Neutral Citation No. [2015] NICh 18 | *Ref:* **HOR9783**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **04/12/2015**

15/40353

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

_____

BETWEEN:

THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Appellant;

and

THE CHARITY COMMISSION FOR NORTHERN IRELAND

Respondent.

_____

HORNER J

A. INTRODUCTION

[1] There is only one issue in this appeal. It is one that does not now concern William Allen ("the applicant") as he has no interest in the outcome of these proceedings. Instead the Attorney General, Mr John Larkin QC, has appealed the decision of the Charity Tribunal ("the Tribunal") as to whether it erred in law in deciding that it did not have jurisdiction to hear the application of the applicant, a former trustee of the Disabled Police Officers Association Northern Ireland ("the Association"), to review the decision of the Charity Commission for Northern Ireland ("the Commission") to institute a statutory inquiry under Section 22 of the Charities Act (Northern Ireland) 2008 ("the 2008 Act") into the governance and financial controls of the Association.

[2] I should like to thank the Attorney General and Mr O'Donoghue QC who appeared for the Commission for the quality of their submissions.

B. BACKGROUND

[3] The applicant had been a trustee for many years of the Association. He had served as Chairman for a number of years up to June 2013. In January 2014 the

applicant was again elected Chairman of the Association. On 12 February 2014 the Commission decided to institute a statutory inquiry under Section 22 of the 2008 Act and put the Association on notice of this. On 8 August 2014 the applicant was suspended by the Commission, initially for a 3-month period. This remained the position until he resigned as a trustee on 20 April 2015. On 5 September 2014 the applicant appealed both against the decision to have a Section 22 inquiry and the decision to suspend him. On 8 September 2014 an application for a review of the decision to hold a Section 22 inquiry was lodged by the Association. The application for review was out of time. However, the Tribunal in a written decision of 24 March 2015 made it clear that it did not have jurisdiction to determine the applicant's application for review of the Commission's decision to institute a statutory inquiry. It further went on to say that there were no grounds to extend time to entertain the application for a review. On 14 April 2015 leave to appeal to the High Court was granted by the Tribunal. On 20 April 2015 the applicant resigned from his position as trustee of the Association with immediate effect.

C. LEGISLATIVE BACKGROUND

[4] The Commission was established by Section 16 of the 2008 Act. Section 6 establishes the Charity Commission for Northern Ireland. Section 7 sets out the Commission's objectives. It provides -

(i) *"The Commission's objectives* [in force 27 March 2009]

> 7.—(1) The Commission has the objectives set out in subsection (2).
>
> (2) The objectives are—
>
> 1. The public confidence objective.
>
> 2. The public benefit objective.
>
> 3. The compliance objective.
>
> 4. The charitable resources objective.
>
> 5. The accountability objective.
>
> (3) Those objectives are defined as follows—
>
> 1. The public confidence objective is to increase public trust and confidence in charities
>
> 2. The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.

3. The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.

4. The charitable resources objective is to promote the effective use of charitable resources.

5. The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public."

(ii) Section 8 sets out its general functions. These include:

"(a) Determining whether institutions are or are not charities.

(b) Encouraging and facilitating the better administration charities.

(c) Identifying and investigating apparent misconduct or mis-management in the administration of charities in taking remedial or protective action in connection with misconduct or mis-management therein …"

(iii) Section 9 sets out the Commission's general duties. Section 9(2)(iv) states:

"In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activity should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed."

(iv) Section 22(1) of the 2008 Act provides:

"22 - General powers to institute inquiries.

(1) The Commission may institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes."

(v) Section 33 provides a power to act for protection of charities. It provides at 33(1) that the Charity Commission having instituted an inquiry under Section 22 and being satisfied –

> "(a) that there is or has been any misconduct or mis-management in the administration of the charity; or
>
> (b) that it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity or securing a proper application for the purposes of the charity of that property or of property coming to that charity, the Commission may of its own motion do one or more of the following things …"

These include:

> "(a) Suspending any person who is "a trustee, charity trustee, officer, agent or employee of the charity … pending consideration being given to that person's removal.
>
> (b) Appointing such number of additional charity trustees as it considers necessary.

The right to apply for a review of the decision to institute such an inquiry under Section 22(1) is contained in paragraph 3 of Schedule 3 to the 2008 Act. It provides, inter alia, that it shall apply to the decision of the Commission "to institute an inquiry under Section 22 with regard to a particular institution."

(vi) Paragraph 4 of Schedule 3 deals with reviews it states:

> "4 – Reviews
>
> (1) An application may be made to the tribunal for the review of a reviewable matter.
>
> (2) Such an application may be made by –
>
> (a) the Attorney General, or
>
> (b) <u>any person</u> mentioned in the entry in Column 2 of the Table which corresponds to

> the entry in Column 1 which relates to the reviewable matter."

It will be noted that paragraph 4(iv) states:

> "In determining such an application the Tribunal shall apply the principles which would be applied by the High Court on an application for judicial review."

[5] The relevant entry in Column 2 of that Table referred to at Schedule 3 paragraph 4(2)(b) says:

> "The persons are –
>
> (a) the persons who have control or management of the institution; and
>
> (b) if (a body corporate) the institution itself."

D. THE GROUNDS RELIED ON BY THE ATTORNEY GENERAL

[6] The Attorney General's case can be briefly summarised as follows. A trustee is a person mentioned in the "entry in Column 2 of the Table which corresponds to the entry in column 1 which relates to the reviewable matter …" The use of persons, must be taken to include a person singular. The interpretation contended for by the Commission would be unduly restrictive. It would not be in accordance with the statutory purpose and it is at odds with the approach to the equivalent legislation in England taken by the First and Upper Tier Tribunals (Charity). Furthermore, such a narrow interpretation would deprive a trustee who was being victimised by the other trustees from seeking a review of the decision to hold an inquiry if those other trustees had unlawfully persuaded the Commission to hold a statutory inquiry under Section 22.

E. THE CASE MADE BY THE COMMISSION

[7] The Commission claims that the right to seek a review is restricted to those persons who have control or management of the charity. It is not extended to any individual trustee unless he can demonstrate that he is in control of the charity. If this were not the position, it would have the consequence of permitting individual trustees to challenge the lawful decisions of other trustees who did have control or management of any particular charity. It also has the beneficial effect of preventing multiplicity of challenges to the decisions to institute an inquiry taken by the

Commission. It is concerned that to extend the right to review to single trustees such as the applicant would result in administrative mayhem.

F. THE DECISION OF THE TRIBUNAL

[8] In a detailed decision the Tribunal concluded that:

(i) The application for review must be brought by "the persons who have control or management of the institution." (Emphasis added by the Tribunal).

(ii) It was of significance that sub-paragraph (a) did not say "any person or persons having control or management of the institution"; nor did it say "a person who has control or management of the institution"; nor did it say "any person who has control or management of the institution"; nor did it say "the person who has or persons who have control or management of the institution." The Tribunal will also consider the reference "institution" in both sub-paragraphs (a) and (b) of the relevant provision served to emphasise that the concept of "the persons who have control or management" should be construed with an eye to the fact that the Act is providing redress for the institution, rather than any individuals.

(iii) The remainder of Column 2 of the Table in Schedule 3 provides that almost every decision or act of the Commission, in addition to being subject to challenge by *trustees* and *persons* and the institution itself, is also subject to challenge by *any other person affected*. However the legislature did not extend the right to apply for review of a decision to institute a statutory inquiry to *any other person who is or may be affected by that decision*. This, it was claimed was indicative of an intention to limit, to some extent, the range of applicants who might launch an application for review.

(iv) As appears from Section 22 of the 2008 Act a decision by the Commission to institute a statutory inquiry into a charity is an intervention against the charity, that is, as against the charity as a collective whole. Accordingly, it is consonant with the nature of the inquiry that the right to challenge the decision to institute its statutory inquiry should be vested in the charity acting as a collective whole.

(v) A further indicator of the legislature's intention may also be derived from Sections 36(3), 37(2), 59(2), 74, 83(7) and 84(4)(b)(i) of the 2008 Act. In each of these instances the legislator deployed the phraseology "person or persons". However it did not do so in relation to the relevant entry in Column 2 of the Table in Schedule 3.

(vi) Finally, as appears at paragraph 4 of Schedule 3 to the 2008 Act, the right to apply for review of a decision to institute a statutory inquiry is extended to the Attorney General. Accordingly, any possible abuse by the Commission of its power to instigate a statutory inquiry, coupled with the subsequent suspension of unsympathetic trustees would not go unchallenged, given the role of the Attorney General. The Tribunal goes on to say that all these aspects of the 2008 Act point towards the legislature not having intended to extend the right to apply for review of a decision to institute a statutory inquiry to a single person who has control or management of the subject charity.

[9] It seems, with respect to this court, that the Tribunal erred in two ways. Firstly, it placed weight on the use of "trustees" in seeking to determine who had the right to seek a review. Section 2(1) of the Interpretation Act (NI) 1954 states:

> "Every provision of this Act shall extend and apply to every enactment, whether passed or made before or after the passing of this Act, unless contrary intention appears in this Act or any enactment."

When the Interpretation Act is not to apply it can be expressly excluded in the Act under consideration. This is done in many statutes. It, of course, can be impliedly excluded but, I do not consider this to be the position here. The effect of the gloss "unless contrary intention appears in this Act or any enactment" should not carry too much weight, see Craies on Legislation at 24.1.5.1.

It will be noted that at Section 185(2) of the 2008 Act it states:

> "Without prejudice to Section 17(5) of the Interpretation Act (Northern Ireland) 1954 (statutory powers and duties generally), an order under sub-section (1) may provide the provisions are to come into operation on different days in relation to charities of different descriptions."

So clearly the maker of the 2008 Act was well aware of the Interpretation Act and took care where it was necessary to do so to ensure that it did not defeat the intention of the draftsman. The fact that the maker of the 2008 Act has only referred to the Interpretation Act on this one particular instance is of significance. There is force in the submission of the Attorney General that the "expressio unio" principle applies.

[10] Section 37(2) of the Interpretation Act states:

> "In an enactment –
>
> (a) words in the singular shall include the plural; and
>
> (b) words in the plural shall include the singular."

It follows therefore that no significance can be attached to the fact that in Table 2 of Schedule 3 "persons" is used in determining whether or not a trustee can seek a review. As Mr Frank O'Donoghue QC on behalf of the Commission recognised this weakness in the Tribunal's decision but still maintained that the Tribunal had reached the right conclusion and that the narrow interpretation contended for by the Commission was the correct one.

[11] The Commission was right to make the concession it did. But it does not answer the question at the heart of this appeal. A charity can have a single trustee in sole control. Thus the provision reads perfectly well as (the person who has control or management of the institution).

It was contended that some support was provided for the position of the Attorney General by authorities of the First Tier and Upper Tier Tribunals in England. The Charities Act 2011 (in England) has broadly similar provisions. But in David Jennings v The Charity Commission for England and Wales CA/2014/0017 it was found that he was not "at the time the inquiry was open, a person with control or management of the relevant institution". This was the basis of its decision that he did not have the necessary standing to give him a right of appeal to the Tribunal. The second decision Thrift Urban Housing, Peter Alman v The Charity Commission for England and Wales CA/2014/0011; CRR/2014/0007 did not concern a trustee. Rather it concerned, inter alia, Mr Alman who was a Chief Executive. No issue was taken about his standing. This appeal did demonstrate that with such reviews it was possible administratively (as judicial reviews demonstrate) to have more than one applicant. Neither of these decisions answers the question of whether an individual trustee has the necessary standing.

[12] Secondly, the Tribunal seemed to believe that in these types of cases the intervention by the Commission will exclusively be against the institution itself. That is incorrect. While the purpose of the inquiry is to ensure, for example, that there is no mis-conduct or mis-management in the administration of the charity, the power to exercise this can involve suspending a trustee. Accordingly, while the purpose may be to ensure good governance of a charity, the Commission's actions can and will affect any trustees who are carrying out that governance.

G. DISCUSSION

[13] I consider that a single trustee does have the necessary standing to seek a review under Schedule 3 of the 2008 Act of a decision by the Commission to hold a statutory inquiry.

[14] Firstly, Section 180(1) of the 2008 Act defines a charity trustee as meaning "the persons having the general control and management of the administration of charity". The plural obviously includes the singular for reasons discussed above. This ties in with column 2 of Table 2 where the identical expression is used. This is obviously deliberate. The clear legislative intention is that a trustee will have the necessary control and management to seek a review. After all each and every trustee of a Trust legally holds a property or rights in trust for another or others. A Tribunal cannot be expected to look at whether a trustee, if there is more than one, on any particular issue concerning the Trust property was in the majority or the minority.

[15] If the Commission was correct in its submissions the court would have to make fact sensitive assessments in every case where a trustee sought a review. How many trustees were there? Was the trustee in the majority on this particular issue? What happens if there is a split equally amongst the trustees? What happens if a trustee abstains? Does the Tribunal have to look at every single decision of the Board of Trustees to see if the Trust application was in the majority? Or does it only have to look at the application for the review. Not only would such an investigation be time consuming but it would also be extremely difficult to say with any degree of certainty what role a particular Trust played in the management and/or control of the Trust.

[16] Secondly, the right to seek a review is in effect an alternative statutory remedy to judicial review through the courts. If the applicant sought a judicial review the court would have to determine whether to permit him to proceed. The Commission would almost certainly want to argue that because there was a statutory remedy, the applicant should exhaust that before seeking judicial review; e.g. see Watch Tower Bible, Tract Society of Britain v Charity Commission [2014] EWHC 4135 where such an argument was successfully advanced. There can surely be no doubt that as a trustee, the applicant, would have the necessary standing to seek a judicial review in a matter such as the instant one. If the narrow interpretation sought by the Commission was accepted, the applicant would not be able to seek the statutory relief on offer under the 2008 Act. Instead, he would have to apply to the courts for judicial review. This is a result that the draftsman cannot have intended.

[17] Thirdly, I consider that the broader interpretation will further the ends of justice. For example, where the majority on the Board of Trustees have sought to

unlawfully persuade the Commission to hold an enquiry to disadvantage a single trustee or minority trustees, then that trustee or those trustees in the minority would be unable to take advantage of the right to seek a review of any decision to hold a statutory enquiry which was based on bad faith or an improper motive. As Bennion on Statutory Interpretation (6th Edition) states at page 727:

> "It is a principle of legal policy that laws should be just, and the court decisions should further the ends of justice. The court, when considering, in relation to the facts of the instant case, which of opposing constructions on the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle."

The ends of justice are in this court's opinion furthered by a wide construction of who can seek a review of the decision to hold a Section 22 inquiry.

H. CONCLUSION

[18] On the facts of this particular case, the result could be said to be academic. However, neither side attempted to argue that this is an appeal to which the decision in R v Secretary of State for the Home Department (ex parte) v Salem [1999] 1 AC 45 applies and that the court should decline to hear the case. However, this issue may arise again before the Tribunal. In those circumstances the court finds in favour of the interpretation put forward by the Attorney General. It confirms that a single trustee does have the necessary standing to seek a review of a decision to hold a statutory inquiry under Section 22 of the 2008 Act.