FIRST-TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER

Appeal number: CA/2016/0008

CAMBRIDGE ISLAMIC COLLEGE

Appellant

- and –

THE CHARITY COMMISSION FOR ENGLAND AND WALES

First Respondent

CAMBRIDGE MUSLIM COLLEGE

Second Respondent

Tribunal: Judge Alison McKenna
Ms Carole Park
Mr Stuart Reynolds

Sitting at Cambridge County Court on 13 July 2017

The Appellant was represented by Matthew Smith, counsel.

The First Respondent was represented by Chris Willis-Pickup, in-house lawyer, Charity Commission.

The Second Respondent was represented by Gwilym Harbottle, counsel.

DECISION

The appeal is allowed.

The Direction of 12 September 2016 is quashed.

The Tribunal makes no further order.

REASONS

Background

1. This appeal concerns a Direction made by the Charity Commission, pursuant to s. 42 (1) of the Charities Act 2011, on 12 September 2016. The Direction required the Appellant charity to change its name.

2. The Appellant is Cambridge Islamic College ("CIC"), a registered charity[1] and company limited by guarantee[2]. CIC's Notice of Appeal is dated 17 October 2016. It asks the Tribunal to quash the Direction. The appeal was stayed on 19 October 2016 pending the Charity Commission's internal review, at which the Direction was confirmed on 8 December 2016. The stay was then lifted.

3. The First Respondent is the Charity Commission ("the Commission"). It resists this appeal. It filed its Response to the Grounds of Appeal on 30 January 2017.

4. The Second Respondent is Cambridge Muslim College ("CMC"), a registered charity[3] and company limited by guarantee[4]. CMC was joined to the appeal by consent on 2 February 2017 and filed its Response to the Grounds of Appeal on 2 March 2017. It was CMC's complaint to the Commission which resulted in the Direction being made. It asks the Tribunal to dismiss CIC's appeal.

5. The Tribunal held a hearing of the appeal in Cambridge on 13 July 2017. The Tribunal had before it a Hearing bundle extending to well over 2000 pages in addition to a plus-sized Authorities bundle. We heard the witness evidence but, due to pressure of time, adjourned with Directions for closing submissions to be made in writing.

6. We are grateful to all the representatives for their helpful oral and written submissions.

[1] Registered Charity number 1163646
[2] Company number 8663526
[3] Registered Charity number 1137219
[4] Company number 07031672

The Charity Commission's Direction

7. The Charity Commission's Direction dated 12 September 2016 directed the charity trustees of CIC to select and adopt a new name for the charity within four weeks. It gave reasons for its Direction as follows. Firstly, that in the Commission's opinion, the name "*Cambridge Islamic College is too like that of Cambridge Muslim College*" and, secondly, that "*the name is likely to give the impression that the charity is connected in some way with another body of persons (being Cambridge Muslim College) when it is not so connected*". The Commission's letter describes the basis for concluding that the legal test of "*too like*" in s. 42 (2) (a) (ii) of the 2011 Act is satisfied as that "*In the context of these two charities the word Muslim and the word Islamic are essentially interchangeable"*. It also states that "*We have been provided with sufficient evidence to show confusion in the public mind between the two entities (s.42(2)(d)) such that the name gives the impression that it is connected with...Cambridge Muslim College when it is not"*. The letter goes on to list the evidence the Commission has considered in making its decision and concludes that "*the public will be unable to differentiate between the two charities despite their differing objects."* The Commission concluded that it was satisfied there was evidence of actual confusion, the likelihood of further confusion, financial loss and future financial loss and evidence of reputational risk and that it was in the public interest to make the Direction.

The Agreed Facts

8. The parties helpfully provided the Tribunal with a schedule of agreed facts and a chronology. The important facts for us to record here are as follows:

   (i) CIC's objects are "*For the public benefit, the advancement of education, in particular but not exclusively through the provision of higher education in Islamic Studies"*. It was incorporated as a company in August 2013 and registered as a charity in September 2015.

   (ii) CMC's objects are "*to advance the religion of Islam for the public benefit in accordance with the beliefs and practices of the four recognised Sunni school of thoughts, including the provision of education and training of Muslim leaders and scholars to work in the United Kingdom and elsewhere, and through this to promote and advance religious harmony within the United Kingdom"*. It was incorporated as a company in September 2009 and registered as a charity in August 2010.

   (iii) The Commission was aware of a disagreement between CIC and CMC about CIC's name before it registered CIC as a charity. It wrote to CIC nine days after its registration, asking it voluntarily to change its name. The e-mail was not received and was re-sent in November 2015.

   (iv) CIC responded to the Commission that the names were not too similar and that there was no confusion. This has remained its stance throughout the case.

   (v) In February 2016, the Commission asked the two charities to try to resolve the issue between themselves but to keep it informed of progress. Representatives

of the two charities met and the two sets of trustees met, but no resolution was reached.

(vi) In June 2016, CMC's solicitors formally asked the Commission to make a s. 42 Direction. They submitted evidence of confusion by third parties about the charities' names.

(vii) In August 2016, the Commission sent a redacted copy of CMC's letter and supporting evidence to CIC for comment, stating that it was minded to make the Direction sought. CIC responded that it still did not accept there was a problem, that it could not change its name now as it was too well-known, and that it had unsuccessfully tried to discuss the matter with CMC.

(viii) On 12 September 2016, the Commission made the Direction now appealed.

(ix) The Commission's Direction was upheld in an internal decision review on 8 December 2016.

9. We also record that:

(x) In June 2017, solicitors for CIC made an open offer to resolve the dispute in the following way. Firstly, to adopt a strapline of "*Centre for Classical Arabic and Islamic Studies"* to be used underneath its name, in English and Arabic where used. The offer was to use the strapline in all materials going forward but not to existing stocks of printed material, for reason of cost. Secondly, to state in all fundraising communications for a period of two years that *"…Cambridge Islamic College is not affiliated with Cambridge Muslim College. Cambridge Islamic College and Cambridge Muslim College are entirely separate and independent institutions"* and to review the situation with CMC thereafter, with a view to extending the use of the statement for a year at a time up to a maximum of five years. The offer was not accepted by CMC, although it said it was willing to consider further offers.

(xi) The matter proceeded to a hearing in July 2017 at which both charities were represented by solicitors and counsel.

The Issues for Determination in this Appeal

10. An appeal against the Charity Commission's Order under s. 42(1) of the Charities Act 2011 requires the Tribunal to "*consider afresh*" the Charity Commission's decision (s.319 (4) (a) of the 2011 Act). In so doing, it can consider evidence which has become available subsequent to the Charity Commission's Direction (s.319 (4) (b) of the 2011 Act).

11. If it allows an appeal against a s. 42 Direction, the Tribunal may quash the Direction and (if appropriate) either remit the matter to the Commission or substitute for the Direction any other direction which could have been given by the Commission (column 3 of schedule 6 to the 2011 Act). If an appeal is allowed and remitted to the

Commission, it may be remitted (a) generally or (b) for determination in accordance with a finding or direction given by the Tribunal (s.323 of the 2011 Act).

12. On 9 May 2017, Judge McKenna formally ruled on the issues to be determined at the hearing owing to an absence of agreement between the parties. Her Ruling determined the matters which the parties were required to address in their evidence and submissions. The issues were ruled to be as follows:

    A. *Are the criteria for making a Direction under s. 42 of the Charities Act 2011 met under s. 42 (2) (a) (ii) or s. 42 (2) (d)?*
    B. *At what point in time should the Tribunal assess the Appellant's name against the criteria in s. 42 (2) (a) (ii) and s. 42 (2) (d) of the Act?*
    C. *To what extent is the existence of the Appellant's registered trade mark relevant to the exercise of the Tribunal's discretion?*
    D. *If the appeal is allowed, what remedy (if any) should the Tribunal order?*
    E. *In deciding what Order to make (if any) to what extent should the Tribunal take account of the Appellant's constitutional arrangements?*

The Legal Framework

13. The Charity Commission's statutory objectives under s. 14 of the 2011 Act include a public confidence objective, a compliance objective and an accountability objective. Its statutory functions under s. 15 of the 2011 Act include determining whether institutions are or are not charities, encouraging and facilitating the better administration of charities, identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action. Section 29 (1) of the 2011 Act provides that the register of charities shall be kept by the Commission in such manner as it thinks fit. Section 38 requires that the register must be open to public inspection at all reasonable times[5].

14. S. 42 of the Charities Act 2011 provides (where relevant) as follows:

    Power to Require Name to be Changed

    (1) *If this subsection applies to a charity, the Commission may give a direction requiring the name of the charity to be changed, within such period as is specified in the direction, to such other name as the charity trustees may determine with the approval of the Commission.*

    (2) *Subsection (1) applies to a charity if –*

    (a) *It is a registered charity and its name ("the registered name") –*

    (i) *is the same as, or*

    (ii) *is in the opinion of the Commission too like,*

    the name, at the time when the registered name was entered, of any other charity (whether registered or not),

    (b)…

[5] The register is available on-line at http://apps.charitycommission.gov.uk/ShowCharity/RegisterOfCharities/AdvancedSearch.aspx

(c)…

(d) the name of the charity is in the opinion of the Commission likely to give the impression that the charity is connected in some way with Her Majesty's Government or any local authority, or with any other body of persons or any individual, when it is not so connected, or

(e)…

(3) Any direction given by virtue of subsection 2(a) must be given within 12 months of the time when the registered name was entered in the register in respect of the charity.

(4) In subsection (2) any reference to the name of a charity is, in relation to a registered charity, a reference to the name by which it is registered.

(5) Any direction given under this section with respect to a charity must be given to the charity trustees.

15. S. 43 of the 2011 Act sets out the duty of charity trustees to give effect to a Direction under s. 42 *"regardless of anything in the trusts of the charity"* and s. 45 makes provision for the procedure for complying with a s. 42 Direction where the charity is also a registered company so that *"(3) the direction is to be treated as requiring the name of the company to be changed by resolution of the directors of the company"*.

16. The term "*too like*" in s. 42 (2) (a) (ii) is not defined in the 2011 Act. The Commission's published Operational Guidance (OG 330) provides at B7.1 that *a main name is too like another charity's main name if there is only a small difference between the two names.* Examples of ways in which names are "too like" are given at B 7.3 as follows:

> *"At a glance, they look so similar that it would be easy for one name to be mistaken for another"*
>
> *"They sound the same and at a glance look very similar, so that it would be very easy for one name to be mistaken for another"*
>
> *"The only difference between two names is that they use certain words or phrases which are commonly used in charity names, e.g. association, charity…"*

The OG also refers here to the fact that similar name checks would already have been made by Companies House on the incorporation of a charitable company, prior to its registration as a charity.

17. At B11, the OG offers guidance on s. 42 (2)(d) of the 2011 Act. Paragraph B11.3 states that

> *"The risk here is that the charity name might mislead the public about the charity's connections…Potential beneficiaries and grant-making bodies might also be misled about who or what the charity is connected with….the public may be misled into thinking that someone or some organisation is connected with a charitable cause when they or it is not"*.

> *"We should use the following key points to assess the risks of a name misleading the public: is the risk obvious because the name includes a word, term or name that the public will clearly associate with…another organisation?..."*

18. Our attention was drawn to the parallel regime for dealing with the registration of companies with names similar to existing companies,[6] established by the Companies Act 2006. This provides at s. 67 for the Secretary of State to direct a company to change its name if it has been registered in a name that is "*too like*" a name appearing at the time of registration in the registrar's index of company names. The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 provide for certain words, expressions, signs or symbols not to be regarded as the same and for certain matters be disregarded in making that assessment. The Companies Act regime provides a formal process for persons to object to a company's registered name and for the appointment by the Secretary of State of company names adjudicators to determine company names disputes.

19. We were referred to case law concerning company law disputes and passing off actions, but, so far as we are aware, there is no case law in relation to s. 42 of the 2011 Act or to its statutory predecessors.

20. We were referred to Parliamentary materials in *Hansard* as an aid to the interpretation of s. 42 of the 2011 Act. We doubt that the conditions for admission of extraneous materials are met in this case, as it seems to us that the section can be understood on a plain reading that does not lead to ambiguity or absurdity. If we are wrong about that, then we note that none of the materials to which we were referred may be described as a statement by the promoter of the Bill which discloses the legislative intention so as to fall within the rule in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

The Evidence

CIC's Witnesses

21. CIC called witness evidence from Mr Mohammed Faisal Khaffar, who is a charity trustee. He explained that "*CIC aims to promote awareness of different Islamic disciplines and is committed to bridging the gap between mainstream secular education and specialist Islamic studies*". He described CIC's 150 courses, 1200 students and 23,000 Facebook followers. He confirmed that CIC owns the trademark of its name in English and Arabic. He described how CIC grew out of an unregistered charitable association known as Muslim Education and Outreach Cambridge, which was founded in 2010. He stated that when incorporating the new company, he was aware of CMC but did not think that the names were too alike because he was aware of other charities co-existing, such as Muslim Aid and Islamic Aid. Mr Khaffar described discussing the name of CIC with CMC in 2014 and,

[6] So far as we are aware, the Companies Act procedure was not invoked in this case, despite the fact that both charities are registered companies.

although he was aware that CMC did not like it, he had thought they had decided to live with it as they did not communicate with him again until much later and did not make a complaint to Companies House when CIC was incorporated.

22. Mr Khaffar said that CMC was quite different to CIC in its objects, its activities, and its student in-take. He thought that CMC's teaching was for those with prior training in Islamic Sciences and so not aimed at the general public, as CIC's offering is. He took the view that the words "Islamic" and "Muslim" are distinct words with different meanings. He was not aware of any instances of confusion between the two charities, other than a problem with Google, which he had taken steps to correct. He explains that he contacted the person whose alleged confusion (and possible missed donation) was reported to the Commission in June 2016, but they had confirmed that they had not been confused. He exhibited that correspondence to his witness statement.

23. Finally, Mr Khaffar explained that a change of name would cause financial loss to CIC owing to the need to re-brand its extensive materials. He estimated that this cost would be in the region of half CIC's annual turnover.

24. The Tribunal heard from Mr Abdul Kayum Arain, who is the Chair of Cambridge Muslim Trust, which runs the Muslim Trust, which runs the Masjid Al-Ikhlas (Mosque) and Cambridge Islamic Centre. He is part of the Chaplaincy team at Anglia Ruskin University. Mr Arain's evidence was that there is no confusion between CIC and CMC in the Cambridge Muslim community. He did not think the names were similar either, stating that "Muslim" refers to the followers of Islam whereas "Islamic" pertains to the religion itself and is used for matters relating to its sources.

25. CIC also relied on the evidence of Mr Muhammad Pervaiz Malak, who is the Chairman of Cambridge Muslim Welfare Society, also known as Abu Bakr Siddiq Islamic Centre or The Cambridge Mosque. His evidence was that there has never been any confusion in the community or the public, that both organisations promote their courses at the Mosque but there is no confusion between the two. He stated that "Islamic" and "Muslim" are two different words and that the word "Islamic" is used specifically for matters connected to the religion itself and its sources whereas the word "Muslim" has much broader usage, describing those who follow Islam as well as anything which may be associated with them, though not necessarily with Islam.

CMC's Witnesses

26. CMC relied on the evidence of Dr S.M.Atif Imtiaz, who is the Academic Director of CMC. He gave evidence that CMC's mission is to develop Muslim faith leadership through world-class education, training and research based on a dialogue between the Islamic intellectual tradition and the ideas and circumstances of the modern world. He described CMC's four-year programme in Contextual Islamic Studies, on which there are currently ten students. It also runs short courses, lectures and talks and supports a number of research fellowships each year.

27. Dr Imtiaz's evidence was that whilst there is a technical difference between the words "Muslim" and "Islamic", they are practically or operationally interchangeable in the minds of the public from whom CMC's donors and supporters are drawn. He

described a number of instances of confusion *"about which charity is which"*. He also states that he is aware of three instances where someone has made a donation to CIC when they intended it for CMC, although none of those persons was willing to give evidence to the Tribunal. We describe the instances of confusion relied upon by CMC at paragraph 31 below.

28. The Tribunal heard evidence from Ms Davina Levy who is CMC's Development Officer. She described further instances of "*confusion between CMC and CIC*" – see paragraph 31 below.

29. CMC, without first seeking or obtaining the permission of the Tribunal, submitted an additional witness statement from Dr Imtiaz with its closing submissions, in which he sought to deal with some of the matters which had been put to him in cross examination. We are quite satisfied that it would not be fair and just for us to admit evidence which is provided only after the close of the hearing so that neither the other parties nor the Tribunal have an opportunity to test it. Accordingly, we refuse to admit the additional witness statement into evidence under rule 15 (2) (b) (iii) of the Tribunal's Rules and we have not taken it into account.

30. The Commission did not call any witness evidence.

Evidence of Confusion

31. Mr Smith and Mr Harbottle produced a very helpful annotated schedule of the evidence of the 25 instances of confusion relied upon by CMC. We summarise its contents below.

(i) *8/4/15 – FD was forwarded a fundraising e-mail from CIC by a friend. She e-mailed CIC and CMC jointly to check who had sent it. It is suggested by CMC that FD may have made a donation to CIC in error but there is no evidence of this.*

(ii) *May and June 2015 – two phone calls received by CMC asking for information about CIC courses. Ms Levy accepted this might have been due to the Google problems. No notes were taken.*

(iii) *Since June 2015, CMC said that it received up to four phone calls a week for CIC. Ms Levy said she took some such phone calls, and overheard others. No notes were taken.*

(iv) *18/7/15 – AS, apparently known to Dr Imtiaz, e-mailed him to ask if he was still at CMC or if Dr Nadwi (Dean of CIC) had taken over.*

(v) *9/9/15 – RA complained to CMC about the high level of communications received. Ms Levy inferred the e-mails were in fact from CIC as it e-mails more frequently.*

(vi) *30/10/15 – two people at the Association of Muslim Lawyers asked Ms Levy for details of course run by CIC after she said she was from CMC.*

(vii) *October 2015, CMC contacts potential donor/supporter EB, who asks why they are contacting him when he has already spoken to a trustee of CIC. EB was apparently irritated by being contacted twice in one day.*

(viii) *SC made a donation to CIC in the belief that it was CMC. She is closely connected to CMC but made a mistake. She did not ask for a refund.*

(ix) *11/1/16 – woman phones CMC about a CIC course after Google search. No note produced.*

(x) *2/2/16 – Davina Levy's evidence is that on this date fundraiser NR thought CMC and CIC were the same charity. Mr Khaffar denies that CIC had contact with NR.*

(xi) *5/2/16 – FAMES (a partner of CIC) mistakenly addresses a parcel to Mr Khaffar of CIC at CMC, using CMC's address. FAMES has since confirmed it is aware of the difference between the two charities.*

(xii) *26/2/16 – Singaporean Islamic Association phones CMC to arrange a meeting with CIC. Mr A in Singapore said this was due to the Google problem. Ms Levy accepted this may have been the case.*

(xiii) *5/4/16 – CMC receives unsolicited e-mail from property consultant addressed to CIC. The consultant has confirmed it is aware of the difference between the two charities. Ms Levy accepted this may have been caused by the Google problem.*

(xiv) *May 2016, publicity material produced by NZF describes CMC's chair or trustees as the Dean and founder of CIC.*

(xv) *August 2016, conference delegate asks CMC chair whether CMC and CIC are the same organisation. No further details available. The CMC chair did not give evidence of this himself.*

(xvi) *17/8/16 – a speculative job application from a student in Tehran was meant for CIC but sent to CMC.*

(xvii) *3/10/16 – a taxi driver confused CMC and CIC.*

(xviii) *4/10/16 – AH confused the two charities on Twitter, and was immediately corrected.*

(xix) *14/10/16 – Muslim academic asks Dr Imtiaz from CMC about on-line courses provided by CIC. No further information provided.*

(xx) *3/2/17 – an individual visits CMC's premises in search of a CIC event. No further information provided.*

(xxi) *3/2/17 -a local Muslim doctor tells CMC that she knows about it as knows Mr Khaffar of CIC and is on the mailing list. No further information provided.*

(xxii) *20/2/17 – doctor and wife of one of CMC's research fellows comments on CIC's virtual learning programme, thinking it was CMC's offering. No further information provided.*

(xxiii) *3/3/17 – a medical consultant writes to say he has been confused between CMC and CIC more than once, including by an advert for a talk at CIC which solicited donations. It is unclear how this letter came about.*

(xxiv) *March 2017, Ms Levy's evidence is that a donor made a donation of £200 to CIC in belief he is donating to CMC. No request for a refund. No further details provided.*

(xxv) *31/3/17 – Ms Levy states that an individual attended a CIC event thinking it was a CMC event.*

32. Although invited to do so, the Tribunal has not carried out is own Google searches as, in order to be fair, it would have needed to invite the parties to comment on its results.

Closing Submissions

33. The parties' positions evolved over the course of the pleadings and altered further after they had heard the other submissions and all the evidence. For this reason, we have described here their positions as set out in their closing submissions rather than their earlier iterations, although we have of course considered the earlier submissions.

34. The written closing submissions of all the representatives agree that the Commission's OG 330 was correct in describing a two-part test under s. 42(2) of the 2011 Act, but they differed as to how it should be applied by the Tribunal in re-making the decision, and the extent to which the Tribunal should have regard to the evidence of confusion in forming its opinion as to part one. The parties' closing submissions on issue A were as follows.

35. *CIC's submission* was that mere confusion is insufficient to make a Direction under s. 42. The statutory provision must be concerned with the integrity of the register because it engages registered names only. The two-part test requires the first stage to be conducted without reference to other evidence: one merely looks at the registered name and decides if it is too like, or likely to give the impression of a connection to, another charity.

36. The test of "*too like"* is, in CIC's submission, a "visual" test – do the names look similar? The Companies Act test has a long history and was it was submitted that it had been imported into the Charities Act with exactly the same wording, so it must be presumed that Parliament intended it to have the same meaning. Applying a visual test, CIC's name is plainly not "*too like*" CMC's name. For that reason, the Registrar of Companies was content to register CIC after CMC had already been registered. It was acknowledged that the Secretary of State (whose opinion is relevant under the Companies Act) and the Commission have different functions and duties, but submitted that whilst the question of who makes the "*too like*" decision varies, the question of how it is made should not.

37. As to s. 42 (2) (d), CIC's submission was that the test is whether the name is "*likely to"* suggest a connection, not whether someone had actually become confused. CIC's name is made up of three ordinary English words, none of which is so distinctive as to suggest a connection with someone else. CIC submitted that it had never been suggested that Jesus College Cambridge suggested a connection with Christ's College Cambridge, nor that Islamic Relief gives the impression of a connection with Muslim Relief. Insofar as it was appropriate to consider the evidence, CIC's witnesses did not regard the words "Muslim" and "Islamic" as interchangeable, but the test is not in any event one of conceptual similarity.

38. If the first stage of the statutory test was required to be fact-sensitive (as CMC suggests) then CIC wondered how the first and second stages of the test are to be distinguished. What would be left to consider at the second stage if the evidence was considered in the first? CIC notes that a fact-sensitive first stage would appear to require the Commission to collect evidence *before* considering whether the first stage applied, with resource implications for the Commission (especially as there is a 12-month window for making a Direction under s.42(2) (a)). This approach would also lead to the result that the answer to the first stage of the test could vary over time, according to the evidence.

39. CIC submitted that the public might be confused for all sorts of reasons: inattentiveness, ignorance, misunderstandings, as well as genuine confusion. However, as s. 42 is concerned only with registered names (and thus what the public will find if it consults the register) and evidence of generalised public confusion is not a sound basis for making a Direction under s. 42 of the 2011 Act.

40. *The Commission's* closing submissions on issue A were that the statutory tests were both met in this case. *"Too like"* is met where there is only a small difference between two names and this is a matter of opinion, to be formed by the Commission (or the Tribunal on appeal). In forming its opinion, the Commission is entitled to take into account all the evidence available to it (and could be criticised on public law grounds if it did not). The Commission suggested that the Tribunal should ask itself "*are the names so alike that this might-or will- cause a problem?"*. In taking this approach, it submitted that Parliament's decision to leave it to the Commission to exercise its discretion properly draws in consideration of its functions and duties and that this legitimately created a difference of approach to the Companies Act provisions. Likewise, the "*impression of a connection*" test was said to be *"in the opinion of the Commission"* so that it must take all the circumstances into account.

41. The Commission submitted that s. 42 of the 2011 Act should be given its ordinary meaning and that there was no basis for considering extrinsic material as an aid to construction. As to the circumstances of this case, it submitted that CIC's name was too similar to CMC's name because two out of three words were the same, and two of the shared words refer to the same location and the same activity. It submitted that the third word "Muslim" or "Islamic" is one that can be used interchangeably (even if to do so would be technically incorrect). It disputed that s. 42 was concerned only with the integrity of the register, and suggested that the register should be viewed as a "guarantor" against confusion, so that if people are confused on the ground then they can check the register.

42. As to the evidence of confusion, the Commission submitted that it has to be satisfied of the likelihood of confusion only, so that evidence of actual confusion carried weight. In respect of CIC's criticism of CMC's evidence, it commented that it is difficult to obtain evidence of confusion because people may not know they are confused or may be embarrassed about it.

43. *CMC's submissions* on issue A were that there is no proper basis for concluding that s. 42 was intended to be applied, as CIC suggests, in the same way as the Companies Act provisions. S.42 (2) (a) (ii) refers to *"any other charity (whether registered or not),"* so suggests that the legislative intention is wider than protecting the integrity of the register. CMC argued for a fact-sensitive approach which allows the Commission to consider the risk of confusion, complaints and disputes and to exercise its discretion accordingly.

44. As to s. 42 (2) (d) and the *"impression of a connection*", CMC submitted that this is clearly different in nature to a visual test, as it necessarily involves an understanding of the context in relation to which evidence may be considered. CMC argued for a broad multi-factorial assessment in relation to both statutory provisions. In CMC's submission, this should include, firstly, the fact that CIC's witnesses had accepted

that the Oxford English Dictionary definition of "Muslim" as meaning "relating to Muslims or their religion" was correct, suggesting that the names are too alike; secondly, the context of the two charities operating in the educational field in Cambridge and with a degree of "overlap"; thirdly, the evidence of actual confusion relied on by CMC, including of misdirected donations; fourthly, the Google problems which are said to stem from the fact the names are *"too like"* each other. CMC submitted that Mr Arain and Mr Malak's evidence was of no real probative value because they had accepted they had not carried out a survey of their members but had only consulted their (small) committees. CMC challenged CIC's evidence about the cost of re-branding.

45. In answer to Issue B, it was agreed by all parties that s. 42(2)(a)(ii) is clear that the first stage of the test (whether the names are "*too like*") falls to be considered at the date of registration of CIC (September 2015). In relation to s. 42 (2) (d), CIC submitted that both stages of this test fall to be considered as at the date the Tribunal makes its fresh Decision, but CMC submitted that the first-stage test of "*likely to give the impression of a connection*" should be assessed by the Tribunal as at the date the Direction was made. The Commission agreed with this view.

46. All parties agreed that the time at which the Tribunal should consider whether to exercise its discretion to make a fresh Direction is the date on which the Tribunal makes its Decision.

Conclusion

47. We set out below our conclusions on issues A and B. In the light of those conclusions, we have not found it necessary to go on to determine the remaining Issues.

48. We are satisfied that s. 42 of the 2011 Act requires the application of a two-stage test. In this case, the first stage involves an assessment of whether the criteria under s. 42 (2) (a) (ii) or s. 42 (d) are met. If that threshold is passed, then the second stage involves consideration of whether, in all the circumstances, discretion should be exercised under s. 42 (1) to make a Direction. This approach arises from a plain reading of the statutory provisions. It was agreed by the representatives, and we note that it reflects the Commission's existing guidance in OG 330.

S.42 (2) (a) (ii)

49. We agree with CIC that the first-stage test of *"too like"* in s. 42 (2) (a) (ii) is a simple visual or aural test. We note that the Commission's OG repeatedly refers to assessing the similarity of names *"at a glance"*, which suggests that a similar approach was envisaged.

50. We do not go so far as CMC in adopting a multi-factorial approach to stage one, or so far in the other direction as CIC in ruling out the consideration of evidence in stage one at all. We agree with the Commission that it should not be precluded from considering all the relevant circumstances of a case when it forms its opinion on this first-stage test. However, it seems to us that the only evidence that it would be appropriate for it to consider at the first stage would be evidence directed towards the

question of the visual or aural similarity of the names at the time of registration. It does not seem to us that it would be reasonable for the Commission to take into account evidence of generalised confusion or other problems arising at a later date at this first stage.

51. In considering the matter afresh as we are required to do, we find we are not satisfied that the words "Muslim" and "Islamic" are "*too like*" each other when applying a visual or aural test. They are obviously different words, which look and sound different. We accept that some confusion between them as terms is possible if one takes a conceptual approach, but that is not in our judgement the test to be applied. It seems to us that the very specific time frame for making the stage one assessment, being "*the time when the registered name was entered in the register,*" supports our interpretation of the test as a visual or aural one, as it seems unlikely that a view about conceptual confusion could reasonably be formed at that time.

52. We acknowledge that the charities' names in this case include two identical words, but there are many other organisations with the words "*Cambridge*" and "*College*" in their names and it has understandably not been suggested that the test is failed for this reason alone. In all the circumstances, we conclude that the first stage of the s. 42(2)(a) test is not met in the circumstances of this case.

S. 42 (2) (d)

53. We agree that the two-stage test under s. 42 (2) (d) is likely to involve greater reliance on context at the first stage. The Commission, as a specialist registrar, must be able to use its knowledge of the register and the charity sector in forming a view about the likelihood that a name would give the erroneous impression of a connection with another charity. We note that this section goes wider than requiring an assessment of the risk of confusion with another charity and is directed at the risk of the impression of a connection with "*any other body of persons*". Once again, we take the view that the Commission is able to take into account relevant evidence, but that evidence of generalised confusion would not be sufficient. If CIC had called itself *Cambridge University Islamic College*, then we can see that there was a likelihood of giving the impression that it was connected with Cambridge University when it was not. However, we find ourselves at a loss to see how CIC can reasonably have been thought to have given the impression that it is connected with CMC. We conclude that the first stage of the s. 42 (2) (d) test is not met in the circumstances of this case.

Remedy

54. Our conclusions above are sufficient to dispose of this appeal in favour of the Appellant. If our conclusion had been that either, or both, of the statutory tests was met in this case, then we would have gone on to consider the evidence of confusion for part two of the two-part test so as to decide whether to exercise our discretion to make a Direction. We find that this exercise would have presented us with considerable difficulty for the following reasons. Firstly, CMC's evidence, taken as a whole, is directed towards a generalised confusion as to which charity is which, or which charity provided which service, or who worked for which charity. It is not directed towards the statutory tests. We note in particular that, in relation to the *"likely impression"* test under s. 42(2)(d), there was no evidence at all before us that people thought CIC was a sub-set, a satellite, a sister organisation, a branch or that it

was otherwise connected to CMC. Evidence of generalised confusion is not evidence of the impression of a connection.

55. Secondly, whilst we are able to consider evidence which would not be admissible in a civil trial, we agree with CIC that CMC's evidence lacked evidential weight. It contained much hearsay, and was frequently adduced in a manner which left the other parties and the Tribunal unable meaningfully to test it because we were presented with the anonymity of the person whose confusion was relied upon. An application under rule 14 of the Tribunal's Rules to protect a person's identity could have been made but was not. We were also unable to satisfy ourselves that some of the expressions of confusion relied upon were genuine and spontaneous as claimed, or whether they had in fact been made in response to a request from CMC for support. This was because CMC did not seem to appreciate the evidential impact of compliance with the Tribunal's direction of 24 April 2017 requiring it to give standard disclosure of "*all documents in their control containing or recording communications to or from…persons said to have been confused"*. At the hearing, CMC claimed some difficulties in complying with that Direction, but they had not previously applied for it to be varied or set aside.

56. Finally, we note that the alleged confusion concerning a potential donation, which had been relied upon by CMC in its original complaint to the Commission, and further relied on by the Commission in making its Direction, was no longer relied upon by CMC at the hearing because CIC had produced for the Tribunal direct evidence from the person concerned which refuted CMC's original case. We accept that these are difficult matters of which to obtain evidence, but we doubt that the evidence presented to us was sufficiently robust for use in legal proceedings. The weight of the evidence is also relevant to the question of what order, if any, we should now make.

57. Whilst our task is to make the Commission's decision afresh, rather than to critique the Commission's decision-making, we record here our view that the Direction which was made on 12 September 2016 gave inadequate consideration to a number of important factors. These were, in no particular order, the failure to consider the time at which the s. 42(2) (a) (ii) test is required to be applied; the absence of any evidential basis for the conclusion that the words "*Muslim and Islamic are essentially interchangeable*"; and the reliance on evidence of general confusion as satisfying the test of one charity giving an impression that it is connected to the other. It also seems to us that the Commission elided the two-stage test, despite its own clear guidance in OG 330 paragraph E3.1, by considering second-stage evidence as relevant to the first stage of the test and finally that it failed to consider, when weighing the question of proportionality, the possible financial impact on CIC of the re-branding which would be required by its Direction. We note that the Commission's internal review took a different approach to these issues in reaching the same conclusion, but that is not the decision now under appeal.

58. Our conclusion is that the appeal against the Direction should be allowed and that the Direction made on 12 September 2016 should be quashed. We have gone on to consider whether we should make a fresh s. 42 Direction, or another Order, or no Order at all. In doing so, we have regard to the Commission's stated approach in its OG that a s. 42 Direction is a last resort to be used in exceptional circumstances. We share that view.

59. As we are not satisfied that the statutory basis for making a s.42 (1) Direction is met in this case, for the reasons given above, it follows that we do not consider that we can, or should, make a fresh Direction under that section.

60. We have considered whether we should make any other sort of Order in these particular circumstances, but it has not been submitted to us that any other Order would be appropriate. The Commission is at liberty to consider whether any of its other powers might be used to assist these charities to reach a solution, but we do not consider it appropriate formally to remit the matter to the Commission in circumstances where we are not satisfied that an exceptional case for regulatory intervention is met.

61. In deciding not to remit this matter to the Commission, we express the hope that this dispute can now be settled between the parties so that further expenditure of charitable funds on regulatory or legal costs can be avoided. We regard CIC's settlement offer (see paragraph 9 (x) above) as a sensible start which can doubtless be refined through formal or informal mediation. CIC offered to give a formal undertaking to the Tribunal to proceed in the manner suggested but the Commission suggested that a contractual agreement between the charities may be more appropriate (as the Tribunal would have difficult enforcing an undertaking). These are the sort of discussions we hope will now take place.

62. In entreating these charities to settle their differences informally, we echo the sentiments of Mr Justice Walker in *The British Diabetic Association v The Diabetic Society and Others* [1996] FSR 1 that:

"*Charities solicit donations from the public…in the expectation that donations will be well spent on furtherance of the charity's purposes. Even for a lawyer it is a difficult mental feat to recognise this very expensive litigation as helping th[ose]…whose subscriptions and gifts will be the ultimate source for payment of the lawyers' bills".*

(Signed)

Alison McKenna **Dated: 29 August 2017**

Principal Judge