IN THE FIRST-TIER TRIBUNAL (CHARITY) **CRR/2014/0005**
GENERAL REGULATORY CHAMBER

TAYO, BAILEY, HALLS, JONES, ROWARTH & FLANAGAN (TRUSTEES OF MANCHESTER NEW MOSTON CONGREGATION OF JEHOVAH'S WITNESSES)

Appellants

- AND -

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

DECISION
ON AN APPLICATION FOR PERMISSION TO APPEAL

1. The Appellants' application to the Tribunal is for a review (pursuant to s. 321 of the Charities Act 2011) of the Charity Commission's decision to open a statutory inquiry into the charity of which they are trustees. That matter has been listed for a final hearing on 10 and 11 March 2015.

2. There was a case management hearing on 15 December 2014, at which I issued directions (with reasons). The Appellants now make an application dated 23 December for the Tribunal to (a) review paragraphs 2 and 3 of the directions of 15 December; in the alternative (b) to give permission to appeal to the Upper Tribunal (Tax and Chancery Chamber) in respect of those paragraphs in the directions; also (c) if permission to appeal is granted, to suspend the effect of the directions which it is sought to appeal; and (d) if permission is refused, to adjourn the proceedings generally to allow the Appellants to renew their application for permission to appeal to the Upper Tribunal.

3. Paragraphs 2 and 3 of the Directions of 15 December are as follows:

> *"2. No direction is made on the Respondent's rule 14 application, but the Tribunal directs under rule 15 (1) (c) that, as the information provided in the redacted documents is not relevant to either party's pleaded case, it does not require that evidence to be disclosed in un-*

> *redacted form to the Appellants and it shall not be put in evidence before the Tribunal at the final hearing of this appeal."*
>
> *"3. The Appellants are to serve on the Respondent and the Tribunal by 15 January 2015 a statement indicating, with reference to the paragraph numbers in the witness statements of Mr Sladen and Ms White, which matters they seek to test in cross examination at the final hearing and explaining how such cross-examination would advance their pleaded case."*

Grounds of Appeal

4. The Appellants have submitted grounds of appeal which challenge those directions on the following basis. In relation to paragraph 2, it is said that the disclosure of the withheld information to counsel only was contrary to the Court of Appeal's decision in *Browning v Information Commissioner*[2014] 1 WLR 3848, in which the Court of Appeal disapproved of the practice of disclosing evidence to representatives only.

5. In relation to paragraph 3 of the directions of 15 December, it is submitted that there is no express rule in the Tribunal Procedure Rules which permitted the direction given and, further, that where the Tribunal has to decide disputed issues of fact, the effect of the direction would be to undermine the effectiveness of cross examination by giving advance notice of its scope to the witness. It is argued that the Upper Tribunal's decision in *Fairford* is not relevant to the circumstances of this case and that the directions of 16 September had not required the Appellants to specify their reasons for cross examination, so they were not in breach of any direction in merely having asked for witnesses to attend for cross examination without specifying why.

6. Complaint is also made about the bundles produced by the Charity Commission for the hearing on 15 December. I do not understand the nature of this ground of appeal but it may help if I clarify that I received volume 3 of the bundle electronically on Friday 12 December and read it over the weekend preceding the hearing of 15 December. Volumes 1 and 2 were made available to me at the hearing only and obviously I had no time to read them in advance but I was referred to certain documents contained in them at the hearing itself. I understand that all three volumes were sent to the Appellants' counsel and it is not specified whether, and if so how, the Appellants were disadvantaged by the arrangements.

Decision

7. I have considered in accordance with rule 44 of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 whether to review my directions, but have decided not to undertake a review as I am not satisfied that there was an error of law in my directions.

8. I accept the Appellants' submission that an interlocutory decision of the First-tier Tribunal is capable of appeal to the Upper Tribunal, following *LS v London Borough of Lambeth* [2010] UKUT 461 (AAC). However, I note that in its decision, the three Judge panel commented that [94] as follows:

> "….it will be open to both the First-tier Tribunal and the Upper Tribunal to refuse permission to bring an interlocutory appeal on the

> ground that it is premature. The circumstances of the individual case must be considered. It is one thing to grant permission for an interlocutory appeal in a case where the final hearing may last for a fortnight. It is another to do so where the final hearing is likely to last about an hour, as is often the case in social security appeals. Moreover, as was suggested in *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) at [19], where case-management decisions are being challenged, the First-tier Tribunal can treat an application for permission to appeal as an application for a new direction if it is satisfied that the challenged direction is not appropriate".

9. I have considered the Appellants' grounds of appeal carefully but I am not satisfied that they raise arguable errors of law as alleged. I also consider that the application now made is premature and that it would have been more appropriate for the Appellants to have waited to raise these issues in an application for permission to appeal following the final disposal of this matter, if they are unsuccessful at that stage.

10. In relation to paragraph 2 of the directions, as is explained in the reasons given, the Tribunal's directions of 16 September 2014 required the Appellants to indicate why it was said that disclosure of the information which the Charity Commission sought to withhold under rule 14 was relevant to their pleaded case. The relevant information was disclosed to the Appellants' counsel only for the purposes of making representations on that preliminary issue, and it is recorded in the directions of 16 September that this course of action was agreed to by the parties. However, as is accepted, the direction was not complied with and, notwithstanding the earlier agreement, it is now submitted that this course of action was wrong in law.

11. It seems to me that disclosure of withheld information to representatives only for the limited preliminary purpose of clarifying their clients' case falls outside the scope of the Court of Appeal's decision in *Browning.* In the present case, all that counsel was required to do with the disclosed information was explain to the Tribunal how it related to the grounds of appeal which they had settled. I find it difficult to understand why they would have needed to take instructions from their lay clients to complete this task. However, if they had found themselves unable to comply with the Tribunal's directions without first taking instructions then they could have applied to the Tribunal for further directions at that stage, which they did not. If counsel had complied with the Tribunal's directions and made a positive link between the withheld evidence and their clients' case, then I accept that the Tribunal would have been bound by the decision in *Browning* in relation to the conduct of the substantive appeal and that further directions would have been necessary. In the circumstances, my own assessment was that the information which the Charity Commission sought to withhold was not relevant to any issue which the Tribunal must decide in these proceedings and, accordingly, I directed that it should not be admitted in evidence under rule 15 of the Tribunal's rules, without making any decision on the Charity Commission's original rule 14 application. It seems to me that this decision was within the scope of my discretion on case management matters and I am not satisfied that it discloses an arguable error of law. I refuse permission to appeal on this ground.

12. In relation to paragraph 3 of the directions, as I explained in the reasons given, the Appellants had not indicated in correspondence with the Charity Commission why they wished to cross examine the Charity Commission's witnesses and it was not at all clear, from their pleaded case, which issues were to be tested in that evidence. Following the approach of the Upper Tribunal (Tax and Chancery Chamber) in

HMRC v Fairford Group plc [2014] UKUT 0329 (TCC) I directed the Appellants to serve a statement of the issues which it was proposed to test in cross examination. As my reasons record, the Appellants' counsel agreed to this direction at the case management hearing on 15 December, although it is now argued that it was erroneous in law.

13. I accept that the Appellants were not in breach of any direction in merely requiring the attendance of witnesses for cross examination without indicating why the witness' evidence was challenged. However, as was discussed at the hearing on 15 December, a significant step in the appeal occurred in between the directions of September and December because, in accordance with the directions, the Charity Commission filed its witness evidence. Having regard to the nature of the Appellants' pleaded case (which does not rely on a dispute as to fact), it was not clear to the Charity Commission, or to me, how that pleaded case would be advanced by cross examination of the witnesses concerned, and the Charity Commission's queries in correspondence had not been answered. It seemed to me that, in accordance with the overriding objective and the requirement to ensure that the proceedings are conducted in a proportionate manner, the Tribunal is entitled to be satisfied that the proposed cross examination is necessary for a fair and just disposal of these proceedings. My direction was accordingly made to allow the Appellants to satisfy me that this is so. In so directing, I have in mind the nature of these proceedings, being a review rather than an appeal *de novo*, and the comments of the Upper Tribunal (Tax and Chancery Chamber) as to the nature of such a review in *Regentford Limited v Charity Commission* [2014] UKUT 0364 (TCC).

14. I also bear in mind that if there is to be cross examination, then it will double the length of the proposed hearing. I must have regard to the cost implications and be sure that it is merited in order for the hearing to be fair and just. The direction made does not require counsel to disclose in advance his questions to the witness but only to indicate the matters which it is sought to test and how it is said they advance the Appellants' pleaded case. I am satisfied that the direction was necessary in the circumstances of this case in order for me to rule on whether the proposed cross examination is to be permitted at all, and I am satisfied that counsel can comply with the direction without compromising the efficacy of his eventual cross examination, if this is permitted. I am satisfied that the direction was within the scope of my discretion on case management matters and I am not satisfied that it discloses an arguable error of law. I refuse permission to appeal on this ground.

15. I am not persuaded that the directions of 15 December 2014 should be suspended or that the case should be stayed in order to permit the Appellants to renew their application for permission to appeal to the Upper Tribunal. Having regard to the overriding objective and the avoidance of delay, I am satisfied that this matter should now move forward to a final hearing in March and that the extant case management directions should be complied with in order to permit that to happen. Accordingly, I refuse the Appellants' applications for a suspension of the directions and for a stay of proceedings.

ALISON MCKENNA
PRINCIPAL JUDGE
14 January 2015