Neutral Citation Number: [2014] EWCA Civ 34

Case No: C1/2013/0993 & (A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MRS JUSTICE LANG
CO72842012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2014

Before:

MASTER OF THE ROLLS
LORD JUSTICE BRIGGS
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between:

THE QUEEN ON THE APPLICATION OF CORE ISSUES TRUST	**Appellant**
- and -	
TRANSPORT FOR LONDON & ANOTHER	**Respondent**
SECRETARY OF STATE FOR CULTURE, MEDIA AND SPORT AND MINISTER FOR WOMEN AND EQUALITIES	**Intervener**

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- -

Paul Diamond (instructed by **The Core Issues Trust**) for the **Appellant**
Nigel Pleming QC and Catherine Dobson (instructed by **Transport for London Legal Department**) for the **Respondent**
Dan Squires (*instructed by* Treasury Solicitor) for the **Intervener**

Hearing dates: 10 & 11 December 2013

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Judgment

Master of the Rolls:

1. This appeal concerns a challenge to a decision by Transport for London ("TfL") made on 12 April 2012 not to allow an advertisement ("the advertisement") placed by the appellant, Core Issues Trust ("the Trust") to appear on the side of London buses. The wording of the advertisement was:

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

2. TfL has an Advertising Policy ("the Policy") which states that advertisements will not be approved for the London public transport network which in TfL's reasonable opinion "are likely to cause widespread or serious offence" or "which relate to matters of public controversy or sensitivity". It is TfL's case that they held (and continue to hold) the reasonable opinion that displaying the advertisement on its buses was likely to cause widespread offence to members of the public on account of its wording and that it contained messages which related to matters of public controversy and sensitivity. This was because the advertisement (including information on the Trust's website) implied that there could be some reversal of or recovery from homosexuality.

3. In summary, the main elements of the Trust's case are that the decision was unlawful because (i) it was motivated by the improper purpose of advancing the re-election campaign of Mr Boris Johnson (the Mayor) and (ii) it was in breach of articles 9 and 10 of the Convention on Human Rights ("the Convention").

4. In a careful and comprehensive judgment, Lang J dismissed the Trust's challenge. The Trust appeals with the permission of the judge.

Background

5. TfL is responsible for the provision of passenger transport services in Greater London. It makes provision for the London bus service through contractors, known as bus operators. Under TfL's "operators' framework", bus operators are afforded the right to accept commercial advertising on the buses subject to certain conditions. These conditions include a requirement that advertisements will not be acceptable if "they do not comply with any advertising policy of the Corporation or TfL from time to time". Advertising is managed by external contractors with whom bus operators enter into arrangements. These contractual arrangements do not directly involve TfL. In respect of the London bus service, the relevant contractor is CBS Outdoor ("CBSO").

6. The Trust is a company limited by guarantee and a registered charity. It describes itself on its website as a non-profit Christian initiative seeking to support men and women with homosexual issues who voluntarily seek a change in sexual preference and expression. The Trust's "Statement of Belief" is said to include the following:

> "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."

7. The Trust's "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."

8. Dr Michael Davidson is the founder and co-director of the Trust, and a trainee psychotherapist.

9. On 4 April 2012, Anglican Mainstream and the Trust placed an order with CBSO for the advertisement to run on 25 London buses between 16 and 29 April 2012. The advertisement was prepared as a response to an earlier advertisement which appeared on the side of London buses stating:

> "SOME PEOPLE ARE GAY. GET OVER IT! *Stonewall*
>
> *www.stonewall.org.uk*"

The earlier advertisement was placed by Stonewall, an organisation that works for equality and justice for lesbians, gay men, bisexuals and transgender individuals.

Statutory and regulatory framework

The Greater London Authority Act 1999 ("the GLAA")

10. TfL is a statutory body established by Parliament under section 154 of the GLAA. By paragraphs 2 and 3 of schedule 10, the Mayor may choose to be a member of TfL, other members of TfL are appointed by the Mayor, and the Mayor, if a member, acts as chairman. The Mayor has chosen to be a member of TFL and is its chairman.

11. The Mayor is required to develop and implement policies for "the promotion and encouragement of safe, integrated, efficient and economic transport facilities and services to, from and within Greater London" (section 141(1)). The transport facilities are "those required to meet the needs of persons living or working in, or visiting, Greater London" (section 141(3)). TfL is responsible for providing or securing the provision of public passenger transport services to, from or within Greater London (section 173) and is required to provide or secure the provision of bus services in Greater London (section 181).

12. Section 154(3) provides that TfL shall exercise its functions:

> "(a) in accordance with such guidance or directions as may be issued to it by the Mayor under section 155(1) below,
>
> (b) for the purpose of facilitating the discharge by the Greater London Authority ("GLA") of its duties under section 141(1) and (2) above to secure the provision of transport facilities, and ……."

13. Section 155(1) provides that the Mayor may issue to TfL:

> "(a) guidance as to the manner in which it is to exercise its functions,
>
> (b) general directions as to the manner in which it is to exercise its functions,
>
> or
>
> (c) specific directions as to the exercise of its functions."

Section 155(4) provides that any guidance or directions issued under subsection (1) must be issued in writing.

14. Paragraph 1(3) of Schedule 10 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". TfL maintains and publishes the Policy under this power.

15. Section 404, which required the GLA to have regard, inter alia, to "the need ...to promote good relations between persons of different... religious beliefs and sexual orientation", and was extended to TfL by a direction of the Mayor, was repealed on 5 April 2011 with the coming into force of section 149 of the Equality Act 2010 ("EA"). As a public body, TfL must now exercise its powers in accordance with section 149 of the EA.

16. Section 149 of the EA provides, so far as 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 protection 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 persons 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 –

…

sexual orientation."

17. Section 12 of the EA provides:

"(1) 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.

(2) In relation to the protected characteristics of sexual orientation-

(a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation;

(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation"

18. Direct and indirect discrimination on the grounds of a protected characteristic is prohibited by sections 13 and 14 of the EA.

The Policy

19. Paragraph 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."

20. Paragraph 1.2 states 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".

21. Paragraph 3.1 of the "Required Standards" set out in the Policy provides as follows:

> "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 following categories:
>
> ……..
>
> (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.
>
> ……….
>
> (i) The advertisement condones or provokes anti-social behaviour.
>
> (k) The advertisement contains images or messages which relate to matters of public controversy and sensitivity.
>
> ....".

22. Following the repeal of section 404 of the GLAA, paragraphs 1.1 and 1.2 and section 3(1)(c) of the Policy should now be read as referring to the obligations set out in section 149 of the EA.

The circumstances in which the advertisement was disallowed

23. The judge reviewed the evidence that was before her in some detail at paras 21 to 52 of her judgment. I shall only refer to some of the key facts. At 16.27 on 12 April, the Guardian published an article on its website about the (leaked) advertisement reporting "an angry response from gay rights campaigners" including Stonewall. The Guardian article triggered a large number of posts on the website, on Twitter and elsewhere, objecting to the advertisement. TfL also received a large number of complaints, as well as several expressions of support for the advertisement.

24. In his first witness statement dated 8 August 2012, Mr Everitt (Managing Director of Marketing and Communications at TfL) says that he had concerns about the advertisement and could see no analysis of whether it complied with the Policy. This was despite the "clear potential for the advertisement (or at least the implication of the advertisement) to cause widespread or serious offence as it implies homosexuality can be cured or similar" (para 28(e)).

25. Just after 17.00 on 12 April, Mr Everitt received an email from the Mayor's Office in response to the Guardian article asking "is this happening?" 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?" Mr Everitt explains in his first witness statement 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".

26. At 18.01, Mr Richard Barnes, Deputy Mayor sent an internal email saying "I believe that we should take a strong and immediate line on this and get it them (sic) stopped. I wonder how TfL could accept them in the first place".

27. At 18.01 TfL issued a press statement in these 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….."

28. At 18.04, Mr Guto Harri (Director of External Affairs to the Mayor) sent an internal email (including to Mr Barnes) saying: "Boris has just instructed tfl to pull the adverts and I've briefed the guardian. Who will break that news in next half hour".

29. At para 32 of his statement, Mr Everitt says:

> "There was some confusion about whether the decision was taken by TfL or the Mayor as shown, for example, in the Guardian article 'Anti-Gay adverts pulled from bus campaign by Boris Johnson' on 12 April 2012. However, although the Mayor had made his views clear and I was aware of them, I made the decision. "

30. The email of 18.04 on 12 April was not in evidence before the judge. Nor did she have further documentation which has been disclosed since the hearing before her. This includes an email from Vicky Morley (Head of Corporate Desk at TfL) at 18.48 on 12 April 2012 which refers to the Guardian article and says:

> "Revelations that adverts asserting the power of therapy to change the sexual orientation of gay people were due to be driven round the capital came as Johnson, who is seeking re-election in May, was due to appear at a mayoral hustings organised by the gay campaigning group Stonewall on Saturday."

31. It was submitted by Mr Diamond to the judge that TfL had exercised its statutory power not to approve the advertisement for the improper purpose of advancing the Mayor's election campaign. TfL's case was that the decision to disallow the

advertisement had been made "solely by Mr Everitt on behalf of TfL, not by Mr Johnson" (para 55 of the judgment). The judge said:

> "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….*" (para 55).

32. She concluded:

> "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."

33. After judgment had been given, Dr Davidson made a request under the Freedom of Information Act 2000 for disclosure of further documents. On 9 May, TfL disclosed certain previously undisclosed email exchanges including the email of 18.04 on 12 April. The Trust then applied to this court for an order that Mr Everitt, the Mayor, Mr Barnes and Mr Harri be required to give oral evidence so that they could be cross-examined in particular about this email. On 14 June 2013, Mr Everitt made a second witness statement. He repeats (several times) that he took the decision. He says that he was aware of the Mayor's views because of communications with Mr Harri. But he had no direct contact with the Mayor and at no time was asked to pull the advertisement by the Mayor, anyone acting on behalf of the Mayor or anyone else. He says that he was not aware of the internal email chain on 12 April at the time he made his first statement. He first became aware of it in May 2013. He says: "Having seen this material I do not accept that the Mayor instructed TfL not to run (or to "pull") the advertisements; my evidence is unchanged".

Improper purpose

34. It is common ground that a public body cannot exercise a statutory power for an improper purpose: see *De Smith's Judicial Review* at paras 5-082 to 5-119. It is not disputed by Mr Pleming that, if the decision to disallow the advertisement had been taken for the purpose of advancing the Mayor's election campaign and not for the purpose of fulfilling the objects of the GLAA and implementing the Policy, it would have been an unlawful decision. The issue in this case is whether the decision was taken for that purpose. This is an issue of fact.

35. Mr Pleming submits that the judge's findings of fact on this issue at paras 55 and 58 of her judgment are unimpeachable. In my view, on the material that was before the judge, that is unquestionably correct. Indeed, I did not understand Mr Diamond to contend otherwise. The question for us is whether the new material makes any difference.

36. Central to the judge's finding was her acceptance of the evidence of Mr Everitt that the decision was made by him. She accepted that he was "influenced" by Mr Johnson. But the decision was his. TfL's interests in implementing its Policy and avoiding causing offence to a section of the public and avoiding criticism and controversy coincided with those of Mr Johnson, who also wished to avoid causing offence and criticism which might damage his election campaign.

37. The difficulty is that there is now in evidence an email which unequivocally states that the Mayor *instructed* TfL to pull the advertisement. On the face of it, this is inconsistent with Mr Everitt's insistence that the decision was his and his alone. Mr Everitt has not provided an explanation for this. All he is able to say in relation to this email is that he did not see it until May 2013 and that it has not caused him to change his evidence that he made the decision. The need for an examination of the role of the Mayor is all the greater because (i) the 18.04 email shows that the Mayor' Office contacted the Guardian immediately apparently in order to make political capital out of the story; and (ii) arrangements had been made for the Mayor to appear on 13 April (the following day) at hustings organised by Stonewall.

38. This is a most unsatisfactory state of affairs. It is surprising that TfL has not obtained witness statements from the Mayor, Mr Harri and Mr Barnes to explain the email. Mr Everitt has provided no explanation for it. If the email means what it says, it is difficult to see how it can properly be said that Mr Everitt and he alone took the decision. And if the Mayor took the decision, the question arises as to what his motives were. It is impossible for this court to decide what part (if any) was played by the Mayor in the decision to disallow the advertisement. It is, therefore, impossible for this court to decide whether the decision was or was not taken for the purpose of promoting the Mayor's election campaign.

39. Mr Pleming submits that, even if Mr Everitt was implementing a decision made by the Mayor, it is clear that such a decision would have been in implementation of the Policy even if it also coincidentally advanced the Mayor's election campaign. It is clear that the Mayor was of the opinion that the advertisement was likely to cause widespread or serious offence to members of the public and related to matters of public controversy and sensitivity. Mr Pleming also relies on the fact that the Mayor is chairman of TfL and has the power to give directions to TfL as to how it should exercise its functions.

40. But there are three difficulties with this. First, the Mayor did not purport to give directions pursuant to section 155 of the GLAA (which are required to be in writing). Secondly, the Mayor was not aware of the Policy until after 12 April: it is therefore difficult to see how he could have been purporting to direct TfL to implement the Policy. Moreover, if in substance the decision was that of the Mayor and it was not in implementation of the Policy, it would have been in breach of article 10 of the Convention on the grounds that it would not have been "prescribed by law" (see paras 56 to 58 below). Thirdly, even if the Mayor's views were as Mr Pleming suggests, that does not necessarily mean that the decision was not taken for the purpose of advancing his political interests.

41. Mr Pleming also submits that there is no need for this court to decide whether Mr Everitt made the decision or it was made for an improper purpose. He says that on the evidence it is inevitable that, if the decision was quashed and if TfL took the decision again (applying the Policy), it would decide to disallow the advertisement. That is because it is inevitable that it would conclude that the advertisement breached the Policy. The evidence of Mr Everitt is unequivocal on this. In these circumstances, Mr Pleming submits that there is no point in quashing the decision on the grounds that it was made for an improper purpose and the court should exercise its discretion to withhold relief.

42. A court may exercise its discretion to refuse a final remedy if it concludes that, even though a decision of a public body is unlawful, it would have made the same decision if it had acted lawfully. A paradigm case is where there has been a breach of the requirements of fairness, for example, the duty to consult, and the court is satisfied that the decision would inevitably have been the same if consultation had taken place.

43. But there are limits to this "no difference" principle. Thus, for example, the court is unlikely to refuse a final remedy on this basis in cases where the decision-maker was biased: *R (Al-Hasan) v Secretary of State for the Home Department* [2005] UKHL 13, [2005] 1 WLR 688 paras 42-43. In that case, the tribunal adjudicating on disciplinary charges against prisoners was biased and its rulings were set aside. The fact that there could not have been any different outcome to the adjudications whoever had heard them was no reason for upholding the adjudication.

44. The general approach should be that a claimant who succeeds in establishing the unlawfulness of administrative action is entitled to be granted a remedial order: see *De Smith* at para 18-047. Where a decision is shown to be unlawful, the court should be wary of refusing relief on the grounds that the decision-making body would reach the same decision if it were to act lawfully. That is particularly important where the unlawfulness is the exercise of a power, not for the statutory purpose for which it was conferred, but for some ulterior purpose, such as the furtherance of a political interest. In such circumstances, the court should be astute to perform its constitutional role as guardian of the rule of law and grant appropriate relief. As I said in *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 at para 122:

> "Authority is not needed (although much exists) to show that there is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review."

45. So how should we proceed in the present case? I shall approach this question on the assumption that (i) the decision *may* have been made for the improper purpose of advancing the Mayor's re-election campaign; (ii) the judge was right to hold on the evidence before her that the disallowing of the advertisement did not infringe the Trust's Convention rights and (iii) it is inevitable that, if TfL were required to reconsider the question, it would not reach a different conclusion from that reached on 12 April 2012.

46. In my view, if the decision that was taken on 12 April 2012 was unlawful because it was taken in order to further the Mayor's political campaign, the court would have a duty to say so. The judge was right to recognise that this would be a serious matter.

47. In the face of Mr Everitt's repeated denials, this court cannot decide whether the Mayor instructed TfL to withdraw permission for the advertisement. The 18.04 email of 12 April raises a strong prima facie case that he did so, but that needs to be investigated. A proper investigation requires evidence from the other key actors, namely the Mayor, Mr Harri and Mr Barnes. As the proceedings are presently constituted, it is not possible for the court to require any of them to make witness statements or give oral evidence. That is because TfL is the sole defendant. The Trust originally issued these proceedings against the Mayor (on behalf of the GLA). It alleged in the Grounds for Judicial Review that the advertisements were "cancelled directly" by the Mayor on 12 April 2012. In an Acknowledgement of Service dated 8 August 2012, the Mayor and TfL asserted that the 12 April decision had been made by TfL alone and they applied for TfL to be substituted as defendant or alternatively added as second defendant. By an order dated 19 October 2012, Kenneth Parker J ordered that TfL be substituted as defendant to the claim.

48. In my view, it is in the interests of justice that a further enquiry be conducted by the court as to whether (i) the decision was instructed by the Mayor and (ii) it was made for an improper purpose. As Christopher Clarke LJ said during the course of argument, the only way this can be done properly is for the Mayor (on behalf of the GLA) to be added back as a defendant. The case should be remitted to the judge for her to make such an order and then give appropriate directions with a view to deciding whether the decision was instructed by the Mayor and made for an improper purpose. It will be for her to decide what directions to give. But I would expect her to direct that written statements be made by the Mayor, Mr Harri and Mr Barnes and then to decide in the light of the statements whether to order cross-examination.

49. We heard full argument on the other issues in the case. It would be wrong for us not to deal with them. If the judge concludes that the decision was unlawful and quashes it, then a fresh decision will have to be taken by TfL (it has not been suggested that the Trust is no longer interested in placing its advertisements on London buses). In that event, the same Convention issues will arise again. The parties need to know whether the judge reached the right conclusion on them. If the judge concludes that the decision was not made for an improper purpose, then the parties need to know whether the challenge to the judge's decision on the other grounds has succeeded. Either way, therefore, it is necessary to deal with them.

The article 10 claim

50. Article 10 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 or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

51. It is not in dispute that article 10 is engaged in this case. The issue, therefore, is whether the interference by TfL with the Trust's article 10(1) rights in not allowing the advertisement was justified under article 10(2). This raises the now familiar questions of whether the interference was (i) prescribed by law; (ii) in pursuance of a legitimate aim; and (iii) "necessary in a democratic society".

52. Before I come to these questions, I need to deal with a preliminary point made by Mr Diamond. He submits that, because advertising space on London buses is sold on a commercial basis, there is a "right to buy" and there should be no restriction on content. He relies on *Greater Vancouver Transportation Authority v Canadian Federation of Students and British Columbia Federation of Teachers* [2009] 2 RCS 295. In that case, the Canadian Supreme Court considered a challenge to the transit authority's advertising policies, which permitted commercial but not political advertising on public transit vehicles. The court found that a blanket ban on political advertising did not constitute a "minimal impairment" of freedom of expression and it was therefore not permitted under the Canadian Charter of Rights and Freedoms.

53. As the judge said at para 101 of her judgment, 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 "public place" and "minimal impairment" which are not reflected in the Strasbourg or our domestic jurisprudence where the protection afforded by article 10 is determined by applying the proportionality test. In any event, the *Greater Vancouver Transportation Authority* case does not support the proposition that, even in Canadian law, there can be no restrictions on access to a publicly owned space for advertising purposes. The court was concerned with a blanket ban on political advertisements. It did not engage with the legitimacy of restrictions on advertising which causes serious or widespread offence, since that was not in issue in that case.

54. The ECtHR has clearly established that it is permissible for public bodies to restrict advertising on the basis of content, provided that any restrictions are prescribed by law and necessary in pursuit of a legitimate aim. In *Murphy v Ireland* (2004) 38 EHRR 13, the court upheld a ban on an advertisement about "the historical facts about

Christ" and "evidence of the resurrection". At para 65, it said that the exercise of the right of freedom of expression carried with it duties and responsibilities "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". In *Animal Defenders International v UK* [2013] ECHR 362, the court upheld the UK's ban on political advertising for television and radio. It did so notwithstanding its finding that there is little scope in article 10(2) for restrictions on debates on questions of public interest and acknowledging that many such debates would fall within the scope of the ban. In *Mouvement Raelien Suisse v Switzerland* (2013) 56 EHRR 14, the Grand Chamber of the ECtHR said at para 58 that "individuals do not have an unconditional or unlimited right to the extended use of public space, especially in relation to facilities intended for advertising or information campaigns".

55. With these introductory points in mind, I turn to the three questions raised by article 10(2).

Prescribed by law

56. Any interference will be prescribed by law where it has a basis in national law, the law is accessible and it is formulated with sufficient precision to enable an individual to foresee, to a degree that is reasonable in the circumstances, when the law will or might be applied: *Sunday Times v UK* (1979) 2 EHRR 245 at paras 47 and 49. The Policy has a basis in national law, since it was introduced by TfL under its general powers under para 1(3) of schedule 10 to the GLAA in order, inter alia, to give effect to its duties under section 404 of the GLAA (now replaced by duties set out in section 149 of the EA). It is also readily accessible, being available on TfL's publicly accessible website.

57. Mr Diamond submits, however, that the criteria applied by TfL to refuse advertisements under the Policy are too vague and imprecise to satisfy the requirement of legal certainty demanded by the "prescribed by law" test.

58. The answer to this submission is that the ECtHR has accepted that, in certain situations, laws must be generally worded and a discretion must be afforded to the body entrusted with enforcement and this may occur without there being a breach of the requirement of legal certainty: *Muller v Switzerland* (1988) 13 EHRR 212 at para 29 and *Wingrove v UK* (1996) 24 EHRR 1 at paras 40 and 42. In particular, a law that confers a discretion is not in itself inconsistent with the requirement of legal certainty, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual adequate protection against arbitrary interference. As the judge found, the fact that the wording of the Policy requires TfL to exercise its judgment in any particular case does not render the policy too vague or imprecise to meet the requirement of legal certainty. I accept the submission of Mr Pleming that the standards of "offensiveness" and "public controversy" are sufficiently precise to meet the requirement of legal certainty. Both "offence" and "controversy" are uncomplicated ordinary English words. They are both concepts that are frequently used to set regulatory standards of decency.

Legitimate aim

59. Mr Pleming submits that the offensive material and public controversy restrictions contained in the Policy pursue a number of legitimate aims. First, they aim to ensure that advertising on the TfL network is uncontroversial and avoids causing widespread and serious offence to the London public. The House of Lords and the ECtHR have upheld similar "offensive material" restrictions, putting beyond doubt the legitimacy of restrictions (as opposed to prohibitions) on offensive and controversial messages: see *R (Pro-Life Alliance) v BBC* [2003] UKHL [2003] UKHL 23, [2004] 1 AC 185 at para 70; *Murphy v Ireland* (2004) 38 EHRR 13 at paras 72 and 74 and *Mouvement Raelien Suisse* at para 61.

60. Secondly, the protection of the rights of others is a legitimate aim. The ECtHR has confirmed that such rights include the rights of individuals of a particular sexual orientation to respect for their dignity and private life under article 8 of the Convention: see *Vejdeland v Sweden* (Application no 1813/07), 9 May 2012 at para 49. The *Vejdeland* case is instructive. The applicants had distributed leaflets in a school. The leaflets said that society had swung from rejection of homosexuality "and other sexual deviances to embracing this deviant sexual proclivity….homosexuality has a morally destructive effect on the substance of society….". The applicants were convicted of agitation against a national or ethnic group. They appealed on the ground that the convictions amounted to a violation of article 10 of the Convention. The ECtHR said that the interference served a legitimate aim, namely "the protection of the reputation and rights of others" within the meaning of article 10(2) (para 49).

61. Thirdly, the Policy ensures TfL's compliance with its statutory duties under section 149 of the EA. The offensive material and public controversy restrictions in the Policy enable TfL to comply with its obligation to have due regard to the need to (a) eliminate discrimination, harassment and victimisation against persons with same-sex sexual orientation; and (b) foster good relations between those who have same-sex sexual orientation and those who do not and in particular to tackle prejudice and promote understanding.

62. Although Mr Diamond appeared not to accept these submissions, in my view there is no answer to them.

Necessary and proportionate to achieve these aims

63. The judge said that the location of the proposed advertisements was highly significant. Advertising on the side of London buses was "extremely intrusive". The advertisements were "large and prominent". Millions of people would be confronted by them and would be unable to avoid them. At para 131 she said:

> "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."

64. She then addressed a submission by the Trust that TfL had applied the Policy in an inconsistent and partial manner, since it had permitted advertising by Stonewall and the British Humanist Association on controversial and sensitive topics such as atheism and homosexuality, which caused offence to many Christians, but then prevented Christians from responding with their views. She said:

> "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."

65. At para 138, she concluded:

> "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."

66. She then referred to a small sample of the objections posted on the Guardian website on 12 April 2012 in response to the Trust's proposed advertisement and to a small sample of the complaints received by TfL on 12 April 2012.

67. At para 142, she said:

> "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."

68. She then considered the effect of section 149 of the EA and said:

> "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.

69. Finally, she drew the threads together and expressed her conclusion on the proportionality issue as follows:

> "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.
>
> …………
>
> 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."

70. Before I express my conclusion on the proportionality issue, I need to deal with two particular criticisms that have been made of the judge's analysis. First, Mr Diamond and Mr Squires submit that she adopted an incorrect interpretation of section 149 of the EA. Secondly, Mr Pleming submits that she adopted an incorrect approach to the question whether the Stonewall and British Humanist Association advertisements complied with the Policy.

The approach to section 149 of the EA

71. It is not in dispute that the public sector equality duty ("PSED") imposed by section 149 of the EA is a duty on a public authority to have due regard to the section 149(1) considerations in exercising its functions. It is not a duty to achieve the goals stated in section 149(1)((a) to (c): see *Baker v Communities and Local Government*

Secretary [2008] EWCA Civ 141, [2009] PTSR 809 at para 31. A public authority is not precluded by section 149 from deciding that equality implications are outweighed by countervailing considerations: see *Baker* at para 34. Although there is an obvious connection between the considerations stated in section 149(1) and the prohibited conduct provisions contained in other parts of the EA, they are not the same. Thus, failure to promote equality of opportunity or to foster good relations between, for example, members of different racial groups, is not the same as race discrimination prohibited by Parts 2 to 8 of the EA: see *Baker* at para 30.

72. The judge stated the nature of the PSED correctly at para 143. But Mr Diamond and Mr Squires (for the Secretary of State) submit that, when she went on to consider whether TfL had breached section 149 and how such breach affected the proportionality assessment, she mischaracterised the nature of the duty. They say that, at that stage of her judgment, the judge held that the duty was to eliminate discrimination and harassment of gays, foster good relations, tackle prejudice and promote understanding between those who have same-sex orientation and those who do not. They also say that she wrongly held that section 149 acted as a "fetter" on TfL's discretion so that it had no choice but to disallow the advertisement.

73. Mr Pleming submits that the judge was well aware that the duty was *to have due regard* to the section 149(1) considerations and that she did not say that the duty was *actually to do* any of the things mentioned in section 149(1)(a) to (c).

74. I would reject Mr Pleming's submission. I accept that, read in isolation, para 144 is equivocal. I also accept that it is possible to read para 145 as consistent with the duty being to have due regard to the section 149(1) considerations, although the word "fetter" is a curious word to use if the judge was thinking about a duty to have due regard rather than a substantive duty to do any of the things mentioned in the subsection. In my view, the idea of the freedom to carry advertisements "which denigrate people on the basis of protected characteristics such as sexual orientation" being "fettered" suggests that the freedom to carry such advertisements *is* lost, rather than that it *may* be lost. As I have said, the PSED does not compel a particular substantive outcome. It mandates a public authority to consider particular matters; but it is then for it to decide what weight to accord to equality considerations and how to balance them against countervailing factors.

75. But if paras 144 and 145 are equivocal, para 177 is not. In this paragraph, the judge concluded that the fact that TfL had applied the Policy inconsistently and partially was outweighed by six countervailing factors, the last of which she expressed in these terms:

> "(f) under the Equality Act 2012, 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."

76. This was in error. I discuss below whether it was a material error.

The judge's treatment of the Stonewall advertisement

77. I have set out what the judge said about the Stonewall and British Humanist Association advertisements at para 64 above. Since the argument before us focused on the Stonewall advertisement (which I have set out at para 9 above), I shall say no more about the British Humanist Association advertisement.

78. There is an issue as to whether the judge decided or merely assumed that the Stonewall advertisement failed to comply with the Policy. In subsequent judicial review proceedings (*R (on the application of Core Issues Trust) v TfL* (CO/15710/2013)), the appellant has challenged the decision of TfL to allow the Stonewall advertisement on the grounds that it failed to comply with the Policy. Interim relief was sought on the footing that to allow the Stonewall advertisement was unlawful and inconsistent with an express holding of unlawfulness by Lang J in the present case.

79. On 31 October 2103, Michael Fordham QC (sitting as a deputy high court judge) refused interim relief. In the course of his judgment, he decided that Lang J did not hold that the Stonewall advertisement failed to comply with the Policy; she merely proceeded on the assumption that it failed to do so. The deputy judge also stayed the proceedings pending the outcome of this appeal.

80. I do not read Lang J's judgment in the same way as the deputy judge. I accept that the opening words of para 135 "I consider that there is force in the Trust's submission" are not suggestive of a decision. But if paras 135 to 137 of the judgment are read as a whole, I consider that the judge did decide that the Stonewall advertisement failed to comply with the Policy.

81. Mr Pleming submits that the judge was wrong to decide whether the Stonewall advertisement complied with the Policy since (i) the lawfulness of that advertisement was not in issue in the current proceedings and (ii) in any event she had insufficient information on which to reach a conclusion as to whether it was "likely to cause widespread or serious offence" or related "to matters of public controversy or sensitivity".

82. I accept that the lawfulness of the Stonewall advertisement was not under challenge in these proceedings. The judge was, however, bound to have regard to the fact that the Trust's advertisement was a riposte to Stonewall's advertisement "SOME PEOPLE ARE GAY. GET OVER IT!" She was able and entitled on the material that was before her to form a view as to whether the Stonewall advertisement was likely to cause widespread or serious offence or related to matters of public controversy and she did so. She did not make a comparison between Stonewall's and the Trust's advertisements. She merely said that TfL's willingness to display the other advertisements was an "important factor" in favour of allowing the Trust to express its views in this particular medium (para 137).

Conclusion on the proportionality issue

83. I would emphasise the following factors. First, the restrictions imposed on the Trust only apply to the advertisements placed on the TfL network. The Trust is not faced with a total prohibition on publishing and disseminating its message. There are many other ways by which it can express its view. This is an important factor in the proportionality assessment. In *Murphy,* the ECtHR said at para 74:

> "The prohibition concerned only the audio-visual media. The State was, in the Court's view, entitled to be particularly wary of the potential for offence in the broadcasting context, such media being accepted by this Court and acknowledged by the applicant, as having a more immediate, invasive and powerful impact including, as the Government and the High Court noted, on the passive recipient. He was consequently free to advertise the same matter in any of the print media (including local and national newspapers) and during public meetings and other assemblies."

84. This reasoning applies to the Trust's advertisement. The restrictions are justified in view of the prominence of the advertisements and the fact that they would be seen by, and cause offence to, large numbers of the public in central London. Moreover, for those who are gay, the advertisements would be liable to interfere with the right to respect for their private life under article 8(1).

85. Secondly, I agree with the judge that the advertisement is liable to encourage homophobic views and homophobia places gays at risk. Closely linked to this is TfL's duty under section 149(1) of the EA which points strongly against allowing the advertisement to appear on its buses, since it would encourage discrimination.

86. In my view, these factors strongly support the proportionality of the interference with the Trust's rights under article 10(1) of the Convention.

87. I do not consider that a different conclusion is justified by the judge's finding that TfL had acted inconsistently by accepting the Stonewall advertisement and refusing the Trust's. She was right to hold (para 148) that the inconsistency of application of the Policy was outweighed by other factors. Of these factors, the most important were that to allow the advertisement would (i) involve a breach of the duty to have due regard to the section 149(1) considerations and (ii) encourage homophobia and put homosexuals at risk.

88. Although the judge did not make a comparison between the two advertisements, I consider that the Stonewall advertisement was intended to promote tolerance of homosexuals and discourage homophobic bullying. That was a lawful aim consonant with the objects of section 149 of the EA and paragraph 3.1(c) of the Policy. "Some people are gay" is a correct statement of fact. The phrase "get over it" in the Stonewall advertisement is a graphic way of saying that people should accept the principles of tolerance which are embodied in the EA. The Trust's advertisement was a riposte to the "gay acceptance" message promoted by Stonewall and would have been seen (and was seen) as countering that message and encouraging "gay rejection" by implying offensively and controversially that homosexuality can be cured.

89. Nor do I consider that the judge's mischaracterisation of the PSED was a material error. Although the distinction between a duty to have due regard to considerations and a duty to bring about a particular outcome is important, the duty to have due regard to the section 149(1) considerations was a factor which militated strongly against allowing the advertisement. I am in no doubt that the judge would have reached the same conclusion if she had applied the PSED correctly. More

importantly, that was the right conclusion to reach for all the reasons given by the judge.

Article 9

90. Mr Diamond submits that, even if the Trust's case under article 10 is rejected, it should succeed under article 9 which 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 religion or 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."

91. The judge held that article 9 was not engaged for two reasons. First, the rights protected by article 9 cannot be enjoyed by corporate entities or non-natural persons such as associations. Although such rights may be enjoyed by religious communities and churches, the Trust is neither of these. Secondly, the Trust is seeking to express its perspective on a moral/sexual issue, and not the manifestation of a belief. The courts have consistently distinguished between manifestation of a belief (which is protected) and practice and conduct which is merely motivated by religion or belief (which does not engage article 9).

92. I do not find it necessary to express a view about either of these reasons. In my judgment, article 9 adds nothing to article 10 in this case. Even if the Trust's advertisement contains religious content, the restriction on this form of religious expression would fall to be analysed under the framework of article 10. This is what was done by the ECtHR in *Murphy v Ireland.* In that case, the applicant argued that the prohibition violated his rights under articles 9 and 10. The court said at para 61 that it considered that the issue primarily concerned the regulation of the applicant's means of expression and not his profession or manifestation of his religion. It analysed the proportionality of the prohibition through the prism of article 10(2), notwithstanding the religious context. It decided the case on the basis of article 10(2) and gave no separate consideration to article 9(2). Since for present purposes there is no material difference in the language of the two paragraphs, this is not surprising. In other words, article 9 added nothing to article 10. A similar approach has been adopted in other cases: see, for example, *Glas Nadezhda Eood and Elenkov v Bulgaria* (Application No 141134/02), 11 October 2007 at para 59.

Section 13 of the Human Rights Act 1998

93. Section 13(1) of the Human Rights Act 1998 provides:

> "If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."

94. I shall assume (without deciding) that the Trust is a "religious organisation". Mr Diamond submits that section 13 requires particular weight to be given to the importance of the article 9(1) right and that the judge failed to do this. It seems that no argument was addressed to the judge on section 13. But in my view, it does not add to the picture. There has been some debate as to what practical purpose is served by section 13: see *The Law of Human Rights, Clayton and Tomlinson* (2nd edition) at para 14.07 and *Lester, Pannick and Herberg, Human Rights Law and Practice* at para 2.13. No case involving freedom of religion has been cited to us in which section 13 has affected the outcome. I see no basis for saying that it affects the outcome of this case.

Article 14 and the EA

95. The Trust submitted to the judge that TfL discriminated against ex-gays who are a protected class under the EA. The judge rejected this submission (which has not been repeated in this court) because the Trust is a corporate body and therefore has no sexual orientation (para 155). She also said at para 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."

96. This is an important statement which, if correct, has wide ramifications. I have set out section 12 of the EA at para 17 above.

97. The judge's reasoning would suggest that, if a person is subjected to less favourable treatment because of his or her *past* sexual orientation, that would not constitute unlawful discrimination pursuant to the EA. But the prohibition in the EA on less favourable treatment "because of a protected characteristic" is not confined to treatment on grounds of the actual sexual orientation of the victim. It has been held that a person known to be heterosexual who was taunted by his co-workers with homophobic abuse is protected by the EA. In *English v Thomas Sanderson Ltd* [2009] ICR 543 at para 38, Sedley LJ said:

> "If, as is common ground, tormenting a man who is believed to be gay but is not amounts to unlawful harassment, the distance from there to tormenting a man who is being treated as if he were gay when is he not is barely perceptible. In both cases the

man's sexual orientation, in both cases imaginary, is the basis---that is to say, the grounds---of the harassment".

98. As Mr Squires says, it would be surprising if less favourable treatment because a person in the past was homosexual, but is now heterosexual, was not equally prohibited. This does not require that "ex-gays" are to be regarded as a separate category of sexual orientation. Discrimination against a person because of his or her past actual or perceived sexual orientation, or because his or her sexual orientation has changed, is discrimination "because of…..sexual orientation". There is no requirement in the EA that discrimination must relate to a person's current sexual orientation. All that is required is that the discrimination is "because of sexual orientation".

Conclusion

99. For the reasons given in paras 34 to 48 above, it is not possible to reach a conclusion on the question whether TfL's decision not to allow the Trust's advertisement was unlawful on the grounds that it was instructed by the Mayor or made for an improper purpose. I would, therefore, remit the case for the judge to reconsider this question in the light of the fresh evidence and in the light of any further material that emerges as a result of directions that she may give. If upon reconsideration the judge decides that the decision was not instructed by the Mayor and not made for an improper purpose, then her decision will stand, since, for all the reasons that I have given at paras 50 to 92 above, I would reject the challenges to TfL's decision to disallow the Trust's advertisement based on articles 9 and 10 of the Convention and section 13 of the Human Rights Act 1998.

100. If the judge decides that the decision was instructed by the Mayor or made for an improper purpose, then the decision must be quashed. In that event, it would be open to TfL to disallow the advertisement provided that its decision was not instructed by the Mayor and was not actuated by an improper purpose.

101. I shall invite counsel to agree a form of order which gives effect to this judgment.

Lord Justice Briggs:

102. I agree with the direction for the further investigation of this case proposed by the Master of the Rolls, and with his conclusion that, if the outcome were to be that the existing decision be quashed, TfL could nonetheless lawfully decide again to refuse to accept the Trust's advertisement. I agree also with the whole of my Lord's reasoning for those conclusions.

103. I wish only to make some brief observations of my own about the judge's finding that the Stonewall advertisement also failed to comply with aspects of the Policy, because it was likely to cause widespread or serious offence or related to matters of public controversy. As my Lord has said, she was able and entitled to make that finding.

104. In my judgment she was also right to do so. There are many people, of many different faiths and none, who have been brought up and taught to believe that all homosexual conduct is wrong. Many have, after long and careful thought, arrived at a

different view. Some have been encouraged along the way by bold expressions of the type found in the Stonewall advertisement. But many others continue sincerely to hold that belief, and some regard a departure from it as inconsistent with the maintenance of their faith. Some would rather give up their jobs, or discontinue their businesses, than act in a way which they believe condones such conduct, whether by conducting civil partnership or gay marriage ceremonies, by admitting gay couples to bed and breakfast accommodation, or by providing adoption training to gay couples. Sincere differences of view about this issue are tearing apart some religious communities, both here and abroad.

105. Like my Lord, I consider that the Stonewall advertisement was probably intended to promote tolerance of gay people and to discourage homophobic bullying, and that this is plainly a lawful aim. But the advice to 'get over it' is a confrontational message which is likely to come across to many of those to whom I have just referred as at least disrespectful of their sincerely held beliefs, and to some as suggesting that there is no place for the toleration of their beliefs in modern society. Displayed on the side of London buses it is therefore likely to cause widespread offence to many, even if it may have promoted tolerance and understanding in others.

106. But like the judge and my Lord, I do not regard that conclusion about the Stonewall advertisement as undermining the proportionality of a refusal to permit the Trust's advertisement, if based upon a lawful process of decision making. It is for that purpose unnecessary even to make a comparison between the degree to which each advertisement may cause offence. Nor is it necessary or appropriate on this appeal to decide whether, as the Trust now claims in separate proceedings currently stayed, the recent decision to accept it again on London buses was itself unlawful. Even if it was, two wrongs do not make a right.

Lord Justice Christopher Clarke:

107. I agree with the judgment of the Master of the Rolls.