



Appeal number: CRR/2014/0001

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

**THE CHARITY COMMISSION FOR
ENGLAND AND WALES**

Applicant

- and -

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

Respondents

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in Chambers on 21 July 2014

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

Permission to appeal is granted.

REASONS

1. This decision concerns the Charity Commission's application for permission to appeal to the Upper Tribunal (Tax and Chancery Chamber) against the First-tier Tribunal (Charity)'s decision of 23 June 2014 by which it refused to strike out the charity's application under rule 8 (3) (c) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

2. The charity trustees' application to the First-tier Tribunal (Charity) was for a "review" under s. 322 of the Charities Act 2011 ("the Act") because the disputed decision of the Charity Commission is listed as a "reviewable matter" in s.322(2)(a) of the Act. Section 321(4) of the Act provides that in determining a review the Tribunal "*must apply the principles which would be applied by the High Court on an application for judicial review*". Schedule 6 of the Act provides that if it allows the review application, the Tribunal may direct the Charity Commission to end the inquiry.

3. The Charity Commission opened a statutory inquiry into the charity on 31 March and informed its trustees of that fact by letter dated 9 April 2014. The charity trustees applied to the Tribunal on 14 April 2014. The Charity Commission then closed its inquiry on 12 May 2014. The Tribunal invited the charity trustees' 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 Act.

4. The charity trustees argued *inter alia* that the Charity Commission's closure of the inquiry did not address the question of the lawfulness of the initial decision to open the inquiry and to have kept it open between 31 March and 12 May 2014 and to have publicised that fact. They argued that the Charity Commission's decision so to act was still within the jurisdiction of the Tribunal and that the lawfulness of that decision should still be adjudicated upon notwithstanding the subsequent closure of the inquiry.

5. The Tribunal invited the Charity Commission to respond to the charity trustees' submissions, which it did on 20 June. It submitted *inter alia* that as the inquiry had been closed, there was no further remedy that the Tribunal could order and therefore that the Appellants' application to the Tribunal has no reasonable prospect of success. It also argued that the continuation of the proceedings would lead to unnecessary costs of public funds and court time and asked the Tribunal to strike out the proceedings under rule 8 (3) (c) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

6. On 23 June, I decided that the charity trustees' application should not be struck out and should proceed to a hearing. I concluded that, as the remedy available to the Tribunal in the event that the application for review was allowed was discretionary, Parliament must have intended to preserve charities' right to have the lawfulness of any decision to open an inquiry subjected to scrutiny by the Tribunal notwithstanding the closure of the inquiry prior to a hearing. I suggested that in such cases the Charity Commission could proceed by not opposing the application to the Tribunal and that a consent order could be filed so as to bring the proceedings to a close at little cost to the parties whilst giving the charity concerned a public remedy. I also indicated that, as this was a novel issue, I would be minded to grant permission to appeal if it were applied for.

7. I referred in my 23 June ruling to the fact that neither party had cited any legal authority in its submissions to the Tribunal. The Charity Commission has now filed grounds of appeal in support of its application for permission to appeal to the Upper Tribunal in which it has referred to a number of legal authorities. It is unfortunate that these were not brought to the Tribunal's attention at the relevant time.

8. In reliance upon the authorities cited, the Charity Commission's grounds of appeal now acknowledge for the first time that the Tribunal retains discretion to hear and determine an application for review of a decision to open an inquiry after the Charity Commission has closed that inquiry. However, it is argued that the Tribunal's discretion to do so should be exercised sparingly and only in cases where there is a strong public interest in the review proceeding. The Charity Commission submits that there is no such public interest in this case and it seeks the Upper Tribunal's ruling on this matter. Whilst not set out as such, my understanding of this application is that the Charity Commission alleges an error of law by the First-tier Tribunal in failing to consider whether there were strong public interest grounds for exercising its discretion in this case. I consider that to be an arguable ground of appeal notwithstanding the fact that it was not put to me before I made my ruling, and I now give permission to appeal to the Upper Tribunal under s. 11 of the Tribunals, Courts and Enforcement Act 2007 and rule 42 of the Tribunal's procedure rules.

9. The Charity Commission has also asked me to consider exercising my power of review in this case. The First-Tier Tribunal's power of review derives from s. 9 of the Tribunals, Courts and Enforcement Act 2007. Rule 44 of the Tribunal's procedure rules prescribes the circumstances in which that power may be exercised. The Charity Commission has not specified what action it wishes me to take in the light of any review but I understand the application to be one to set aside the ruling of 23 June and to re-make the decision (ss. 9 (4) (c) and 9 (5) (a) of the Tribunals, Courts and Enforcement Act 2007). I may only undertake a review of a decision if I am satisfied that it contains an error of law. I have considered the guidance given on that issue by a three Judge panel of the Upper Tribunal in *R (RB) v FTT*¹ [2010] UKUT 160 (AAC), and note the requirement (see paragraph [50]) for the First-tier Tribunal to avoid usurping the functions of the Upper Tribunal on contentious points of law.

10. Whilst I am satisfied that it is arguable that there was an error of law in the ruling of 23 June, I am not satisfied that there was an error of law. As noted in the ruling itself, this is a novel area for the charity jurisdiction and one in which the guidance of the Upper Tribunal would be welcome. I have therefore concluded that I should not exercise my power of review but that I should grant permission to appeal to the Upper Tribunal.

11. Finally, in its application for permission to appeal the Charity Commission has requested the suspension of the decision under appeal pending determination of this matter by the Upper Tribunal. Rule 5 (3) (1) of the Tribunal's procedure rules allows the First-tier Tribunal to suspend the effect of its own decision pending determination of an appeal by the Upper Tribunal. Although not particularised, I understand this request to be one for the suspension of direction (2) of the ruling of 23 June, so that the Charity Commission is not required to file its Response to the charity trustees' application. The Charity Commission will now, as a result of this decision, be required to make its case in the Upper Tribunal proceedings and, accordingly, I am willing to suspend the requirement for it to file a Response in the First-tier Tribunal and leave it to the Upper Tribunal to issue directions about the documents it should file. This will avoid a duplication of effort and is consistent with the overriding objective.

¹ [http://www.osspsc.gov.uk/judgmentfiles/j2967/\[2010\]%20AACR%2041%20bv.doc](http://www.osspsc.gov.uk/judgmentfiles/j2967/[2010]%20AACR%2041%20bv.doc)

12. I direct that the Tribunal administration send a copy of the Charity Commission's application for permission to appeal and a copy of this ruling to the charity trustees' solicitors forthwith. They will be notified by the Upper Tribunal (Tax and Chancery Chamber) when the Charity Commission has made its application in reliance upon this grant of permission to appeal and they will be given an opportunity to make further representations to the Upper Tribunal at that stage.

PRINCIPAL JUDGE

21 July 2014

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