



**IN THE FIRST-TIER TRIBUNAL**

**Case No. CA/2009/0004**

**GENERAL REGULATORY CHAMBER (Charity)**

**ON APPEAL/APPLICATION FROM:**

**Charity Commission decision numbers:** 1087378/C-266748XT5G, 1087378 -263862-D5FS and others

**Dated:** 18<sup>th</sup> September 2009, 9<sup>th</sup> November 2009 and earlier

**Appellants:** EYOB GEBRE-SELLASSIE  
AFRICAN AIDS ACTION (the “Charity”)

**Respondent:** THE CHARITY COMMISSION FOR ENGLAND AND WALES

**Heard at:** Holborn Bars

**Date of hearing:** 15<sup>th</sup> January 2010

**Date of decision:** 9th February 2010

**Before**

**Peter Hinchliffe (Tribunal Judge)**

**Attendances:**

For the Appellant: Elizabeth Joseph

For the Respondent: Matthew Smith

**Subject matter: Appeal against decisions and orders of the Respondent – determination of preliminary issues**

**Cases: R v Secretary of State for the Home Department, *Ex parte* Salem (1999 A.C. 450)**

## **DECISION OF THE FIRST-TIER TRIBUNAL**

The Appeals are struck out pursuant to Rules 8 (2) (a), 8 (3) (a) and 8 (3) (c) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the "Tribunal Rules").

### **REASONS FOR DECISION**

#### **Background**

The Charity was established in order to provide for the relief of sickness of people suffering from HIV, in particular but not exclusively people from Africa and the Caribbean. On 28<sup>th</sup> August 2008, the Respondent notified the Charity that it had cause for concern that required further investigation and instituted an inquiry under s.8 of the Charities Act 1993 (the "Act") into the Charity. On the same date the Respondent issued an order under s.18 (1) (iv) of the Act requiring the Charity's bank to not part with any funds held in the Charity's bank accounts. The Charity and the Respondent were engaged in reviews, correspondence and meetings until 5<sup>th</sup> November 2009 when the Appellants submitted a Notice of Appeal to this Tribunal in respect of the most recent decision of the Respondent to extend and modify the order to the Charity's bank. The Notice of Appeal also raised a number of other issues. On 9<sup>th</sup> November 2009 the Respondent wrote to the Charity informing it of the conclusion that the Respondent had reached in the inquiry, outlining the actions it expected the Charity to take as a consequence and notifying the Charity that it was closing the inquiry. On 10<sup>th</sup> November 2009 the Respondent discharged the order to the Charity's bank. A further Notice of Appeal was submitted on 14<sup>th</sup> December 2009 in respect of the Respondent's letter of 9<sup>th</sup> November 2009. The Respondent submitted an application to strike out these proceedings on 14<sup>th</sup> December 2009. Amended grounds of appeal were also submitted by the Appellants together with other applications and submissions.

The Tribunal held a directions hearing on 15<sup>th</sup> January 2010 in order that the Tribunal could consider and determine the following preliminary issues:

- The scope of the Appeals; in particular the decisions, orders or directions of the Respondent that are the subject of the Appeals.
- Whether there is any reason why the issues in the Appeals cannot be dealt with in a single consolidated Appeal.
- The jurisdiction of the Tribunal to hear all or any part of the Appeal or Appeals as clarified at the Hearing.
- The Respondent's application to strike out all or any part of the Appeal or Appeals as clarified at the Hearing.
- Any application for an extension of time submitted by either party.
- The application to add parties to the proceedings.

I will deal with these in order:

## **1 The Scope of the Appeals**

- 1.1 The Appellants confirmed that the following issues were the subject of the Appeals:
  - 1.1.1 The decision of the Respondent to institute an inquiry under section 8 of the Charities Act 1993 (the "Act") and the process by which that decision was made and the inquiry was conducted.
  - 1.1.2 The various orders of the Respondent made pursuant to section 18 (1) (iv) of the Act to "freeze" the bank account of the Charity and to maintain the restrictions on the operation of the account (the "Freezing Order").
  - 1.1.3 The actions of the Respondent in reaching the conclusions set out in the letter of 9<sup>th</sup> November 2009 and in requiring the Charity's compliance with the Action Plan attached to the letter ("the Letter and Action Plan").

1.1.4 The Appellants explained that these decisions, orders and actions of the Respondent would have a continuing effect on the Charity's reputation and its ability to operate and that, therefore, they were seeking a formal quashing or revocation of the relevant decisions, orders and actions even though they had been discharged or ceased to have effect.

**2 Whether there is any reason why the issues in the Appeals cannot be dealt with in a single consolidated Appeal.**

2.1 It was agreed by the parties at the hearing that, if the Appeals in respect of the issues set out in section 1.1 above were to continue, they could do so in a single set of proceedings.

**3 The jurisdiction of the Tribunal to hear all or any part of the Appeals.**

3.1 It was accepted by the Respondent that the decision to institute an inquiry under s. 8 of the Act and make the Freezing Order under s.18 of the Act were both within the jurisdiction of the Tribunal.

3.2 The Respondent did not accept that the sending of the Letter and Action Plan constituted a decision, order or direction that fell within the jurisdiction of the Tribunal. In advancing their arguments on this point the Respondent relied on the terms in which the letter of 9<sup>th</sup> November and the Action Plan were expressed. In particular they pointed to the statement at the start of the Action Plan that: *"The actions detailed below are the Commission's regulatory advice and must be implemented as soon as possible if not followed they risk being in breach of their legal duties and may be regarded as evidence of misconduct or mismanagement"*.

3.3 It is the Respondent's strong contention that the Letter and Action Plan constitute regulatory advice and not an exercise of its legal powers. It believes that the emphatic tone of the Letter and Action Plan were justified by the conclusion it had reached on the facts revealed in the course of the inquiry into the Charity. However, its counsel argued that this tone did not alter the fact that, in its view, the Letter and Action Plan gave regulatory advice only. The Respondent points out that the closure of the inquiry and

the lifting of the Freezing Order were not conditional on the Charity's compliance with the Letter and the Action Plan. The Respondent also drew my attention to the express statement in the letter of 9<sup>th</sup> November 2009 that:

*“However, in deciding what should be done about this, we have considered carefully all that has happened and decided to give the trustees a chance to work consensually with us and put steps in place to stop this happening again. On that basis we have decided that we will not at this stage, use our legal powers against the charity or trustees to direct this. We will provide you with regulatory advice and guidance in the form of the attached Action Plan and at the meeting we have suggested. Just because we have not used our powers against the charity, does not mean that everything is in order. It is important that you understand that we are still concerned about the breaches and mistakes that have taken place.”*

- 3.4 The Appellants responded to these arguments by pointing out that the decision to open an inquiry and make the Freezing Order formed part of a continuing act that still had effect on the Appellants. In addition, they pointed out that the Letter and Action Plan imposed a clear obligation on the Appellants to comply with the Action Plan and, by way of example, required the Appellants to ensure that the Charity recouped amounts paid to Mr Ghebre-Sellassie for expenses. Counsel for the Appellants argued that this latter requirement was to be viewed as having the effect of an order under the terms of the Act and was therefore within the jurisdiction of the Tribunal.
- 3.5 The Appellants were also of the view that the errors and flaws that they believe have been made in reaching the conclusions expressed in the Letter and Action Plan should be taken into account by the Tribunal in deciding whether the review of the Letter and Action Plan is within its jurisdiction. Both the Action Plan and a subsequent letter of 22<sup>nd</sup> December 2009 sent by the Respondent made it plain that the Charity would be subsequently monitored by the Respondent in order to make sure that it had complied with the obligations set out in the Action Plan. The Appellants argue that this is

further evidence that the Letter and Action Plan were intended to have a legal effect on the Charity and its trustees.

- 3.6 I have considered the arguments of the parties with great care, both those submitted in writing ahead of the hearing and those put forward at the hearing. There is plainly some dissonance between the directive tone and intended practical effects of the Letter and Action Plan on the one hand, and the advisory status that the Respondent intended it to have in regulatory and legal terms on the other. The express statement in the Letter and Action Plan that are set out above are clear enough. In addition to the extract from the Action Plan referred to above, I note that the letter states:

*“It is imperative that the measures outlined in the Action Plan are implemented as soon as possible. We will give you 6 months from the date of this letter to implement the changes and we will come back and visit you when we will complete a full inspection of the charity, ..... If it is not compliant and concerns arise about the capacity and capability of the trustees to discharge their responsibilities, or the trustees do not implement the steps in the action plan intended to put the charity back on a proper footing, then further breaches and concerns will be used as evidence of misconduct or mismanagement and we will need to review the use of our legal powers against the trustees and charity.”*

The letter also goes on to say that the Appellants would have the opportunity to comment on the accuracy of the report that is to be published at the end of the inquiry before it is published.

- 3.7 It is clear from the legislation establishing this Tribunal that the jurisdiction of the Tribunal to hear appeals against the acts or omissions of the Respondent was to be limited. Section 2A (4) of the Act establishes that the Tribunal has jurisdiction to hear and determine:

*“such appeals and applications as may be made to the Tribunal in accordance with Schedule 1C to this Act, or any other enactment, in respect of decisions, orders and directions of the [Charity] Commission”*

- 3.8 The Act does not seek to clarify or define what is meant by “*decisions, orders or directions of the Commission*”. Schedule 1C to the Act does however offer guidance on the use of these terms in defining the jurisdiction of this Tribunal. Schedule 1C contains a list of the decisions, orders or directions that may be the subject of an appeal to this Tribunal. For the purpose of determining whether the Letter and the Action Plan can be the subject of an appeal it is my conclusion, for the purpose of these Appeals, that all or some part of the Letter and Action Plan must constitute a decision, order or direction of a type that is listed in Schedule 1C. In determining whether the Letter and Action Plan or any specific action within them constitutes a decision, order or direction, I have taken particular account of the fact that Schedule 1C does not provide for any appeal against the outcome of an inquiry under section 8 of the Act. A finding of fact or other conclusion reached during the inquiry is not in itself a decision, order or direction which may be appealed to the Tribunal.
- 3.9 The Appellants have not sought to specifically identify the relevant provision of Schedule 1C into which their appeal should fit. The Appellants submit that the Letter and Action Plan and in particular, the requirement that; “*trustees and former trustees of the charity must account for payments and other benefits received but not expressly authorised by the Commission or the Charity’s governing document.*”, should properly be regarded as an order for the purposes of deciding on jurisdiction. I put it to counsel for each of the parties that the most likely basis upon which the Letter and Action Plan or individual actions within them could be regarded as a decision, order or direction that fell within Schedule 1C, might be if they were regarded as an “Order made by the Commission under section 19 A (2) of the Act which directs a person to take action specified in the order”. Such an Order is listed in Schedule 1C and so can be the subject of an appeal to the Tribunal. Both counsel were content with this approach. However I have considered all of the possibilities listed in Schedule 1C.
- 3.10 Having done so, it is my conclusion that the Letter and Action Plan and the requirements in the Action Plan that individual actions be undertaken do not,



in the particular facts and circumstances of this case, constitute a decision, order or direction falling within the scope of Schedule 1C. The Letter and Action Plan form a basis upon which directions, orders or decisions could be made if the requirements of the Letter and Action Plan are not met or addressed in a manner that the Respondents believe to be satisfactory. This may seem like a fine distinction to the Appellants and I have some sympathy with any confusion they may have felt over the precise legal or regulatory status of the Letter and Action Plan. However, in practice the distinction is of some significance. It permits the Respondent to make a finding of fact and then to inform the relevant charity of the potential consequences of this finding and permit the charity to take steps or to submit further representations in order to avoid any further action on the Respondent's part. This is the position in which the Appellants now find themselves. In these circumstances, there is no certainty that any action will be taken by the Respondent. In the event that the Respondent elects subsequently to make a decision, order or direction as a consequence of a finding of fact or any other conclusion reached in the inquiry or following the review of the Charity's response to the Letter and Action Plan, such a decision, order or direction may be the subject of an appeal (if submitted within the appropriate time limits) to this Tribunal. A finding of fact or conclusion reached in the inquiry which forms the basis for such decision, order or direction may then be open to consideration and challenge in any such appeal.

- 3.11 As a consequence of this conclusion, it is my decision that the part of the Appeal that relates to the issue set out in 1.1.3 above (the actions of the Respondent in reaching the conclusions set out in the letter of 9<sup>th</sup> November 2009 and in requiring the Charity's compliance with the Action Plan attached to that letter) is not within the jurisdiction of the Tribunal at this time.

#### **4 The Respondent's application to strike out.**

- 4.1 The Respondent has submitted an application to strike out the Appeal on the issues set out in 1.1.1 and 1.1.2 above. The Respondent is of the view that the Appeal in respect of these two issues:

- 4.1.1 Is out of time and there are no circumstances that justify an extension of time.
- 4.1.2 Is not within the jurisdiction of this Tribunal as the Tribunal may only consider a decision, direction or order that is extant or "remains on foot". Therefore the Appeal must be struck out pursuant to Rule 8(2) (a) of the Tribunal Rules.
- 4.1.3 Has no real prospect of success and therefore the Tribunal should exercise its discretion to strike out the Appeal pursuant to Rule 8(3) (c) of the Tribunal Rules.
- 4.1.4 Represents an abuse of process.
- 4.2 In considering the timing of the Appeal in respect of the issues listed in 1.1.1 and 1.1.2, it was accepted by the Appellants that the original decision of the Respondent to open an inquiry under section 8 of the Charities Act 1993 on 28<sup>th</sup> August 2008 and the original Freezing Order on the same date were out of time. The Appellants had to submit an appeal within 42 days of such decision and order being sent to them. The first Appeal submitted by the Appellants was received by the Tribunal on 4<sup>th</sup> November 2009.
- 4.3 This Appeal against the decision of the Respondent on 18<sup>th</sup> September 2009 pursuant to s.18 (13) and s.89 (5) of the Act to modify and extend the Freezing Order was made within the 42 day period prior to the submission of the Appeal and was therefore in time and within jurisdiction. This was accepted by both parties.
- 4.4 The Tribunal has the authority under rule 5 (3) (a) of the Tribunal Rules to extend or shorten the time for complying with the time limit for the submission of Appeals if it is fair and just to do so. The Appellants have invited me to do so in this case for the following reasons:
- 4.4.1 Each decision is, by virtue of the repeated renewals or by its continuing effect, a continuing decision.
- 4.4.2 The Appellant, Mr Ghebre-Sellassie suffered from ill-health during the period as a consequence of the actions of the Respondent.

- 4.4.3 The Appellants were unable to obtain legal advice due to the effects of the Freezing Order restricting the use of the Charity's funds to pay for advice.
- 4.5 I have considered the evidence and representations submitted by the Appellants on these points and the arguments of the Respondent. I am not persuaded that the time limit for an appeal against a particular decision or order should be extended merely because it has serious or long lasting effect or because it forms a part of a series of connected decisions, orders or directions some of which fall within the time limit for an appeal. There may be circumstances in which one or either of these arguments has some force in terms of enabling this Tribunal to deal with a case fairly and justly. However, I see no reason to decide that it is appropriate in this instance, where the effect of the decision and orders were clear at the outset.
- 4.6 I am similarly not persuaded from the limited evidence presented to me that ill health played a part in preventing either the Charity of Mr Ghebre-Sellassie from bringing an appeal during the relevant period following the original decision and Freezing Order and the subsequent reviews of the Freezing Order.
- 4.7 The Appellants' arguments in respect of their inability to obtain legal advice have more force. It is a troubling feature of this case that the Freezing Order issued to Lloyds TSB Plc does appear to have influenced the ability of the Appellants to obtain legal advice about challenging the Freezing Order. On 16<sup>th</sup> April 2009 the Respondent received a letter from a firm of solicitors acting for the Charity. I have not seen a copy of this letter. I have seen the Respondent's reply on 17<sup>th</sup> April 2009, which contains the following section:
- “As the charity's solicitor you will be aware that one of the Commission's concerns about this Charity is the governance and decision making. I understand that one of the trustees has been suffering from a serious and debilitating illness which has prevented him from communicating with the Commission or playing an active part in the management of the Charity. This leaves just two trustees, Mr Sellassie and Mr Johnston, although to date the Commission has only had contact with Mr Sellassie.*

*It is of course reasonable for the trustees to seek professional advice. However to enable charitable funds to be used to pay for the professional services, you will appreciate that it must be a proper decision for the charity to take i.e. a decision which is properly discussed and resolved at a quorate trustee meeting.”*

From subsequent correspondence with the Respondent (see the letter of 17 June 2009), I note that Mr Ghebre-Sellassie referred to the Respondent having, “*denied us access to our funds to denied us employ a lawyer*”. This point was repeated in the Appeal.

4.8 It is easy to accept that the Appellants may have formed this view if the reply that the Respondent gave to the solicitors who were considering advising the Charity led them to decline to act for the Charity. I do not think it fair or just for the Respondent to allow a position to continue whereby an order issued by the Respondent has the effect of hindering trustees from seeking legal advice about how to respond to that or another order or decision of the Respondent. This is of particular concern as the Respondents would have been aware in this case that the trustees were likely to need help to put the Charity on a proper legal footing. The Respondent should have taken steps to assess the effect of their letter of 17<sup>th</sup> April 2009 on the Charity’s ability to obtain necessary legal advice and should not benefit in these proceedings from their failure to do so. However, I note that the original decision to institute an inquiry into the Charity had been made many months prior to the Charity’s decision to seek legal advice. I have not seen any evidence or heard any arguments that lead me to conclude that if the Charity had taken advice at this point, it would have had any bearing on the Charity’s view of the Respondent’s decision of 28<sup>th</sup> August 2008 to open an inquiry, or its ability to pursue an appeal in respect of that decision. Mr Ghebre-Sellassie was seeking advice at that time in respect of the Respondent’s then current order to dissolve the Charity and the Freezing Order.

4.9 It follows from this conclusion that the part of this Appeal that relates to the issue at 1.1.1 above (the decision to institute the inquiry) is out of time and that I see no good reason to extend the time limit. The part of this Appeal

that relates to the issue in 1.1.2 above (the Freezing Order) is also out of time but, subject to consideration of the other issues in the application to strike out, I consider that it would be fair and just to extend the time limit in respect of the Appeal on this issue.

4.10 I will therefore go on to consider the Respondent's argument that the Tribunal does not have jurisdiction to hear appeals against decisions that have been discharged and that therefore under Rule 8 (2) (a) of the Tribunal Rules I must strike out this Appeal. In the light of my decision at 4.9 above that the part of the Appeal that relates to the decision to institute the inquiry is out of time, I need only consider this issue in respect of the part of the Appeal that relates to the Freezing Order.

4.11 The Respondent discharged the Freezing Order on 10th November 2009; five days after it had become aware of the Appeal to the Tribunal. I note that the Respondent has stated that the decision to revoke the Order was taken on 3<sup>rd</sup> November 2009, before it became aware of the Appeal. Counsel for the Respondent invited me to decide that this Tribunal can never have jurisdiction over a direction, order or decision that has been revoked, expired, discharged or otherwise is no longer extant. The decision of the House of Lords in R v Secretary of State for the Home Department, Ex parte Salem (1999 A.C. 450) was quoted as authority for this proposition. The timing of the events in these proceedings provides a warning of the potential dangers in drawing a general conclusion of this breadth. The notion that the Respondent can of its own volition exercise a power to take matters out of the jurisdiction of the Tribunal once proceedings have begun deserves serious consideration in due course. However I do not believe that there is a need for me to decide this general point in this case and I do not see anything in R v Secretary of State for the Home Department, Ex parte Salem that requires me to do so before reaching a decision in these proceedings. I shall restrict myself to making a decision on the particular facts and circumstances of this case.

4.12 In this case the Order that is the subject of the Appeal was unconditionally discharged by the Respondent within a few days of the Appeal being

submitted. The power of the Tribunal in the event that the Appeal against the making of the Freezing Order was to succeed would be to quash the Freezing Order, to add to it or to substitute another order. The decision of the Respondent to discharge the Freezing Order therefore offered the Appellants precisely the same practical remedy that they sought in the Appeal. It might have been thought at this stage that the Appellants had, in simple terms, 'won' their case on this part of the Appeal. The decision to continue with the Appeals arises, as I understand it, out of a desire to vindicate the reputation of the Appellants in order to assist the Charity in its future activities. It is not clear to me that a decision of this Tribunal on the appeal against the Freezing Order would have the effect that the Appellants seek. Nor is it clear that such an Appeal is the best means by which this goal could be achieved. Concerns about the service provided by the Respondent can be raised with the Charity Commission's Independent Complaint Reviewer and the Appellants continuing dealings with the Respondent may provide other opportunities to restore the reputation of the Appellants if they have indeed been unfairly damaged. In this case I do not consider it a good use of the Tribunal's time or of the energy or resources of the Appellants or the Respondent to continue with an Appeal in respect of the Freezing Order now that that order has been discharged and the Charity has regained control over the accounts and the funds within them. The Tribunal has no power to provide the remedy that the Appellants seek were the Appeal on the Freezing Order to be heard. In these circumstances it is my conclusion that that part of the Appeal that relates to the Freezing Order has no reasonable prospects of success if it were to continue.

- 4.13 It follows from the above that my decision is that, notwithstanding my concerns about the effect of the Freezing Order on the ability of the Charity to obtain legal advice, it is not appropriate for me to exercise my discretion to waive the time limits for the submission of the Appeal in respect of the initial order to freeze the bank accounts of the Charity or the extensions or modifications to this order that were issued prior to 18<sup>th</sup> September 2009. The parts of the Appeal that relate to such orders and decisions are therefore out of time. Furthermore, after considering the representations

made by the Appellants prior to the hearing and by Counsel for the Appellants at the hearing with regard to the Appeal against the Respondent's decision on 18<sup>th</sup> September 2009 to extend and modify the Freezing Order; I conclude that that part of the Appeal has no reasonable prospects of success for the reasons set out above and I should therefore strike out that part of the Appeal pursuant to Rule 8 (3) (c) of the Tribunal Rules.

## **5 The applications for extension of time and application to add new parties to the proceedings.**

5.1 These applications were agreed by both parties at the hearing, but in the light of my decision on the issues above, they have no further relevance.

## **6 Effect of this decision**

6.1 This decision on the preliminary issues in these proceedings leaves no further issues to be determined. Accordingly, these proceedings are finally determined in accordance with Rule 32(4) of the Tribunal Rules. This is the decision notice of the Tribunal for the purposes of Rule 38 (2) (a) of the Tribunal Rules.

## **7 Right of appeal**

7.1 An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for exercising this guidance are available on the Tribunal's website; [www.charity.tribunals.gov.uk](http://www.charity.tribunals.gov.uk).

Signed:

**Peter Hinchliffe**  
**Tribunal Judge**

**Dated: 9 February 2010**