



## **European network of legal experts in gender equality and non-discrimination**

### **FLASH REPORT**

<b>Country:</b>	United Kingdom
<b>Title:</b>	Fostering services, religion and sexual orientation
<b>Date:</b>	18 August 2020
<b>Expert:</b>	Lucy Vickers
<b>Context</b>	
<b>Issue at stake:</b>	Discrimination against gay and lesbian foster parents due to the religion and belief of the adoption agency
<b>Grounds of discrimination:</b>	Sexual orientation
<b>Field of application:</b>	Goods and services
<b>Source:</b>	National court decision, R (Cornerstone (North East) Adoption and Fostering Service Ltd)) v The Office for Standards In Education, Children's Services and Skills [2020] EWHC 1679 (Admin)
<b>Applicable law:</b>	Equality Act 2010

### **Content**

**Case development:** Cornerstone is an independent fostering agency (IFA). It specializes in offering foster and permanent homes to children in the care of local authorities. The charity is founded on, and operates according to, its perception of evangelical Christian principles, such that it will only recruit carers who are prepared to abide by its Statement of Beliefs and Code of Practice. The Code of Practice requires staff, volunteers and carers to be evangelical Christians and to refrain from 'homosexual behaviour' as described in the Code of Practice. In effect, the only potential carers Cornerstone accepts are evangelical married heterosexual couples of the opposite sex. Ofsted is a statutory body whose functions include the registration, regulation and inspection of IFAs. Following an inspection of Cornerstone in 2019, Ofsted concluded that Cornerstone's recruitment policy violated provisions of the Equality Act 2010 (EA 2010) prohibiting discrimination on grounds of sexual orientation in the provision of goods and services. In addition, it concluded that the policy violated the European Convention on Human Rights (ECHR) read with the Human Rights Act 1998 (HRA 1998). It required Cornerstone to change its policy.

In this legal claim, Cornerstone challenged Ofsted's conclusions. First it argued that Cornerstone was not involved in the provision of services. Second, it argued that any discrimination was because of homosexual behaviour and not because of sexual orientation such that the refusal to recruit gay and lesbian foster carers did not discriminate either directly or indirectly on grounds of sexual orientation. Third, it argued that it was covered by an exception available for charities that limit their benefits to persons who share a protected characteristic, in this case religion or belief. In addition, a number of claims related to the ECHR were made, which are not the subject of this report.

**Decision of the court:** The High Court held that Cornerstone was offering a service to potential foster parents. It also fulfilled a public function as it provided carers for children who were under the care of the state. Also, the recruitment policy did discriminate on

grounds of sexual orientation, both directly and indirectly. Any indirect discrimination could not be justified. Moreover, the exception for charities did not apply in this case as the limit was based not on the religion or belief of carers, but on their sexual orientation. With regard to the ECHR claims the court held that the recruitment policy violated Article 14 of the Convention read with Article 8 insofar as it required carer applicants to be heterosexual.

Permission has been granted for the decision to be appealed to the Court of Appeal.

**Key points of analysis:** Cornerstone argued that its role in recruiting prospective carers did not amount to the provision of a service so as to come within the protection of s29 EA 2010. However, the Court was very clear that Cornerstone provided a service to two sections of the public: those adults who wish to become foster or adoptive parents; and those children and young people who need to be fostered or adopted. Indeed, the judge pointed out that the full name of the charity (Cornerstone (North East) Adoption and Fostering Service Ltd) includes reference to the idea of providing a service. The provision of this service was clearly covered by the relevant section of the EA 2010.

On the question of whether the policy to recruit only those who would abide by the Code of Practice was discriminatory, the Court took the view that the policy 'clearly, directly, and unambiguously discriminates against non-heterosexuals' and so it was a clear breach of s29 EA prohibiting discrimination in the provision of services.

In the alternative, the question of indirect discrimination was discussed. Clearly the policy requiring compliance with the code of practice put gay and lesbian carers at a disadvantage compared to heterosexual carers, and so the question was whether Cornerstone could justify this policy as a proportionate means of achieving a legitimate aim. Cornerstone claimed that it could justify the policy on the basis that it served a number of aims including increasing the pool of evangelical Christian foster carers; and increasing the number of foster placements available against an alleged overall national shortage of foster carers. The Court considered these particular aims and found them to be unfounded: there is not a shortage of foster carers which needed to be remedied. As for the question of whether the policy could be a proportionate means of achieving those aims the court decided that excluding gay and lesbian evangelical Christians from fostering could not be a proportionate means of increasing the pool of evangelical Christian carers. Moreover, the Court concluded that 'Cornerstone has failed to show by convincing evidence that its policy benefits children and young people in a way it would not if the policy did not discriminate' and categorically rejected any suggestion that gay men and lesbians cannot make wonderfully loving foster and adoptive parents whether they are single or in a same-sex partnership.

On the question of whether any exemption might apply to Cornerstone as a religion or belief organisation, the Court considered s 193 of the EA 2010. This provides that an organisation will not contravene the EA 2010 by restricting the provision of benefits to those who share a protected characteristic if it is acting in pursuance of a charitable instrument and the provision of benefits is a proportionate means of achieving a legitimate aim. Cornerstone had argued the restriction of its services to heterosexual couples was a proportionate way of achieving a legitimate aim. Although the Court accepted that Cornerstone was acting in pursuance of a charitable instrument it held that by only providing its services to heterosexuals, Cornerstone was not acting in a proportionate way to achieve a legitimate objective, for the same reasons as had been given with regard to the indirect discrimination claim.

The approach of Christian Concern (<https://christianconcern.com/comment/the-cornerstone-adoption-and-fostering-case-chalk-one-up-for-the-good-guys/>) illustrates the potential for a polarised public debate surrounding freedom of religious expression in the UK, in which conservative religious views are pitted against progressive liberal views, with sexual orientation proving a particularly divisive issue.

**Internet link source:** <https://www.bailii.org/ew/cases/EWHC/Admin/2020/1679.html>