



Appeal number: CRR/2014/0001

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

**THE TRUSTEES OF THE ETHIOPIAN ORTHODOX Appellant
TEWAHDO CHURCH
ST. MARY OF DEBRE TSION LONDON**

- and -

**THE CHARITY COMMISSION FOR Respondents
ENGLAND AND WALES**

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in Chambers on 23 June 2014

Upon the Tribunal having considered representations from the parties as to whether this appeal should be struck out

IT IS DIRECTED

- (1) that this appeal is not struck out and shall proceed to a hearing;
- (2) that the Respondent shall file its Response to the Appellant's application within 28 days of the date appearing below;
- (3) that the parties have permission to apply for further directions.

REASONS

1. The Charity Commission opened a statutory inquiry into the charity on 31 March and informed its trustees by letter dated 9 April 2014. The Appellants applied promptly to the Tribunal on 14 April 2014.

2. The Charity Commission then informed the Appellants' solicitors and the Tribunal on 12 May that it had closed the inquiry. The Tribunal asked the Appellants' solicitors to confirm their position in the light of the information that the inquiry had been closed. They replied that they still wanted the Charity Commission to file its Response. The Charity Commission's Response was due to be filed on 15 May 2014, but it had already closed the inquiry by that date. I was satisfied at that stage that, bearing in mind the overriding objective, it would not have been fair and just to require it to file a Response in the circumstances and so directed that it was not required to do so pending receipt of the Appellants' representations as to why the appeal should not be struck out. I invited the Appellants' representations as to whether their application to the Tribunal had a reasonable prospect of success bearing in mind that, as the inquiry had been closed, there was no remedy that the Tribunal could order under its powers in column three of schedule 6 to the Charities Act 2011.

3. I am grateful to the Appellants for the representations provided by their solicitors on 13 June. Those representations may be summarised as follows:

(a) That the Appellants have two applications before the Tribunal: firstly an appeal against the reasonableness and proportionality of the Charity Commission's decision to open an inquiry and secondly an application for the review of reviewable matters;

(b) That the reputation of the charity has been damaged by the Charity Commission's opening of an inquiry, which has been made known to third parties and to the media;

(c) That the decision to open the inquiry was not made on reasonable grounds as the Charity Commission's decision was based upon a misinterpretation of the charity's governing document;

(d) That the Tribunal has continuing jurisdiction to decide whether the decision to open the inquiry was lawful notwithstanding the closure of the inquiry;

(e) That the Tribunal should have served the Appellants with notice of its intention to relieve the Charity Commission of its obligation to file a Response and should have enforced strict compliance with the time limits for the filing of the Response under the Tribunal's Rules, following *HMRC v McCarthy and Stone* [2014] UKUT B1 (TCC);

(f) That the Applicant's case does have a reasonable prospect of success notwithstanding the closure of the inquiry because the Charity Commission has accepted that its initial interpretation of the charity's governing document needed further clarification;

(g) That the Charity Commission's closure of the inquiry does not address the question of the lawfulness of its decision to open the inquiry and to have kept it open between 31 March and 12 May 2014 and to have publicised that fact. The Charity Commission's decision so to act is within the jurisdiction of the Tribunal and can still be adjudicated upon.

4. I asked the Charity Commission to respond to the Appellants' submissions, which it did on 20 June. These may be summarised as follows:

(a) It is acknowledged that the decision to open the inquiry was partly based on the trustees not complying with a request to do something which

it now appears they may have had no power to do. For that reason it was considered appropriate to close the inquiry and the Charity Commission has made a public statement to this effect;

(b) As the inquiry is now closed, there is no further remedy that the Tribunal could order under the entry for section 46, at column three of schedule 6 to the Charities Act 2011 and therefore the Appellants' application to the Tribunal has no reasonable prospect of success;

(c) The continuation of these proceedings would lead to unnecessary costs of public funds and court time and the Tribunal is requested to strike out the proceedings under rule 8 (3) (c) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009;

(d) In the event of any further regulatory action being taken, the Appellants will have an opportunity to challenge this in the appropriate way.

5. I am concerned that the Appellants' solicitors may have misunderstood the jurisdiction of the Tribunal in this matter. They appear to consider that the Tribunal has jurisdiction to hear both an appeal by way of rehearing against the decision to open the inquiry and, additionally, the power to conduct a review of that decision. This is not in fact the case. The statutory provisions in the Charities Act 2011 are as follows:

"319 Appeals: general¹

(1) Except in the case of a reviewable matter (see section 322) an appeal may be brought to the Tribunal against any decision, direction or order mentioned in column 1 of Schedule 6.

321 Reviews

(1) An application may be made to the Tribunal for the review of a reviewable matter.

(2) Such an application may be made by—

(a) the Attorney General, or

(b) any person mentioned in the entry in column 2 of Schedule 6 which corresponds to the entry in column 1 which relates to the reviewable matter.

(3) The Commission is to be the respondent to such an application.

(4) In determining such an application the Tribunal must apply the principles which would be applied by the High Court on an application for judicial review.

(5) The Tribunal may—

(a) dismiss the application, or

(b) if it allows the application, exercise any power mentioned in the entry in column 3 of Schedule 6 which corresponds to the entry in column 1 which relates to the reviewable matter.

¹ <http://www.legislation.gov.uk/ukpga/2011/25/section/319>

322 *Reviewable matters*

(1) *In this Chapter references to reviewable matters are to—*

- (a) *decisions to which subsection (2) applies, and*
- (b) *orders to which subsection (3) applies.*

(2) *This subsection applies to decisions of the Commission—*

- (a) *to institute an inquiry under section 46 with regard to a particular institution;”*

6. It follows that the Tribunal’s only jurisdiction in this matter is to determine an application for a review of the decision to open the statutory inquiry. The Tribunal has no power to conduct a re-hearing of that decision. In determining the application for a review, the Tribunal must apply the principles that the High Court would apply on an application for judicial review, and must either dismiss the application or, if it allows the application, it may exercise the powers in column three of schedule 6 to the Charities Act 2011.

7. Notwithstanding the apparent error in the Appellants’ understanding of the Tribunal’s jurisdiction (for which I do not criticise them at all, as this is an extremely complex and esoteric area), their submissions make the very good point that the Charity Commission’s administrative decision to close the inquiry does not address the lawfulness of its decision to open the inquiry in the first place. Parliament clearly intended that charities which are subject to a decision to open a statutory inquiry should have the ability to challenge the lawfulness of that decision by way of a review by the Tribunal and I am concerned that Parliament’s intention that there should be transparency and accountability in such matters could be frustrated if the Charity Commission were able to deprive the Tribunal of jurisdiction simply by closing the inquiry. There are obviously reputational issues at stake for charities which are known to have been subject to a decision to open an inquiry, and I am concerned that these may not be ameliorated by the mere closure of that inquiry.

8. The Charity Commission’s submissions rely in part upon the Tribunal’s inability to order the closure of an inquiry that has already been closed. I accept that this is the case. However, as I have noted above, the Tribunal’s power to exercise the remedies in column three of schedule 6 to the Act is discretionary. This means that it would be perfectly possible within the statutory framework of the 2011 Act for the Tribunal to hear the application for review and allow the appeal without then ordering any particular remedy. It seems to me that this possibility undermines the Charity Commission’s argument because whilst the closure of the inquiry deprives the Tribunal of the availability of a discretionary remedy, it does not apparently deprive the Tribunal of jurisdiction to determine the application for a review. It seems to me that there may be a fundamental difference between reviews and appeals in this regard. In an appeal by way of re-hearing, the *rationale* for bringing an appeal is to have a fresh decision made by the Tribunal. In cases where the fresh decision had already been taken by the Charity Commission, it might make no sense to proceed further. However, in the case of a reviewable matter, there is no right to a fresh decision but there is an opportunity for the Appellant to challenge the reasonableness, fairness, proportionality and so forth of the decision which is amenable to review. I am troubled by the suggestion that a charity should be deprived of this opportunity by administrative action on the part of the Government body whose decisions are subject

to review. This would leave that charity without a remedy in cases of unfairness. It seems to me that, in making separate statutory provision for the conduct a review and for a remedy consequent upon it being successful, Parliament must have intended to preserve charities' right to have the lawfulness of the decision to open an inquiry subjected to scrutiny by an independent judicial body notwithstanding the closure of the inquiry prior to a hearing.

9. This is a genuinely difficult issue and there is no precedent for me to follow. Neither of the parties has referred me to any legal authority to support their submissions and the matter must be resolved by statutory interpretation. I am acutely conscious of the potential cost to the public purse of allowing this matter to proceed to a hearing. I am also concerned that the charity should not incur costs on litigation if an alternative course is available to it. It seems to me that it would be possible in cases such as this one for costs to be saved on all sides by the filing of a consent order making clear that the Charity Commission does not oppose the charity's application to the Tribunal, and so asking the Tribunal formally to allow the appeal. This would give the charity a formal "outcome" that may be seen to restore its reputation. In the absence of such an outcome the reputational impact for any charity which was wrongly subject to an inquiry might only be ameliorated by a public hearing and public decision by the Tribunal.

10. Having considered this matter very carefully, I accept the Appellants' contention that, notwithstanding the closure of the inquiry, the Tribunal retains jurisdiction to review the original decision to open an inquiry. I conclude that the Appellants' application must have a reasonable prospect of success because the Charity Commission has already accepted that its initial interpretation of the charity's governing document needed further clarification so that the decision to open the inquiry was, arguably, flawed. It follows that I have decided not to strike out the Appellants' application but to direct the Charity Commission to file its Response, following which I will issue further directions for a hearing of this matter.

11. As noted above, an alternative course would be for the parties to file a consent order asking the Tribunal to allow the appeal. The terms of any such order would be a matter for negotiation between the parties but, if approved by the Tribunal, it would be published on the Tribunal's website in the usual way so that the charity could thereby obtain some public recognition of its position without incurring the costs of a full hearing. I would be willing to allow the parties more time to discuss this course of action if that would be helpful.

12. Finally, it may be helpful if I were to indicate at this stage that if I were asked for permission to appeal this ruling by either party I would be minded to grant it in order to obtain an authoritative ruling from the Upper Tribunal on this important jurisdictional issue.

PRINCIPAL JUDGE
23 June 2014

© CROWN COPYRIGHT 2014