



Appeal number: CA/2019/0007

**FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
CHARITY**

BETWEEN:

SAMSON OCHIENG

APPELLANT

- and -

CHARITY COMMISSION FOR ENGLAND AND WALES

RESPONDENT

**TRIBUNAL: Judge Peter Hinchliffe
Helen Carter-Shaw
Stuart Reynolds**

The Tribunal sat in public at Field House, London on 16th December 2019 and 31st January 2020.

The Appellant represented himself.

The Respondent was represented by Felix Rechtman, Head of Litigation at the Respondents.

DECISION

The appeal is dismissed.

REASONS

The Appeal

1. The Appellant, Mr Ochieng appeals against an Order made by the Respondents (the “Charity Commission”) on 13 February 2019 to disqualify him from being a trustee for any and all charities and from holding any office or employment with senior management functions in any or all charities for a period of eight years (the “Order”). The Order was made under s.181A of the Charities Act 2011 (the “Act”).
2. The Charity Commission notified Mr Ochieng on 25 September 2018 of its intention to disqualify him from being a trustee for a charity and provided a provisional statement of reasons (the “Provisional Decision”). The Charity Commission invited Mr Ochieng to submit representations in response to the Provisional Decision. A legal representative of Kenya Community Support Network, the charity with which Mr Ochieng is associated (the “Charity”), submitted extensive representations on 8 November 2018. On 13 February 2019, the Charity Commission sent a letter to Mr Ochieng setting out the conclusion of its review of the representations that it had received on the Provisional Decision (the “Decision Review”) and setting out the terms in which the Order would be made. The Order set out the Charity Commission’s conclusions that:
 - (i) Mr Ochieng was a charity trustee, officer, agent or employee at a time when there was misconduct or mismanagement in the administration of a charity and he was either responsible for the misconduct or mismanagement or knew of it and failed to take any reasonable steps to oppose it or facilitated it; and
 - (ii) Mr Ochieng is unfit to be a charity trustee; and
 - (iii) it is desirable in the public interest to make the Order to protect public trust and confidence in charities generally.

The Order took effect for eight years from 27 March 2019.

3. Mr Ochieng submitted an appeal against the Order on 20 March 2019. The grounds of the appeal are:
 - (i) That the decision to disqualify him was made in haste and without looking into all of the facts and circumstances. Mr Ochieng provided further documents in support of his position. and
 - (ii) He had discharged his duties as a co-coordinator of the Charity honestly.

Mr Ochieng asked for a suspension of the Order, which he believed infringes his rights.

The Charity Commissions’ response

4. The response of the Charity Commission to the appeal set out the background to the Order and provided extensive background material from their investigation into the Charity and Mr Ochieng. The Charity Commission stated that they had reduced the period of disqualification from 10 years to 8 years in response to the representations made by the Charity’s legal representatives on Mr Ochieng’s behalf. The Charity Commission stated that their view of the factors that justified the Order remained unchanged.

Legislation

5. Section 181A of the Act gives the Charity Commission the power to issue orders disqualifying a person from being a charity trustee or trustee for a charity.
6. The relevant parts of sections 181A and 181B of the 2011 Act are as follows:

“181A Disqualification orders

- (1) The Commission may by order disqualify a person from being a charity trustee or trustee for a charity.
- (2) The order may disqualify a person—
 - (a) in relation to all charities, or
 - (b) in relation to such charities or classes of charity as may be specified or described in the order.
- (3) While a person is disqualified by virtue of an order under this section in relation to a charity, the person is also disqualified, subject to subsection (5), from holding an office or employment in the charity with senior management functions.
- (4) A function of an office or employment held by a person (“A”) is a senior management function if—
 - (a) it relates to the management of the charity, and A is not responsible for it to another officer or employee (other than a charity trustee or trustee for the charity), or
 - (b) it involves control over money and the only officer or employee (other than a charity trustee or trustee for the charity) to whom A is responsible for it is a person with senior management functions other than ones involving control over money.
- (5) An order under this section may provide for subsection (3) not to apply—
 - (a) generally, or
 - (b) in relation to a particular office or employment or to any office or employment of a particular description.
- (6) The Commission may make an order disqualifying a person under this section only if it is satisfied that—
 - (a) one or more of the conditions listed in subsection (7) are met in relation to the person,
 - (b) the person is unfit to be a charity trustee or trustee for a charity (either generally or in relation to the charities or classes of charity specified or described in the order), and
 - (c) making the order is desirable in the public interest in order to protect public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order.
- (7) These are the conditions—

...

D that the person was a trustee, charity trustee, officer, agent or employee of a charity at a time when there was misconduct or mismanagement in the administration of the charity, and—

- (a) the person was responsible for the misconduct or mismanagement,
- (b) the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or
- (c) the person's conduct contributed to or facilitated the misconduct or mismanagement”.

181B Duration of disqualification, and suspension pending disqualification

- (1) An order under section 181A must specify the period for which the person is disqualified.
- (2) The period –
 - (a) must be not more than 15 years beginning with the day on which the order takes effect, and
 - (b) must be proportionate, having regard in particular to the time when a conviction becomes spent or, where condition B applies, would become spent if it were a conviction for the relevant disqualifying offence, and to circumstances in which the Commission may or must grant a waiver under section 181 where a person is disqualified under section 178.
- (3) An order takes effect –
 - (a) at the end of the time specified by Tribunal Procedure Rules for starting proceedings for an appeal against the order, if no proceedings are started within that time, or
 - (b) (subject to the decision on the appeal) when any proceedings started within that time are withdrawn or finally determined”.

7. Section 181B (4) of the Act also relates to the Commission’s power to suspend a person from being a charity trustee or trustee of a charity pending disqualification. Section 181C of the 2011 Act sets out the procedure that the Commission must follow when making a disqualification order under section 181A of the Act.
8. Schedule 6 of the Act sets out the decisions and actions of the Charity Commission that can be appealed, the persons who can bring such an appeal and the powers of the Tribunal is deciding such appeals and includes the following:

1 Decision, direction or order	2 Appellants/applicants	3 Tribunal powers if appeal or application allowed
Order made by the Commission under section 181A.	The persons are the person who is the subject of the order.	Power to— (a) quash the order in whole or in part and (if appropriate) remit the matter to the Commission; (b) substitute for all or part of the order any other order which could have been made by the Commission; (c) add to the order anything which could have been contained in an order made by the Commission

Background

9. Kenya Community Support Network (the “Charity”) is a company limited by guarantee incorporated on 12 February 1999 and registered with the Charity Commission on 27 May 2004 as charity number 1104003.
10. Mr Ochieng is one of the founders of the Charity. He was its director from 1999 to 2001 and its secretary from 2001 to 2011. It is agreed that he held the position of Volunteer Co-ordinator at the time that a statutory inquiry was opened by the Charity Commission. The Charity Commission regards Mr Ochieng as a trustee of the Charity as he satisfied the definition of a trustee under section 177 of the Act, being;
“Persons having the general control and management of the charity”.
Mr Ochieng denies that he acted as a charity trustee at the relevant time, but he is clear that he has had a long and close involvement with the Charity and takes great pride and interest in its work
11. The Charity Commission set out the reasons for their decision to make the Order in the Grounds of Defence that they filed in response to the appeal and at the hearing. In late 2016, the Charity Commission had received a detailed report from financial investigators appointed by Comic Relief, which identified a number of concerns about the Charity. The Charity Commission opened a regulatory compliance case and met with the Mr Ochieng and a trustee of the Charity on 26 October 2017 to discuss the concerns raised by Comic Relief. On 22 January 2018 the Charity Commission opened a statutory inquiry under section 46 of the Act (the “Inquiry”) into the Charity to examine a number of regulatory concerns, which included
 - The Charity’s expenditure and whether it was in furtherance of its objects for the public benefit.
 - Whether the Charity was being used for significant private benefit.
 - Whether there was mismanagement and misconduct in the administration of the Charity by the trustees.

12. On 12 February 2018, the Charity Commission issued an order to the Charity's bank freezing the Charity's bank account.

Agreed facts

13. Prior to the hearing and at the hearing Mr Ochieng and the Charity Commission agreed on the following matters, which the Tribunal found to be supported by the evidence.
- (i) The Charity's charitable objects in the governing document are as follows:
 - "A) To relieve poverty, sickness and distress among Kenyans and other Kiswahili speakers in the United Kingdom and Kenya.
 - B) To promote research into the conditions of life of the inhabitants of Kenyans and refugees therefrom and to disseminate the result of such research"
 - (ii) The Charity Commission listed five trustees of the Charity in late 2019 in the Register of Charities. Mr Ochieng was not one of them. Dave Muanga and Mary Thami were amongst the trustees at that time.
 - (iii) The Charity received grant funding from Comic Relief. In 2010 a grant of £485,915 spread over four years was awarded to help improve the living conditions of slum dwellers in the Homa Bay area of Western Kenya, where there is extensive poverty and a significant number of people suffering with HIV. Three further grants were awarded by Comic Relief in 2013 and 2015 for a total of £394,828. In total, the Charity received £798,243 from Comic Relief.
 - (iv) Under the terms of the grants, it was planned and agreed that 80% of the funding would be sent to an organisation in Kenya, which would implement the work required to meet the goals set by Comic Relief and the Charity.
 - (v) The main recipient of funds from the Charity for use in support of the Homa Bay community is the Maisha Trust.
 - (vi) An allegation of loss of funds had been made by an employee of Maisha Trust in October 2015 and the Grant by Comic Relief was suspended by Comic Relief. After explanations were received from Maisha Trust the grant funding resumed in January 2016
 - (vii) In June 2016 allegations were made to the Charity, and copied to Comic Relief, by the Chair of the Maisha Trust that almost half of the expected funds had not been received by the implementing organisations in Kenya and that some of these funds had been received or used by Mr Ochieng.
 - (viii) In response to these allegations, Comic Relief instructed a separate charity with experience in audit and financial investigation called (at that time) Mango to conduct an investigation into the Charity.
 - (ix) The report by Mango was issued in 2nd December 2016 (the "Mango Report"). It identified 18 companies in the UK with which Mr Ochieng or his wife had been involved since 1998. These included Sahara Communities Abroad, known as SACOMA, a registered charity (number 1091162), three commercial companies with 'Sacoma' in their name and Extreme Travel Ltd. Mr Ochieng was a director of all of these companies.
 - (x) The funding that the Charity provided to organisations in Kenya was sent to the Maisha Trust largely via intermediaries, rather than directly through the banking system. Amongst the intermediaries were SACOMA and Extreme Travel.
 - (xi) The use of intermediaries for money transfer is a familiar concept in Kenya and is referred to as the "Hawala" system.
 - (xii) Comic Relief visited the project in Homa Bay being funded out of their grants to the Charity and met with Maisha Trust and the Charity in 2014 and at other times. Comic Relief also filmed in Homa Bay on more than one occasion and used the project as an example of the activities that they wanted donors to fund in Africa. The 2014 visit report from Comic Relief concluded that the project had made good progress and had achieved a lot in a short period of time. The combination of work undertaken to help in developing and empowering those in the slums and work undertaken to assist those with HIV was particularly praised. It was recommended that work begin on applying for a continuation of funds. Three recommendations were made to improve financial and

administrative procedures. Comic Relief sent the Charity a congratulatory letter as a consequence and thanked them for their work.

(viii) Mr Ochieng and the Charity provided extensive banking records to show the movement of funds received from Comic Relief from the Charity to intermediaries or directly to recipients in Kenya and from the intermediaries to MaishaTrust.

(xiii) Maisha Trust did not provide any banking records to Mango or Comic Relief. Mango was unable to visit Maisha Trust or obtain records from them as they were informed that there was an investigation into Maisha Trust by the NGO Coordination Board of Kenya.

(xiv) The Charity Commission relied on the report prepared by Mango and did not conduct a fresh investigation.

The Mango Report

14. The conclusions in the Mango report were stark. Mango concluded that the Charity had prevented them from carrying out an investigation in Kenya and obstructed their investigation in the UK. They concluded:

“Even though the documents provided by KCSN [the Charity] on September 23rd 2016 fell well short of what had been requested by Comic Relief, they were sufficient to enable Mango to prove that there were serious irregularities.

There is evidence to suggest that Sam Ochieng fraudulently used at least £380,960 of the grant monies. There is also evidence to suggest that at least £570,671 of the expenditure was inadmissible.

A summary of the key financial flows and which monies have been used fraudulently and are inadmissible expenditure is shown on the following page”

15. Mango stated that the “strongest evidence of fraud available” was the payments of £61,800 to SACOMA and £84,530 to Extreme Travel. Mango identified a further £214,630 that had gone to Kenyan entities linked to Mr Ochieng, including CITI Trust in Kenya.
16. Following receipt of a response from the Charity to the report and additional records and documentation, a further review was carried out by Mango and a supplementary report issued on 15th June 2017. Mango concluded in the supplementary report that an additional £13,762 of expenditure could now be regarded as admissible. The Mango supplementary report noted that the bank statements that had been provided showed funds being paid by the Charity to UK entities, who then transferred them to organisations in Kenya and not directly to the Maisha Trust. Funds were paid by the Charity to SACOMA UK and Extreme Travel Ltd, who transferred funds to SACOMA Kenya and Extreme Safaris in Kenya respectively. Mango speculated that the reason for this approach might have been to avoid Kenyan exchange controls. Other organisations received cash; CITI Trust, Clear Resources, Little White Lilies and Africa Connections, in order to then send money to the Maisha Trust bank accounts. Mango noted that they still had no access to Maisha Trust’s bank records that might show the receipt of funds that originated with the Charity. Mango investigated the history of the Maisha Trust and noted that it had changed names and that other companies or organisation named Maisha existed and that some had links to Mr Ochieng and his wife. At the time of the report they concluded that the Maisha Trust, now known as the Maisha Development Trust, existed and operated in Homa Bay, whilst a separate Maisha Trust also existed which had its own bank account and was owned and managed by Mr Ochieng and his family.
17. Mango considered the letters from the NGO Co-ordination Board of Kenya that Mr Ochieng provided. These all related to an investigation by the NGO Board into the Maisha Trust and its Chair. The letter from the NGO Board referred to illegal bank accounts operated by Maisha and pointed out that the Chair and the Treasurer were sister and brother. Mango concluded that it was unusual that letters dealing with such a confidential investigation had become available to Mr Ochieng and the Charity and raised the possibility that the investigation had been instigated by Mr

Ochieng in order to discredit the Chair. No evidence for this conclusion was provided in the supplementary report,

The Hearing

18. The Charity Commission relied on three witnesses: Stephen Roake, Head of Compliance Visits and Inspections at the Charity Commission, who conducted the internal review of the decision by the Charity Commission to make the Order. Johanna Kelly, the Counter-Fraud Manager at Comic Relief and Tim Boyes-Watson, the CEO of Mango at the time they conducted their investigation and prepared their report.
19. The Charity Commission explained the reasons for the making of the Order.
20. The factual position in relation to the use and transfer of funds provide by Comic Relief to the Charity is complex. At the outset of the hearing, in order to assist in understanding the facts, the Charity Commission provided a chart showing 19 companies and organisations connected to Mr Ochieng. Both parties were clear that they could not track the movement of all funds once they had left the UK, as the records of Maisha Trust were not available. Uncertainty about the identities and status of individuals were also a feature of the cases. The Tribunal understood and both parties accepted that seeking to provide relief and support to some of the most deprived areas in the world must involve dealing with communities, individuals and systems that are undeveloped and inexperienced. It was clear that Comic Relief 's interest in the Homa Bay project was that it involved working with a community that was deprived of basic services and education as well as suffering with poverty and ill-health. The goal of empowering the community would be undermined if all parties involved had to meet minimum standards of IT, banking, accounting and administration. The Tribunal was not asked to infer that the lack of detailed records was always suspicious in itself and it did not do so.
21. The Charity Commission submitted that Mr Ochieng was a de facto trustee of the Charity and he had general control and management of the charity. They pointed to his position as founder of the Charity and the director and secretary between 1999 and 2011. He attended all trustee meetings during this period according to the minutes of the meetings and he continued to attend after he ceased to be secretary in 2011. He was one of three signatories on the bank account. He had stated that he attended all meetings of the trustees other than those sections of some meetings that related to himself and his wife. The Charity Commission argued that the tone adopted by Mr Ochieng in correspondence with trustees, the Maisha Trust and others was one of control. The premises used by the Charity were owned by Mr Ochieng or a company he owned. When the Charity Commission sought to meet with the Charity, Mr Ochieng and one trustee, Mr Muanga, attended and Mr Ochieng answered most of the questions. Moreover, Mr Muanga referred to Mr Ochieng training staff and the trustees being reliant on him.
22. The Charity Commission concluded that there were four broad areas of misconduct or mismanagement:
 - (i) The use of the "Hawala" system and the risk that this posed to charity funds.
 - (ii) The transfer of charity funds to Mr Ochieng and his wife and into his bank account. The Charity Commission referred to payments totalling £39,500 from the Charity to individuals with the surname Ochieng. This payment included £8,400 in mortgage repayment on Mr Ochieng's behalf.
 - (iii) The failure of the Charity to account to Comic Relief for the full grant that it had paid or to repay it when asked. After the Mango Report had been issued, Comic Relief had asked for repayment of £350,000 of the Grant paid to the Charity. No repayment had been received.
 - (iv) The failure to keep proper records
23. On the basis of these acts of misconduct or mismanagement, the Charity Commission argued that the Mr Ochieng was unfit to act as a charity trustee.

24. The Charity Commission submitted that it was in the public interest that he should be disqualified from acting as a charity trustee as a large sum of money was unaccounted for from one of the UK's largest and most high profile charities as a result of his misconduct and mismanagement.
25. Mr Ochieng stated that the Charity Commission had made a hasty decision without fully investigating the matter.
26. He had first started work on what became the Charity in 1986 when he and others in the Kenyan Community in the UK had been concerned about the need to support Kenyan immigrants with HIV. In 2004 the organisation had become a charity. He explained that his family is from Homa Bay and he was brought up in a slum so he was strongly motivated to help the community in Homa Bay. He had met the organisation that became the Maisha Trust in its then form in 2004 and started to work with them. It was run by a committee of local women and the organisation was unincorporated and lacked a bank account at the time. The committee had no experience of lawyers and could not travel to Nairobi and so Mr Ochieng and his wife had set up the Maisha Trust as a company and then transferred it to the committee of women in Homa Bay. Mr Ochieng said that this explained why he and his wife were shown as past directors and owners of Maisha Trust. It was not until 2008 that he approached Comic Relief for funding.
27. Mr Ochieng referred to the new information, in particular the banking records, that he had provided to the Charity Commission since the Mango Report was first produced. He provided extracts from the bank statements of the organisations that the Charity had used as intermediaries in making payments to Maisha Trust. He set out his response to the reasons relied upon by the Charity Commission in making the Order. Understandably, he focused on the allegations of fraud. Mr Ochieng made it clear that he could not obtain or provide records from Maisha Trust and that Maisha Trust and its Chair were being investigated for fraud by the authorities in Kenya.
28. Mr Ochieng was a trustee of SACOMA. He said that the Charity Commission had agreed that he could be a trustee and get paid for helping to run SACOMA. He is an expert in fund raising and he only gets paid if he is successful.
29. Mr Ochieng stated that the Charity sent payments to Maisha Trust via third parties in order to save the significant cost of banking charges and bank exchange rates. Comic Relief had stressed the need for UK recipients of funding to ensure that funds were transferred to the project being supported at minimum cost. He regarded bank costs, and in particular exchange rates, as a serious expense. He had used Extreme Travel, CITI Trust and SACOMA and he knew and trusted them all. This approach, which Mr Ochieng did not call an 'Hawala' system, worked by an organisation with UK and Kenyan operations setting off amounts due in Pounds Sterling and Kenyan Shillings between the UK and Kenyan operations without always transferring the sums. However, he said that the accounts of the companies show the movement of funds. All of the funds had been sent by the Kenyan entities to Maisha Trust and it was clear from the bank records that payments had been made. However, he could not prove that all of the funds have been received by Maisha Trust as they had refused to provide the records to him or Mango or to Comic Relief. He said that Maisha Trust may have been prevented by the NGO Coordination Board of Kenya from releasing such documentation.
30. Mr Ochieng referred to the investigation that the NGO Co-ordination Board in Kenya and the Kenyan Police had begun into the Maisha Trust and its Chair. He stated that the Charity Commission and Mango had relied on documents provided to them by the Chair of the Maisha Trust but that these were doctored or inaccurate. He explained that the Chair of Maisha Trust had a family connection with him and that she was personally motivated to attack him.
31. Mr Ochieng referred to the fact that Comic Relief had visited the project that the Charity was funding via the Maisha Trust many times and had always been satisfied. No alarms were raised.

He argued that if the level of funds that Mango had referred to had not been available to the project then Comic Relief would have realised when they visited or monitored the project.

32. He referred to a report prepared by an experienced community development consultant, Susanne Garnett, that the Charity had commissioned. Ms Garnett had identified some mismanagement in the Maisha Trust and suggested some improvements, which had upset the Chair. Ms Garnett provided a written statement to the Charity, which was provided to the Tribunal and the Charity Commission at the hearing. Ms Garnett stated that one of her major clients, as an international development consultant between 2009 and 2019, was Comic Relief. She confirmed that she had visited the Maisha Trust in January 2015 and had reported her concerns to the Charity and Comic Relief about the high level of control displayed by the Chair and the nervousness of staff in front of the Chair. She also expressed concern about the lack of board minutes and the signing of cheques by the Chair alone and a complete lack of clarity of financial record keeping. She had strong concerns about the honesty of the Chair, who displayed wealth that was out of keeping with her job as a teacher. Ms Garnett was not available as a witness and the letter was provided by Mr Ochieng during the hearing. The Charity Commission had no opportunity to question Ms Garnett. The Tribunal has taken account of its contents as a part of Mr Ochieng's submissions in the proceedings.
33. Mr Ochieng explained that the funds that his wife had received from the Charity were for her work as a consultant with considerable experience in the import and export of African agricultural products. The Kenyan client she had worked for, Bomet County Government, was grateful for the positive impact of her work. When UK charity funding had dried up the Charity had needed to find extra funds and the arrangement with Bomet County provided funds for training local people in export activities. His wife had led this activity and his daughter had been paid a small sum for showing representatives of Bomet County around London. He had also secured support and funding or sponsorship from others, including Western Union, to help keep the project and the Charity's activities going.
34. He had not used any funds from the Charity for any personal benefit. This allegation had been made by the Chair of the Maisha Trust after reforms and change had been suggested by the Charity and by Ms Garnett. He had acted with integrity throughout.
35. Mr Ochieng submitted a witness statement and made lengthy submissions. He was questioned by Mr Rechtman and by the Tribunal.
36. Mr Rechtman asked Mr Ochieng about documents that appeared to the Charity Commission to have been fabricated or to contain inconsistencies. The continuing involvement of one of the trustees, Ms Thami, was also questioned as she had stated to the Charity Commission that she had resigned. Mr Ochieng denied any impropriety in either respect.
37. Mr Ochieng was asked about the wisdom of making payments via SACOMA, which had entered into a Company Voluntary Arrangement ("CVA") in 2012 and went into liquidation in 2016. Mr Ochieng denied having any real knowledge of the insolvency proceedings, but he was clear that SACOMA could continue to trade whilst in the CVA.
38. Mr Ochieng said that he could see no risk in transferring funds through third parties and he continued to regard this as a cost effective method of operating. He did agree that it had become possible to make direct transfers by bank to Maisha Trust at a certain point as it had opened a pounds sterling bank account. After this the Charity had made some payments directly and some via intermediaries. He saw nothing improper in paying funds from the Charity into his bank account where he had followed procedures, which he always did. He also believed that proper procedure had been followed when the Charity elected to provide a consultancy agreement to his wife.

39. The funds that he received in his account were used to pay volunteers in cash and for other minor expenses where cash was required. This was necessary and not a risk he believed. The payment of two months instalments of his mortgage repayment was also justified, as he was overseas at the time and could not arrange to make a payment himself. It was a practical problem that the Charity had been able to help with.
40. Mr Ochieng said that he was not responsible for any misuse of the funds by Maisha Trust. Comic Relief had said that the local organisation must be given some independence. He said that the Charity would not repay any funds to Comic Relief as they had all been sent to Kenya for use in the project funded by Comic Relief.
41. Mr Ochieng explained that other trustees of the Charity had, when their health permitted, approved the payments and said that the minutes of the trustees meetings supported his submissions.

Findings of Fact and Law

A Disqualification Order

42. The role of the Tribunal in this appeal is to make the decision afresh on whether the Order should be made on a proper application of s.181A of the Act.
43. Under s.181A (6) an order disqualifying Mr Ochieng under this section may only be made if the Charity Commission or, in this case the Tribunal, is satisfied that each of three conditions are satisfied. These conditions are:
 44. Firstly, that one or more of the conditions listed in subsection 181A (7) are met in relation to Mr Ochieng. In this case, the Commission chose condition D from subsection (7). Condition D takes effect if Mr Ochieng was a trustee, charity trustee, officer, agent or employee of a charity at a time when there was misconduct or mismanagement in the administration of the charity, and
 - he was responsible for the misconduct or mismanagement,
 - he knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or
 - his conduct contributed to or facilitated the misconduct or mismanagement.
 45. Secondly, it must be concluded that Mr Ochieng is unfit to be a charity trustee or trustee for a charity (either generally or in relation to the charities or classes of charity specified or described in the order). The word ‘unfitness’ is not defined in the Act. ‘Unfitness’ must therefore be given its ordinary English language meaning. The Tribunal notes that the Charity Commission has issued guidance, which is not binding on the Tribunal, which states that;
 - “Conduct does not need to be deliberate. Non-deliberate conduct, for example conduct which is reckless, negligent, or done in wilful disregard, or failing to act, could demonstrate a person’s unfitness to be a trustee.”
 46. Thirdly making the order must be desirable in the public interest in order to protect public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order.
 47. If the Tribunal does determine that these conditions are met and an order should be made disqualifying Mr Ochieng from being a trustee of a charity, then the Tribunal must also determine the duration of the order and its scope. The scope may vary by reference to whether one or more charities are covered by the order and, if it is more than one, whether all charities or a class of charities should be covered and whether the disqualification should extend to senior management

functions as well as the trustee role. The expression ‘senior management role’ is defined in s.181(4).

48. In considering the application of section 181A of the Act, the Tribunal must consider the proportionality and reasonableness of any order that is the subject of an appeal.

Fraud

49. In setting out their case at the outset, the Charity Commission relied on the conclusion in the Mango Report that there had been fraud by Mr Ochieng. These allegations were repeated and explained in the witness statement of Mr Boyes-Watson. The Tribunal sought clarification of the legal and factual basis for this conclusion. In the course of giving evidence, it became clear that Mr Boyes-Watson regarded the reference to fraud in the Mango Report as being references to a high risk of fraud. He stated that Mango had found evidence of fraud and reported that to Comic Relief, however this was evidence that showed “a high risk of fraud”. He clarified at the hearing that he was not concluding that there had been fraud; he was concluding that there was evidence of potential fraud. Mr Roake in his evidence and Mr Rechtman in his submissions on behalf of the Charity Commission stated that the Charity Commission had relied on the Mango Report, including the supplementary report in making its decision. It had not conducted new forensic investigation, even after new evidence had been provided by Mr Ochieng. It had considered all of the representation and evidence received and taken these into account in coming to its decision. Ms Kelly in her evidence indicated that Comic Relief relied on the Mango investigation; that was the reason for it appointing Mango to conduct the investigation into the allegations made about Mr Ochieng. Comic Relief had not conducted a separate investigation.
50. Mr Ochieng was understandably concerned to challenge the allegations against him of fraud. In the light of the evidence from the witnesses, the Tribunal sought clarification of the Charity Commission’s position on these allegations. Mr Rechtman, on behalf of the Charity Commission, clarified that their position was that the evidence pointed to a risk of fraud. The Tribunal was aware that it was not necessary for it to find that Mr Ochieng had acted fraudulently in order to reach a decision on this appeal and it has not reached such a finding.

Conclusions

51. The Tribunal considered carefully all of the evidence and submissions provided to it and formed a view based on its own analysis of the evidence and submissions.
52. It was clear throughout the proceedings that considerable uncertainty existed about what had happened to the funds provided by Comic Relief to the Charity. From the evidence available to it, the Tribunal found itself unable to accept in full the positions originally advanced by either the Charity Commission or Mr Ochieng.
53. The Mango Report was relied upon by the Charity Commission and Comic Relief. The Mango Report set out facts and issues that raised clear and strong concerns and justified Comic Relief and the Charity Commission taking prompt action to avoid the risk of the further loss of charity funds. However, Mango had not been able to investigate matters in Kenya and neither Comic Relief nor the Charity Commission had sought to undertake an investigation about the action or inactions of people or organisations in Kenya. The Mango Report had set out conclusions about dishonesty by Mr Ochieng in unconditional terms. However, these could not be justified and Mr Boyes-Watson did not seek to defend them. The Tribunal found that the evidence before it did not justify a conclusion that Mr Ochieng had committed fraud.
54. The Tribunal also found that the evidence indicated that the Homa Bay project was extensive and successful for some years. A number of visits by Comic Relief and by Ms Garnett found progress had been made in implementing the multi-faceted project in a difficult environment. The Mango

Report referred to evidence of inadmissible expenditure amounting to well over half of the grant funding from Comic Relief. The Tribunal understands that evidence that establishes conclusively that expenditure was either admissible or inadmissible would only be available if the Maisha Trust has maintained complete records and makes them available to the parties. However, the Tribunal finds that it is unlikely that the progress reported by Comic Relief would have been achieved if the majority of funds up to the date of their last visit had been misappropriated at that time. On the evidence before it, the Tribunal is not in a position to come to any other conclusion on the extent of any misuse or misappropriation of funds that may have taken place.

55. The evidence from Mr Ochieng that the Kenyan authorities, including the Kenyan police, are investigating the Chair of the Maisha Trust for misuse of funds or theft was given little weight by Mango and the Charity Commission. The copies of communications from the authorities that Mr Ochieng provided point to a serious and targeted investigation. Some doubt has been cast on the authenticity or bona fides of the correspondence by the Charity Commission. The Tribunal is unwilling to conclude that the correspondence is fake or that the investigation has been instigated by Mr Ochieng. The Tribunal is unable to reach a conclusion about whether any charitable funds have been lost and, if so, whether they were misused before they were sent to the Maisha Trust or afterwards. In any event, the Tribunal finds that a conclusion on this aspect of the evidence is not essential in order to determine this appeal.
56. In considering the position advanced by Mr Ochieng, the Tribunal was not convinced by his argument that he is not in a controlling position in the Charity. The Tribunal accepts for the reasons given by the Charity Commission and set out in paragraph 21 above that Mr Ochieng was the dominant force in the Charity. The minutes of the trustee meetings confirm that most of the initiatives originated from Mr Ochieng and most of the actions were reported on by him. The question mark that exists over the documents produced by Mr Ochieng containing different signatures for Mr Muanga, the Treasurer, and referring to the presence of Ms Thami at meetings long after she had told the Charity Commission she had resigned were not resolved. Mr Ochieng's explanations were that Mr Muanga was very unwell and unable to undertake his tasks for long periods and his signature varied over time and that Ms Thami was too nervous to talk to the authorities. The Tribunal concludes from this that, at the very least, Mr Ochieng was exercising control over the Charity's bank accounts and filling the gap left by the poor health of the voluntary Treasurer and was comfortable dealing with the Charity Commission and other third parties without reference to some or all of the trustees. The evidence and submissions of Mr Ochieng establish that he acted with considerable freedom in running the affairs of the Charity. The Tribunal concludes that he had general control and management of the Charity and was a de facto trustee of the Charity during the period in which it received and distributed funds from Comic Relief.
57. The Mango Report and the Charity Commission recorded the following payments made to Mr Ochieng and to his family and to organisation connected with him:
- | | |
|-------------------------------|---------|
| Mr Ochieng's bank account | £ 7,750 |
| Mr Ochieng's wife | £30,950 |
| SACOMA | £62,000 |
| Extreme Travel | £84,500 |
| Mr Ochieng's mortgage account | £ 8,400 |
| CITI Trust | £80,000 |
- In addition, the Charity Commission referred to numerous withdrawals from the Charity's bank account at cash dispensers in the UK and to numerous phone, fuel, shopping and restaurant bills unsupported by invoices and amounting to over £15,000.
58. Mr Ochieng has had considerable time to explain the basis for these payments and why they were a proper use of charitable funds. The Tribunal does not accept that it was enough for Mr Ochieng to follow any procedures agreed by the Charity trustees from time to time, when dealing with a conflict of interest or handling charitable funds. Mr Ochieng was in a position to decide if those

procedures were adequate. He was also in a position to fill any gaps in the Charity's internal policies. In any event, his position in the Charity and his experience meant that it was reasonable to expect him to exercise some judgement in managing any conflict of interest or perception of a conflict of interest that arose as a result of his actions or his position in the Charity.

59. The Tribunal is similarly unpersuaded that Mr Ochieng and the Charity can wash their hands of the Maisha Trust because it was encouraged by Comic Relief to offer independence to organisations in Kenya. The Charity and its trustees must act with due diligence in administering charitable funds. This was encouraged and expected by Comic Relief. Whilst there are considerable practical difficulties in dealing with Maisha Trust and the project in Homa Bay, it was the Charity's responsibility to take such steps as were practical to monitor the use of funds to the extent that it was possible with the resource and experience available to the Charity. On the basis of the evidence before it and after taking account of the limited resources and experience of Mr Ochieng and the Charity, the Tribunal found that neither Mr Ochieng, nor the Charity, were sufficiently diligent or timely in monitoring the proper use of the charitable funds they were receiving and distributing.
60. Mr Ochieng was anxious to deny any and all of the allegations about his misconduct and mismanagement of the Charity. He was able to point to records of the movement of funds and to the difficulties that the Charity had to face in working in Kenya. However, the Tribunal was concerned that Mr Ochieng was unable to accept any responsibility for the Charity's inability to answer questions about the bulk of its expenditure in Kenya, the payments to organisations and individuals connected to him, or the withdrawal of cash or payments of personal expenses without any invoices. He was unable to justify or explain what alternatives had been considered or what safeguards had been put in place prior to Charity funds being paid to his bank account (in order, he said, to meet charitable expenses), to his wife for the provision of expert consultancy services and to organisations with which he was connected for payment services that were available from regulated entities. A clear objective explanation of the alternatives that had been considered at the time, or the safeguards that had been put in place, was required when funds were paid to accounts, individuals and organisations with which Mr Ochieng had a connection. Such explanations were not recorded at the relevant times and were not provided in the course of these proceedings.
61. The Tribunal was particularly concerned that the banking records of the Charity show that it was making cash transfers to Kenyan entities via the banking system at the same time that it was also making payment via companies and charities associated with Mr Ochieng. Mr Ochieng was asked why both means of money transfer were being used at the same time and he referred to the need to keep costs down. The Tribunal does not find this response to be logical or convincing. Mr Ochieng was asked why the Charity had not used Western Union in order to make transfers abroad when Western Union was one of the businesses that Mr Ochieng said had provided sponsorship to the Charity. He again stated that it was expensive, but could offer no other explanation. The Tribunal concluded that it was more likely than not that Mr Ochieng had an ulterior motive for making payments via SACOMA and Extreme Travel when banking and payment services providers were available and in the case of Western Union were, on Mr Ochieng's account, willing to help support the Charity.
62. The decision by Mr Ochieng to use charitable funds to make mortgage payments on his behalf is particularly troubling. The sums are modest compared to those referred to elsewhere in these proceedings, but it is hard to believe that a person of integrity would not see that such a use of charity funds was improper. Mr Ochieng's explanation that he was overseas and therefore unable to make the payment himself, makes little sense in the modern world and he was given the chance to offer further explanation but did not do so.
63. Mr Ochieng's initial denial of any knowledge of the CVA of SACOMA, whilst he was a director, was not credible. The Charity Commission pointed to the records at Companies House that showed that he had agreed to the CVA. His decision to continue to use this company as an

intermediary in making payments of charitable fund whilst it was in a CVA and before its liquidation was, at best, reckless.

64. The Tribunal was concerned to understand what consideration had been given to the possibility of private benefit accruing to Mr Ochieng and his family as a result of the payment of charitable funds via the bank accounts of Mr Ochieng, his family and organisation with which he had a connection. It was not clear that the Charity had taken any steps to identify and minimise this risk. It was unclear whose responsibility this was within the Charity and who, other than Mr Ochieng had decided how payment should be made to Kenyan recipients or volunteers in the UK. The Tribunal concluded that no effective procedures existed that would have prevented Mr Ochieng or the organisation he selected from benefitting from the use of charitable funds, even if such funds eventually found their way to the correct recipient.

Misconduct or mismanagement in the administration of a charity

65. In all of the circumstance of this case the Tribunal finds that that the Charity's actions in transferring large sums of cash from the Charity to accounts, individuals and organisations with which Mr Ochieng was connected over a number of years amounts to mismanagement in the administration of a charity.
66. The decisions of the Charity to use commercial organisations and a charity that was already in insolvency proceedings as a conduit for the transfer of charitable funds to an overseas recipient, instead of using regulated banking or payment services arrangements, was reckless and amounted to mismanagement in the administration of a charity.
67. The frequent withdrawal of charitable funds from cash machines and the payment of numerous personal expenses without any proper records of the recipient and purpose of the expenditure is mismanagement in the administration of a charity.
68. The use of Charity funds to pay mortgage payments of a trustee or employee amounted to misconduct in the administration of a charity.

Responsibility for the misconduct or mismanagement

69. The evidence establishes that Mr Ochieng was aware of all of the payments of charitable funds to accounts, individuals and organisation with which he was connected. He was aware of a conflict of interest and the need for this to be managed, but he disregarded alternatives that would have removed or reduced the conflict. He did little to ensure that the Charity kept records of how the conflict was to be managed, other than leaving the trustee meeting at which it was agreed that his wife would receive a consultancy agreement from the Charity. It is not clear how the Charity monitored or ensured that its funds were used solely in pursuit of the Charity's objects and without any private gain arising for Mr Ochieng or his family. The Tribunal finds that Mr Ochieng was either responsible for this mismanagement of the Charity, or he knew of this mismanagement and failed to take any reasonable step to oppose it.
70. The evidence establishes that Mr Ochieng made the decision to use commercial organisations and a charity, which was already in insolvency proceedings, with which he had connections as a conduit for the transfer of charitable funds. The tribunal finds that he was responsible for this mismanagement of the Charity.
71. Mr Ochieng was aware of the frequent withdrawal of charitable funds from cash machines and the payment of numerous personal expenses without any proper records. The Tribunal finds that Mr Ochieng was either responsible for this mismanagement of the Charity or he knew of this mismanagement and failed to take any reasonable step to oppose it.

72. The evidence establishes that Mr Ochieng requested that some of his mortgage payment be made by the Charity. The tribunal finds that he was responsible for this misconduct.

Unfitness

73. The misconduct, the repeated instances of mismanagement and the high level of recklessness shown by Mr Ochieng over a period of years lead the Tribunal to conclude that Mr Ochieng is unfit to be a charity trustee. Mr Ochieng was unwilling to admit during the course of these proceedings that he or the Charity was at fault in any way even after all of the relevant facts were available to him. He declined to say that he would act differently in the future as he was convinced that his actions were right. His refusal to admit any failings reinforced the Tribunal's view as to his unfitness.

Public Interest

74. The mismanagement and misconduct referred to above involves a clear risk that charitable funds received from donors are unaccounted for and individuals connected with the management of the Charity may be perceived to have benefited from the Charity. The impact on public confidence of such mismanagement and misconduct could be considerable for the Charity and other charities with which it has dealings. It is in the public interest, in order to protect public trust and confidence in charities generally, that Mr Ochieng be disqualified from acting as a trustee of any charity.

The Order

75. Mr Ochieng's misconduct involved control over money and showed a complete disregard for financial controls and risk management. The Tribunal therefore concludes that the disqualification should extend to senior management functions in any charity.

76. In all of the circumstances and after careful deliberation, the Tribunal found no reason to reduce the eight year duration of the existing disqualification Order.

77. The Tribunal reviewed its overall conclusions and those of the Charity Commission and found that the Order in the form issued by the Charity Commission represents a proportionate and reasonable means of achieving a necessary level of protection.

Decision

78. The appeal is dismissed.

79. A right of appeal, on a point of law only, lies to the Upper Tribunal against this decision. Any person seeking permission to appeal must make application in writing to this tribunal for permission to appeal no later than 28 days after this decision is issued; identifying the alleged error of law and state the result the person making the application is seeking.

Signed

Peter Hinchliffe
Judge of the First-tier Tribunal

Date: 20 March 2020

Date of Promulgation: 24 March 2020