

Revisiting Bob Jones University:  
Common Law Perspectives on Fundamental Public Policy – The UK

Professor Debra Morris, University of Liverpool, UK

Introduction

As we all know, in the important case of *Bob Jones University v United States*<sup>1</sup> the US Supreme Court held that a University with racially discriminatory admissions and other policies was not charitable and therefore did not qualify for the tax exemption given to charities. In interpreting the charitable tax exemption statute, the Court stated that ‘entitlement to tax exemption<sup>2</sup> depends on meeting certain common-law standards of charity - namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy’.<sup>3</sup> According to the Supreme Court, the Government had a fundamental and overriding interest in eradicating racial discrimination in education, which substantially outweighed whatever burden denial of tax benefits placed on the University’s exercise of its religious beliefs.

As the Supreme Court based its decision, in part, on common law, in this paper, as a common lawyer from the UK, I will consider how the case may have been determined in the UK.<sup>4</sup> In order to do this, I will first consider more generally how UK law treats (or would treat) organisations that violate ‘fundamental public policy’. It will be seen that the closest analogy is a recent discussion in the Charity Tribunal on the charitable status of a Catholic adoption charity wanting to limit its services to heterosexual couples. This was not a tax case, but rather a charitable status case. Nevertheless, it is interesting to compare how the Tribunal treated this matter, which came to the charity regulator’s attention as a result of a faith-based

---

<sup>1</sup> 461 US 574 (1983).

<sup>2</sup> Under section 501(c)(3) of the Internal Revenue Code of 1954.

<sup>3</sup> 461 US 574, 586 (1983).

<sup>4</sup> In the UK, for constitutional purposes, charity law is devolved for purposes other than tax. Whilst slightly different regulatory regimes now operate in England and Wales (under the Charity Commission) Scotland (under the Scottish Charity Regulator - OSCR) and in Northern Ireland (under the Charity Commission for Northern Ireland) tax law is not devolved, so that the whole of the UK uses a single definition of ‘charity’ for tax purposes. In the past, provisions for regulating charities have differed significantly in each jurisdiction, but Scotland and Northern Ireland now have similar regulatory regimes to that in England and Wales, as a result of the implementation of the Charities and Trustee Investment (Scotland) Act 2005 and the Charities Act (Northern Ireland) 2008. The Scottish reforms precede the English ones and the Northern Irish ones came later.

charity's request to the charity regulator in England and Wales, the Charity Commission, to change its objects so as to allow it to provide its services to heterosexual couples only. A similar case has been considered in Scotland, where the charity regulator in Scotland received a complaint from a campaigning organisation, the National Secular Society, which argued that a charity was acting in a discriminatory manner when deciding upon potential recipient of its services.

These cases, where the 'hierarchy' of protected classes within equality law (i.e. religion versus sexual orientation) was at issue in the UK will be considered in due course. In the first section, I will briefly examine the UK tax code to see what it tells us about any limitations on the charitable organisations upon which exemptions (either directly or through donations) may be conferred.

### 1. The UK approach to charity exemptions in the tax legislation

Previously, tax legislation containing reliefs for charities and their donors relied entirely on the case-based trust law definition of 'charity', now contained in the Charities Act 2011,<sup>5</sup> and not in any provisions of the tax legislation. Despite calls to the contrary,<sup>6</sup> there has never been a restricted definition of charity for fiscal purposes. However, there has been a recent extension of UK tax reliefs to bodies equivalent to charities in the European Union (EU) and in the European Economic Area (EEA) countries of Iceland and Norway. Traditionally, EU Member States have limited eligibility for tax-privileged status to resident charities (or equivalent) and their donors. However, following several key judgements,<sup>7</sup> the European Court of Justice (ECJ) has developed a general non-discrimination principle, according to which an EU-based foreign charity is entitled to hold the same tax-privileged status as a national charity, provided that it can be shown to be comparable to a national charity. This extension of tax reliefs to donors who donate to foreign bodies prompted Her Majesty's Revenue and Customs (HMRC), concerned about potential fraud (and presumably revenue loss), to introduce a new definition of 'charity' which applies to all organisations, domestic or

---

<sup>5</sup> See Charities Act 2011, s 1. A statutory definition of charity was introduced for the first time in England and Wales in Charities Act 2006, now consolidated in the 2011 Act.

<sup>6</sup> See, e.g. the (unsuccessful) argument put in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531.

<sup>7</sup> See, e.g. *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* (C-386/04) [2006] ECR I-8203; *Hein Persche v Finanzamt Lüdenscheid* (C-318/07) [2009] ECR I-359.

foreign, that seek to claim UK charity tax reliefs and exemptions.<sup>8</sup> Whilst this is still largely based on the common law definition of charity, now, in order to continue to be eligible for tax reliefs and exemptions, there is a four-stage test:

1. the organisation must be established for charitable purposes only. The definition of charitable purposes is that under the law of England and Wales and is now found in section 2 of the Charities Act 2011.
2. the organisation must meet the jurisdiction condition. This means it must be located in the UK or a member State of the EU or Iceland and Norway.
3. the organisation must meet the registration condition. This means that it must be registered by the Charity Commission where the law requires, or by an equivalent regulator in its home country if the law there so requires.
4. the organisation must meet the management condition. This final requirement means that all persons in the charity having control and management responsibilities must be 'fit and proper persons'. The term 'fit and proper' is not further defined in the legislation, but guidance has been provided.<sup>9</sup>

This new stricter definition of charity for tax purposes could lead to a body being recognised as a charity by the Charity Commission, but not being recognised as a charity by HMRC. For example, if a manager or trustee fails the new 'fit and proper persons' test, HMRC *may* reject the charity's claim to tax relief.

Despite this 'interference' with the traditional 'trust based' common law definition of charity, it can be seen this new tax definition is very much rooted in the common law definition, to which we will now turn.

## 2. Common Law (now statutory) Definition of Charity

It is only since 2006 that there has been a statutory definition of charity in England and Wales, now found in the Charities Act 2011.<sup>10</sup> Historically, when considering what is and is not charitable, the courts have looked to the preamble to the long since repealed Charitable Uses Act 1601 (commonly referred to as the Statute of Elizabeth I) which contained a list of charitable purposes. The 1601 Act was largely concerned with administration of trusts of a

---

<sup>8</sup> Finance Act 2010, s 30, sch 6.

<sup>9</sup> The test is designed to prevent charities claiming tax exemptions where the trustees or senior managers may abuse the charities' tax status. See further, HMRC, *Guidance on the Fit and Proper Persons Test*, updated March 2017

<https://www.gov.uk/government/publications/charities-fit-and-proper-persons-test/guidance-on-the-fit-and-proper-persons-test>

<sup>10</sup> Charities Act 2011, s 2. The 2011 Act consolidates the provisions in the Charities act 2006, where the definition first appeared.

charitable nature, prompted by abuse which had become common.<sup>11</sup> The preamble therefore contained an illustrative list of the purposes which were considered to be charitable at the time. Over the years these purposes became categorised and in *Income Tax Special Purposes Commissioners v Pemsel*<sup>12</sup> Lord Macnaghten famously stated:

‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

Lord Macnaghten’s four categories (known as the ‘four heads of charity’) have acquired considerable persuasive status. In England, until the adoption of a statutory definition of charity, establishing a charitable purpose as the first criteria necessary for any intended charitable body was determined by considering whether the purpose came within one of the four heads.<sup>13</sup> To be charitable, the purpose had to fall under one of these heads, it had to have an element of public benefit, and had to be exclusively charitable.

The Charities Act 2011 now provides a statutory definition of charity.<sup>14</sup> To be considered charitable, an organisation must demonstrate that its purposes, as set out in its constitution, fall within one or more of those in the new list of twelve charitable purposes, and also that it is established for the public benefit.<sup>15</sup> Those twelve purposes are:

1. The prevention or relief of poverty.
2. The advancement of education.
3. The advancement of religion.
4. The advancement of health or the saving of lives.
5. The advancement of citizenship or community development.
6. The advancement of arts, culture, heritage or science.
7. The advancement of amateur sport.
8. The advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity.
9. The advancement of environmental protection or improvement.
10. The relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage.
11. The advancement of animal welfare.

---

<sup>11</sup> The long title was ‘An Acte to redresse the Misemployment of Landes Goodes and Stockes of Money heretofore given to Charitable Uses.’ Lord Simonds noted: ‘It is a commonplace that that statute, as its title implied, was directed not so much to the definition of charity as to the correction of abuses which had grown up in the administration of certain trusts of a charitable nature.’ *Gilmour v Coats* [1949] AC 426 (HL) 442.

<sup>12</sup> [1891] AC 531 (HL) 583.

<sup>13</sup> See, e.g. *Inland Revenue Commissioners v McMullen* [1981] AC 1 (HL).

<sup>14</sup> There is substantial, but not complete, overlap between the purposes laid down in section 501(c)(3) and the English law concept of charitable purpose.

<sup>15</sup> Charities Act 2011, s 2(1).

12. The promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services.

In general terms, the list covers all purposes which have, over the years, become recognised as charitable purposes, via the *Pemsel* heads. The first three purposes retain the first three *Pemsel* heads, but add 'prevention' to the 'relief' of poverty. The remaining purposes expand upon the meaning of purposes beneficial to the community (the fourth head). A catch-all is also retained to allow any other existing charitable purposes to remain charitable and finally new charitable purposes which are similar to pre-existing or statutory charitable purposes are recognised as charitable.

Importantly, whilst public benefit must also be present, none of the purposes brings with them a presumption that public benefit is automatically provided,<sup>16</sup> and there is no definition of public benefit in the Act. In the run up to the enactment of the Charities Act 2006, the Government decided that the current non-statutory approach would remain, giving flexibility and the capacity to accommodate the diversity of the sector and that guidance as to the operation of the public benefit requirement should be issued by the Charity Commission.<sup>17</sup> Until 2006, there was a presumption of public benefit that applied to the first three *Pemsel* heads of charity. The Charities Act 2006 sought to remove that presumption<sup>18</sup> so that all charities must now positively prove public benefit, but the old case law still remains valid as a result of the wording of the legislation.<sup>19</sup> Decisions about whether a particular charity meets the public benefit requirement continue to be determined by the Charity Commission, on the basis of case law, and ultimately by the courts.<sup>20</sup> As well as showing that the pursuit of an organisation's purposes are capable of producing a benefit that can be demonstrated and that is recognised by law as beneficial,<sup>21</sup> the benefit should be provided for, or available to, the public or a sufficient section of the public.<sup>22</sup>

Whilst there has been much discussion in English case law around public benefit (with some drifting into public policy debate) and a significant renewal of interest in this area since the

---

<sup>16</sup> Charities Act 2011, s 4(2).

<sup>17</sup> Secretary of State for the Home Department, *The Government Reply to the Report from the Joint Committee on the Draft Charities Bill, Session 2003–04 HL Paper 167/HC 660* (Cm 6440, December 2004) 7.

<sup>18</sup> See now Charities Act 2011, s 4(1)(a).

<sup>19</sup> See *ibid* s 4(3).

<sup>20</sup> See, e.g. *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC).

<sup>21</sup> See, e.g. *Gilmour v Coats* [1949] AC 426 (HL).

<sup>22</sup> *Verge v Somerville* [1924] AC 496 (PC).

statutory definition was introduced,<sup>23</sup> the Supreme Court in *Bob Jones University* has tackled the issue of ‘public policy’ head-on in a way which it has not been considered in the English Courts. In the next section, I will consider the minimal ways in which public policy has been dealt with in English charity law cases.

### 3. Charity and Public Policy in the English Courts

There is no similar English authority to the *Bob Jones University* case and indeed very few mentions of public policy in charity cases at all. I will mention just two. First, not long after the first world war, when a testator left a gift in his will ‘to the German Government for the benefit of its soldiers disabled in the late war’ the judge did consider the argument that since the beneficiaries are persons who fought against England in the war, it was against public policy to uphold such a gift as a charitable gift.<sup>24</sup> Maugham J responded:

the only objection on the ground of public policy that I can see is the fact that these people were once enemies. I shall say very little on that subject, because I am unable to see how it can be contrary to public policy to benefit persons who were once enemies but who have ceased to be such by reason of the fact that peace has been declared. ... Accordingly, I hold that there is no objection to this gift from the point of view of public policy.<sup>25</sup>

I would suggest that, for present purposes, the reasoning as to whether or not the gift was indeed contrary to public policy is irrelevant. What is significant, in the context of this paper, is that the judge did explicitly consider public policy arguments. We can assume that if he had found the gift to be contrary to public policy then he would have gone on to hold that it was not charitable. Importantly, this case referred to public *policy*, not public *benefit* arguments, and the judge simply dealt with them, without specifically commenting on this somewhat novel argument.

In the second, much more recent, case to explicitly consider public policy, *Re Harding, deceased*,<sup>26</sup> in response to the suggestion that a gift for the benefit of the black community was contrary to public policy because it was discriminatory on racial grounds, Lewison J

---

<sup>23</sup> See, e.g. Mary Syngé, *The ‘New’ Public Benefit Requirement Making Sense of Charity Law?* (Hart Publishing 2015).

<sup>24</sup> *Re Robinson* [1931] 2 Ch 122.

<sup>25</sup> *ibid* 128.

<sup>26</sup> [2007] EWHC 3 (Ch), [2008] Ch 235.

stated that ‘there is no trace in previous authority of any such public policy’.<sup>27</sup> He cited *Mitford v Reynolds*<sup>28</sup> where Lord Lyndhurst LC upheld a charitable gift for the benefit of the ‘native inhabitants of Dacca’ which he clearly said was used ‘in contradistinction to the European inhabitants or the descendants of European inhabitants’.<sup>29</sup> However, by the time *Re Harding, deceased* was decided, the Race Relations Act 1976 had been passed and the case was therefore governed by equality law. Under that Act it was (and continues to be under the Equality Act 2010 which supersedes the 1976 Act) unlawful for charities to limit their beneficiaries by reference to their colour. Under the legislation, any conditions that seek to impose such limits will simply be removed, and this is what saved the gift in this case.<sup>30</sup> This saving provision in the legislation removed the need for the court to confront the public policy argument head-on, since the gift could not remain in its present state due to equality law.

Before the wide application of equality law, which applies also to charitable trusts,<sup>31</sup> the English courts have occasionally dealt with the problem of a potentially discriminatory charitable gift by using the equitable doctrine of *cy près*. This allows the courts to alter the terms of a charitable trust when the testator’s intent is frustrated due to the impossibility, impracticability, or illegality of carrying it out exactly as the donor specified. Trustees have sought *cy près* orders to remove a condition or subsidiary term providing for discrimination in respect of the charity concerned. These have often been cases where the donor wishes to support a specific institution, such as a college, and a racial or religious restriction is made applicable to those who will receive some benefit from the institution. *Cy près* is based on the settlor’s intention. Adopting a liberal approach, the court may find that the donor’s primary intent was to establish or aid the institution concerned and that the restriction is now preventing the institution from accepting the gift.<sup>32</sup> On that basis, the court may then remove the restriction. It has always been clear, however that the judges have not considered that

---

<sup>27</sup> *ibid* [23].

<sup>28</sup> (1842) 1 Phillips 185, 41 ER 602.

<sup>29</sup> *ibid* 193, 605.

<sup>30</sup> See now Equality Act 2010, s 193(4).

<sup>31</sup> See now *ibid* ss 193 and 194(2).

<sup>32</sup> See, e.g. *Re Dominion Students’ Hall Trust* [1947] Ch 183 where a ‘colour bar’ which restricted a charitable hostel to male students of European origin from the overseas dominions of the British Empire, was removed and *Re Lysaght* [1966] Ch 191 where a ‘religion bar’ which excluded Jews or Roman Catholics from studentships derived from a gift to the Royal College of Surgeons, was removed.

these charitable gifts would be contrary to public policy. For example, in *Re Lysaght* Buckley J stated:

I accept that racial and religious discrimination is nowadays widely regarded as deplorable in many respects ... but I think that it is going much too far to say that the endowment of a charity, the beneficiaries of which are to be drawn from a particular faith or are to exclude adherents to a particular faith, is contrary to public policy.<sup>33</sup>

As I have noted elsewhere,<sup>34</sup> these discriminatory issues will only be resolved by *cy près* if two conditions are satisfied. First, they require an application to the court by the trustees, and secondly, the court must take a liberal approach to the testator's 'intention'. An over-zealous application of the *cy près* doctrine by the courts, however, could deter potential donors who fear interference with their gifts.<sup>35</sup> Despite this, the case has been made in the US<sup>36</sup> for a wider application of *cy près* to remove discriminatory terms, based on public policy.

I will now turn to the issue related to *Bob Jones University*, considered recently in the English courts, which is whether or not a discriminatory trust can nevertheless be for the public benefit and therefore charitable.

#### 4. Public Benefit and Discrimination in the UK

This question has recently arisen in the context of religious adoption charities and their attempts to limit their services to heterosexual couples. Before looking at those cases specifically, I will consider the link between public benefit and discrimination.

Many charities see the advancement of equality as part of their *raison d'être*. As Mirkay stated, 'nondiscriminatory practices and policies comport with the commonly accepted notion of being "charitable" and conferring public benefit.'<sup>37</sup> Yet, many charities discriminate i.e. choose to whom to target their services, often on the basis of what would *prima facie* be

---

<sup>33</sup> [1966] Ch 191, 206.

<sup>34</sup> Debra Morris, 'Charities and the Modern Equality Framework - Heading for a Collision?' (2012) 65 Current Legal Problems 295, 308.

<sup>35</sup> See, e.g. '[donors] are sensitive customers, and if they feel that someone else is going to apply their property in some quite different way which they would not like, they are apt not to give at all.' Tenth Report from the Expenditure Committee, HC 495-1, 1974-75, *Charity Commissioners and their accountability* (London: HMSO, 1975) para 6

<sup>36</sup> See, e.g. Frances Howell Rudko, 'The *Cy Pres* Doctrine in the United States: From Extreme Reluctance to Affirmative Action' (1998) 46 Cleveland State Law Review 471.

<sup>37</sup> Nicholas Mirkay, 'Is It Charitable to Discriminate: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities' [2007] Wisconsin Law Review 45, 85.

unlawful grounds (i.e. favouring those with certain ‘protected characteristics’<sup>38</sup> within the equality legal framework to the exclusion of others). This might be due to specific altruistic design or to limited resources, or both. If all charities (and other service providers) had to confer benefits on everybody, this would not achieve substantive equality. Another approach to the promotion of equality is therefore to treat different groups of people in different ways in order to level the playing field for those who may otherwise have been disadvantaged. This is in line with many charities’ modus operandi, since many are set up to address particular disadvantage or to help the less fortunate.<sup>39</sup> Indeed, discrimination appears to be a feature of many charities that restrict their beneficiaries to those sharing a particular religion, nationality, place of birth etc. It may be necessary to restrict benefits to persons of a particular religion if the object of the charity is the advancement of religion, or to restrict benefits to persons residing in a particular place if the object of the charity is to improve conditions for local residents. There are therefore many exceptions in the anti-discrimination legislative framework, which is now usefully contained in one statute - the Equality Act 2010 - that charities may use.<sup>40</sup>

The Equality Act 2010 substantially altered the legal landscape for charities in the UK. It consolidated existing anti-discrimination legislation<sup>41</sup> and, by bringing all forms of discrimination under one Act, it brought some uniformity to the legislative approach to equality. However, one specific exception for charities, now contained in section 193 of the Act, has been tightened up significantly in the 2010 Act and has proved to be particularly difficult for charities to interpret and apply. Under the provision, charities will not breach the Act by providing benefits only to people who share a particular protected characteristic if this is in accordance with the charitable instrument that establishes or governs the charity and this is justified either:

- as a proportionate means of achieving a legitimate aim; or
- for the purpose of preventing or compensating for a disadvantage linked to that protected characteristic.

---

<sup>38</sup> Defined in Equality Act 2010, s 4. These are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation.

<sup>39</sup> See, e.g. charities quoted in empirical research reported in Debra Morris, Anne Morris and Jennifer Sigafos, *The Impact of the Equality Act 2010 on Charities* (Charity Law & Policy Unit, University of Liverpool 2013) 92.

<sup>40</sup> For example, there are exceptions in the Act for: membership associations; single-sex fund-raising; membership based on religious belief; positive action in service provision; religious or belief organisations; admission to education; and, sport. See, in general, *ibid* ch 4.

<sup>41</sup> It replaced nine statutes and nearly 100 sets of regulations that had been introduced over many years.

Previously, the equivalent of this key charity-specific exception simply required charities to restrict their objects in their governing documents. Now, importantly, that restriction must be justified for the discrimination to be lawful. This section was the subject of protracted litigation in the *Catholic Care* case, to be considered later, where a Catholic adoption charity sought to change its objects so as to limit its advice-giving services to heterosexual applicants only. Ultimately, this was found not to fall within the exception and therefore any such limitation would be unlawful.

Importantly, for our purposes, the exception does not refer to the concept of ‘public benefit’. So, the question remains, is it possible to have a charitable object that *meets* the public benefit requirement but is *not* Equality Act compliant? Can a charity with identifiable public benefit nevertheless be found to have unjustifiably discriminated because its restrictive purpose is neither a proportionate means of achieving a legitimate aim, nor is it for the purpose of preventing or compensating for a disadvantage? Alternatively, does compliance with the Equality Act mean the public benefit test is also passed?

Where beneficiaries of a charity are defined by some personal characteristic (including Equality Act protected characteristics) the charity regulator, when determining charitable status, should consider in each case why the restriction is there and, why the restriction is reasonable in the context of the charitable aims to be carried out. For example, it should consider what special need of the service or facility do the people in the restricted class have? Presumably, if these questions cannot be answered to the regulator’s satisfaction, the charity will fail the public benefit test; if the class of people whom the aims are intended to benefit is unreasonably restricted then they are not ‘a section of the public’. Where that is the case, the organisation would have to widen the class of people who can benefit, or it would not meet the public benefit requirement. If a body does not meet the public benefit requirement, it is not a charity and therefore questions of compliance with Equality Act exceptions for charities are irrelevant. The only bodies that can take advantage of the section 193 exception from equality law are those that satisfy the statutory definition of a charity.

In the Charity Commission's statutory guidance on public benefit,<sup>42</sup> in the section that relates to the need for a charity's benefit to be for the public, or a section of the public, there is reference to equality law. It is clearly stated<sup>43</sup> that charities must not define their beneficiaries on the basis of a 'protected characteristic' where the situation does not fall within one of the exceptions in the Equality Act as this will not benefit a sufficient section of the public. Further, in the Charity Commission's public benefit legal analysis document it is stated that:

Under the Equality Act 2010, in some circumstances it may be unlawful to establish a charity for purposes which discriminate on the ground of a protected characteristic. Where the Act does not make it unlawful to establish a charity for purposes which discriminate on the ground of a protected characteristic, the Commission considers that it is likely that a purpose which could not be administered in accordance with the provisions of the Act would be held not to be for the public benefit, and hence not a charitable purpose.<sup>44</sup>

The Charity Commission has also published specific guidance<sup>45</sup> for charities on the Equality Act 2010. Here, on several occasions, the Charity Commission begins to conflate the equality law requirements with the public benefit test, with the result being that, if restrictions cannot be sanctioned under section 193 or any other exceptions, there will be no public benefit either. For example, at one point it is stated that if either test in section 193 is not met and benefits are nevertheless restricted, such an organisation 'will not be able to show that it is for the public benefit and cannot therefore be a charity'.<sup>46</sup>

The Equality and Human Rights Commission (EHRC), also recognises the very clear link between the public benefit requirement and the satisfaction of the Equality Act exceptions for charities. For example, in its statutory code of practice on Services, Public Functions and Associations,<sup>47</sup> the EHRC notes that the Charity Commission:

---

<sup>42</sup> In 2013, the Charity Commission published three new public benefit guides. All charity trustees must have regard to these 3 guides: 'Public benefit: the public benefit requirement' (PB1); 'Public benefit: running a charity' (PB2); and, 'Public benefit: reporting' (PB3). As a result of the decision of the Upper Tribunal Tax and Chancery Chamber in *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC), [2012] 2 WLR 100, some elements of the original guidance have been rewritten. Separate guidance that explains the legal underpinning for the principles of public benefit can be found in Charity Commission, 'Public benefit: analysis of the law relating to public benefit' (2013).

<sup>43</sup> Charity Commission, 'Public benefit: the public benefit requirement' PB1 (2013) 11.

<sup>44</sup> Charity Commission, 'Public benefit: analysis of the law relating to public benefit' (2013) 17.

<sup>45</sup> Charity Commission, 'Equality Act guidance for charities' (2013).

<sup>46</sup> *ibid* para 7.2.

<sup>47</sup> EHRC, 'Equality Act 2010 Code of Practice - Services, Public Functions and Associations' (2011).

will consider the likely impact of any restriction on beneficiaries in the charitable instrument, and whether such restriction can be justified, in assessing whether the aims of a charity meet the ‘public benefit’ test.<sup>48</sup>

While the precise correlation between the Equality Act exceptions for charities and the public benefit test remains unclear, it is at least arguable that a charity seeking to operate a discriminatory restriction that does *not* bring itself within one of the exceptions, should, in addition to being in breach of the Equality Act, have difficulty in passing a public benefit test. This should result in the organisation failing to achieve charitable status. Indeed, it has been stated that ‘a discriminatory charitable trust is a contradiction in terms’.<sup>49</sup> As the UK human rights campaigner, Peter Tatchell, put it, ‘how can a charity do good works if it denies equal treatment to its... service users? Aren’t public benefit and discrimination mutual contradictions?’<sup>50</sup>

With that background in mind, I will now turn to look at the Catholic adoption charity cases.

### *Catholic Adoption Charity Litigation*

The extent to which public benefit can be shown where a charity’s services are limited to a section of the public that equates to unlawful discrimination has recently been considered in two Catholic adoption charity cases. The English case came before the Charity Tribunal and on appeal to the court and the Scottish case came before Scottish Charity Appeals Panel. In both countries, Catholic adoption charities wanted to limit their services to heterosexual couples. This discussion will focus on the English case of *Catholic Care*<sup>51</sup> which involved significantly longer, more considered, litigation than its Scottish equivalent of *St Margaret’s*.<sup>52</sup> In the latter, the Panel allowed the charity’s appeal and quashed the decision of Scottish charity regulator, the Office of the Scottish Charity Regulator (‘OSCR’), which had sought to prevent the charity’s practices, following a complaint from the National Secular

---

<sup>48</sup> *ibid* para 13.35.

<sup>49</sup> P S A Lamek, ‘Case Comment’ (1966) 4 Osgoode Hall Law Journal 113, 119.

<sup>50</sup> Joint Committee on the Draft Charities Bill, The Draft Charities Bill (2003-04 HL 167-III, HC 660-III) Vol 3: Written Evidence, Memorandum from Peter Tatchell (DCH 92) Ev 377.

<sup>51</sup> *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC).

<sup>52</sup> *St Margaret’s Children and Family Care Society (SC028551) v Office of the Scottish Charity Regulator*, EHRC intervening App 02/13. For further discussion of both decisions, see Debra Morris, Anne Morris and Jennifer Sigafos, ‘Adopting (in)equality in the UK: the Equality Act 2010 and its impact on charities’ (2016) 38 *Journal of Social Welfare and Family Law* 14.

Society. The Panel accepted the argument that the charity's entire public benefit (which went beyond the 'tangible' benefit of placing adopted children, to the 'intangible' benefit of the propagation of religion to society) had not been taken into account when weighing up the balance of benefit and disbenefit. However, the decision lacks clarity in places and has been (correctly, in my view) described as 'not easy to follow' by the EHRC<sup>53</sup> and as 'difficult to follow' by OSCR.<sup>54</sup> *Catholic Care*, on the other hand, was subject to considerable legal analysis, before both the regulator and the courts. Catholic Care wanted to change its objects to allow it to fall within what is now the section 193 exception considered above. The issue was first determined by the Charity Commission which said that it would not give its consent to the change<sup>55</sup> as allowing the charity to limit its services to heterosexual couples only would lead to unlawful discrimination, not falling within the exception. The regulator's determination was then considered by the Charity Tribunal to whom the charity unsuccessfully appealed. It then went on appeal to the High Court. This led to a second determination of the issue by the Charity Commission (following the High Court decision), an appeal to the First-tier Tribunal (Charity) and then a final appeal to the Upper Tribunal.<sup>56</sup> It is also important to note that first instance decisions of both the Charity Tribunal and the Scottish Charity Appeals Panel<sup>57</sup> are not Superior Courts of Record and their decisions do not create legal precedent. This comes in the appeal to (now) the Upper Tribunal in England (originally the High Court) and to the Upper Tribunal for Scotland (originally the Court of Session) in Scotland. The Scottish case went no further than the original Appeals Panel. The English case was heard by a Superior Court of Record twice.

In the English *Catholic Care* case, it was ultimately held that there must be 'particularly weighty' reasons to justify discrimination on the basis of sexual orientation. Although the charity argued that donors would stop supporting it if it allowed same-sex couples to use its

---

<sup>53</sup> EHRC, 'Scottish Charities Appeal Panel decision in relation to St Margaret's Children and Family Care Society. Statement from the Equality and Human Rights Commission' (2014).

<sup>54</sup> Office of the Scottish Charity Regulator, 'Wider issues raised by the Scottish Charity Appeal Panel decision on St Margaret's Children and Family Care Society (SC028551) 14 March 2014.

<sup>55</sup> Charity Commission for England and Wales, Decision on whether or not to grant section 64 consent for Catholic Care (Diocese of Leeds) and Father Hudson's Society to amend their objects, 24 November 2008 (unreported). The case ultimately only concerned Catholic Care as Father Hudson's Society withdrew its appeal before the first Tribunal hearing.

<sup>56</sup> During the course of these events, the Tribunals Courts and Enforcement Act 2007 transformed the tribunal system into a two-tier structure, so that appeals are now heard in the Upper Tribunal, not the High Court (as was the case for the first *Catholic Care* appeal).

<sup>57</sup> Note that the functions of the Scottish Charity Appeals Panel were transferred in January 2018 to the First-tier Tribunal for Scotland and allocated to the General Regulatory Chamber under the Tribunals (Scotland) Act 2014.

adoption service, the Upper Tribunal ruled that the charity had not demonstrated that this would be the case and it was therefore in breach of the Equality Act. After four years of litigation, Catholic Care decided not to appeal this decision and it is no longer providing adoption services.

Although, as Matthew Harding has correctly observed, the question whether or not the discriminatory purpose in the *Catholic Care* litigation would satisfy the public benefit test was ‘hardly considered’,<sup>58</sup> there is some (albeit minimal) useful dicta to consider. In line with its earlier evidence to the Joint Committee on Human Rights,<sup>59</sup> the EHRC, in its early intervention,<sup>60</sup> had argued that a charity that discriminates on grounds of sexual orientation and that does not fall within the section 193 exception would fail the public benefit test and so not be charitable. The Tribunal was disinclined to accept that submission, although it did not find it necessary finally to rule upon it in its preliminary decision.<sup>61</sup> On appeal, Briggs J in the High Court also considered it unnecessary finally to decide whether a discriminatory purpose could ever be for the public benefit and whether a body which existed for the pursuit (inter alia) of such a purpose could be charitable. He did, however, go on to suggest that any discriminatory treatment by a charity that went beyond that allowed by the exception in what is now section 193 would likely give rise to ‘large public disbenefit’ and we can presume that this would not allow a charity to satisfy the public benefit test:

An organisation which proposes to fulfil a purpose for the public benefit will only qualify as a charity if, taking into account any dis-benefit arising from its *modus operandi*, its activities nonetheless yield a net public benefit ... Thus, a charity which proposed to apply differential treatment on grounds of sexual orientation otherwise than as a proportionate means of achieving a legitimate aim might thereby fail to achieve charitable status (or lose it, if it sought to pursue such activities by amendment of its objects).<sup>62</sup>

---

<sup>58</sup> Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press 2014) 207.

<sup>59</sup> Memorandum submitted by the Equality and Human Rights Commission to the Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, (2008-9, HL 169, HC 736) Ev 132, 139.

<sup>60</sup> *Father Hudson's Society and another v Charity Commission (Equality and Human Rights Commission intervening)* [2009] PTSR 1125.

<sup>61</sup> *ibid.*

<sup>62</sup> [2010] EWHC 520 (Ch), [2010] 4 All ER 1041 [97]. Compare the decision of the Scottish Charity Appeals Panel in *St Margaret's* where it was stated by the Panel: ‘it is not as simple to say that if The Equality Act is breached then the Public Benefit Test is not met and any guidelines contrary to that view should be revised by the Respondent.’ *St Margaret's Children and Family Care Society (SC028551) v Office of the Scottish Charity Regulator*, EHRC intervening App 02/13, lines 804-806.

In England and Wales, where there is no statutory definition of ‘public benefit’,<sup>63</sup> it is accepted that in deciding whether a purpose is for the public benefit, a court must balance the benefit of a purpose with any detriment that results.<sup>64</sup> In *Catholic Care*, in carrying out the required balancing act, Briggs J held that a weighty and considerable justification would be required to shift the element of public disbenefit.

The Charity Commission applied the approach laid down by Briggs J when it came to re-considering (and again denying) Catholic Care’s request to change its objects so as to allow it to provide its services to heterosexual couples only, stating:

The proposed discrimination on the basis of sexual orientation is not likely to be for the public benefit unless it is a proportionate means of achieving a legitimate aim.<sup>65</sup>

In the charity’s later appeal against the regulator’s second determination, the Charity Commission once more argued that a charity which discriminated on grounds of sexual orientation that was not justified under article 14 of the European Convention on Human Rights<sup>66</sup> could not meet the public benefit requirement.<sup>67</sup> Again, the point was not specifically dealt with in the Tribunal’s decision, which was very fact-based, focusing on whether the charity’s activities amounted to a proportionate means of achieving a legitimate aim. On further appeal to the Upper Tribunal,<sup>68</sup> Sales J, in upholding the earlier decisions, made no mention of the complex interrelationship between justification of what would otherwise be discriminatory treatment and the public benefit test for charities. Sales J

---

<sup>63</sup> In Scotland, on the other hand, under Charities and Trustee Investment (Scotland) Act 2005, s 8, to determine whether a body provides or intends to provide public benefit, OSCR and the courts must have regard to:

a) how any –

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public,

in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

<sup>64</sup> Charity Commission, ‘Public benefit: analysis of the law relating to public benefit’ (2013) 11 citing *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 [106]. See also, the earlier decision of the House of Lords in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 and Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press 2014) ch 7, for his comments on how this balancing act should be undertaken.

<sup>65</sup> Charity Commission for England and Wales, *Catholic Care (Diocese of Leeds)*, decision made on 21 July 2010, Application for consent to a change of objects under s 64 of the Charities Act 1993, para 7.2.

<sup>66</sup> Article 14 of the European Convention on Human Rights is the general anti-discrimination provision which must be pleaded in relation to some other substantive right in the Convention.

<sup>67</sup> *Catholic Care (Diocese of Leeds) v Charity Commission* [2011] UKFTT B1 (GRC) [13].

<sup>68</sup> *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC).

emphasised that there must be ‘particularly weighty’ reasons to justify discrimination on the basis of sexual orientation. Although the charity argued that donors would stop supporting it if it allowed same sex couples to use its adoption service, the Upper Tribunal ruled that the charity had not demonstrated that this would be the case.

The charity sought to justify its decision not to provide its adoption services to non-heterosexual couples partly by reference to the motivations of its donors who were, according to the charity, not discriminatory, but simply in favour of the traditional family institution.

This view was not supported in the High Court by Briggs J when he said:

the respect for the religious beliefs motivating such faith-based adoption agencies would not be likely to constitute a justification of differential treatment in favour of heterosexual couples under Article 14 [of the European Convention on Human Rights] because of the essentially public nature of their activities, carried out to a significant extent on behalf of local authorities, and funded to a greater or lesser extent by them.<sup>69</sup>

Nevertheless, the argument was not wholly lost on Sales J when the case came back to the Upper Tribunal:

In my opinion, donors motivated by respect for Catholic doctrine to have a preference to support adoption within a traditional family structure cannot be equated with racist bigots... Such views have a legitimate place in a pluralist, tolerant and broadminded society, as judgments of the ECtHR [European Court of Human Rights] indicate.<sup>70</sup>

Using ‘good’ motive to justify otherwise unlawful discrimination does not appear to be in line with principles of equality law and such an approach should be adopted with significant caution.<sup>71</sup> In any event, the notion of ‘good’ motive (somewhat akin to the ‘public benefit’ doctrine that is fundamental to charity law) is highly subjective and depends very much on the value frameworks of those that are examining it. This is particularly evident when it is considered in a religious context. Nevertheless, there is a prevalent idea that, because the motive behind charitable endeavour is inherently good due to the ‘halo’ effect,<sup>72</sup> this should be enough to ensure compliance with law, including equality law. A Canadian commentator

---

<sup>69</sup> *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales* [2010] EWHC 520 (Ch) [84].

<sup>70</sup> *Catholic Care (Diocese of Leeds) v Charity Commission* [2012] UKUT 395 (TCC) [44].

<sup>71</sup> See further, Debra Morris, Anne Morris and Jennifer Sigafoos, *The Impact of the Equality Act 2010 on Charities* (Charity Law & Policy Unit, University of Liverpool 2013) 61.

<sup>72</sup> See, e.g. Rob Atkinson, ‘Altruism in Nonprofit Organizations’ (1990) 31 *Boston College Law Review* 501; Henry Hansmann, ‘Reforming Nonprofit Corporation Law’ (1981) 129 *University of Pennsylvania Law Review* 497.

has suggested it is ‘malicious discrimination’ that should be outlawed when it comes to charitable provision.<sup>73</sup> Whilst this categorization appears to be a highly emotive basis on which to classify behaviour as lawful or not, which has no place in English law, the exceptions in the Equality Act 2010 that charities can rely on (including section 193, discussed in this case) may well be explained as ‘non-malicious’ discrimination or discrimination ‘for good reason’, suggesting that motive *may be* relevant. Ordinarily, happily the two *will* coincide: good motive will usually be good enough to ensure compliance. However, that is not always the case.

In the USA, the favourable tax treatment of charities has been used by some to question whether it should ever be ‘charitable to discriminate’<sup>74</sup> with the result that there should be a ‘nondiscrimination requirement’ applied to all charities. Mirkay states that ‘any discrimination by a charitable organization is intrinsically incompatible with that organization’s charitable purpose and mission’.<sup>75</sup>

In the final section of this article, I will turn to the *Bob Jones University* decision to see how it would fare before the UK Supreme Court.

### Bob Jones University in the UK Supreme Court?

The discussion above around the *Catholic Care* litigation shows that there is much to compare between the reasoning in the *Bob Jones University* case and principles that would apply in a UK court, and yet ‘fundamental public policy’ as such, again, is not a concept that was raised in the UK litigation. The US Supreme Court’s decision in *Bob Jones University* is uniformly cited as the case which is authority for the fact that an institution seeking tax-exempt status must not be contrary to established public policy. However, Burger CJ made it clear that ‘entitlement to tax exemption depends on meeting certain common law standards of

---

<sup>73</sup> P S A Lamek, ‘Case Comment’ (1966) 4 Osgoode Hall Law Journal 113, 115. He went on to state (at 118) ‘malicious discrimination is the very antithesis of public benefit which is an essential element of all varieties of legal charity’. See, however, an alternate viewpoint, put forward by another Canadian academic – Adam Parachin, ‘Public benefit, discrimination and the definition of charity’ in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press 2013) 198.

<sup>74</sup> See, e.g. Nicholas Mirkay, ‘Is It Charitable to Discriminate: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities’ [2007] *Wisconsin Law Review* 45, in which he discusses *Bob Jones University*.

<sup>75</sup> *ibid* 84.

charity’,<sup>76</sup> where, we have seen above, ‘public benefit’ rather than ‘public policy’ is the standard to be reached, and on a number of occasions the judge conflates public policy and public benefit rationales.

The Revenue Ruling on which the original Revenue decision to deny tax exempt status to the University was based also refers to the fact that the statutory requirement under section 501(c)(3) ‘of being “organized and operated exclusively for religious, charitable, ... or educational purposes” was intended to express the basic common law concept of “charity”.’<sup>77</sup> It then adds that ‘all charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy’.<sup>78</sup> Burger CJ referred to the rationale for US tax exemptions being ‘deeply rooted in our history, as in that of England’<sup>79</sup> and linked to the special privileges that have long been extended to charitable trusts, because they provide a benefit to society. He also cited Lord Macnaghten and his classification of charity in *Pemsel*. Much of Burger CJ’s dicta talked of public benefit, not public policy but then he went on to say, in line with the Revenue Ruling and citing the US authority of *Perin v Carey*:

A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy.<sup>80</sup>

Illegality and public policy, however, have often been discussed not, as we have seen earlier, in cases on charitable trusts, but in the English case law on private trusts.<sup>81</sup> Burger CJ seems to use public policy and public benefit requirements interchangeably, for example, when he states:

to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.<sup>82</sup>

---

<sup>76</sup> 461 US 574, 586 (1983).

<sup>77</sup> Revenue Ruling 71-447, 1971-2 Cum Bull 230.

<sup>78</sup> *ibid*.

<sup>79</sup> 461 US 574, 588 (1983).

<sup>80</sup> 24 How 465, 501, 16 L Ed 701 (1861).

<sup>81</sup> See, e.g. in the context of beneficial ownership of property, *Tinsley v Milligan* [1994] 1 AC 340 (HL) and in the context of religious forfeiture clauses in wills, *Blathwayt v Baron Cawley* [1976] AC 397 (HL).

<sup>82</sup> 461 US 574, 592 (1983).

Similar themes are covered in both *Bob Jones University* in the US Supreme Court and the *Catholic Care* litigation in the English Tribunal system. In both cases, the judges asked themselves very similar questions and came to the same conclusions: the religious reasons for supporting the discrimination, in the first case on grounds of race and in the second, on grounds of sexuality, were not sufficiently weighty. In the US Supreme Court, Burger CJ said:

the Government has a fundamental, overriding interest in eradicating racial discrimination in education -- discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, ... and no 'less restrictive means,' ... are available to achieve the governmental interest.<sup>83</sup>

The sort of 'weighing up' exercise that Burger CJ undertook when comparing the two competing objectives of preventing discrimination on grounds of race and advancing religion is very similar to the exercise undertaken in the English *Catholic Care* case. For example, in the High Court decision in *Catholic Care Briggs J* stated:

... it is common ground that [sexual orientation discrimination] is one of those forms of discrimination (called by equality lawyers a 'suspect class') in relation to which a difference in treatment will be justified, so as not to infringe article 14, only if particularly convincing and weighty reasons are shown.<sup>84</sup>

Similarly, in the Upper Tribunal in *Catholic Care*, Sales J stated:

Notwithstanding the statements in the cases about the legitimacy and acceptability of views in favour of promoting traditional family life, it is also clear from the Strasbourg authorities that even where a body acts in accordance with such views, if in doing so it discriminates against homosexuals it is still necessary for it to show that there are particularly convincing and weighty reasons justifying differential treatment.<sup>85</sup>

We could conclude that the public policy arguments used in the US Supreme Court simply equate to the equality law arguments used in England. There is some UK authority that supports this conclusion. Whilst *Bob Jones University* has rarely been cited in UK court decisions, there is one UK Supreme Court case<sup>86</sup> on a school's admissions policy, where it

---

<sup>83</sup> *ibid* 604.

<sup>84</sup> [2010] EWHC 520 (Ch) [57].

<sup>85</sup> [2012] UKUT 395 (TCC) [48].

<sup>86</sup> *R v Governing Body of JFS and another (United Synagogue and others intervening)* [2009] UKSC 15, [2010] 2 AC 728.

was referred to by two of the justices. In that case, a faith-based school sought to deny entry to a pupil who was not recognised as being Jewish by the Office of the Chief Rabbi of the United Congregation of the Commonwealth. This policy was found to unlawful under the Race Relations Act 1976.<sup>87</sup> In the course of his judgement, Lord Clarke, stated that:

the 1976 Act banning direct discrimination is an application of public policy, rather like the decision of the United States Supreme Court in *Bob Jones University v United States* (1983) 461 US 574.<sup>88</sup>

In the same case, Lord Hope noted that this school case was ‘quite different too from the example of the Dutch Reformed Church’. He said:

The discrimination that its belief invited, on grounds of colour, was overtly racist. A court would have no difficulty in dismissing the religious belief as providing no justification for it at all: see also *Bob Jones University v United States* (1983) 461 US 574, where the US Supreme Court upheld the decision of the Inland [*sic*] Revenue Service to revoke the university’s tax exempt status because, while permitting unmarried people who were black to enrol as students, it had adopted a racially discriminatory policy of denying admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating although it had been based on sincerely held religious beliefs. Beliefs of that kind are not worthy of respect in a democratic society or compatible with human dignity.<sup>89</sup>

## Conclusion

It appears that whilst similar principles are at play in both US and UK litigation, in the UK, there is a preference for addressing these issues by reference to ‘public benefit’ doctrine, rather than ‘public policy’. Whilst this has not been explicitly discussed by the judiciary, it may be that there is a concern that public policy doctrine places too much discretion in the judiciary, whereas public benefit is perceived to be a more acceptable concept for judges to determine. Public benefit has always been an essential element in charities. It distinguishes charitable trusts from private trusts, and it is public benefit that is often said<sup>90</sup> to justify the advantageous taxation treatment afforded to charities.

Looking at these issues through a ‘public benefit’ rather than ‘public policy’ lens may give the appearance of less judicial interference. In addition, in the UK, an additional element also

---

<sup>87</sup> This would now fall under the Equality Act 2010.

<sup>88</sup> [2009] UKSC 15 [150].

<sup>89</sup> *ibid* [202] citing *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, para 36.

<sup>90</sup> See, e.g. dicta of Lord Cross in *Dingle v Turner* [1972] AC 601 (HL) 624: ‘the courts ... cannot avoid having regard to the fiscal privileges accorded to charities’.

needs to be factored in and that is the European Convention on Human Rights. To confer the benefits of charitable status (including the fiscal benefits) upon a body that does discriminate must be considered in the light of the Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR). The Equality and Human Rights Commission made the point, in its evidence to the Joint Committee on Human Rights in its legislative scrutiny of the Equality Bill, that:

Conferment of ‘charitable status’, with its attendant tax and other benefits, is a public function. It is exercised, in England and Wales, by the Charity Commission... A ‘public benefit’ must be defined compatibly with section 3 HRA: in other words, an ostensibly charitable object cannot be regarded as ‘charitable’ unless it is compatible with ECHR standards. Thus, a charitable instrument which limits conferment of a benefit to a group defined by reference to a status which falls within Article 14 [of the European Convention on Human Rights]<sup>91</sup> ...must be objectively justified on the Strasbourg standard. If the discrimination in the terms of the ostensibly ‘charitable’ instrument cannot be justified to that standard, then the Charity Commission, or, on appeal, Charity Tribunal would act contrary to the ECHR and unlawfully if it treated the object as being ‘of public benefit’.<sup>92</sup>

We have seen therefore, that in the UK, if the courts can measure the proposed charity behaviour against standards laid down in a specific piece of legislation, such as the Equality Act, again, this seems to be a preferred approach. It is noticeable in the *Catholic Care* litigation how the judges throughout the protracted litigation were reluctant to engage in broader discussion, even of public benefit, and were keen to stick to equality law principles, with a sharp focus on the (consistently unsuccessful) attempt to find justification for discriminatory behaviour.

Whilst discussion of fundamental public policy is conspicuously absent in the UK charity case law, it is suggested that either way the outcome is likely to be the same. Applying UK principles to the *Bob Jones University* case would lead to the denial of charitable status, through a combination of failure to comply with the public benefit test and lack of compliance with equality law. Precedent would suggest that the focus would be on the latter with a close examination of any specific exceptions to equality law upon which the charity in question sought to rely.

---

<sup>91</sup> Article 14 of the European Convention on Human Rights is the general anti-discrimination provision which must be pleaded in relation to some other substantive right in the Convention.

<sup>92</sup> Memorandum submitted by the Equality and Human Rights Commission to the Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill* (2008-9, HL 169, HC 736) Ev 132, 139.

6 October 2018