



**First-tier Tribunal
(General Regulatory Chamber)
Charity**

Appeal Reference: CA/2018/0011

**Heard at Piccadilly Exchange, Manchester
On 2 April 2019**

Before

JUDGE J HOLBROOK

Between

**JOHN NICHOLSON
ANNIE O'GARA
KHOLOUD AL AJARMA**

Appellants

and

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

DECISION AND REASONS

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DECISION

The appeal is dismissed.

REASONS

Background and issues

1. By a Notice of Appeal presented to the Tribunal on 6 November 2018, John Nicholson, Annie O’Gara and Kholoud Al Ajarma seek to appeal against a decision of the Charity Commission for England and Wales not to remove the following three charities from the register of charities: The JNF Charitable Trust; The JNF Educational Trust; and KKL Charity Accounts (“the Charities”).

2. Upon preliminary consideration of the Notice of Appeal, I noted that the parties disagreed about whether the Appellants have the necessary standing to appeal against the Charity Commission’s decision. In addition, I observed that there appeared to be a further preliminary issue – at least in relation to Mr Nicholson – as to whether that question had already been determined, both by this Tribunal and by the Upper Tribunal.

3. The parties were invited to make written submissions, following which it became clear, not only that the Charity Commission disputed the Appellants’ standing to bring the appeal, but also that it contended that the appeal had been made out of time. I therefore directed that the following should be determined as preliminary issues:

- Whether the Appellants (or any of them) have standing to bring the appeal.
- Whether the appeal was brought in time (and, if not, whether time should be extended for bringing it).

4. I consented to the Appellants’ request for these issues be determined at a preliminary hearing, and that hearing took place in Manchester on 2 April 2019. All three Appellants appeared at the hearing in person and Mr Nicholson spoke on behalf of all of them. The Charity Commission was represented by Iain Steele of counsel. The Tribunal had been provided in advance with agreed bundles of documentary evidence and relevant authorities. This documentary material included witness statements given by Ms Al Ajarma and by Ms O’Gara. Neither witness was questioned about their evidence during the hearing (although they were each permitted to make brief oral supplementary statements). Instead, the focus of the hearing was on legal submissions made by Mr Steele and by Mr Nicholson.

5. Judgment was reserved.

Do the Appellants have standing to bring the appeal?

6. The Charity Commission's decision not to remove the Charities from the register of charities was made in response to the Appellants' application to it for the Charities to be de-registered. The decision was made under section 34(1) of the Charities Act 2011 ("the 2011 Act"). By virtue of section 319(1) of the 2011 Act, the decision is therefore subject to a right of appeal to the Tribunal (because it is a decision mentioned in column 1 of Schedule 6 to the 2011 Act). However, section 319(2) makes it clear that such an appeal may only be brought by the Attorney General, or "by any person specified in the corresponding entry in column 2 of Schedule 6". In relation to a decision made under section 34 of the 2011 Act not to remove an institution from the register, those persons are:

- (a) the persons who are or claim to be the charity trustees of the institution,
- (b) (if a body corporate) the institution itself, and
- (c) any other person who is or may be affected by the decision.

7. In the present case, each of the Appellants contends that he or she has standing to make this appeal by virtue of being a 'person who is or may be affected by the decision'.

8. The meaning of this expression was clarified by the Upper Tribunal (Tax and Chancery Chamber) in Nicholson v Charity Commission for England and Wales [2016] UKUT 198 (TCC). At paragraph 44 of her judgment in that case, Asplin J (as she then was) concluded 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 ..."

9. Asplin J made it clear (at paragraphs 46 - 52 of the judgment) that an individual is not 'a person ... affected by the decision' for the purposes of the 2011 Act merely as a result of being an addressee of that decision. Moreover:

"It is insufficient that he disagrees with the decision emotionally, politically or intellectually and as a result is affected emotionally and/or socially, however sincere his concerns."

...

"In context therefore, it seems to me that "*affected by the decision*" should be construed to connote circumstances in which the decision in question has a direct, or the potential for a direct, effect upon a person's legal rights."

10. The relevant question in relation to standing is thus a narrow one, but it is also fact sensitive and must be considered in each case in the light of all the relevant circumstances. With this in mind, it is necessary to examine in turn the circumstances of each of the three Appellants in the present proceedings.

Kholoud Al Ajarma

11. I begin with Ms Al Ajarma because it appears to be accepted by the parties that, of the three Appellants in this case, she is the one who is most likely to have standing to bring the appeal.

12. Ms Al Ajarma is a Palestinian who was born in Aida Refugee Camp near Bethlehem. That is where she grew up and where her family still lives. Ms Al Ajarma's evidence is that, in 1948, her family (along with many others) were forcibly displaced from land they owned in the village of Ajjur: land which is now in Israel and which forms part of the site of Britannia Park, a forest and recreation area established by the Jewish National Fund in the 1950s. Ms Al Ajarma asserts that she and her family have been unlawfully prevented from returning to Ajjur and from reclaiming their land.

13. Ms Al Ajarma also asserts that the Jewish National Fund has been what she describes as "an active member in the forced displacement and colonization of Palestine and its continuation". Further, Ms Al Ajarma asserts that Britannia Park has been developed by the Jewish National Fund, to the detriment of herself, her family and others, using funds raised in the UK by the Charities. For this reason, Ms Al Ajarma contends that the Charities are not charitable institutions and she seeks their removal from the register of charities "as the first step in restorative justice". She concluded her witness statement by saying:

"I believe that I – and my family – have been and continue to be "affected" by the JNF UK raising money in the UK, with charitable tax relief, to fund the set-up and maintenance of the British Park, over the remains of our homes and lands. I believe that we have been further "affected" by the way the Charity Commission refused me, and I ask the Tribunal the same thing – to reverse the decision."

14. Mr Nicholson argued that Ms Al Ajarma has standing to bring this appeal by virtue of her being a Palestinian whose family lands have been taken and are being used to her/her family's exclusion because of the activities of the Charities. He says that Ms Al Ajarma is thus affected by the Charity Commission's decision not to de-register the Charities as this affects her ability to claim restitution of her and her family's entitlement. Mr Nicholson reminded me that it is only necessary for Ms Al Ajarma to establish that she is a person who 'may be' affected by the Charity Commission's decision.

15. Whilst I do not doubt the sincerity of Ms Al Ajarma's evidence, or the strength of her feelings in this matter, I am not persuaded that she is, or that she may be, affected by the decision she seeks to appeal against – at least not in the sense described

by Asplin J in the Upper Tribunal's judgment in Nicholson (see paragraph 8 above). It follows that Ms Al Ajarma does not have standing to bring this appeal.

16. The Charity Commission's decision not to remove the Charities from the register does not 'relate to' Ms Al Ajarma at all: it relates to the Charities. The fact that the decision was made in response to an application made to the Commission by Ms Al Ajarma does not mean that it necessarily relates to her. Nor (as the Upper Tribunal has made clear) does the fact that Ms Al Ajarma was one of the addressees of the decision mean that she is necessarily affected by it.

17. I am not persuaded that Ms Al Ajarma's legal rights have been impinged or affected by the decision she now seeks to challenge or that there is any identifiable impact on her legal rights which is likely to occur. It is unnecessary for the Tribunal to determine whether Ms Al Ajarma or her family has rights in respect of property overseas (and it would be inappropriate for the Tribunal to express any opinion in that regard). However, even if it is accepted that Ms Al Ajarma does have such rights, it is not apparent that the Charity Commission's refusal to de-register the Charities would have any effect, or any likely effect, upon them. Any such rights as may exist are unaffected by the Commission's refusal to de-register the Charities. Indeed, no evidence was presented to demonstrate how the de-registration of the Charities might result in, or even facilitate, the restitution of land which Ms Al Ajarma desires.

18. As is apparent from the extract from Ms Al Ajarma's witness statement reproduced at paragraph 13 above, she (in common with the other Appellants) feels aggrieved, not only by the Charity Commission's decision not to remove the Charities from the register, but also by the manner in which that decision was taken and communicated. Ms Al Ajarma considers that the Commission failed to give proper consideration to the evidence and arguments presented to it during 2018 about the status and activities of the Charities, and about her particular circumstances and those of her family. Mr Nicholson argued that the quality of the Charity Commission's decision-making was so lacking in care and diligence that it should be regarded as not being in accordance with the law, and that any of the Appellants should have standing to apply to the Tribunal for an order that the Commission should revisit the matter in order to fulfil its responsibilities as a public body.

19. The Charity Commission rejects the criticisms made of its approach in this case. However, it is anyway unnecessary for me to examine those criticisms in the present circumstances, because an appeal which is properly brought under section 319 of the 2011 Act proceeds as a rehearing rather than as a review: the Tribunal must consider afresh the decision appealed against, and any procedural flaws in the Charity Commission's prior decision-making process will therefore be immaterial to the outcome. Nevertheless, such an appeal must still be brought by a person who has the requisite standing to do so under section 319(2): the Tribunal has no free-standing power to direct the Charity Commission as to the manner in which it should make decisions.

Annie O’Gara

20. Ms O’Gara is a close friend and supporter of Ms Al Ajarma. She feels strongly that Ms Al Ajarma and her family have suffered injustice because of the events described above and because, in Ms O’Gara’s view, the conduct of the Charity Commission in responding to the application for the Charities to be removed from the register fell below that which should reasonably be expected of a UK public body. Ms O’Gara thus considers that she should have standing to bring the appeal because it raises an issue of public confidence.

21. Ms O’Gara’s witness statement notes that she had submitted a personal letter of support to the Charity Commission in connection with Ms Al Ajarma’s application for the de-registration of the Charities and that she had also been the author of a section of the submission made to the Commission. She offered a commentary on aspects of UK and international law and she made a number of criticisms of the manner in which the Charity Commission dealt with the de-registration application. Nevertheless, Ms O’Gara appears to have no direct personal connection with the events in question or, indeed, with the Charities. She provided no evidence that she is, or that she may be, affected by the Charity Commission’s decision not to remove the Charities from the register. It follows that, like Ms Al Ajarma, Ms O’Gara lacks the necessary standing to bring this appeal. I have explained at paragraph 19 above why Ms O’Gara does not have standing to appeal purely on procedural grounds, and neither the fact that Ms O’Gara entered into correspondence with the Charity Commission about the decision, nor the fact that she was an addressee of the decision, are sufficient to give her the necessary standing to bring the appeal.

John Nicholson

22. Mr Nicholson did not provide a witness statement or any other evidence to demonstrate that he is, or that he may be, affected by the relevant decision of the Charity Commission – although I note that his relevant circumstances appear to be broadly similar to those of Ms O’Gara. In any event, however, Mr Nicholson faces an additional – and in my view insurmountable – obstacle to bringing this appeal. This arises from the fact that he was a party to the previous proceedings (before both this Tribunal and the Upper Tribunal) which culminated in the Upper Tribunal’s decision in Nicholson. The outcome of that decision continues to bind the parties to it, and Mr Nicholson is not entitled to re-litigate any question which it conclusively determined.

23. The Upper Tribunal’s decision in Nicholson concerned an appeal brought by Mr Nicholson against a decision of this Tribunal, dated 4 August 2014, that he did not have standing to appeal against a decision of the Charity Commission not to remove the Charities from the register. This Tribunal had found that Mr Nicholson was not a person who was, or who may be, affected by the Charity Commission’s decision and the Upper Tribunal upheld that finding, holding that Mr Nicholson cannot be a person affected by the decision for the purposes of the 2011 Act as a result of being an addressee of the decision or as a result of having been such an addressee coupled with

the other matters on which he relied (which were, first, the extent of his engagement with the Charity Commission's decision-making process; and, second, the public importance of determining whether the Charities are in fact charitable).

24. Although, strictly speaking, the Charity Commission decision which Mr Nicholson now seeks to appeal against is not the same decision as the one he challenged in 2014 – that decision was made in January 2014 whereas (as explained below) the decision now subject to challenge was made in September 2018 – the subject matter of the decision is identical and Mr Nicholson has offered no explanation as to how or why his circumstances have changed such that he now has standing to appeal even though he did not have standing previously. In reality, Mr Nicholson is seeking to re-litigate a question which has already been judicially determined. He is not entitled to do that (by virtue of the doctrine of *res judicata*) and he must be prevented from bringing the appeal for that reason alone.

Was the appeal brought in time?

25. Given my findings that none of the Appellants in this case have the necessary standing to bring this appeal, the question whether the appeal was brought in time is largely academic. For the sake of completeness, however, I have considered the competing arguments on the issue of timeliness. I have concluded that the appeal was brought out of time and the reasons for this conclusion are explained below. I have not gone on to give detailed consideration to the question whether time for making the appeal should therefore be extended, as extending time would clearly be pointless in circumstances where the Tribunal has no jurisdiction to determine the appeal anyway.

26. Rule 26(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 provides:

An appellant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of appeal so that it is received—

- (a) if the appellant was the subject of the decision to which the proceedings relate, within 42 days of the date on which notice of the decision was sent to the appellant; or*
- (b) if the appellant was not the subject of the decision to which the proceedings relate, within 42 days of the date on which the decision was published.*

27. It is agreed that the time limit for starting proceedings in the present case is governed by Rule 26(1)(b) and that the decision which the Appellants seek to challenge was 'published' when it was sent to them by the Charity Commission. However, the parties disagree about whether a letter from the Charity Commission dated 12 September 2018 (but not sent to the Appellants until 18 September) should properly be regarded as the Commission's decision for these purposes, or whether a subsequent letter, dated (and sent on) 18 October 2018, is 'the decision'. If the earlier of these two letters is the decision, then the appeal was brought out of time when it

was sent to the Tribunal on 6 November 2018. However, if the Commission's subsequent letter is the decision, then the appeal was brought in time.

28. It is necessary to examine some of the procedural background. On 15 May 2018, the Appellants made an application to the Charity Commission (under section 36(1) of the 2011 Act) for the Charities to be removed from the register. The Charity Commission responded to that application by the letter sent on 18 September. That letter recorded the Commission's view that none of the Appellants had standing to make an application under section 36(1), but went on to state that, given the importance of ensuring that institutions entered on the register are properly registered, the Commission had nevertheless considered whether the Charities should be removed from the register. The letter noted that this issue had been considered previously (in 2013), and that the Commission had at that time concluded that the Charities were established for exclusively charitable purposes and should therefore remain on the register. The Commission considered that its previous analysis of the Charities' status was still relevant and that it was not materially affected by any of the information which the Appellants had provided in May 2018. The letter stated that the matters raised in May 2018 were the same as or similar to those previously considered and did not clearly provide a legal basis for removing the Charities from the register or for altering the Charity Commission's 2013 decision.

29. I note that the Charity Commission initially issued two versions of this letter. One was addressed to Mr Nicholson and it contained references to Ms Al Ajarma in the third person. A second version of the letter was addressed to Ms Al Ajarma herself. The content of the second version of the letter was the same as that of the first version and, indeed, it still contained references to Ms Al Ajarma in the third person. This clearly looked rather odd, given that Ms Al Ajarma was now the addressee of the letter. However, I am satisfied that this was simply the result of a clerical error (and obviously so) and I note that the Charity Commission subsequently sent Ms Al Ajarma a corrected version of the letter. I do not accept the argument that the error was such as to make any decision contained within the letter void for uncertainty.

30. Both Mr Nicholson and Ms O'Gara complained to the Charity Commission that its letter had failed to address the question of whether, in light of the material provided to the Commission in May 2018, Ms Al Ajarma had standing in her own right to apply for the removal of the Charities from the register. The Charity Commission responded to this complaint by its letter dated 18 October 2018, which was addressed to Mr Nicholson and copied to Ms Al Ajarma. That letter offered an assurance that the decision not to remove the Charities from the register had been made having fully considered the material provided in May 2018 and that the Commission had considered whether the Appellants had standing to make an application under section 36(1) of the 2011 Act. It stated that the Commission had taken into account what had been said about the circumstances of Ms Al Ajarma and her family, but that "it was not necessary to make findings about the disputed history of the displacement of Palestinians because the question of standing relates to the nature of the decision (to register a charity) and the effect of that on the applicants".

The letter also stated that it was difficult to see how the Commission's registration decision impinged on any rights Ms Al Ajarma might have to disputed land, and that: "The Commission's position remains that it is not evident how the applicants are or may be affected by the decision ...".

31. I am satisfied that the letter from the Charity Commission sent to the parties on 18 September 2018 contained the Commission's decision not to remove the Charities from the register. Its subsequent letter, sent on 18 October, merely confirmed that, in the Commission's view, it had taken that decision having had regard to all relevant considerations. The letter dated 18 October did not indicate that the Charity Commission had retaken its decision (indeed, quite the reverse) and it did not give rise to a fresh right of appeal to the Tribunal.

32. It follows that this appeal was brought out of time.

Outcome

33. I determine that none of the Appellants have standing to bring this appeal and that it was brought out of time anyway. The appeal is therefore dismissed.

Signed J W HOLBROOK

Judge of the First-tier Tribunal
Date: 24 April 2019