



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

Appeal number: CA/2021/0013

BETWEEN:

MERMAIDS

Appellant

- and -

THE CHARITY COMMISSION FOR ENGLAND AND WALES

First Respondent

-and -

THE TRUSTEES OF LGB ALLIANCE

Second Respondent

Before:

Judge Alison McKenna
Sitting in Chambers
on 10 December 2021

RULING on REQUEST FOR PRELIMINARY ISSUE HEARING

Further to paragraphs 8 and 9 of the Tribunal's Directions of 23 September 2021

And pursuant to rules 5 and 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended)¹

IT IS NOW DIRECTED AS FOLLOWS:

¹ [SI/SR Template \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk)

1. The Second Respondent's application for the issue of the Appellant's 'standing' to be determined at a preliminary issue hearing is refused. All issues in dispute between the parties are to be determined by the Tribunal following a final hearing.
2. The parties are now invited to agree further Case Management Directions between them to assist in bringing this matter to a final hearing. The Appellant's draft directions, submitted on 19 November 2021, should be used as a starting point for discussion. If there is no agreement, the Tribunal will issue further case management directions early in the new year.
3. The Parties are reminded that they are required by the overriding objective to cooperate with each other, and with the Tribunal, as confirmed by the Upper Tribunal in *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC)², (paragraph 13). This includes a requirement to liaise with each other concerning procedural matters; to identify and clarify issues; to agree a course of action; and to identify and agree any additional directions required, before they refer a matter to the Tribunal.

REASONS

1. The background to this matter is that the Appellant filed a Notice of Appeal on 1 June 2021, by which it challenges the First Respondent's decision of 20 April 2021 to enter the Second Respondent onto the Register of Charities.
2. The registration decision was made pursuant to s. 30 of the Charities Act 2011. Column 2 of Schedule 6 to that Act provides that an appeal against a s.30 decision may be brought by '*...(c) any other person who is or may be affected by the decision*'. The First Respondent raised the issue of whether the Appellant is 'a person who is or may be affected' by its decision in its Response to the Notice of Appeal. The Second Respondent, having been joined as a party, also disputes the Appellant's standing to bring the appeal in its Response.
3. Further to case management directions issued on 23 September 2021, the parties were invited to make submissions on the question of whether there should be a preliminary issue hearing to decide the question of 'standing'. In short, the Appellant submits that all matters should be determined at the final hearing and the First Respondent agrees with that position. The Second Respondent asks the Tribunal to direct a preliminary issue hearing on the issue.
4. In considering this matter, I am exercising a discretion afforded to me by rule 5(3)(e) of the Tribunal's procedural rules. In exercising that discretion, I must seek to give effect to the overriding objective in rule 2.
5. My understanding is that some progress has been made in preparing for a substantive hearing. Pleadings are closed but the witness evidence has not yet been filed. The Tribunal is, as I understand it, looking to list the substantive matter for a two-day hearing on a date before the end of May 2022.

² <http://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=2607>

6. As the parties have acknowledged, there is only one decision of precedent on the meaning of the phrase ‘*is or may be affected*’ which is used in the 2011 Act. This was the Decision of Mrs Justice Asplin (as she then was) in *John Nicholson v Charity Commission* [2016] UKUT 0198 (TCC)³. The Decision in that case finds at [42] that “...*the category of persons in question in each case is not prone to a definitive definition. It is fact sensitive and must be considered in each case in the light of all the relevant circumstances.*” And further:

44. In my judgment when read in context and having taken account of the fact that the purpose of the statutory provision must be found in the words of the statute itself, the ordinary and natural meaning of the phrase is that a person with standing is one who is or may be “affected by the decision.” It is necessary therefore, to focus solely upon the particular decision and to determine whether in all the circumstances it has had an effect upon the particular person in question. It seems to me that in order to be affected by the decision, first the decision itself must relate to the person in some way. Secondly, the person’s legal rights must have been impinged or affected by the decision and to be a person who “may” be affected, there must be an identifiable impact on the person’s legal rights which is likely to occur, a matter to which I shall return.

45. The relevant question therefore, is a narrow one. Is the person affected by the particular decision? In order to determine that question it is necessary to consider the nature of the decision and all the surrounding circumstances.The question is highly fact sensitive and should not be approached on a prescriptively narrow basis.

7. On the question of preliminary issue hearings, the parties have referred me to the White Book commentary on rule 3.1 (2)(i) of the Civil Procedure Rules. Whilst it is helpful to consider the approach taken by the courts to case management matters, I am not bound to take the same approach in the Tribunal. However, I am bound by decisions of the Upper Tribunal, which has given guidance on the approach a First-tier Tribunal should take to preliminary issue hearings in the Decision of UTJs Herrington and Faulk (as she then was) in *The Right Honourable Clifton Hugh Lancelot De Verdon Baron Wrottesley v HMRC* [2015] UKUT 0637 (TCC).⁴ I have also found it helpful to refer to the fifth edition of *Tribunal Practice and Procedure* by Edward Jacobs (2019), at [7.186] – [7.196].
8. In *Wrottesley*, the Upper Tribunal reviewed the court authorities on directing preliminary issue hearings and set out at [28] the matters to be considered by a First-tier Tribunal when deciding whether to direct a preliminary issue hearing. I now turn to consider each of these issues, taking into account the relevant submissions made by the parties.
- (i) *The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.*

³ [John Nicholson v The Charity Commission for England and Wales: \[2016\] UKUT 0198 \(TCC\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/court-judgments/2016/ukut0198)

⁴ [The Right Honourable Clifton Hugh Lancelot De Verdon Baron Wrottesley v The Commissioners for HM Revenue and Customs: \[2015\] UKUT 0637 \(TCC\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/court-judgments/2015/ukut0637)

This advice chimes with the Appellant's reference to Lord Scarman's description of preliminary issue hearings as '*treacherous shortcuts*' in *Tilling v Whiteman* [1980] AC 1, cited in the White Book. I note the caution urged upon me by the Upper Tribunal but also that none of the authorities deals with the question of standing which, in the Second Respondent's submission, is particularly suitable for a preliminary issue hearing.

- (ii) *The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a "knockout" one.*

The question of standing is, in principle a 'knockout point' but the test of '*is or may be affected*' is an unusually broad one which as a matter of precedent requires a fact-sensitive analysis of all the circumstances. See also issue (vi) below.

- (iii) *An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.*

The Second Respondent submits that the question of standing is one of law only and can be resolved in a short hearing at which there would be no need for cross examination. The Appellant disagrees and submits that the Upper Tribunal's Decision in *Nicholson* makes clear that the issue of standing in charity appeals is one that would require detailed findings of fact and consideration of all the circumstances.

I am satisfied that the question of standing in this case is a mixed question of fact and law about which I am required to be particularly cautious. I take the view that a fact-finding hearing will be necessary to determine the issue of standing. I doubt that it would be fair and just for the Tribunal to determine issues of disputed fact without the evidence being tested in cross examination. It does not seem to me on the basis of the pleadings (although not having seen the evidence) that it would be possible in this case to separate out the evidence and submissions relevant to standing from the evidence and submissions necessary to determine the substantive appeal. See also issue (iv) below on this point.

- (iv) *Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result*

at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way.

On the basis of the parties' pleaded cases, there is an overlap of issues in respect of (a) the alleged disbenefit/collateral purpose of the Second Respondent relied on by the Appellant in support of its case for de-registration; and (b) the alleged impact on the Appellant of the alleged activities of the Second Respondent which is relied on to found standing. It seems to me that if the Tribunal were to make partial findings of fact in the Appellant's favour in relation to (b) at a preliminary issue hearing, then it could be hindered in making findings of fact as to (a) on the basis of different/additional evidence presented to it at the substantive hearing. There may also be an issue as to the constitution of the Tribunal in any second hearing, whereas the most efficient use of the Tribunal's time would clearly be for the same Judge to deal with all issues.

- (v) *Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.*

The Appellant submits that a preliminary issue hearing would cause substantial overall delay in determining this appeal as it would require a one-day hearing, witness evidence, and (in all likelihood) time for a reserved decision. In its submission the current window for the substantive hearing is therefore likely to be lost with a need to direct a further hearing if the Appellant succeeds as to standing. The Second Respondent submits that the final hearing may be avoided by a preliminary ruling in its favour and, in any event, would be shorter and more cost-effective if there is a preliminary issue hearing.

It seems to me that the likelihood of an onward appeal to the Upper Tribunal in respect of the Tribunal's determination of standing (whichever way it is decided) is high. This is an area with scant legal authority, and it is clear from the correspondence and pleadings that there are issues of fundamental conceptual importance to all concerned, in addition to having financial implications if the Second Respondent were to lose its charitable status. An appeal on the preliminary issue of standing would be likely to delay the final determination of the appeal.

- (vi) *The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.*

As the issue under consideration for a preliminary hearing is the Appellant's standing to bring an appeal, the appeal will be brought to a swift end if the Appellant is found by the Tribunal not to be a *person who is or may be affected by the decision*. It therefore falls into the category of a 'knockout point'. However, if the Appellant were to be found by the Tribunal to have standing, the matter would proceed to a substantive hearing. I am unable to form a view as to the likelihood of either outcome without hearing the evidence.

- (vii) *Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.*

The Appellant submits that a preliminary issue hearing would increase the parties' costs and that additional time would be required for preparation and hearing. The Second Respondent submits that the direction of a preliminary issue hearing would save overall time and costs.

The only submission made by the First Respondent was to the effect that there is, in its view, an overlap of evidence in the issues needed to be determined in relation both to standing and the substantive appeal. I note that, for this reason, it now opposes a preliminary issue hearing despite having previously suggested that it would be appropriate.

It seems to me that the cost and time required for pre-trial preparation and the substantive hearing would be increased if a preliminary hearing were directed in the circumstances of this case, where there is an overlap of issues and evidence which could lead to the duplication of evidence and argument before the Tribunal.

- (viii) *The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly.*

Having considered all the matters above, it does not seem to me that it would be in accordance with the overriding objective to direct a preliminary issue hearing in this case. I am mindful of the need to avoid delay and to manage costs and I consider that, in the particular circumstances of this case, a preliminary issue hearing would lead to considerable protraction of the proceedings, with increased costs to the parties likely to arise from the duplication of evidence and argument in relation to overlapping issues. Mindful also of the caution urged upon me by the Upper Tribunal, I conclude that I should exercise my discretion so as to refuse the Second Respondent's application. I have directed accordingly.

Signed:

JUDGE ALISON MCKENNA

Dated: 10 December 2021