

IN THE ARCHES COURT OF CANTERBURY
CLERGY DISCIPLINE MEASURE 2003

**In the Matter of an appeal against the decision of the Bishop's Disciplinary Tribunal
for the Diocese of London**

Concerning a complaint against the Reverend David Samuel Gilmore

Appearances:

Mr John Botros for the Appellant, the Reverend David Samuel Gilmore
Mr Adrian Iles as Designated Officer

WRITTEN DETERMINATION OF APPEAL

1. Since 2008 the Revd David Gilmore, who is aged 40, has been Rector of St Anne's Soho in the Diocese of London. This is his appeal against both the decision of, and the subsequent penalty imposed by, a Bishop's Disciplinary Tribunal on 16 December 2010, for misconduct, consisting of conduct unbecoming or inappropriate to the office and work of a clerk in Holy Orders. Both before the Tribunal and before this Court the Designated Officer, Mr Iles of Counsel, has conducted the case for the complainant, the Venerable William Jacob, Archdeacon of Charing Cross. For the substantive hearing before the Tribunal on 10 and 11 November 2010 Fr Gilmore was represented by Mr Quentin Gelder, being replaced by Mr Mark Hill QC at the hearing on penalty on 16 December. At the hearing on 4 April 2011 he was represented by Mr John

Botros of Counsel. At the conclusion of the hearing we announced our unanimous decision to dismiss the appeal and we now give our reasons.

Non-Disclosure Order

2. In its decision the Tribunal referred to two servicemen, the initiators of the complaint, as A and B, and to two witnesses called on behalf of Fr Gilmore as X and Y. On 16 December 2010 the Tribunal ordered that the actual name and any identifying details of the persons so identified must not be published or otherwise made public, being satisfied under rule 49 of the Clergy Discipline Rules 2005 (“the Rules”) that this was desirable to protect the private lives of the persons concerned. At the start of this appeal this court made a further order in identical terms, and for the same reason, under rule 26 of the Clergy Discipline Appeal Rules 2005 (“the Appeal Rules”). Breach of that order would be referable to the High Court as a contempt of court.

The complaint and charges

3. The Archdeacon’s initial complaint of 17 December 2009 was of misconduct by Fr Gilmore in that in the course of providing accommodation for two servicemen attending a Lesbian, Gay, Bisexual and Transexual [LGBT] Conference in London, organized by the Revd James Francis, Fr Gilmore, when it would appear that he was drunk, made indecent propositions of a sexual nature to the two servicemen, and persisted in pressing his attentions on them when they had clearly indicated that his attentions were unwelcome. The Archdeacon made his complaint as a result of oral complaints made by

A and B on 4 December 2009 concerning Fr Gilmore's conduct towards them earlier that day. The charge as referred to the Tribunal by the President of Tribunals was as follows:

“That [Fr Gilmore] engaged in conduct that is unbecoming or inappropriate to the office and work of a clerk in Holy Order under section 8(1)(d) of the CDM 2003 in that, at the Rectory on 4 December 2009, he acted in a manner towards [A and B], for whom he was officially requested to provide accommodation in their capacity as delegates to a conference organised by a chaplain of the Royal Navy, that has caused them to complain to the organiser of the conference that the respondent

- (a) made indecent proposals to them;
- (b) acted indecently towards B;
- (c) acted indecently in their presence in the accommodation provided for them, it having been made clear to them that his conduct was unwelcome, and
- (d) should not be in a position to act in such a way to potentially vulnerable young people and damage the reputation of the Church”.

Item (d) falls into a different category to the other items, relating not to past actions but rather expressing an opinion on the future risk arising from such actions. In other words item (d), as Mr Iles accepted, is not itself a charge of misconduct.

Background

4. The facts as found by the Tribunal were as follows. The Revd. James Francis, a Royal Navy chaplain, organized a LGBT Conference in London on 3 and 4 December 2009 for members of Her Majesty's Armed Forces. He asked Fr Gilmore whether he was

prepared to allow St Anne's Church Hall to be used to provide accommodation for some delegates and Fr Gilmore agreed to this. Because a group of delegates decided at the last moment not to stay overnight, only two servicemen, A and B (then aged 30 and 20 respectively, and who had not met previously), required to be accommodated and Fr Gilmore decided that these two could stay at the Rectory itself. On the evening of the first day of the Conference there was a reception at the Victory Services Club at which A was introduced to Fr Gilmore, and then a pre-arranged party at the KU Club in Frith Street, Soho which Fr Gilmore left early saying he was tired. A and B returned to the Rectory at about 0230, having consumed a significant quantity of alcohol, following the sending of several text messages by Fr Gilmore, that sent at 0016 merely saying "Back at home, whenever", whereas the last, sent at 0154, read "Guys I need to sleep".

5. A and B purchased on their way back a take-away meal, intended as some kind of apology for their lateness. Fr Gilmore had already gone to bed, but let them in wearing boxer shorts, a T shirt and socks which he had put on to do so.

At the Rectory before A went to bed

6. A and B offered to share their takeaway with Fr Gilmore, who offered them some wine, and the three sat together in Fr Gilmore's sitting room eating the food and drinking the wine. The Tribunal found that there followed banter and innuendo of a sexual nature from all sides, and according to Fr Gilmore, A and B were cuddled up together at one end of a 4-seater sofa, whilst Fr Gilmore sat at the other end. Then the sleeping arrangements were mentioned. The previous evening Fr Gilmore had shown A the two rooms at

opposite ends of the corridor that had been prepared for their use, but now the two made clear that they proposed to sleep together. At this point Fr Gilmore said words to the effect “Not unless you want me as a bolster between you”, which the two interpreted – and the Tribunal was satisfied that were right to do so – as an offer to them that either A or B or both of them might share a bed with him and that he would be content were they to do so.

At the Rectory after A had gone to bed

7. After a while A went to bed, leaving B and Fr Gilmore talking together, by which time Fr Gilmore was lying along the sofa, with B still sitting at its far end. A time came when Fr Gilmore’s foot touched B’s thigh or leg, and B said words to the effect “Are you making a move on me?”, to which Fr Gilmore replied light-heartedly “If I was trying to make a move on you, you would know”. The Tribunal rejected Fr Gilmore’s version that this touching was accidental and found that it resulted from a deliberate movement of Fr Gilmore’s foot from B’s leg to his crotch area. Ten minutes later, as Fr Gilmore admitted, he may have placed his hand on B’s leg, though he denied this was deliberate or in a sexual manner. The Tribunal were sure that Fr Gilmore deliberately touched B’s leg and then moved his hand to B’s genital area, whereupon B intimated that the act was unwelcome and moved Fr Gilmore’s hand away. There then followed further discussion, some of it of an explicitly sexual nature, including conversation about the size of Fr Gilmore’s penis, and whether he was getting sexually aroused, though the Tribunal was not satisfied that Fr Gilmore initiated this particular conversation. Then Fr Gilmore suggested that B and he should sleep together. The Tribunal found that Fr Gilmore

referred to B's "good looking, hot little body". Having been rebuffed by B, Fr Gilmore was found to have said words to the effect "don't repeat this conversation or I will get hanged". At 0345 B retired to bed and slept in the same bed as A.

At the Rectory after 0700

8. Fr Gilmore woke at 0730, and went naked to the bathroom to have a shower. He had arranged for people to make breakfast for his guests at 0800 and decided to wake up A and B. The Tribunal found that the door to their bedroom was not closed and that Fr Gilmore, instead of simply knocking loudly on the door with words to the effect that it was time to get up for breakfast, peeped round the door and saw A and B engaged in sexual activity. He then advanced into the room (still naked) and stood about a foot from the bed watching their sexual activity, for a period which he now admits (through his Counsel) to have been more than a minute. Fr Gilmore admits that he had an erection whilst watching A and B, and the Tribunal found that this was a result of him masturbating himself on impulse. A majority of the Tribunal were also satisfied that Fr Gilmore went into the bedroom either hoping to be aroused by such sexual activity or having decided to arouse himself in the presence of such sexual activity. All members of the Tribunal were agreed that having made a flawed decision to enter the bedroom, he should have left much sooner than he did, and that he only left when A told him to "fuck off".

The Tribunal's findings on misconduct

9. At the end of its decision the Tribunal summarised its findings of misconduct:

“Firstly, though expressed in an ambiguous and jocular way, [Fr Gilmore] asked both A and B, who were complete strangers, to sleep with him in his bed and was willing for them to do so. Second, [Fr Gilmore] deliberately put first his foot and then his hand against B’s leg and crotch area when such behaviour was neither encouraged nor approved of by B. Thirdly, [Fr Gilmore] allowed a conversation of a sexual nature to take place between himself and B. Fourthly, [Fr Gilmore] asked B to sleep with him and when such offer was declined asked B not to repeat such conversation because of the potentially serious consequences for him. Fifthly, [Fr Gilmore] chose to enter A’s bedroom naked when it was unnecessary for him to do so and when he knew that sexual activity was taking place between A and B and chose to masturbate himself whilst watching such sexual activity. We are in no doubt that all of such behaviour on the part of [Fr Gilmore] damages the reputation of the church”.

To that extent they adjudged the complaint well founded and that the case against Fr Gilmore was proved.

The Tribunal’s Order on penalty

10. At the hearing on penalty, the Tribunal was told that Fr Gilmore accepted its findings of fact about what happened, that he was contrite, and that he regretted the behaviour which had brought embarrassment and shame on him. This remorse was taken into account in deciding upon the appropriate penalty, as was the concession by his Counsel that immediate removal from office and a temporary prohibition were inevitable. Its Order was that he be removed from office with immediate effect; that he be prohibited

from the exercise of any of the functions of his Orders for a period of two years; and that his name be entered on the Archbishop's List in accordance with s.38 of the Clergy Discipline Measure 2003 ("the Measure"). Since there has been some misunderstanding about the last matter, we need to explain that entry on the Archbishop's List under s.38 would have occurred without any specific order being made to that effect by the Tribunal, and occurs whenever a penalty is imposed by a Tribunal, whether or not the penalty is imposed in respect of a finding involving sexual misconduct and whether or not that finding is accompanied by any finding about future risk.

Postponement of penalty

11. As a result of rule 10(1) of the Appeal Rules, the implementation of the penalty imposed by the Tribunal has been postponed pending the disposal of this appeal. However, Fr Gilmore has been suspended by his bishop under rule 10(2).

Right of appeal

12. S.20(1) of the Measure provides that:

- “(a) the respondent may appeal against any penalty imposed on him, and
- (b) the respondent on a question of law or fact...may appeal against any finding of the disciplinary tribunal...
to the Arches Court of Canterbury (where the proceedings take place in the province of Canterbury)....”

There is currently no requirement for leave to appeal.

The powers of the appellate court

13. This being the first occasion on which the appellate court in either Province has heard a substantive appeal under the Measure, we set out rule 27 of the Appeal Rules:

“On any appeal the appellate court may –

- (a) confirm, reverse or vary any findings of fact of the tribunal,
- (b) refer a particular matter back to the tribunal for hearing and determination in accordance with any direction that may be given by the appellate court,
- (c) order the complaint to be reheard by the same or a differently constituted tribunal,
- (d) confirm or set aside a penalty imposed by the tribunal, or substitute a greater or lesser penalty,
- (e) impose one or more of the penalties under section 24 of the Measure where the tribunal has not imposed any penalty....”

The Notice of Appeal

14. This indicated that Fr Gilmore wishes to appeal against findings of law and fact against the penalty.

Refinement of alleged errors of law

15. In his later Skeleton Argument, Mr Botros identified six alleged errors of law. These were:

- (1) Mistake as to the role of Fr Gilmore in the organization of the LGBT Conference and the arrangement of accommodation for A and B.

- (2) Absence of a pastoral relationship between the parties.
- (3) Use of emotive language selectively to prejudice the appellant, the contention being that a reasonable person would consider A and B's behaviour to be grossly indecent and by comparison Fr Gilmore's conduct not to be in any way indecent.
- (4) Insupportable and malicious conclusion that B was a vulnerable person and that Fr Gilmore constituted a danger to vulnerable people.
- (5) Errors by Tribunal in conduct of the proceedings in relation to (i) failure to ask questions necessary to clarify the issues; (ii) errors in relation to the standard of proof, leading to infringement of Fr Gilmore's right to a fair trial under Article 6 of the European Convention on Human Rights ("ECHR"); and (iii) errors of form in relation to the initial witness statements of A and B.
- (6) Mistake by the Diocesan Registrar in relation to Fr Gilmore's right of appeal.

Refinement of alleged errors of fact

16. In his Skeleton Argument, Mr Botros identified four alleged errors of fact. These were:

- (1) Disregard of evidence of matters before arrival at the Rectory showing inconsiderate behaviour of A and B.
- (2) Misinterpretation of events at the Rectory before A went to bed
- (3) Misinterpretation of events after A had gone to bed
- (4) Misinterpretation of evidence of what happened in the morning.

Refinement of appeal against penalty

17. In his Skeleton Argument, Mr Botros relied on three matters:

- (1) That Fr Gilmore is not a danger to vulnerable people.
- (2) The severity of consequences for Fr Gilmore
- (3) The severity of consequences for those whom Fr Gilmore had helped in the past.

Analysis of alleged errors of law

18. We consider each of the alleged matters in turn.

(1) Mistake as to the role of Fr Gilmore in the organization of the LGBT Conference and the arrangement of accommodation for A and B.

19. Mr Botros submits that that the facts of the complaint were “incorrectly (or untruthfully) framed” and that this “substantially impaired” the Tribunal’s ability to understand the involvement and conduct of Fr Gilmore. We agree that the Archdeacon’s initial complaint was wrong to refer to the LGBT Conference as “an official engagement between the Armed Forces and St Anne’s”, a description repeated in his witness statement. The conference was organized by a Royal Navy Chaplain, and neither St Anne’s nor Fr Gilmore were involved in the organization of the conference which took place elsewhere. That point was made by Fr Gilmore in his witness statement of 24 January 2010. There is nothing in the Tribunal Determination to suggest that they misunderstood the position. The President’s complaint was not wrong in describing the

accommodation Fr Gilmore provided as “officially requested”, given that it was advertised in the conference programme as an official arrangement between the Armed Forces and St Anne’s and had been agreed by Fr Gilmore after consultation with his churchwardens. The intention was that the hall be used “as a crash pad for several delegates”. Again there is nothing in the Tribunal’s decision to suggest that they misunderstood the position. Therefore this ground of appeal is not substantiated.

(2) Absence of a pastoral relationship between the parties.

20. Mr Botros relies on the determination of the Chancery Court of York in *Concerning a complaint against the Reverend David Charles King* (7 April 2008) for the proposition that the presence of a pastoral relationship is significant in considering a suspension. We agree. But we do not understand the relevance of that proposition to the alleged error of law in the present case, where we have no difficulty in accepting that there was no pastoral relationship between Fr Gilmore and the two men who stayed at the Rectory, who were strangers for whom another person had sought accommodation to save them money. It does appear that, during his quite lengthy conversation with B, Fr Gilmore regarded himself as acting pastorally towards B, taking advantage of what he described as a “pastoral opportunity”, but we do not consider that this was enough to constitute a pastoral relationship in the sense used in *King*. On the other hand we can find no indication in the Tribunal’s Determination that they found that a pastoral relationship existed between Fr Gilmore and A and B or either of them, and none of their findings of misconduct depend in any way on the existence of a pastoral relationship. Thus this ground is misconceived.

(3) Use of emotive language selectively to prejudice the appellant, in circumstances where that a reasonable person would consider A and B's behaviour to be grossly indecent and by comparison Fr Gilmore's conduct not in any way indecent.

21. In his criticism of A and B's behaviour, Mr Botros relies on matters such as the description by A of his current "boyfriend" (not B) as more of a "fuck-buddy" than a boyfriend, by which Fr Gilmore (probably correctly) understood him to mean somebody with whom he had a regular arrangement for sex, rather than someone with whom he had a full committed relationship. We can, however, find nothing "emotive" in the language of the Tribunal's determination, which is impressively restrained, even clinical, in its examination of the evidence. The Tribunal referred to A and B's "abuse of the Respondent's hospitality by arriving late and by insisting on sleeping together when their host might have been offended by such behaviour"; and expressly stated that they "were unimpressed by the admittedly promiscuous behaviour of A and B", and that Fr Gilmore "was probably justifiably frustrated by the late return of A and B". Whether or not it be right, as Mr Botros urges, to categorise A and B's behaviour as "grossly indecent" is in our opinion irrelevant to whether Fr Gilmore's conduct itself was misconduct in the sense of being "conduct unbecoming or inappropriate to the office and work of a clerk in Holy Orders" (see s.8(1)(d) of the Measure).

22. More to the point is whether Mr Botros is right that Fr Gilmore's conduct "was not in any way indecent". The President's charge repeatedly used the word "indecent" or "indecently", whereas the words "inappropriate" and "inappropriately" could have been

used and would have accorded with the language of s.8(1) of the Measure. The Designated Officer argues that the factual findings by the Tribunal clearly show that Fr Gilmore's conduct towards the two men was indecent. Alternatively he argues that since at no stage before or during the hearing was any point taken concerning use of words "indecent" and "indecently" in framing the allegations against Fr Gilmore, it is now too late to raise a new point. He points out that had the matter been raised at the hearing, the Tribunal would have been able to frame the allegation differently in compliance with the Second Practice Direction, PD2 (2008), for example by substituting "inappropriate" for "indecent". In the further alternative, if there is any merit in Mr Botros' point, the Designated Officer draws our attention to the power of the appellate court under rule 27(a) of the Appeal Rules to vary any finding of the tribunal – for example by substituting "inappropriate" for "indecent".

23. On the findings of fact by the Tribunal, each of the items found to constitute misconduct *do* in our opinion constitute both "indecent" and "inappropriate and unbecoming" behaviour for a priest in the circumstances of persons such as A and B invited to stay at the Rectory. Therefore we see no reason to resort to the power under rule 27(a), by which (as we agree) the same result of upholding the charges would necessarily follow. Accordingly we reject this ground.

(4) Insupportable and malicious conclusion that B was a vulnerable person and that Fr Gilmore constituted a danger to vulnerable people.

24. Mr Botros states in his Skeleton Argument that “It is repeatedly suggested that arising from this matter it is possible to conclude that the Appellant constitutes a danger to vulnerable people. As a matter of law and fact it is submitted that such a conclusion is insupportable and in so far as it arises from a situation which did not involve vulnerable people, is malicious”. He is correct that the initiating complaint referred to posing “a risk to young and vulnerable gay people who may turn to St Anne’s and the Church as a secure place” and President’s charges under item (d) referred specifically to the risk to “potentially vulnerable young people”. However, the substantive part of the Tribunal’s decision includes a finding that, in the absence of drink, neither A nor B could be described as ‘potentially vulnerable’, and thereafter refers to vulnerability only in the context of Fr Gilmore’s conduct towards B after A had gone to bed. In paragraph 50 the Tribunal says that they “have no doubt that “B was *more* vulnerable than [Fr Gilmore] by reason of his relative age, his being a guest in a stranger’s house and his having had a quantity to drink” (emphasis added), a finding that we find perplexing, and which Mr Iles interpreted as a finding that for the stated reasons B was vulnerable, which would render the words “more” and “than the Respondent” otiose. Then in paragraph 52, in connection with its finding that Fr Gilmore did offer B to come and sleep with him in his bed and had described B as having a “good looking, hot little body”, the Tribunal adjudged this to be misconduct “particularly given our findings as to B’s vulnerability”.

25. As we interpret the decision, the Tribunal made no finding that Fr Gilmore constituted a future risk to young people, nor was it necessary for it to do so to find the charge of misconduct proved, and if we are wrong on this, then we consider that the Tribunal was wrong so to find.

26. Our attention was drawn by Mr Botros to the New Oxford English Dictionary definition of vulnerable as:

“exposed to the possibility of being attacked or harmed either physically or emotionally”.

The words vulnerable and vulnerability have acquired a technical meaning in connection with abuse of power, especially sexual exploitation. Thus the definition of vulnerable used in “Promoting a safe church, Policy for safeguarding adults in the Church of England” (2006) is:

“Any adult aged 18 or over who, by reason of mental or other disability, age, illness or other situation is permanently or for the time being unable to take care of him or herself, or to protect him or herself against significant harm or exploitation.”

Elsewhere the same publication recognizes that everyone has different levels of vulnerability and that each of us may be regarded as vulnerable at sometime in our lives. Accordingly, it urges the need to promote safe practice by those in positions of trust. One of the testimonials on which Mr Botros relied in mitigation referred and to the definition of “vulnerable adult” in para 23 of “No secrets: guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from

abuse” (Department of Health and Home Office, 2000), taken from the Consultation Paper “Who decides?” (Lord Chancellor’s Department, 1997):

“[a person] who is or may be in need of community care services by reason of mental or other disability, age or illness; and
who is or may be unable to take care of him or herself or unable to protect him or herself against significant harm or exploitation”.

The latter part of that definition is more relevant than the former to what we are here considering.

27. We have seen nothing to suggest that B, a service 20-year old serviceman, fell within any of these definitions. On the evidence before the Tribunal he was someone well able to look after himself, and take part in the London conference and its aftermath of socializing. He also seems to have been capable of sexually teasing an older man, in this case Fr Gilmore. We note that the Tribunal suspected that B had instigated the conversation about Fr Gilmore’s penis. Such a person is not properly described as “vulnerable” notwithstanding the age difference of about 20 years and the fact that Fr Gilmore was a clergyman. Mindful though we are of the responsibilities and influence of the clergy in the conduct of relationships, we do not consider that B (at the time of the actions in issue) was properly to be considered vulnerable or potentially vulnerable, whether as a result of age, intoxication or any other circumstances.

28. Though, for the reasons we have just explained, we disagree with the Tribunal’s views on the vulnerability of A and B, and particularly B, we reject entirely the allegation

that the Tribunal acted maliciously and it is to be regretted that this allegation was ever made.

29. On the other hand we consider that the offer Fr Gilmore made that B should share his bed, and the description he gave to B's body, were wholly inappropriate, and would have been if made to any guest, whether that person was vulnerable or not. Accordingly the charge that Fr Gilmore acted indecently towards B, and that this constituted misconduct, was clearly made out.

(5) Errors by Tribunal in conduct of the proceedings in relation to (i) failure to ask questions necessary to clarify the issues, (ii) errors in relation to the standard of proof, leading to infringement of Fr Gilmore's right to a fair trial under Article 6 of the European Convention on Human Rights ("ECHR"); and (iii) errors of form in relation to the initial witness statements of A and B.

30. We shall consider each item in turn.

31. (i) The Tribunal recorded, under the heading "Some preliminary matters", that in cross-examination, Fr Gilmore's Counsel "never sought to formally challenge any parts of the evidence of A or B and never suggested to them that they were in any way mistaken or dishonest in such evidence, notwithstanding that the Chairman had observed to Mr Gelder that subject to his instructions it might be appropriate for him to do so." Complaint was initially made by Mr Botros that the Tribunal should have gone further "to satisfy itself as to the reasons for this omission by the defence by asking any

questions necessary to clarify the issues”. In oral argument Mr Botros formally abandoned this point and therefore we do not need to consider it further. The failure to challenge the evidence of A and B did not render the process or its outcome unfair or unsafe.

32. (ii) S.18(3)(a) of the Measure provides that:

“the standard of proof to be applied by the tribunal or court shall be the same as in proceedings in the High Court exercising civil jurisdiction”.

It follows that the standard of proof is the balance of probabilities, and that the Notice of Appeal is misguided in contending that the standard of proof should be the criminal standard of “beyond reasonable doubt”. Wisely, Mr Botros did not pursue this point at the hearing, nor the associated point concerning Article 6 of the ECHR.

33. (iii) This then leaves the unpleaded allegation that, because the initial statements of A and B did not comply with the rules, lacking for example any statement of truth as required by rule 35(3) of the Rules and B’s initial witness statement appearing to have a final paragraph possibly added by some person unknown, the Tribunal’s findings were legally flawed. Mr Botros realistically accepts that these errors were corrected in later statements which were also before the Tribunal and that these matters should have been raised at first instance, rather than left to the appeal court. Whilst we urge the importance of complying in all respects with the rules in the conduct of litigation under the Measure, we see no reason to regard the Tribunal’s determination as procedurally erroneous on account of these deficiencies. Nor do we see any merit in the

one matter relied upon by Mr Botros at the hearing, namely that the final paragraph of B's initial statement may have relevance to the question of vulnerability. We do not accept this.

(6) Mistake by the Diocesan Registrar in relation to Fr Gilmore's right of appeal.

34. This received only the briefest of mentions in the Grounds of Appeal. In any event the ground is without any merit. On 22 December 2009 by email at 1242 Fr Gilmore was told there was no appeal against a determination of a tribunal under the Clergy Discipline Measure. By email the same day at 1330 Fr Gilmore was informed that the position had been checked, the previous advice was wrong, and that there was a right of appeal under s.20 of the Measure. By a further email sent at 1546 he was told that the period for appealing was 28 days. Therefore his position has not been prejudiced by the initial error in any way. In oral argument Mr Botros accepted that any error by person advising Fr Gilmore *after* the Tribunal's decision had been announced could not ground an appeal against that decision. Mr Botros then sought to argue that similar advice about the unavailability of an appeal had been given to Fr Gilmore *before* the decision was announced, and that this had affected Fr Gilmore's stance at the hearing on penalty. He admitted that there was no evidence that such previous error had occurred, and therefore the new ground too lacks any merit.

Analysis of alleged errors of fact

(1) Disregard of evidence of matters before arrival at the Rectory showing inconsiderate behaviour of A and B.

35. There was a conflict of evidence as to whether A and B had visited another bar between leaving the KU Bar and walking to the Rectory. The Tribunal concluded that this was the case. There was also a suggestion that they might have visited yet another bar. The Tribunal made no decision on this dispute since they were satisfied that the determinations of the allegations against Fr Gilmore were in no way assisted by what happened until shortly before A and B returned to the Rectory. We see no basis for criticizing the approach taken by the Tribunal. Insofar as the complaint is that A and B were so drunk when they arrived at the Rectory that they should not be believed, we see no reason to question the Tribunal's assessment that they were not very drunk, although they had both consumed a significant quantity of alcohol. We share the Tribunal's view that Fr Gilmore would not have offered them further alcohol at the Rectory if they were already very drunk. At the oral hearing Mr Botros argued that A and B had arrived at the Rectory in a sexually-charged state, as a result of the nature of the conference they had been attending and the gay bars they had been visiting, and that the Tribunal failed to take this into account. Whilst it is clear that A and B started cuddling one another soon after they arrived at the Rectory, we consider that Mr Botros overstates the position, and has failed to identify anything material to undermine the Tribunal's interpretation of what later took place.

(2) Misinterpretation of events at the Rectory before A went to bed

36. Mr Botros alleges inconsistency between the Tribunal's acceptance that some of Fr Gilmore's remarks were made in an "ambiguous and jokey way" and their conclusion that they were "sure that [Fr Gilmore] was entertaining the possibility that either A or B or both of them might share his bed." There is no inconsistency.

(3) Misinterpretation of events after A had gone to bed

37. Mr Botros argues that that the Tribunal should have accepted Fr Gilmore's evidence that he was not seeking to make advances towards B, and that if B had been the subject of sexual advances he could easily have moved to the other sofa or gone to bed. These are points that could have been (and to some extent were) made at the hearing. There is nothing to show that the Tribunal's conclusions as to what occurred at this stage were perverse.

(4) Misinterpretation of evidence of what happened in the morning.

38. Mr Botros here relies on two matters. First "the totally improper conduct of A and B in abusing the hospitality of the appellant" by engaging in sexual activity in his house and with the door open. Second, that the Tribunal was wrong to conclude that Fr Gilmore's erection could only have happened by reason of masturbation and not spontaneously.

39. The Tribunal said that it was unimpressed by the admittedly promiscuous behaviour of A and B. On the other hand, having heard the evidence on both sides, they unreservedly accepted A and B's account of what happened that morning when Fr Gilmore entered, and lingered in, their room. Four members of the Tribunal, having heard the evidence, were satisfied that the Respondent masturbated himself in A and B's presence. For our part we readily concede Mr Botros's point that physiologically Fr Gilmore's erection could have been spontaneous upon seeing what was taking place in the bedroom and manually unassisted. The tribunal were, however, entitled to prefer the evidence of A and B on this matter, and we readily understand why the Tribunal rejected Fr Gilmore's account in his evidence in chief that all that had happened was that he had an instantaneous erection, described as such as men can have in the morning.

Conclusion on substantive appeal

40. For the above reasons, save that we do not find B to have been a vulnerable adult, or Fr Gilmore to have posed a risk to such persons (if the Tribunal did so find), we find no errors of law or fact in the Tribunal's decision.

Approach to penalty

41. In *King* at para 20, the Chancery Court of York approved the approach to penalty in section 1 of the Guidance on Penalties issued by the Clergy Discipline Commission in March 2006 (“The Guidance”) that:

“Any penalty imposed should be in due proportion to the misconduct, having taken into account and given due weight to all material circumstances including the particular facts of the misconduct”.

Analysis of appeal against penalty

42. In its Remarks on Issuing Penalty, the Tribunal rightly said that the clergy of the Church of England are called upon to set a high standard of moral behaviour, and that the reputation of the Church in the community depends to a great extent on the example of the clergy, who should recognize their role as public representatives of the Church, and whose lives should enhance and embody the communication of the gospel. We agree. We also consider that the unbecoming and inappropriate conduct of Fr Gilmore which took place that morning at the Rectory was a form of sexual misconduct, falling within the opening words of section 5 of the Guidance on Penalties issued by the Clergy Discipline Commission in March 2006, and referred to in para 19 of the judgment in the *King* appeal:

“Sexual misconduct is usually a deliberate and damaging failure to comply with the high standards of Christian behaviour required of the clergy”.

The Guidance properly states that “Clergy who commit sexual misconduct should be dealt with firmly...”. Short-lived as the misconduct was, and, so it would seem, without positive harm to A or B, we are satisfied that Fr Gilmore’s behaviour towards these two servicemen, temporarily accommodated in the Rectory, was sufficiently serious to justify removal from office and a temporary period of prohibition. This is especially so given the complete lack of contrition and remorse evident from various aspects of this appeal.

43. In line with the concessions made below by Leading Counsel on Fr Gilmore’s behalf as to the appropriateness of removal from office and temporary prohibition, Mr Botros eventually accepted that were we to confirm the Tribunal’s findings of fact, these penalties were inevitable. Mr Botros made a number of points in relation to sentence.

(1) That Fr Gilmore is not a danger to vulnerable people.

44. An aggravating feature in the case of *King* was that the woman in question was held to have been “in a vulnerable state in December 2004” when the relationship began. We have already, in connection with the substantive appeal, accepted that B cannot properly be described as vulnerable, and that we do not regard Fr Gilmore’s conduct as posing a threat to “potentially vulnerable young people”. Since, however, no mention was made of vulnerability in the Tribunal’s Remarks on Issuing Penalty, we doubt that this matter influenced its decision on penalty to any significant extent, if at all.

(2) The severity of consequences for Fr Gilmore

45. Whenever a sentence of removal from office and temporary prohibition is imposed there will inevitably be personal difficulties for the clergy concerned. This matter was addressed in the judgment in *King* where the view was expressed that the reputation of the clergy is more important than the fortunes of any individual member of the clergy. We agree, however, with the view there also expressed that:

“Depending upon the circumstances, in particular, the nature of the misconduct, and the degree of repentance, the age of the respondent may be a material factor (for example youth and inexperience) in arriving at an appropriate penalty”.

The Tribunal gave credit to Fr Gilmore for the remorse his Counsel had expressed on his behalf, credit which we cannot give in view of the nature of his appeal, which has consisted of a frontal challenge to each of the findings of misconduct. Nor in his case can Fr Gilmore rely on youth and inexperience.

(3) The severity of consequences for those whom Fr Gilmore had helped in the past.

46. We have allowed Mr Botros to introduce a number of letters by way of mitigation. A large number of his parishioners describe his work “to transform St Anne’s from what was formerly known as a ‘gay club’ into a parish church that welcomes everyone who wishes to worship our Lord Jesus Christ” and the links he has made with the local community. Four letters from police officers (of varying levels of seniority) speak of the contribution Fr Gilmore has made in respect of curbing the crime problems of the local area, and in particular combating the drug market in Soho. It is also clear that

he has played a significant part in highlighting the vulnerability of sex workers in the area, whilst not condoning their choice of career path. We accept this overall testimony that Fr Gilmore is a respected individual in his local community, and also that, as a conscientious and caring man, he has done good work pastorally. One testimonial from a fellow priest and head-teacher in Romford concludes that:

“The Church of England sorely needs priests like The Reverend David Gilmore and it would be irretrievably the poorer without him.”

A Westminster Councillor, who has known rectors of St Anne’s since the 1960s, asserts that Fr Gilmore:

“must be allowed to continue his work. The Church would be much poorer without him and so would Soho for which he had so many positive plans.”

We do not doubt that removal from office will deprive both his parishioners and the local community of a priest with unusual and valuable talents.

47. These matters apart, Mr Botros’ principal argument for limiting prohibition to one year only was that Fr Gilmore’s misconduct had been confined to a period of a few hours between 0230 and approximately 0800. We accept that the shortness of this period is a material factor and distinguishes the case from, for example, the case of *King* where what the Tribunal described as “an improper, intimate and physical relationship” with a parishioner lasted for a period of almost two years albeit falling short of sexual

intercourse. In that case removal from office and prohibition for four years was upheld on appeal.

Conclusion on penalty

48. Should that period be two years (as the majority of the Tribunal thought) or longer (as a minority of the Tribunal thought and as we have power to impose under rule 27(d) of the Appeal Rules) or shorter (as Mr Botros urges)? Some members of the Court were initially minded to increase the period of prohibition, by reason that the factor of contrition and remorse no longer had a place in the calculation of penalty. Others would initially have wished to limit the period of prohibition so as to accelerate Fr Gilmore's return to what is sometimes described as "Pioneer Ministry". But upon reflection we were unanimous that, in addition to removal from office, prohibition for a period of two years, to run from 16 December 2010, was appropriate to mark the seriousness of what had occurred, and in no way disproportionate. Accordingly the appeal against penalty also fails.

The future

49. We hope that our finding on vulnerability may help Fr Gilmore to find work during the period of his prohibition. In due time, and following a proper period for him to reflect on what happened, and on the stupidity and insensitivity which marked his misconduct, we hope that he will be able to resume ordained ministry, making use of his undoubted gifts.



Charles George QC
Dean of the Arches



Marian Freeman



Robert Alexander



Deborah Dewes



Mark Roberts

4 April 2011