

## **The Confraternity of the Blessed Sacrament – 1082895**

### **1. Decision Review**

In view of the high level of public interest and the significance of the issues involved, I have been appointed to conduct a review of the Charity Commission's initial findings that were issued in the form of a draft Regulatory Case Report (RCR) to the trustees and other parties. The review has been carried out in line with our published procedures. [[http://www.charity-commission.gov.uk/library/about\\_us/decision\\_review.pdf](http://www.charity-commission.gov.uk/library/about_us/decision_review.pdf)].

I am Harry Iles, Head of Operations Wales and have not had any previous connection with the case. In conducting this review, I have been mindful of the public sector equality duty set out in the Equality Act 2010. I can also clarify that I have no association or affiliation with any religious groups.

### **2. The scope of the decision review**

To review the conclusions reached in relation to a grant made by The Confraternity of the Blessed Sacrament (the Confraternity) to the Ordinariate of our Lady of Walsingham (the Ordinariate). In particular:

- A. Whether the decision of the trustees of the Confraternity was validly made (in particular, whether the trustee body was inquorate because the trustees were subject to 'a personal interest' such that they were not entitled to act).**
- B. Whether the grant from the Confraternity to the Ordinariate was wholly within and in furtherance of the objects of the Confraternity.**

I have also considered the following questions:

- In construing the meaning of objects of the Ordinariate, what regard should be had to the Personal Ordinariate of Our Lady of Walsingham established by canon law (The Canonical Organisation)?
- On a proper construction of the objects of the Confraternity, whether the grant was within the scope of those objects?
- Are the objects of the Ordinariate such that a grant could be made on terms by the Confraternity and applied by the Ordinariate in furtherance of the objects of the Confraternity?

For the purposes of this review, I have not reviewed other conclusions contained in the draft RCR and have dealt with those representations relevant to the two substantive questions above.

### **3. Summary of conclusions**

The decision to make a grant to the Ordinariate was taken at an inquorate meeting, the majority of the trustees having a (financial) personal interest for the purpose of clause 7.13 of the 2010 constitution.

The meeting being inquorate, the decision was invalid. There was no valid exercise of the power to make a gift to the Ordinariate and the payment was unauthorised.

The gift is held upon constructive trust by the Ordinariate for the Confraternity.

The objects of Ordinariate even taking account of the canonical organisation are wider than those of the Confraternity. A gift given to the Ordinariate without restriction could be used for purposes which have no connection with the Anglican tradition at all.

The precise meaning of Anglican Tradition is unclear but there is substantial doubt whether the Confraternity could make a grant to the Ordinariate which could be applied by the Ordinariate consistently with the objects of the Confraternity.

The Commission therefore considers the trustees of both charities are under a duty to take action to ensure the repayment of the money.

## **ANALYSIS**

**A. Whether the decision of the trustees of the Confraternity was validly made (in particular, whether the trustee body was inquorate because the trustees were subject to 'a personal interest' such that they were not entitled to act).**

### **3. I have reviewed the Commission's findings which were:**

On an objective assessment, a majority of the Confraternity's trustees had a personal interest in respect of the decision about the grant. Accordingly, under the terms of the Confraternity's constitution, they were required to absent themselves from the decision making and could not be included in the quorum.

As a result, the meeting at which the decision was made was inquorate and the decision was invalid.

Accordingly the Ordinariate charitable company does not hold the grant for the purposes set out in the grant agreement. Rather, it holds the grant money on trust for the Confraternity.

### **4. I have taken into account the view of the majority of the trustees:**

At the time of both decisions, the trustees who were subsequently ordained were not within the class of potential beneficiaries. At the time of the decisions, the trustees had not been ordained and did not therefore have a 'personal interest' in the decision.

The making of the grant was not a step that could have resulted in any of the Trustees being in a better financial position than they would otherwise have been in, because there was no link between the grant decision and receipt of support from the Ordinariate. This was secured by two means:

(a) an undertaking was secured from the Ordinariate that no part of the grant would be used in a way that conferred a benefit on any of the Trustees.

(b) canon law under which the canon law ordinariate is established confers the right to receive adequate remuneration for performance of their duties so that their basic material needs can be met. Reference is made to the Article 7.1 of the Complementary Norms for the Apostolic Constitution.

## 5. Analysis of the issue of Personal Interest

Clause 7.13 of the Confraternity's constitution states:

*7.13 Whenever a Trustee has a personal interest in a matter to be discussed at a Trustees' meeting or a meeting of the Council-General, the Trustee must:*

*7.13.1 declare an interest before discussion begins on the matter;*

*7.13.2 withdraw from the meeting for the item unless expressly invited to remain in order to provide information;*

*7.13.3 not be counted in the quorum for that part of the meeting; and*

*7.13.4 withdraw during the vote and have no vote on the matter.*

The term 'personal interest' based upon its ordinary meaning is an interest on the part of a trustee which conflicts, or may conflict with his duty as a trustee. It would include a direct or indirect financial interest in the outcome of the decision.

The Ordinariate was established to support the canonical organisation and that it was incorporated to act as a legal vehicle for this purpose is apparent from the express terms of its objects which included *the provision of accommodation and other support for clergy who are engaged in the advancement of the Objects or who have retired, including support for the dependants of such clergy.*

Within the ordinary meaning of the term the trustees had a personal interest. That they had not formally been accepted into the canonical organisation does not mean that no conflict arises. A trustee who is contemplating an action which will result in a personal benefit, such as employment, would be subject to a conflict. It is clear from *Wright v Morgan* [1926] AC 788 that trustees should be judged on the true effect of their decision and actions, not simply their technical status at the moment of the decision or action.

## 6. Were, as argued by the trustees, the mechanisms adopted such that the trustees did not have a personal interest?

Neither the fact that the trustees had no control over the Ordinariate, nor the fact that mechanisms were said to be in place to prevent the trustees from benefitting from the grant, are enough to undermine the conclusion that they had no personal interest.

Monies donated to the Ordinariate would be used to support the canonical organisation, including the training and maintenance of its clergy. The obligation to provide adequate remuneration can only be fulfilled within the finances it has to do so. The view as to what sort of remuneration or accommodation would be adequate may in part be dependent on the level of resources available.

Further even if there was an undertaking that none of the trustees would benefit directly from the grant, at very least a substantial grant from the Confraternity would have the effect of freeing up other resources, whether by way of large donation from other religious organisations or smaller amounts from lay members, which can be applied for the benefit of members of its clergy including the trustees or former trustees of the Confraternity.

Moreover the trustees accept that they decided on the figure of £1 million as it would act as a signal to others contemplating making donations. In other words, it was intended to encourage further donations and those donations would not be subject to any restriction on their application and could be used to benefit the five trustees.

It seems that the trustees who were contemplating joining the canonical organisation had a personal interest in the overall financial health of the organisation which was to train them for the priesthood and maintain them, and for which they were leaving the Church of England.

On the basis of the above the trustees had a personal financial interest, direct or indirect, in the decision which fell within the scope of clause 7.13 of the constitution.

It is also arguable that that a possible conflict might also arise from the doctrinal position the trustees are obliged to adopt upon becoming members of the canonical organisation and which would require them to deny the validity of Anglican holy orders.

### **7. If the trustees had a personal interest, what is its effect on the decision made to make the grant?**

The Confraternity's constitution provides that the Trustees with a personal interest in the matter to be discussed "must ... not be counted in the quorum for that part of the meeting", and "must withdraw during the vote and have no vote on the matter". Accordingly, if the trustees seeking ordination had a personal interest in connection with the proposed grant, there was only one Trustee who could be counted in the quorum. The quorum for meetings of the Trustees is "three Trustees one of whom shall be a General Officer". As such the meeting of 19 May 2011 was accordingly inquorate insofar as the matter being discussed was the proposed grant to the Ordinariate.

A meeting may not transact business (vote or make decisions in any other way) unless it is quorate. Anything purported to be done at an inquorate meeting (or at that part of a meeting that is inquorate) is accordingly invalid.

Consequently if the decision to make the grant was invalid it would appear that the Ordinariate does not hold the grant monies for the purposes set out in the Grant Agreement. Rather it holds the money for the sole benefit of the Confraternity.

On this basis, the money ought to be repaid; and the current Trustees of the Confraternity are under a duty to seek to recover it. The Ordinariate is also under a duty to repay it.

The decision being invalid, the question of whether or not the grant fell within and was capable of furthering the Confraternity's objects would only be relevant if a quorate trustee body were to reconsider a grant and therefore it is appropriate to review our initial findings on this question below.

### **B. Whether the grant from the Confraternity to the Ordinariate was wholly within and capable of furthering the objects of the Confraternity**

#### **8. I have reviewed the Commission's view that:**

- (i) The objects of the Confraternity are tied to the Anglican tradition;

(ii) In construing the objects of the Ordinariate, regard should not be taken of the wider intentions in connection with the establishment of the canonical organisation; that the purpose of the Ordinariate are tied to the Catholic religion and do not extend to the Anglican Tradition.

(iii) That, consistently with its objects, the Confraternity could not make a grant for the general purposes of the Ordinariate.

(iv) That it was not clear that the Ordinariate could apply the grant 'in the Anglican tradition' and therefore 'only in ways in keeping with the Confraternity's objects.'

(v) It is not clear, taking into account its own objects, the Ordinariate could apply the grant "in the Anglican Tradition" and therefore "*only in ways in keeping with the Confraternity's objects*", as required by the grant agreement.

#### **9. The trustees view is that:**

The object of promoting the *catholic faith in the Anglican Tradition* does not require it to promote the Anglican faith, and that the objects of the Ordinariate by reference to the Personal Ordinariate are specifically tied to the '*Anglican Tradition*'. It is argued that the Commission has not had sufficient regard to the canon law organisation and, if it had done so, then the objects of the two charities would be seen as compatible.

#### **10. Analysis of question of whether the grant from the Confraternity to the Ordinariate was wholly within and in furtherance of the objects of the Confraternity**

The Commission has no legal power to determine the meaning of the objects of the Confraternity or the Ordinariate. However it is necessary for the Commission to form a view about the meaning of the objects in line with the principle of construction that would be applied by the civil courts.

The objects of both organisations should be construed within the principles of construction that would be applied by the civil courts. Those principles of construction were considered in detail in the recent Upper Tribunal case of *Helena Housing V HMRC [2011] STC 1307*.

The objects of the Ordinariate make specific reference, by way of means, to the canonical organisation. The ambit of the charitable activities are thus incorporated into the objects and in construing the objects reference should be had to the potential activities which it may undertake and the terms upon which the canonical organisation is established. The terms upon which the canonical organisation are established under the Apostolic Constitution and Complementary Norms are relevant to construing the meaning of the objects by reference to the manner in which it is specifically stated they will be pursued. However the wider intentions of the founders are not relevant to construing the meaning of the objects.

In this respect consideration of the terms upon which the Ordinariate is established under the Apostolic Constitution and the Complementary Norms is relevant in construing the extent of those objects.

The interpretation of the phrase '*the advancement of the catholic faith in the Anglican Tradition*' gives rise to difficult theological questions. It is argued that the Church of England has historically regarded itself as part of the catholic church, in the sense of the universal church, and maintains that it derives its holy orders – its ministers' power to administer the sacraments – from an unbroken succession back to the early church. It accepts Roman Catholic priests to have been validly ordained but the Roman Catholic Church does not reciprocate that recognition.

One interpretation of the scope of the phrase “catholic faith in the Anglican Tradition” is that it refers to the catholic faith as practised within the institutional framework of the group of churches in communion with the See of Canterbury, commonly known as the Anglican Communion.

That would recognise the ordination and authority of Anglican clergy and the ability of such priests to take the sacrament.

The objects are not however restricted to ‘advancing the catholic faith in the Anglican Communion’. The meaning of ‘Anglican Tradition’ is unclear but the trustees of the Confraternity however argue that the canonical organisation maintains such a tradition and was established for that specific purpose.

It is doubtful that it can be said that the canonical organisation advances the catholic faith in the Anglican Tradition only on the basis that it appears to envisage that some elements of that tradition’s liturgy, pastoral care of hymnody may be preserved. Can it be said to be catholicism in the Anglican Tradition albeit that it may preserve some elements of that tradition. This is particularly so where those elements of the Anglican tradition are those approved by Rome, rather than Anglican Church. The Ordinariate is part of the Roman Catholic Church and it is that tradition that appears paramount.

Even taking account of the activities of canonical organisation the objects of the Ordinariate are wider than those of the Confraternity. The objects are not restricted to the advancement of the catholic faith in the Anglican Tradition. That predominance of the Roman tradition is preserved by the Apostolic Constitution. Under the Constitution:

*The Personal Ordinariate is governed according to the norms of the universal law and the present Apostolic Constitution and is subject to the Congregation for the Doctrine of Faith and the other Dicasteries of the Roman Curia in accordance with their competencies.*

Articles III expressly contemplates the use of the Roman Rite, without any inclusion of any element of the Anglican heritage or practice albeit that it provides a faculty to use certain elements of the Anglican liturgy as may be approved. The canonical organisation is established in the tradition of the Roman Catholic Church but which makes concession to certain aspects of the Anglican Tradition as approved by Rome. For example the Ordinary, in full observance of the discipline of celibate clergy in the Latin Church as a rule will admit only celibate to the order of the presbyter. The admission of married men is by petition on a case by case basis.

A gift to the Ordinariate without restriction could be used for purposes which have no connection with the Anglican Tradition at all.

**11. Could the Confraternity make a grant to the Ordinariate on terms which only further its objects and could the Ordinariate apply the grant only in ways in keeping with the Confraternity’s objects?**

It is doubtful whether the Ordinariate could properly apply funds consistently with the objects of the Confraternity ‘to advance the faith in the Anglican Tradition’ in accordance with the terms of the grant ‘*only in ways in keeping with the objects of the Confraternity.*’

Fundamentally the Ordinariate is established as part of the Roman Catholic Church. It requires its members to be 'in full communion' with the Catholic Church. The Roman Catholic Church does not recognise Anglican Ordination and thus does not recognise the authority of Anglican Bishops and Priests to celebrate the Sacraments or Mass. Fundamental to that is that Anglican Orders have no legal effect and that communion services taken by Anglican priests are without authority. Further the 'complementary norms' provide that those previously ordained in the Catholic Church and subsequently become Anglicans may not exercise sacred ministry in the Ordinariate.

Although the Canonical makes provision for the reception of Anglicans, they must be re-ordained and in order to be in full communion with the teachings deny the authority of Anglican orders. Such 'traditions' as are retained are only those which have been approved by the Holy See.

Whatever the precise meaning of the Anglican Tradition it must be a fundamental part of that tradition that Anglican holy order are accepted as valid. It can not be part of that tradition to deny its own validity. This presents a fundamental obstacle to the proposition that the Confraternity can advance the catholic faith in the *Anglican tradition* by the grant of monies for the benefit of another catholic community that would deny communion to members of churches within the Anglican Communion (including members of the Confraternity) and requires its own members to deny the validity of Anglican holy orders, including the orders of members of the Confraternity. That would appear to be at odds with the Anglican Tradition.

It is doubtful that it can be said to be catholicism in the Anglican tradition, albeit that it may preserve some elements of that that tradition. It is part of the Roman Catholic Church and that tradition is paramount, albeit that such parts of the Anglican patrimony as are compatible with the Roman tradition may be permitted to be carried on with the approval of the hierarchy of the Roman Catholic Church.

Although it may be difficult to determine what is meant by Anglican Tradition without expert evidence, on the basis of the analysis above, I can not see that that the grant to the Ordinariate could be applied consistently with the objects of the Confraternity. However, ultimately, the determination of meaning of the objects would fall to the court.

## **12. Conclusion**

The findings above conclude my review.

Having taken full account of the representations, my decision is that:

The decision to make a grant to the Ordinariate was taken at an inquorate meeting, the majority of the trustees having a (financial) personal interest for the purpose of clause 7.13 of the 2010 constitution.

The meeting being inquorate, the decision was invalid. There was no valid exercise of the power to make a gift to the Ordinariate and the payment was unauthorised.

The gift is held upon constructive trust by the Ordinariate for the Confraternity.

The objects of Ordinariate even taking account of the canonical organisation are wider than those of the Confraternity. A gift given to the Ordinariate without

restriction could be used for purposes which have no connection with the Anglican tradition at all.

The precise meaning of Anglican Tradition is unclear but there is substantial doubt whether the Confraternity could make a grant to the Ordinariate which could be applied by the Ordinariate consistently with the objects of the Confraternity.

The Commission therefore considers the trustees of both charities are under a duty to take action to ensure the repayment of the money.

Although our initial findings were issued in the form of a draft Regulatory Case Report, I do not consider that it would be appropriate to issue a RCR at this stage before we have reached a conclusion to the case.

Harry Iles - Head of Operations Wales – 18 May 2012