimate public interest. But the location of these advertisements means that the message can only be a brief one, capable of being read as the bus passes by. The advertisements by the Trust, Stonewall and the British Humanist Association were all skilfully designed to deliver a short, sharp shock to the public. Their wording was confrontational. The alternative modes of expression – articles, leaflets, the internet – enable a reasoned case to be made instead. The case law of the ECtHR shows that reasoned debate is likely to be more deserving of protection under Article 10 than slogans and abusive messages.

133. I do not accept the submission that because the advertising space is sold on a commercial basis, there is a "right to buy" and there should be no restriction on content. This is not consistent with the case law under Article 10, which is concerned with the expression of views wherever they appear.

134. The Trust's secondary submission was that TfL applied its Advertising Policy in an inconsistent and partial manner. It had permitted advertising on controversial and sensitive topics such as atheism and homosexuality, thus causing offence to many Christians, but then prevented Christians from responding with their views.

135. I consider that there is force in the Trust's submission. The advertisements by the British Humanist Association and Stonewall did not comply with TfL's own restrictions which prohibit advertisements "likely to cause widespread or serious offence" or which "relate to matters of public controversy or sensitivity". Both advertisements were in the form of confrontational assertions which made no contribution to a reasoned debate. The British Humanist Association advertisement was highly offensive to the religious beliefs of the significant section of the public who believe in God. The Stonewall advertisement was highly offensive to fundamentalist Christians and other religious groups whose religious belief is that homosexuality is contrary to God's teachings.

136. TfL sought to justify the Stonewall advertisement on the grounds that it furthered TfL's objectives under section 149, Equality Act, but declined to provide any detail about the basis of the decision. I doubt whether this confrontational advertisement did anything to "tackle prejudice" or "promote understanding" among homophobic people. It was more likely to spark retaliation, as indeed it did in the case of Anglican Mainstream and the Trust.

137. In the light of the evidence and submissions, I make the proportionality assessment under Article 10(2) on the basis that TfL's decision to exclude the Trust's advertisement was inconsistent and partial, in the light of its willingness to display the British Humanist Association and Stonewall advertisements. Furthermore, it denied the Trust the opportunity to respond to the Stonewall advertisement, in what the Trust described as "the right to counter". These are important factors in favour of allowing the Trust to express its views in this particular medium.

138. Turning to the Trust's advertisement, I am satisfied, on the evidence, that it will cause grave offence to a significant section of the large number of people who will view it. For those who are gay, it is liable to interfere with the right to respect for their private and family life, under Article 8(1). This goes far beyond a 'heckler's veto'. In my view, the evidence of complaints received supports these conclusions.

139. Although it is important to weigh in the balance the fact that CAP found that the advertisement did not breach its Code, CAP did not have the benefit of viewing the complaints seen by TfL and this Court.

140. The following are a small sample of the objections posted on the Guardian website on 12th April 2012, in response to the Trust's proposed advertisement:

> "I have to confess that this 'post-gay' word is deeply unsettling me. I'm wondering if they'll need to label us with pink stars so we can be easily identified when the 're-education' or 'treatment' begins."
>
> "This is truly disgusting, and I can't believe it was allowed. Treating homosexuality (through therapy or otherwise) as if it were a disease is very backward, and illegal amongst other things. And for such messages to be paraded around London is just unbelievable ..."
>
> "This is hate speech in my view as it encourages the interpretation homosexuality as something to be treated. Just appalled that this can even get off the ground."
>
> "This is an absolute disgrace. As a gay person I find this not only shocking, but incredibly offensive."

141. The following are a small sample of the complaints received by TfL on 12th April 2012:

> "I am appalled that TfL have decided to allow homophobic advertising on their London buses. The "Not gay, post-gay and proud" campaign promotes an outdated, disreputed, and backward idea that being gay can be, and should be cured - an idea that is not only incorrect, but is also highly offensive. .. As a gay woman I have faced homophobic attitudes since my early teens and still experience it now in my twenties. I use the London buses to get to work 5 days a week, but if I see or hear about a single bus with that poster driving around I will be

> withdrawing my support of this company until you withdraw your support of homophobia."
>
> "I write to complain in the strongest possible terms about TfL's decision to carry advertising materials for a campaign by the Core Issues Trust and Anglican Mainstream, which promotes therapy to 'cure' gay people of their gay tendencies. I believe TfL's decision to promote both the campaign and the idea that homosexuality is an affliction in need of a cure to be highly misguided and irresponsible for a number of reasons:
>
> - the presence of these materials in such a prominent and everyday London context legitimises negative perceptions of homosexuality and general homophobia.
>
> - London is a modern, cosmopolitan city with a large number of gay people living in it, who will now - should they travel on buses on these specific routes - encounter material that suggests they are in need of therapy so as to become 'ex-gay'.
>
> - there are numerous cases of young people struggling with their sexuality as a result of encountering general homophobia in everyday life. This campaign adds to the enormous pressure they experience at this crucial time in their lives….."
>
> "Not only is this message intolerant and divisive, it also uses the terms 'ex-gay' and 'post-gay' which refer to people who have been through so-called therapy to address their homosexuality. Given that this treatment has been entirely discredited by the British Medical Association, it seems irresponsible in the extreme to advertise (and thereby legitimise) such theories."
>
> "I am currently a police officer for the Met and also an LGBT Liaison officer. This shocks me and I believe is also an offence. … If this advert is allowed to be publicly displayed, I personally hold you responsible as the Mayor of London, and you will be committing the offence by allowing it to be displayed. I expect you to put a very quick stop to this.… With people already finding it hard coming to terms with their sexuality, this gets posted and it will be harder for some. There is already a massive issue with gay bullying and hate crime and this will give people an excuse. We do not want another gay person to kill themselves because they can't be who they are!"

142. The last complaint quoted above raises the issue of the threats to gays arising from homophobia. The European Commissioner for Human Rights, Thomas Hammarberg, recognised the medicalisation of homosexuality as a form of homophobia: see *"Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe"* (2011). I accept that the Trust takes issue with this analysis, and argues that reparative therapy to overcome same sex attraction should be recognised as legitimate and of

assistance to those who seek it. The Trust has the right to express its view. But, as I have already indicated, this advertisement is a confrontational assertion, not a reasoned, informed contribution to a debate. I consider that it is liable to encourage homophobic views, whether intentionally or not, and, in general terms, homophobia places gays at risk.

143. The Trust submits that everyone should enjoy freedom of expression in a publicly owned space. The buses are not, of course, public property. But the fact that they are operated on behalf of a public body makes it all the more important that they do not carry a message which is contrary to the Equality Act 2010. In respect of those who have same-sex sexual orientation, Section 149 requires TfL to have due regard to the need to:

a) eliminate discrimination, harassment and victimisation against persons with same- sex sexual orientation;
b) foster good relations between those who have same-sex sexual orientation and those who do not, in particular to tackle prejudice and promote understanding.

The Advertising Policy reflects this requirement (under the predecessor provision in section 404 GLAA 1999).

144. In my judgment, TfL would be acting in breach of its duty under section 149 if it allowed the Trust's advertisement to appear on its buses, as it encourages discrimination, and does not foster good relations or tackle prejudice or promote understanding, between those with same-sex sexual orientation and those who do not.

145. I recognise that this conclusion is contrary to the philosophical position represented by Ronald Dworkin's eloquent plea for freedom of expression at paragraph 99 above. But in my view, the effect of the Equality Act 2010 is to fetter the freedom of public bodies to carry advertisements which denigrate people on the basis of protected characteristics, such as sexual orientation, gender, race, religious belief etc. This is a policy decision made by Parliament. The Trust has not applied for a declaration that the Act is incompatible with the Convention.

146. All the factors I have referred to above - the location of the advertisement, the large number of people exposed to it over several weeks, the nature of the message, its effect on gays, and the public sector equality duty - plainly distinguish advertising on TfL buses from the newspaper advertisement which was approved by the High Court of Northern Ireland in the *Sandown* case.

147. In my judgment, section 12 HRA 1998 does not assist the Trust. It does not confer upon the Trust any additional rights beyond those in Article 10(1). Its purpose, as set out in section 12(1), is to ensure that the Court gives proper regard to the right to freedom of expression when granting any relief, such as injunctions.

148. For the reasons set out above, my conclusion is that TfL's decision was justified and proportionate in pursuit of the legitimate aim of protecting the rights of others. Therefore the refusal was not a breach of the Trust's rights under Article 10(1). The fact that TfL had applied its Advertising Policy inconsistently and partially and refused the Trust a right to respond was outweighed by the countervailing factors, described above, which made it proportionate to refuse to display the advertisement.

Article 14 and the Equality Act 2010

149. Article 14 prohibits discrimination in the enjoyment of Convention rights "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

150. Article 14 does not provide a free-standing right; it only applies where the facts in issue fall within the ambit of another Convention right, in this case, Article 10.

151. The Trust submitted that, by refusing its advertisement whilst accepting the advertisement by Stonewall, TfL had discriminated against it, contrary to Article 14.

152. Although I have found that Tfl was inconsistent and partial, I do not consider that it discriminated against the Trust on grounds which are capable of falling within Article 14. In my view, TfL refused to display the advertisement because of its content, not because of the identity of the organisation or persons placing the advertisement.

153. The Trust submitted that TfL discriminated against ex-gays who are a protected class under the Equality Act 2010, falling within the definition of sexual orientation in section 12, and that ex-gays face hostility and discrimination from both homosexuals and heterosexuals.

154. I do not accept this submission, for two reasons

155. First, this claim is brought by the Trust, which as a corporate body, has no sexual orientation and therefore is not a victim of any discrimination on the grounds of sexual orientation.

156. Second, ex-gays are not protected under the Equality Act. Section 12 prescribes three categories of sexual orientation protected under the Act: orientation to persons of the same sex (homosexuals); orientation to persons of the opposite sex (heterosexuals); orientation to persons of either sex (bisexuals). There is no fourth category of persons who were previously orientated to persons of the same sex and are now orientated to persons of the opposite sex.

157. This analysis is supported by the Statutory Codes prepared and issued by the Equality and Human Rights Commission under section 14 of the Equality Act 2006 and to which tribunals and courts must have regard when relevant to questions arising in proceedings. The Statutory Codes contain the following guidance on the meaning of sexual orientation for the purposes of section 12 of the 2010 Act:

> "Sexual orientation is a protected characteristic. It means a person's sexual
> orientation towards:
> • persons of the same sex (that is, the person is a gay man or a lesbian);
> • persons of the opposite sex (that is, the person is heterosexual); or
> • persons of either sex (that is, the person is bisexual)."

158. For these reasons, the claim under Article 14 and the Equality Act fails.

Article 9

159. Article 9 protects the human right to freedom of thought, conscience or religion. It provides:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religious belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

160. In my judgment, Article 9 is not engaged in this case.

161. First, because the rights protected by Article 9 cannot be enjoyed by corporate entities or non-natural persons such as associations (see *Lester & Pannick: Human Rights Law & Practice*, (3rd ed), at 4.9.4; *Vereniging v Rechtswinkels Utrecht v Netherlands* 46 DR 200 (1986) E Com HR). Article 9 rights may be enjoyed by religious communities and churches, but the Trust is neither of those.

162. Second, because the Trust is seeking to express its perspective on a moral/sexual issue, not the manifestation of a religious belief. The Courts have consistently distinguished between manifestation of a belief, which is protected under Article 9, and practice and conduct which is merely motivated by a religion or belief, which does not engage Article 9. The position is summarised in the European Court's recent judgment in *Eweida v United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 13 January 2013, at [82]:

> "Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 paragraph 1 (see Skugar and Others v. Russia (dec.), no. 40010/04, 3 December 2009 and, for example, Arrowsmith v. the United Kingdom, Commission's report of 12 October 1978, Decisions and Reports 19, p. 5; C. v. the United Kingdom, Commission decision of 15 December 1983, DR 37, p. 142; Zaoui v. Switzerland (dec.), no. 41615/98, 18 January 2001). In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion

> which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question (see Cha'are Shalom Ve Tsedek v. France [GC], no. 27417/95, paragraphs 73-74, ECHR 2000-VII; Leyla Şahin, cited above, paragraphs 78 and 105; Bayatyan, cited above, paragraph 111; Skugar, cited above; Pichon and Sajous v. France (dec.), no. 49853/99, Reports of Judgments and Decisions 2001-X). (Emphasis added)."

163. Whether or not a person expresses the belief concerned will be highly relevant in deciding whether or not an act motivated by a belief constitutes manifestation of that belief. Thus, in *Arrowsmith v UK* (1981) 3 EHRR 218, which concerned a pacifist who had been convicted for distributing leaflets encouraging UK troops to refuse to serve in Northern Ireland, the Commission held at [71] that "the term 'practice' as employed in Article 9(1) does not cover each act which is motivated and influenced by a religion or belief". It added:

> "It is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Article 9 (1), even when they are motivated or influenced by it".

164. The courts have also considered whether the action was a 'necessary expression' of the religion or belief. In *X v UK* (Application no. 5442/72), 20 December 1974 1 DR 41, the Commission considered the case of a Buddhist prisoner who was refused permission to send religious articles for publication in a Buddhist magazine. He produced statements showing that communication with other Buddhists was an important part of his religious practice. The Commission found that "… he has failed to prove that it was a necessary part of this practice that he should publish articles in a religious magazine".

165. Even if the advertisement sought to be placed by the Trust was motivated by a religious belief, it did not actually express that belief. Nor was the Trust required by religious belief to communicate these views by way of advertisement on London buses.

166. For these reasons, I accept TfL's submission that Article 9 is not engaged on the facts of this case.

167. Section 13 HRA 1998, which requires the court to have regard to the exercise of rights under Article 9 by a religious organisation itself or by its members collectively, does not assist the Trust since no Article 9 rights are engaged.

Irrationality

168. The Trust, in its 'Grounds for Judicial Review', submitted that TfL's decision was irrational, although the point was not pursued in its skeleton argument or oral submissions.

169. The threshold for succeeding in establishing that a decision is irrational is set very high. The court is not concerned with what it regards as the correct decision, but with the quite different test of whether a decision-maker, properly directed in law and properly applying its mind to the matter, could have regarded the conclusion as a permissible one.

170. However, where fundamental human rights are in issue, the Court must adopt the more rigorous standard of review, encapsulated in the phrase "anxious scrutiny", to assess whether the decision-maker has interfered with fundamental rights, and if so, whether that interference was objectively justified.

171. I have considered above whether or not TfL's Advertising Policy, and the decision made under the policy in this case, was in breach of the Trust's human rights, and concluded that it was not.

172. In my judgment, the decision made by TfL was not irrational. Its advertising policy expressly prohibited advertisements which were "likely to cause widespread or serious offence to members of the public" or which related to "matters of public controversy and sensitivity". It was reasonable to conclude that the content of this advertisement was likely to cause widespread offence and was sensitive and controversial. The huge number of complaints, and their content, provided TfL with a sufficient basis upon which to make a reasonable decision not to run the advertisement. Even if, as the Trust alleged, the Mayor and TfL personally disagreed with the content of the advertisement, this was not the sole or decisive reason for the decision. Finally, displaying an advertisement of this nature would have been a breach of TfL's statutory equality duty in s.149, Equality Act 2010.

173. Apart from the allegation of irrationality, the Trust has not challenged the decision on other conventional judicial review grounds which might have been available to it, namely:

a) procedural unfairness;

b) failure to take into account relevant considerations;

c) inconsistent and partial application of TfL's Advertising Policy as a breach of the administrative law principle of consistency.

Therefore it would be wrong for me to decide the claim against TfL on these grounds. I observe that, even if the Trust had pursued these grounds, it could only, at best, have resulted in the Court quashing TfL's decision, leaving TfL free to make the same decision again, in a lawful manner. No doubt that was the reason why the Trust chose to rely instead upon the Human Rights Act 1998 and the Equality Act 2010.

Summary of conclusions

174. On the evidence before me, the Mayor did not abuse his position as Chair of TfL in order to advance his re-election campaign.

175. TfL's decision-making process was procedurally unfair, in breach of its own procedures, and demonstrated a failure to consider the relevant issues.

176. Article 10(1) ECHR, which protects the right to freedom of expression, was engaged. TfL's Advertising Policy was a justified and proportionate restriction on the right to freedom of expression. TfL's decision to refuse to display the Trust's advertisement was also justified and proportionate, in furtherance of the legitimate aim of protecting the rights of others. Therefore the refusal was not a breach of the Trust's rights under Article 10(1).

177. The fact that TfL had applied its Advertising Policy inconsistently and partially was outweighed by the countervailing factors against allowing the advertisement to run, namely:

a) advertisements on the side of London buses are highly intrusive;

b) the advertisement would cause grave offence to a significant section of the many inhabitants of London; and, for those who are gay, it was liable to interfere with the right to respect for their private and family life under Article 8(1);

c) it was perceived as homophobic and thus increasing the risk of prejudice and homophobic attacks;

d) it was not a contribution to a reasoned debate;

e) leaflets, articles, meetings and the internet all provide an alternative vehicle for the expression of the Trust's message;

f) under the Equality Act 2010, TfL was under a duty to eliminate discrimination and harassment against gays and to "foster good relations" "tackle prejudice" and "promote understanding" between those who have same-sex orientation and those who do not. Displaying the advertisement would have been in breach of that duty.

178. There was no breach of Article 14 ECHR (the right not to be discriminated against) and the Trust was not protected under the Equality Act 2010.

179. Article 9 ECHR (freedom to manifest religious beliefs) was not engaged.

180. For the reasons given above, TfL's decision could not be characterised as irrational. The Trust did not pursue its claim on conventional judicial review grounds of procedural unfairness, failure to take into account relevant considerations or breach of the administrative law principle of consistency.

181. The Trust's claim was in my view, arguable and therefore permission is granted, but the claim for judicial review is dismissed.