



Appeal number: CA/2017/0014

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

GRAHAM HIPKISS

Appellant

- and -

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

Judge Alison McKenna

Sitting in Chambers on 17 April 2018

RULING ON PRELIMINARY ISSUE

Background

1. This appeal concerns the Charity Commission’s decision of 10 November 2017 to remove The Human Organ Preservation Research Trust, registered charity number 1001750, (“HORPT”) from the Register of Charities. That decision was made by explicit reference to the Commission’s statutory power under s. 34 (1) (a) of the Charities Act 2011.
2. By his Notice of Appeal dated 21 December 2017, the Appellant challenges the Commission’s decision. The appeal has been provisionally listed for an oral

hearing in July 2018 and the Tribunal has issued Directions aimed at ensuring that the case will be ready to be heard at that time.

3. In its Response to the Notice of Appeal dated 16 February 2018, the Charity Commission sought to rely for the first time on its statutory power under s. 34 (1) (b) of the 2011 Act as an additional ground for removal of HORPT from the Register. The Appellant asked the Tribunal to rule on this as a preliminary issue, which I now do. He submits that it is impermissible for the Charity Commission to introduce a new statutory ground at the appeal stage because (a) it is not permitted by the legislative scheme and (b) it is prejudicial to his case. He asks me to direct that the Charity Commission may not rely on the new ground for removal of HORPT from the Register in this appeal.

4. Further to my Directions of 21 March, the Charity Commission responded to the Appellant's application for a preliminary ruling on 13 April. The Commission submits, in summary, that the nature of an appeal to this Tribunal is *de novo* so that the Tribunal is seized generally of the question of whether HORPT should be removed from the Register, rather than the specific grounds for doing so; further, that the Tribunal is expressly permitted to consider evidence which was not before the Commission when it made its decision; further, that the Appellant will suffer no prejudice if the Tribunal considers the additional ground.

The Law

5. Section 34 of the Charities Act 2011 provides that:
The Commission must remove from the register –
(a) any institution which it no longer considers is a charity, and
(b) any charity which has ceased to exist or does not operate.

6. Section 319 (1) of the 2011 Act provides that “...an appeal may be brought to the Tribunal against any decision, direction or order mentioned in column 1 of schedule 6” to the Act.

7. Section 319 (4) of the 2011 Act provides that:

In determining such an appeal, the Tribunal –

(a) must consider afresh the decision, direction or order appealed against, and

(b) may take into account evidence which was not available to the Commission.

8. Schedule 6 to the 2011 Act has a single column 1 entry for decisions of the Commission under s.30 and s. 34 of the 2011 Act, both being decisions “*(b) to remove or not to remove an institution from the register*”. No distinction is drawn in the Schedule between decisions made under s. 34 (1) (a) or (b) in columns 1, 2 or 3.

9. The Charity Commission referred me in its submission to case law on the nature of an appeal by rehearing and judgments of the Court of Appeal where it has allowed new issues to be relied on at appeal.

10. Rule 8 (2) of the Tribunal’s Rules provides that the Tribunal “*must strike out the whole or a part of the proceedings if the Tribunal – (a) does not have jurisdiction in relation to the proceedings or that part of them...*” Rule 8 (7) provides that:

This rule applies to a Respondent as it applies to an Appellant except that –

a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings...

11. The Supreme Court upheld in *BPP Holdings Ltd and others v Commissioners for Her Majesty’s Revenue and Customs* [2017] EWCA Civ 121, the First-tier Tribunal’s decision to debar the Respondent from defending an appeal, in circumstances where its delay in providing a proper statement of its case had caused the Appellant “*clear prejudice*” in bringing its appeal.

Ruling

12. I accept the Charity Commission's argument that the Tribunal will be, when hearing this appeal, seized of its decision to remove HORPT from the Register in the broadest sense and that the appeal is one against that substantive decision, rather than against the reasons given for making it at the time. I also accept the Charity Commission's submission that arguments and evidence may properly be put to the Tribunal which were not relied on by the statutory decision maker when making the decision appealed against. I also accept that there is no difference in the remedies which would be available to the Appellant, were the Tribunal to allow an appeal against a decision made under s. 34 (1) (a) or one made under s. 34 (1) (b) of the 2011 Act.

13. However, it seems to me that we are dealing here with a carefully-considered statutory scheme in which Parliament provided for a prescribed list of decisions taken by the Commission to engage a right of appeal to the Tribunal. In considering s. 34 of the 2011 Act, it seems to me that on a plain reading it provides for a removal decision to be taken under s. 34 (1) (a) on one basis and for a removal decision to be taken under s. 34 (1) (b) on another. The two sub-sections provide discrete bases for making a decision to remove a charity from the Register and the Commission is at liberty to invoke either or both of them in making its decision. I also note that each ground for removal relies on a distinct analysis of the institution's alleged non-charitability, and would need to be supported by different argument and evidence. Accordingly, an appeal against a decision made under one sub-section would be in nature very different from an appeal against a decision taken under the other.

14. Having nailed its colours to the mast of s. 34(1) (a) in its decision of 10 November 2017, the question arises whether the Commission may now properly ask the Tribunal to determine the question of whether s. 34 (1) (b) also applies in this case. I conclude that it may not, for the following reasons.

15. Firstly, the jurisdictional point. The Tribunal's jurisdiction to determine any appeal relies on a relevant decision having been taken by the Charity Commission. Sometimes, the Tribunal is asked to make a finding of fact as to whether a relevant decision has been made. In this case, it is common ground that no decision was made under s. 34 (1) (b) of the 2011 Act. Unsurprisingly, there is no appeal before us in respect of such a decision. The case law in support of the ability of a party to raise new argument and evidence at appeal stage is nothing to the point in these circumstances. I conclude that the Tribunal is not seized of the s. 34 (1) (b) point because, quite simply, the Commission has never made a decision under that statutory provision.

16. A no-jurisdiction strike out is mandatory under rule 8 (2) (a) of the Tribunal's Rules. As I understand rule 8 (2)(a) read with rule 8 (7), if I conclude that I have no jurisdiction to decide the s. 34 (2) (b) point then I must strike out the offending part of the Respondent's case. I am satisfied that the Commission's submissions of 13 April constitute the relevant representations prior to a strike out, which are required under rule 8 (4), so that I may properly proceed to debar the Charity Commission from relying on its arguments under s. 34 (1) (b) in defending this appeal.

17. If I am wrong about that, then then there is a procedural fairness point. The Appellant had no notice of a decision being taken under s. 34 (1)(b) because no such decision was taken. He had no notice of the second ground being relied upon until the Commission filed its Response to his appeal against the first ground for removal. His Grounds of Appeal do not address the different basis for removal contained in s. 34 (1)(b). He has had no opportunity to assemble his evidence on which to rely in contesting a decision that HORPT has ceased to exist or does not operate. He has prepared his case under s. 34 (1) (a) and this can be assumed to be at a fairly advanced stage of preparation given the proximity of the hearing date and prior steps required by the Directions. It seems to me that this situation represents a "*clear prejudice*" to his case.

18. The overriding objective requires me to conduct proceedings in a manner that is fair and just. This includes ensuring that the parties are able to participate fully in the proceedings. As matters stand, even if I am wrong about the jurisdictional point, I am not persuaded that it would be fair and just to allow a discrete statutory basis for removal from the Register to be pleaded by the Commission for the first time at the Response stage. I do not see how the Appellant can participate fully in an appeal in which the Respondent seeks to rely on arguments in respect of a decision which has not been properly made and explained to him at the relevant time.
19. In view of my comments above, it seems to me that if the Commission wishes to rely on s. 34 (1) (b) as a discrete ground for the removal of HORPT from the Register, then it must now proceed to make a decision under that section and inform the Appellant in the usual way. If the Appellant wishes to appeal, it would be possible for the Tribunal to direct a stay of this appeal for a period sufficient for the two appeals economically to be heard together at a later date. The parties are asked to keep the Tribunal informed of developments.
20. Otherwise, for the reasons given above, **I now DIRECT** under rule 8 (2) (a) that the Respondent is debarred from relying in this appeal on any or all of its arguments in support of a case under s. 34 (1) (b) of the 2011 Act. The Respondent is to provide the Tribunal and the Appellant with an appropriately amended Response as soon as practicable and in any event is to include an amended document in the hearing bundle.

Signed

Alison McKenna
Principal Judge

Dated: 17 April 2018

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