UT/2015/0011&0178

Charity Commission - Appeal from FTT decision – review of decision to open statutory inquiry – section 46 Charities Act 2011 - Article 14 of Schedule 1 to the Human Rights Act 1998. Appeal from case management decisions in relation to cross examination and disclosure for the purposes of the review.

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY)

ON APPEAL FROM THE FIRST-TIER TRIBUNAL (CHARITY)

B E T W E E N :

TAYO, BAILEY, HALLS, JONES, ROWARTH & FLANAGAN (TRUSTEES OF MANCHESTER NEW MOSTON CONGREGATION OF JEHOVAH'S WITNESSES)

Appellants

- and –

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

TRIBUNAL: MRS JUSTICE ASPLIN

Sitting in public at Royal Courts of Justice, Rolls Building, London EC4A 1NL on 2 and 3 March 2017

Richard Clayton QC and Lee Parkhill (instructed by Watch Tower Bible and Tract Society) on behalf of the Appellants

Iain Steele (instructed by the Charity Commission) on behalf of the Respondent

DECISION

1. The Appellants are the charity trustees of a registered charity, Manchester New Moston Congregation of Jehovah's Witnesses ("the Charity"). The Charity is an unincorporated association. The Respondent, the Charity Commission for England and Wales ("the Commission") is the statutory regulator and registrar of charities in England and Wales under the Charities Act 2011 ("the 2011 Act").

2. On 30 May 2014, the Commission decided to open a statutory inquiry into the Charity pursuant to its power under section 46 of the 2011 Act. The Charity applied to the First-tier Tribunal (the "FTT") for a review of that decision pursuant to section 321 of the 2011 Act. By its decision of 9 April 2015, amended on 22 April 2015, the FTT dismissed the application for a review (the "Substantive Decision").

3. There are three appeals before the Upper Tribunal (the "UT"): one is in relation to one aspect of the Substantive Decision; and two are in relation to related case management decisions made by the FTT in relation to the hearing on 10 March 2015 which led to the Substantive Decision (the "Substantive Hearing").

4. Permission to appeal was granted in relation to the Substantive Decision on two grounds namely that the FTT erred in law in holding that: Article 14 ECHR was not engaged because the FTT was not satisfied that the Appellants' rights under Article 9 and 11 were infringed; and in failing to find that the treatment of the Charity could not be justified (the "Substantive Appeal").

5. The first case management decision which is appealed is contained in the FTT's ruling at paragraph 2 of Directions made on 15 December 2014 (the "December Directions"). The FTT directed that certain documents need not be disclosed in un-redacted form and put before the FTT at the Substantive Hearing. Permission to appeal was granted by the UT on 18 February 2015 on the grounds that the FTT's decision as to relevance at paragraph 2 of the Directions was unsustainable, it having been conceded that the documents were relevant, the documents were before the decision maker and therefore, were necessary to the review, and the onus was not on the Charity to demand sight of the documents and should only have been withheld if Rule 14(2) was satisfied (the "Disclosure Appeal").

6. The second case management decision which is appealed was made on 4 February 2015 limiting cross examination at the Substantive Hearing (the "Cross Examination Decision"). Permission to appeal was granted by the UT on 14 October 2015 on the grounds that the FTT was wrong: to regard issues which had been numbered 1 - 6 in submissions to the FTT as "technical legal issues" rather than giving rise to a factual enquiry; to characterise the Charity's complaints as challenges to reasonableness rather than lawfulness; and to hold that references to "advancing" the Charity's case through cross examination meant Counsel putting his client's case to the witness as if he were in court (the "Cross Examination Appeal").

Relevant Background

7. It is not in dispute that the decision to initiate a statutory inquiry arose from reports of the Charity's handling of a convicted sex offender, Mr Rose, who was also a former trustee of the Charity. It is also not in dispute that following Mr Rose's release from prison in about February 2014, the Commission heard from various sources that Mr Rose had been accepted back into the Charity and that there had been a "dis-fellowshipping" hearing which Mr Rose's victims (now adults) had been required to attend and to answer questions, including from Mr Rose, about the offences for which he had been convicted. The purpose of the hearing was to decide whether Mr Rose could remain as one of Jehovah's Witnesses. As recorded at [6] to [10] of the FTT Decision, having been made aware of the circumstances, the Commission held a meeting with the Charity and correspondence ensued.

8. In early May 2014, the Commission's case officer, Ms Seatle referred the case to its Pre-investigation Assessment and Monitoring Team. On 30 May 2014, Mr Sladen completed a "Decision Log" setting out his assessment of whether there were grounds to open a statutory inquiry. He concluded that in his view it was "reasonable to conclude that the regulatory concerns in this charity are "most serious" and that the most suitable regulatory response for the Commission to adopt is to open a formal inquiry." He stated that he had considered the information in the "incoming referral and in the case file" and that it was clear that certain "headline facts" had emerged, namely:

    - An individual by the name of Jonathan Rose was convicted of child sex offences in October 2013 and was sentenced to nine months imprisonment for those offences;

    - As a member of the Manchester New Moston Congregation of Jehovah's Witnesses, this criminal offence did not automatically bar him from being a member – either under the charity's internal procedures or the wider law;

    - On his release from prison, the elders of the charity took steps to determine whether this individual should remain a member of the congregation – effectively an internal disciplinary process which can result in what is called "dis-fellowshipping";

    - This process would appear to have involved the elders of the charity (its trustees) and Mr Rose interviewing his victims, in an apparently intrusive way."

    Mr Sladen's decision was reviewed and approved by his senior officer, Dave Walker also on 30 May 2014 and the decision to open the inquiry was made on that date.

9. As the FTT records at [12] of the Substantive Decision, after the opening of the inquiry, by a letter dated 10 July 2014 from Mr Cook of Watch Tower Bible

and Tract Society of Britain ("Watch Tower") an umbrella charity for Jehovah's Witness congregations, the Commission was informed that the "dis-fellowshipping hearing" had been conducted by Elders of a different congregation and therefore, the Charity had played no part in the process. The involvement of other Elders in the "dis-fellowshipping hearing" was dealt with at [66] of the FTT Decision and that decision is not appealed. None of the other "headline facts" are disputed.

10. On 15 July 2014, the Charity applied to the FTT for a review of the Commission's decision to open the inquiry pursuant to section 321 of the 2011 Act, on the grounds that the Charity's Article 9, 11 and 14 rights had been breached. It was stated that a breach of Article 14 read together with Article 11 had occurred and reference was made to certain other charities into which there have been investigations by the Commission relating to safeguarding of vulnerable beneficiaries and four schools run by charities at which sexual offences had been committed against children but where there had been no statutory inquiry by the Commission were identified.

11. It was also stated in the Grounds for the review that the Charity intended to seek disclosure of documents including: "... (b) any documents (redacted, if necessary and appropriate) which relate to concerns the Commission has in respect of sex abuse or sexual impropriety in relation to other charities including, in particular, other charities comprising other religions or private schools".

12. At the hearing on 12 September 2014 which took place by telephone (the "September Hearing") the FTT made a number of directions (the "September Directions"). Amongst other things, it was directed that witness statements be exchanged by 13 November 2014 and that matters including disclosure and cross examination should be dealt with at a case management hearing in December. However, the Charity was given permission to reserve the filing of any of their witness evidence until after the December case management hearing, if the issues which that evidence was to cover were affected by an application for disclosure to be determined at that hearing. Any application to be dealt with at the case management hearing was to be filed and served with supporting evidence at least 14 days before the hearing.

13. The Commission served statements from Mr Sladen and Kathryn White, who provided information about the other cases cited by the Charity in their pleaded Grounds as allegedly showing that the Commission had discriminated against the Charity. The Charity served statements from William Halls and Richard Cook. In his witness statement, Mr Cook did not refer to the charities which had been identified in the Charity's Grounds for the review, but did refer to a different set of examples of sexual offences against children by individuals connected with the Church of England and the Roman Catholic Church.

14. On 2 December 2014, the Charity made applications for various directions, including an order requiring the Commission to disclose: "any documents (redacted, if necessary and appropriate) which relate to regulatory action the Respondent has taken in respect of sex abuse or sexual impropriety in relation to: (a) the charities referred to at paragraphs 65 – 67 of the first statement of Richard Cook, and (b) any other charities connected to the cases referred to in paragraphs

68 and 69 of the first statement of Richard Cook." On 10 December 2014, the Commission replied explaining that Ms White was preparing a supplemental statement dealing with them in the same way as she had done in relation to the charities which had already been mentioned. It was stated that therefore there was no need for a direction for disclosure.

15. The December Directions made at the hearing on 15 December 2014 included at paragraph 6 a direction that the Commission have permission to serve the additional witness statement from Ms White relating to the charities identified by Mr Cook and it was served on 8 January 2015. As paragraph 15 of the December Directions, the FTT recorded that:

> "The Appellants sought orders for additional disclosure in respect of regulatory action taken by the Respondent in relation to certain charities identified in the witness statement of Mr Cook and in respect of the training offered to the Respondent's staff in a number of areas. The Respondent agreed to provide an additional witness statement from Ms White dealing with the former and to write to the Appellants setting out details of the latter."

16. The Charity's skeleton argument for the Substantive Hearing contained an allegation of direct discrimination on the basis that the Charity had been "targeted" for an inquiry on grounds of the religious beliefs of its members as Jehovah's Witnesses. However, it is not disputed that criticism of the extent of disclosure provided in Ms White's second statement, was only made in Mr Clayton QC's oral reply at the Substantive Hearing which was noted by the FTT at [50] of the Substantive Decision. A notice of appeal and reasons for the appeal was filed on 22 June 2015 and permission to appeal in terms of the Substantive Appeal was granted by the UT on 14 October 2015.

Statutory Framework and Jurisdiction

17. The Commission has power to institute an inquiry in relation to a Charity pursuant to section 46 of the 2011 Act. It is not disputed that the power is a wide one. Section 46(1) is in the following form:

> "The commission may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes. "

In the case of a review, section 321 of the 2011 Act applies. On such a review, the FTT "must apply the principles which would be applied by the High Court on an application for judicial review": section 321(4). The FTT may dismiss the application or if it allows the application may exercise the power to direct the Commission to end the inquiry: section 321(5)(b).

18. It is not in dispute that, in general, the FTT has wide case management powers including general case management powers to regulate its own procedure, including a power to "permit or require a party or another person to provide

documents, information or submissions to the Tribunal or a party" (rule 5(3)(d)); a power to give directions as to: "(a) the exchange between parties of lists of documents which are relevant to the appeal, or relevant to particular issues, and the inspection of such documents", "(c) issues on which it requires evidence or submissions", "(d) the nature of the evidence or submissions it requires", "(g) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given (i) orally at a hearing; or (ii) by written submissions or witness statement", and "(h) the time at which any evidence or submissions are to be provided" under Rule 15(1); a power to order "any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings" (Rule 16(1)(b)); and under Rule 14(2), a power to make a direction prohibiting the disclosure of a document or information to a person if it is satisfied (a) that such disclosure would be likely to cause that person or some other person serious harm, and (b) having regard to the interests of justice, that it is proportionate to give such a direction.

19. There is a right to appeal from the FTT to the UT on any point of law arising from the FTT's decision: section 11 Tribunals Courts and Enforcement Act 2007. It is common ground that a point of law extends to a finding of fact which is perverse.

20. In relation to the approach to adopt on appeals from the FTT's case management decisions, Mr Steele on behalf of the Commission drew my attention to *HMRC v Ingenious Games LLP* [2014] UKUT 0062 (TCC) at [56]. Mr Clayton on behalf of the Charity did not challenge the principles which are set out. They are as follows:

> "The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT: Walbrook Trustees v Fattal [2008] EWCA Civ 427, [33]; Atlantic Electronics Ltd v HM Revenue and Customs Commissioners [2013] EWCA Civ 651, [18]. The Upper Tribunal should exercise extreme caution before allowing appeals from the FTT on case management decisions: Goldman Sachs International v HM Revenue and Customs Commissioners [2009] UKUT 290 (TCC), [23] - [24]."

The Disclosure Appeal

21. This appeal relates to the FTT's case management decision in relation to the disclosure of material that the Commission had redacted or withheld. The matter was dealt with by the FTT at paragraph 2 of the December Directions in

the following way:

> "No direction is made on the Respondent's rule 14 application, but the Tribunal directs under rule 15 (1) (c) that, as the information provided in the redacted documents is not relevant to either party's pleaded case, it does not require that evidence to be disclosed in un-redacted form to the Appellants and it shall not be put in evidence before the Tribunal at the final hearing of this appeal."

(the "Paragraph 2 Direction")

Further, at paragraph 13 of the December Directions the Judge gave the following reasons for her decision:

> "The Respondent had applied for certain information to be withheld from the Appellants under rule 14 (2) of the [FTT Rules]. The withheld information had been provided in un-redacted form to the Appellants' counsel following the Tribunal's earlier directions. The Appellants had not complied with paragraphs 2 (c) and 7 of the Tribunal's earlier directions by specifying why it was said that disclosure of the redacted information was necessary to a fair and just disposal of the proceedings. The Respondent did not seek to rely on the redacted information at the hearing of this appeal. In the circumstances it did not appear to the Tribunal that the redacted information was relevant to an issue before it and accordingly that it would be fair and just to exclude it under rule 15 of the Rules. As the redacted information was not relevant to an issue in the proceedings, there was no need to rule on the Respondent's rule 14 application."

Background in detail

22. It is not in dispute that prior to the decision to open the statutory inquiry, the Commission had received information from individuals about their concerns about matters at the Charity relating to the "dis-fellowshipping" hearing. It is said that the individuals had expressed serious concern about their identities becoming known and, as a result, the Commission decided to make an application under Rule 14 of the FTT Rules for an order prohibiting the disclosure or publication of documents (or parts of documents) which would be likely to enable the Charity or others to identify the individuals who had provided information. The application was made on 19 August 2014 in respect of two documents, numbered 1 and 2, and those parts of four other documents, numbered 3-6, that had been highlighted in yellow (the "Disclosure Application").

23. They are described and the reasons for an order under Rule 14(2) are set out in the Commission's letter of 19 August 2014 as follows:

"Ground 1: Disclosure is likely to cause serious harm

Disclosure of the Relevant Information would be likely to enable the Appellants to identify those persons, including the [REDACTED] (identity of individual)] who provided information and/or co- operation with the Commission and/or the Police.

The serious harm is likely to result from the disclosure is as follows:

(a) that the [REDACTED] (identity of individual)] would be at risk of harassment or other harm, in particular, [REDACTED SUMMARY OF REDACTED TEXT: "the person's address"] were disclosed (Document 1 only): and

(b) that these people or their families would be disfellowshipped from being members of their religious congregations and/or shunned by those congregations (Documents 1 to 6)

The Commission believes that this harm is likely to result on the basis of:

(a) information provided by the [REDACTED] (identity of individual)] in Document 1, as set out below [REDACTED SUMMARY OF REDACTED TEXT "that person and his/her family would be at risk of harassment or other harm if his/her identity is disclosed.

"[REDACTED (quote from page 2 of document 1) [REDACTED (quote from page 4 of document 1) "[REDACTED (quote from page 11 of document 1)

(b) As recorded in Document 6, Jehovah Witnesses religious doctrine include that members should not "take brother to court". This appears to include not providing information regarding fellow members to law enforcement and regulators. Breach of religious doctrines can lead to the disfellowship and/or shunning of those who provide information.

This is not merely a theoretical risk. Documents 4 and 6 record that the family of one of Mr Rose's victims were shunned by the Charity and its trustees and told to leave the congregation (see pages 1 of the Document 4 and pages 3 to 4 of Document 6) ….

Ground 2: proportionality

> The Commission acknowledges that it did rely on at least some of the Relevant Information when making the decision to open an inquiry that is subject to review in these proceedings.
>
> In particular, as is recorded in the Commission's Decision Log (a copy of which was provided with the Commission's response on 12 August 2014) the Commission noted (para 15) that Mr Rose was subject to a disfellowship process on his release from prison and that this process 'would appear to have involved the elders of the charity (its trustees) and Mr Rose interviewing his victims, in an apparently instrusive [sic] way'. This is based, at least in part, on the Relevant Information.
>
> However, it appears that the Appellants do not dispute the actual and potential victims of Mr Rose were allowed to be questioned during the disfellowshipping process. ….
>
> In addition, as noted above, the focus of the Commission's redactions is to prevent disclosure of the identify of [REDACTED] (identity of individual)]. The Commission has sought, whenever possible, to avoid redacting or withholding the substance of the information received, or to provide this information to trustees in another way (for example, in a meeting in March 2014), so that they can respond to the allegations.
>
> The Commission, therefore, considers that, although it has relied on the Relevant Information, it will not cause material prejudice to the Appellants' ability to bring their case if the direction is made …."

In the light of the purpose of the application, submitted to the FTT on 20 August 2014, the Commission did not provide a complete copy to the Charity, but provided a redacted version on 29 August 2014, an unredacted version having been provided to the FTT. On 25 September 2014, the Commission provided the Charity with redacted copies of the four documents that were not withheld in their entirety.

24. At the September Hearing, the FTT made the following directions which were directly relevant to the disclosure issue:

> "2. No direction is made on the Respondent's rule 14 application, and the Tribunal makes no finding in respect of the rule 14 criteria, but the parties have agreed as follows:

a. Upon Mr Clayton QC and Mr Parkhill, leading and junior counsel for the Appellants, providing an undertaking to the Respondent that they will not disclose to any person the information provided to them pursuant to this sub-paragraph, the Respondent shall, after 25 September 2014, deliver to the Appellants' counsel one un-redacted copy of each of the documents it seeks to withhold, or in part withhold, from the Appellants.

b. The Respondent shall send to the Appellants' counsel, by e mail, redacted versions of the four documents that are not being withheld in their entirety in a form that may be seen by the Appellants.

c. The Appellants shall have liberty to apply for disclosure, to them, of any or all of the documents the Respondent seeks to withhold or redact. Any such application shall be made in accordance with paragraphs 7 and 12.

…

7. If a party wishes another party to give specific disclosure of documents which the latter has declined to give, they are to apply to the Tribunal setting out the specific documents sought and the basis on which it is said that disclosure is necessary for a fair and just disposal of the proceedings. Any such application shall be made at least fourteen days before the Case Management Hearing referred to below, in accordance with paragraph 12 below, and shall be determined by the Tribunal at that hearing.

…

12. If either party seeks any order or directions at the Case Management Hearing (other than an order in respect of the duration and timetable of the final hearing) they shall file and serve an application (together with any evidence in support, if relied on) at least fourteen days before the Case Management Hearing."

Pursuant to paragraph 10(a) of the September Directions, any such application was to be made at least 14 days before the case management hearing in December 2014, and was to be determined at that hearing.

25. The Charity's Counsel received the redacted material on 3 October 2014 and retained it until after the hearing on 15 December 2014 which led to the December Directions. When the parties exchanged witness statements on 14

November 2014, the Commission provided non-confidential summaries of the redacted material, to supplement the information provided in the redacted version of the Disclosure Application. Further, it was stated in Ms White's first statement at [32] that if the Charity's Counsel identified any specific points in the documents that they wished to communicate to their instructing solicitors or to the Charity itself, the Commission would be willing to consider consenting to such disclosure. No request was made and no application was made for the disclosure of the redacted material.

26. On 17 November 2014, Watch Tower wrote to the Commission stating that the documents should be disclosed in full subject to the Commission proceeding with its Rule 14 Application and, despite the September Directions, proposed a further set of directions for that application involving the exchange of evidence and submissions and a half-day hearing. By a letter of 24 November 2014, the Commission invited the Charity to explain why they considered that the redacted material was relevant to their pleaded case, and to which of their grounds it related pursuant to the September Directions. Amongst other things, the Commission added that if the Charity were determined not to file a disclosure application under paragraphs 2(c) and 7 of the September Directions**,** the Commission would start the process by re-filing its Rule 14 Application and any evidence in support. By a letter of 27 November 2014, the Charity stated that the redacted material was "directly relevant to these proceedings", but did not comply with paragraph 7 of the September Directions by setting out "the basis on which it is said that disclosure is necessary for a fair and just disposal of the proceedings".

27. Thereafter, on 1 December 2014, the Commission re-filed its Rule 14 application, together with a supporting witness statement from Christopher Willis Pickup. The following day, the Charity applied to the FTT for directions including those it had proposed regarding the Rule 14 application and on 10 December 2014, the Charity filed a second witness statement of William Halls. In his witness statement, Mr Willis Pickup addressed the Charity's point that the information which the Commission sought to withhold had been relied upon when making the decision to initiate the inquiry and therefore, was directly relevant to the proceedings. He made four points which in summary were: (a) the Commission intended to defend the review without relying on any information not disclosed to the Charity so that the FTT would not review documents not shared with the Charity and that this demonstrated that the information withheld did not carry significant weight in the decision to open the inquiry; (b) the key information upon which the decision maker relied had been disclosed and that non-confidential summaries of documents numbered 5 and 6 upon which the decision maker did rely had been provided and could be compared with the unredacted versions provided to counsel; (c) the FTT would be applying the principles of judicial review and therefore, there was a reduced requirement to make its own findings of fact; and (d) that the interest in avoiding serious harm if identities were disclosed outweighed the Charity's interests in obtaining disclosure beyond that already provided.

28. At the December Hearing on 15 December 2014, amongst other things, the Judge made the Paragraph 2 Direction as to relevance and disclosure under Rule 15(1)(c).

Submissions

29. Mr Clayton took me to Rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the relevant parts of which are as follows:

> **"14. Prevention of disclosure or publication of documents and information**
>
> (1) The Tribunal may make an order prohibiting the disclosure or publication of -
>
> (a) specified documents or information relating to the proceedings; or
>
> (b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.
>
> (2) The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if -
>
> (a) the Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
>
> (b) the Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction. . . "

Mr Clayton also referred me to Rule 27 which provides that the Respondent to an appeal must deliver to the FTT a response to a notice of appeal within 28 days after the date on which it has received the notice of appeal and, in particular, to Rule 27(4) and (5) which state that:

> "(4) If the proceedings challenge a decision, the respondent must provide with the response a copy of any written record of that decision, and any statement of reasons for that decision, that the appellant did not provide with the notice of appeal and the respondent has or can reasonably obtain.
>
> (5) If the proceedings challenge a decision, the respondent must provide with the response a list of -
>
> (a) the documents relied upon by the respondent when reaching the decision; and
>
> (b) any other documents which the respondent considers could adversely affect its case or support the appellant's case."

He points out that Rule 27(4) does not prevent the reasons for a decision from

being served before the appeal. In this case, they were not served until after the application for a review was made and therefore, he says that no point should be taken on the fact, that in the absence of the reasons, it was not possible to plead the grounds for a review in full.

30. In relation to the relevance of the redacted documents with which the Paragraph 2 Directions was concerned, Mr Clayton points to the Commission's Response to the Notice of Appeal in this case dated 12 August 2014. Under the heading "Rule 27(5)" at paragraph 8 it was stated that a list of documents relied on in reaching the Commission's decision was set out at Annex C and at paragraph 9 that the Commission would be making an application under Rule 14 in respect of two documents relied upon in making its decision, not included in Appendix C. Mr Clayton concludes that the documents referred to in paragraph 9 were the documents numbered 1 and 2 and that the others, parts of which were redacted and which were numbered 3 - 6 were accepted to be relevant and to have fallen within paragraph 8. He also notes that: the application contained in the Commission's letter of 19 August 2014 and the enclosures to it were not disclosed to the Charity in unredacted form; and that it is acknowledged in the letter that the Commission "did rely on at least some of the Relevant Information when making the decision to open an inquiry". He submits therefore, that the Commission expressly stated that the two documents which had not been disclosed and those which had been redacted were relevant to its decision making and therefore, the FTT was wrong to decide as it did in the Paragraph 2 Direction on the basis that they were not relevant.

31. Mr Clayton submits that there is an inherent unfairness in having relied upon material which is not disclosed and that, as a result, the Charity has been fighting a shadow case. He referred me to Mr Willis Pickup's witness statement in support of the Rule 14 application and in relation to Mr Willis Pickup's reason "(a)" pointed out that he did not state that the material which was intended to be withheld was not relevant to the Commission's decision but rather conceded that it was and stated that it had not been given significant weight. Mr Clayton referred me to paragraph 15 of Mr Sladen's Decision Log in which he stated that in forming a view he had "considered the information in the incoming referral". Mr Clayton says that that is a reference to the redacted document numbered "6" which refers to documents "1", "2", "4" and "5" and therefore, that it is highly relevant. Mr Clayton also took me to paragraph 20 of Mr Sladen's first witness statement in which he listed the key documents which he relied upon, one of which was an email of 7 April 2014 from Julie Ann Redfearn of Greater Manchester Police to the Commission which was the redacted document "5".

32. In addition, he says that the summary of the documents provided in Ms White's first witness statement does not do them justice and that the summary of document "6" at paragraph 30 of the witness statement is inaccurate. In any event, Mr Clayton says that the summaries are not enough. In this regard, he referred me to *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 in which the Supreme Court was concerned with whether it could adopt a "closed material procedure" on an appeal and if it could, whether it was appropriate to do so. The case concerned a decision to impose financial restrictions under section 62 of and Schedule 7 to the Counter-Terrorism Act 2008 upon dealings

with a major Iranian commercial bank. In his written submissions Mr Clayton referred to the following passage from the judgment of Lord Neuberger:

> "2. The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum …
>
> 3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party … knowing, or being able to test, the contents of that evidence and those arguments … or even being able to see all the reasons why the court reached its conclusions."

33. Mr Clayton went on to refer me to *Browning v Information Commissioner & Anr* [2014] 1 WLR 3848. Maurice Kay LJ delivered the judgment of the Court of Appeal. At [25] he pointed out that it was common ground that the decision of the FTT to exclude the claimant from a closed session was permissible under its rules. The real issue arose in relation to the exclusion in addition of the legal adviser willing to give an undertaking as to confidentiality. Mr Clayton referred me to [29] of the judgment at which the nature of the issue, the fact that it is of a fact sensitive nature and the extract from the judgment of Lord Neuberger in the *Bank Mellat* case which I have already set out. He went on to refer me to the following additional passages:

> "31. Our courts have shown an aversion to permitting counsel to see or hear evidence which he is not at liberty to disclose to his client. In the context of criminal litigation, this is illustrated by *R v Davis* [1993] 1 WLR 613, 616-617, per Lord Taylor of Gosforth CJ; *R v Preston* [1994] 2 AC 130, 152-153, per Lord Mustill; and *R v G* [2004] 1 WLR 2932, para 13, per Rose LJ. However, such an approach is not confined to criminal litigation. *Somerville v Scottish Ministers (HM Advocate General for Scotland intervening)* [2007] 1 WLR 2734 was concerned with an application for judicial review. As in the criminal cases, the issue concerned public interest immunity. An arrangement had been devised whereby

documents were to be made available to counsel on condition of strict confidentiality which prevented him from disclosing them or their contents to his client. Lord Rodger of Earlsferry said, at paras 152-153:

> 'Although devised with the best of intentions, this procedure was, in my view wrong in principle. As a result, it not only gave rise to very real practical difficulties but led the court to adopt a mistaken approach to the inspection of the documents by the Lord Ordinary … counsel for the petitioners was left in a very difficult situation where, as a result of reading the documents, he had information that he was not able to reveal to, or discuss with, his clients or instructing solicitors. He even felt inhibited from revealing it to Lord Ordinary. The result was a certain paralysis in the procedure. In agreement with all of your Lordships, I am satisfied that no such procedure should be followed in the future.'

Drawing on the criminal cases to which I have just referred, Lord Mance said, at paragraph 203:

> 'It puts counsel in an invidious and unsustainable position in relation to his or her client. As in this case, such a procedure may also put counsel into a position where he or she is uncertain what it is permissible to disclose or say when making submissions to the court about public interest immunity.'

…

34. In the *BUAV* case, the FTT opined that this approach might be departed from but only "in exceptional cases" (see para 15 of Appendix 2 quoted at para 24 above). It seems to me that it was there using the word "exceptional" in a predictive sense rather than as positing a substantive test of exceptionality. What is important is that each case should be considered in its particular factual context.

35. What is also important is that when the FTT excludes both a party and his legal representative it does its utmost to minimise the disadvantage to them by being as open as the circumstances permit in informing them of why the closed session is to take place and, when it has finished, by disclosing as much as possible of what transpired in order to enable submissions to be made in relation to it. The same commitment to maximum possible candour should also be adopted when writing the reasoned decision. Having been taken by counsel to the contemporaneous notes written during the proceedings, I am satisfied that this was achieved in the present case. Parenthetically, I should add that Mr Coppel's complaints about

> having been bounced out of the Upper Tribunal hearing peremptorily and unfairly seem to me, on proper investigation, to be unfounded."

34. Mr Clayton submits that he objected to the course adopted during the telephone hearing on 12 September 2014, that he and his junior should be provided with documents subject to a confidentiality undertaking. He says that he made submissions during the hearing about the decision in the *Browning* case and that he never agreed to the course which was adopted which is described as having been agreed. He says that attempts were made afterwards to have the matter relisted but were refused. He also submits that the confidential material went beyond the names of informants and included tendentious accounts upon which Mr Sladen had clearly relied when making his decision to open the inquiry.

35. He also referred me to *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, a case which was concerned with a decision by school governors not to admit a pupil wearing a jilbab. The claim for judicial review was dismissed on the basis that the pupil had not been excluded from school and even if she had been, there was no limitation on her rights under article 9(1) and even if there were it would have been justified under article 9(2). The Court of Appeal allowed the appeal. However, that decision was overturned in the House of Lords. Mr Clayton referred me, in particular, to Lord Bingham's speech at [29], [30] and [32] and that of Lord Hoffmann and [66] and [68] at which in summary they held it was necessary to consider proportionality of the school's interference with the pupil's right to manifest her religious belief. At [68] Lord Hoffmann held as follows:

> "... In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which was is not justified under article 9(2)? ... "

Mr Clayton says that the position is the same here and that it was necessary to consider proportionality under Article 9(2) and in order to do so, he says that an exacting analysis of the factual case advanced in defence of a measure is necessary: *Bank Mellat v Her Majesty's Treasury* (supra) per Lord Sumption JSC at [20].

36. Mr Clayton submits therefore that the Charity had a right to know the full case against it and to test and challenge it fully, that Rule 14(2) should be construed narrowly and that is clear that there was a misdirection in this case. He also relies upon *Somerville & Ors v Scottish Ministers (HM Advocate General for Scotland intervening)* [2007] 1 WLR 2734 and, in particular, to the approach of Lord Rodger at [155]. He stated that the correct approach in that case was that the redacted passages in certain documents were relevant to one or more issues in the petitioners' case and that there was no onus on counsel for the petitioners to show why they should recover the full version of the documents including

redacted passages. In addition, Mr Clayton referred to *R on the application of National Association of Health Stores & Anr v Department of Health* [2005] EWCA Civ 154 in which Sedley LJ referred to the best evidence rule and stated at [49] that "In the absence of any public interest in non-disclosure, a policy of non-production becomes untenable if the state is allowed to waive it at will by tendering its own precis instead."

37. Mr Clayton submits therefore, that it was perfectly obvious that the documents in question were relevant, as a matter of open justice they should have been disclosed, that second hand accounts of the documents coupled with an impermissible disclosure only to counsel was insufficient, that the review required consideration of the detailed facts including all the documents taken into account by the Commission in making its decision and that the onus was on the Commission to show that the documents or parts of them should be excluded on the basis that Rule 14(2) was satisfied.

38. Mr Steele on behalf of the Commission on the other hand says that it was open to the Charity to make submissions on relevance but it failed to do so altogether. Furthermore, he says that it has never been said until now that the way in which the matter was dealt with which was set out at paragraph 2 of the September Directions had not been agreed and no application or indication of a need to relax the confidentiality undertaking was given at any time. Furthermore, no application for disclosure was made after receipt of Ms White's first witness statement. Instead, the Charity sought to push ahead under Rule 14 and failed to give details as to why the withheld and redacted documents were material to the Charity's pleaded case and the grounds to which they related.

39. Mr Steele submits that this is not a situation, therefore, in which either the *Browning* or the *Somerville* decision applies. *Browning* was concerned with open justice in relation to a hearing on the merits and *Somerville* dealt with an issue of public interest immunity in which materials had been disclosed to counsel but the judge had not looked at them. It had been accepted that the material was relevant and therefore, in that case, the onus was not on counsel to say why it should be disclosed.

40. Mr Steele says that the approach to disclosure in judicial review is considerably narrower than in ordinary civil proceedings and pointed to the principles identified in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650. In his written submissions, Mr Steele stated that as the House of Lords explained, since a challenge to an administrative decision by way of judicial review raises predominately legal issues, disclosure is not ordinarily necessary for fairly disposing of the matters in issue. He highlighted the following passage from the speech of Lord Bingham at [4] and, in particular, the final sentence:

> "Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be

> necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited."

He also drew attention to Lord Bingham's statement at [3] that even where there is a disputed issue of proportionality under the Human Rights Act 1998, disclosure is not to be regarded as automatic and the following passage of Lord Brown's speech:

> "56. ... in my judgment disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the court should continue to guard against what appear to be merely "fishing expeditions" for adventitious further grounds of challenge... ."

41. Mr Steele also points out that in fact, the documents relied upon by Mr Sladen in making his decision were those to which he referred in paragraph 20 of his witness statement and that therefore, only two of the six redacted documents were relied upon, the reference to a wider category pursuant to Rule 27(5) having been no concession in that regard. Non-confidential summaries of those documents were provided. There was no criticism of the summaries prior to or at the December hearing at a time when counsel had un-redacted copies of the documents. Nevertheless, these points are taken now. Furthermore, Mr Steele says that Mr Clayton's points in relation to open justice do not arise because the FTT did not take into account documents which had not been seen by the Charity. Instead, it decided that they were not relevant. It was a question for the FTT whether the documents were relevant and the appeal court should be slow to interfere.

42. Lastly, I was taken to the confidential schedule to the Appellants Counsel's skeleton argument. Mr Steele submits that none of the allegations they contain go to the headline facts upon which Mr Sladen relied when deciding to open the inquiry. Mr Steele submits therefore, that Rule 14(2) is irrelevant to the appeal.

Conclusion:

43. When considering this matter, it is important to separate out the separate strands of the argument on behalf of the Charity. First, Mr Clayton complains about the procedure adopted and recorded at paragraph 2 of the September Directions which he says is contrary to the decisions in *Browning* and *Somerville.* Although Mr Steele is correct to note that the *Browning* decision was concerned with the exclusion of a legal adviser in addition to the party itself from a closed hearing on the merits and the *Somerville* decision was concerned with circumstances which differ from this case because the material

in question was accepted to be relevant and had been given to counsel subject to a confidentiality undertaking, but had not been provided to the judge, it seems to me quite obvious that the general approach adopted is important.

44. However, the procedure in paragraph 2 of the September Directions was not in itself one of the grounds of appeal. Furthermore, it seems to me that it is not open to Mr Clayton on appeal to contend that he did not agree to the procedure adopted in the face of the express terms of that paragraph which was not appealed nor the subject of any application to vary or set aside which would have been the natural course if the paragraph was an inaccurate record. In fact, no complaint was made at the time or until now. It seems to me that if the course set out at paragraph 2 was agreed to and un-appealed, the Charity cannot complain and even if the September Directions were inaccurate, it seems to me that it is too late now, in effect, to seek to appeal them by a round about route and without having raised the issue of the procedure as a ground of appeal. In any event, in my judgment, the procedure adopted was within the proper ambit of the Judge's exercise of discretion and within the FTT's Rules. Furthermore, as I have already said, the circumstances differed both from those in the *Browning* and the *Somerville* decisions.

45. Secondly, Mr Clayton says that summaries were not enough and that the Charity was entitled to the entirety of the redacted documents which he says contained tendentious matters as well as the identities of the complainants. I agree with Mr Steele that it is also too late now to complain about the accuracy of the summaries when no complaint was made about them at the time despite the fact that counsel were in possession of the unredacted versions and made no complaint or any application at the time. Furthermore, it is made clear in Mr Sladen's witness statement that only two of the redacted documents were relied upon, summaries of which were provided. In any event, the adequacy of the summaries was not a ground of appeal and therefore is not relevant.

46. Thirdly, Mr Clayton makes general submissions about open justice and the entitlement to see the documents and have the documents before the court upon which the decision was made. Although I agree that the authorities to which I was referred are not directly relevant because documents were not disclosed to the FTT which were not made available to the Charity, nor was Mr Clayton and his junior excluded from a hearing on the merits, I agree with Mr Clayton that subject to the questions of confidentiality, relevance and the way in which the documents should be dealt with, in principle, the documents upon which the decision to open the inquiry was made should have been before the FTT.

47. What of the actual direction which is appealed? Applying the principles in *HMRC v Ingenious Games LLP* (supra) should the UT interfere with the Paragraph 2 Direction? In my judgment, it is clear from the 19 August 2014 letter and Mr Willis Pickup's witness statement that the Commission accepted that the withheld and redacted material was relevant to the decision to open the inquiry and therefore, to the review. However, in my judgment, this matter does not turn on the terms of any concession, even if there were a formal concession to be found in Mr Willis Pickup's witness statement and/or the Rule 14 application letter of 19 August 2014. What is relevant and clear from paragraph 20 of Mr Sladen's witness statement is that at least some of the redacted material had been considered by him when he made his decision.

48. However, in my judgment, it was open to the FTT having properly directed itself in the circumstances of this case, to decide that the withheld material was not relevant to the pleaded case for the purposes of the review under section 321 of the 2011 Act. In my judgment, the FTT was entitled to come to that conclusion and did not err in law in the light of: the fact that non-confidential summaries of the information relied upon by Mr Sladen had been provided; Counsel had been provided with the un-redacted materials under an agreed procedure which had not been appealed; no complaint was made of the summaries; the Charity did not specify how the redacted information was relevant to the issues before the FTT in accordance with the agreed and un-appealed procedure; and the Commission had stated that it was not relying upon the redacted or withheld information for the purposes of defending its decision to commence the inquiry. It seems to me that the FTT took into account the relevant factors, excluded irrelevant factors and came to a decision within the proper ambit of its case management powers.

49. I come to this conclusion, despite Mr Clayton's submissions to the effect that in the light of the fact that the review of a decision of this kind which involves Human Rights requires the reviewer to consider whether the decision was lawful rather than merely procedurally proper, all documentation should have been before the reviewing body because it may be required to determine the proportionality of an infringement of those rights. As both Lord Bingham and Lord Brown pointed out in the *Tweed* case, in the context of judicial review, the principles of which apply on a review under section 321 of the 2011 Act, even where proportionality under the Human Rights Act 1998 is disputed, disclosure is not to be regarded as automatic.

50. Accordingly, I dismiss the Disclosure Appeal.

The Cross Examination Appeal

51. The issue as to cross examination had been canvassed at the September Hearing and was dealt with at paragraphs 8, 9 and 10 of the September Directions. Paragraph 9 provided as follows:

> "If a party wishes to cross examine any witness in respect of whom a statement has been filed, they are to notify the other party that they require that witness to attend the final hearing not later than 14 days after service of the witness statement. If either party wishes to object to the requirement for attendance of their witness for cross examination on the basis that no aspect of the other party's pleaded case will be advanced by cross examination of that witness, then an application for a direction under rule 15 must be made to the Tribunal no later than ten days prior to the Case Management Hearing."

The reference to the Case Management Hearing was to the December Directions hearing. Following exchange of witness statements, the Charity stated that it required both the Commission's witnesses, Mr Sladen and Ms White to attend for cross-examination and the Commission invited the Charity

to identify, in respect of each witness, (a) the matter(s) in respect of which they sought to cross-examine that witness, and (b) which aspect(s) of their pleaded case would be advanced by cross-examination of that witness. The Charity did not respond. On 5 December 2014, in accordance with paragraph 9 of the September Directions the Commission applied to the FTT for an order that its witnesses need not attend the substantive hearing for cross-examination. Thereafter, on 8 December 2014 the Charity repeated that they "envisage[d] cross-examination", without giving details and put forward a time estimate for the substantive hearing of 3 - 4 days, with "Evidence to last 2 - 2 ½ days". At the December Hearing the matter was dealt with in the December Directions as follows:

> "3. The Appellants are to serve on the Respondent and the Tribunal by 15 January 2015 a statement indicating, with reference to the paragraph numbers in the witness statements of Mr Sladen and Ms White, which matters they seek to test in cross-examination at the final hearing and explaining how such cross-examination would advance their pleaded case."

The Charity was unsuccessful in its application for permission to appeal paragraph [3] of the December Directions. In any event, the FTT went on to require the Commission to serve a response and stated that it would rule on the issue by 6 February 2015. Judge McKenna went on at paragraph 14 to set out the procedure which had been adopted as follows:

> "The Appellants had notified the Respondent that they wished to cross examine Mr Sladen and Ms While [sic] at the final hearing of this matter but had not explained what matters it was sought to test and how such cross examination would advance their case. Mr Clayton accepted that the Appellants' letter to the Respondent could have been more helpful in this regard. However, now the witness statements are available to the Tribunal and having regard to the Upper Tribunal's guidance in HMRC v Fairford Group plc [2014] UKUT 0329 (TCC), the Appellants agreed to file a statement explaining the matters which it is proposed to test in cross examination and what aspects of its pleaded case such cross examination is intended to advance. The Respondent agreed to respond to the Appellant's statement explaining whether it opposed the proposed cross examination, following which the tribunal will rule in writing on whether the proposed cross examination should be permitted under rule 15 of the Rules. ..."

52. On 4 February 2015, Judge McKenna gave her decision, the relevant parts of which are as follows:

> "1. Under paragraph 5 of my directions of 15 December 2014 I agreed to provide a Ruling by 6 February on the question of

whether the Appellant is to be permitted to cross-examine the Charity Commission's witnesses Mr Sladen and Ms White at the hearing listed to commence on 10 March 2015. That direction was made in the exercise of the Tribunal's discretion under rule 5 (1) to regulate its own procedure, and under rule 15 which allows it to determine the manner in which evidence is to be given. Those powers must of course be exercised in order to give effect to the overriding objective and in particular to ensure that the case is dealt with in a way which is proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties. As I indicated at the December directions hearing, in these circumstances the Tribunal must be satisfied that live witness evidence in general and the proposed cross examination in particular are necessary for a fair and just determination of the parties' pleaded cases.

2. The matter before the Tribunal in this case is a Review rather than an Appeal. The issue for the Tribunal at the final hearing in March will be whether it was reasonable for the Respondent to have opened a statutory inquiry into the charity of which the Appellants are trustees on the date that it did and on the basis of the information then before it. The Tribunal will not be taking the decision afresh but must determine the issue in accordance with the principles that would be applied by the High Court on an application for judicial review. The Charity Commission has submitted that the Tribunal should follow the practice of the High Court in judicial review proceedings and admit oral evidence only exceptionally in a Review case. I note that in *Regentford v Charity Commission* [2014] UKUT 0364 (TCC) the Upper Tribunal heard a submission at [29] to the effect that the question of whether oral evidence should be permitted by the First-tier Tribunal in a Review would depend on the nature of the challenge made to the Charity Commission's decision. The Upper Tribunal neither agreed nor disagreed with this submission in deciding that case but it is an approach that I adopted in asking the Appellants to clarify the nature of their challenge to the Charity Commission's decision.

...

Issue 7

5. As the Appellants acknowledge, their substantive case is set out in paragraph 10 of the "Grounds" document, which was settled by leading counsel on 15 July 2014. Paragraph 10 describes the Appellants' case in six sub-paragraphs, which do not contain any mention of a challenge to the factual accuracy of the matters on which the Respondent relied to open its inquiry. Those six paragraphs are expanded upon in the section headed "Submissions" which also does not mention the issue of factual inaccuracy.

6. The Appellants have now contended in their schedule of proposed cross examination that the "Grounds" document also relies on a seventh issue, namely that the Respondent opened the inquiry on the basis of "factually incorrect information". I have noted that the issue of factual accuracy is not included in paragraph 10 nor indeed in the "Submissions" section (which stretches from page 23 to 33 of the "Grounds" document). The only reference that I can find to factually incorrect information in the Appellants' extensively-pleaded case is in paragraph 42 of the "Grounds" document, which falls into the section headed "Factual Background". I had not, for this reason, previously understood any issues of disputed fact to form part of the Appellants' case. I now understand, having asked the Appellants to explain why cross examination is necessary to their case, that they do rely on this issue as a seventh ground. . . .

7. In addition to arguing that the Appellants ought not now to be permitted to rely on a ground which was not clearly pleaded, the Respondent also questions the extent to which any factual dispute between the parties is relevant to the issues in a Review case. It submits that the purpose of the statutory inquiry was to establish and verify evidence and that it had not (and was not required to) make any firm findings of fact before opening the inquiry. Be that as it may, it seems to me that if (as it now appears) there is genuinely a dispute between the parties about factual matters, it would be fair and just for the Appellants to be permitted to test those issues in a proportionately short cross examination at a hearing. There are relatively few instances in the schedule where what is now referred to as issue 7 is proposed to be explored with a witness and it would in fact involve questioning the Respondent's witness Mr Sladen only, as issue 7 does not feature at all in the proposed cross examination of Ms White. The probative value of that exercise will be a matter for the Tribunal once it has heard the evidence, but I am satisfied that the proposed cross examination of Mr Sladen in relation to issue 7 should be permitted and so I direct that he attend to give oral evidence under rule 15(1) (g) (i). . . .

"Advancing the Appellants' Case"

8. Parts of the Appellants' schedule refer to "advancing the Appellants' case" through cross examination of a witness. The Charity Commission has understood this to mean that the Appellants' counsel will, in effect, be making submissions to the witness at that point and (understandably) objects to this. I had rather understood it to be a reference to counsel formally putting his lay clients' case to the witness as he would in a Court. I remind the parties that the Tribunal is not bound by the rules of evidence which apply in civil proceedings (rule 15 (2) (a) (i)) and that it is not therefore necessary in the Tribunal for the Appellants' counsel to "put his case" to a witness in order to found a basis for his closing submissions.

9. For that reason I now refuse permission for the Appellants' counsel to put to either of the Respondent's witnesses any of the questions which are referred to in the schedule as "advancing the Appellants' case". To the extent that it is necessary for me to do so, I give the Appellants' counsel permission to make his submissions without having formally "put his case" to any witness.

Issues 1 – 6

10. Issues 1-6 as pleaded at paragraph 45 of the Appellants' Grounds are, in summary, as follows:

> (i) that the decision to open the inquiry was disproportionate and/or disproportionately interfered with the Appellants' Convention rights to freedom of religion and of association;
>
> (ii) that the scope of the inquiry is disproportionately broad and thus places restrictions on the Appellants' Convention rights to freedom of religion and of association;
>
> (iii) that the decision to re-open issues which the Respondent has previously accepted as being resolved was an abuse of process;
>
> (iv) that the Respondent erred in law in its approach to the duties of trustees;
>
> (v) that the decision to open the inquiry was irrational; and
>
> (vi) that the Respondent has discriminated against the Appellants contrary to article 14 HRA *[sic]*.

11. The Appellants' schedule of proposed cross examination proposes to "challenge" and "explore" with the Respondent's witnesses a number of matters relating to issues 1-6. However, I consider that these are technical legal issues and I am not persuaded that the Appellants' proposed cross examination of the Respondent's witnesses in respect of issues 1-6 will materially advance the Appellants' case. Issues 1-6 are matters which will rightly form the basis of legal argument in counsel's submissions but I do not consider that witness evidence would be probative of the issues which the Tribunal must decide in relation to them. I therefore refuse permission under rule 15 (1) (c) for oral evidence to be called, and thus for the Appellant's counsel to cross examine Mr Sladen, in relation to issues 1 – 6.

12. In view of my decisions about issues 1-6 and 7 above, there are no remaining permissible questions for Ms White in the Appellants' schedule. Accordingly, I now refuse to direct Ms White to attend to give oral evidence and/or to submit to cross examination.

... ”

(the “Cross Examination Ruling”)

53. Mr Clayton submits that Judge McKenna misunderstood the reference to “advancing the case” and was wrong to decide at [11] that issues 1 - 6 were “technical legal issues.” In this regard, he reminded me of Lord Sumption’s reference in the *Bank Mellat* case to the need for an exacting analysis of the facts. He says that the Judge misunderstood the nature of the Human Rights challenge which was as to the unlawfulness and not the reasonableness of the decision and required close factual scrutiny as to whether there was as justification.

54. He also points out that even if the FTT is required by section 321(4) of the 2011 Act to adopt not only the principles but also the procedure of the Administrative Court, that there is no hard and fast rule that cross examination is not permitted in judicial review cases: *R (A) v Croydon London Borough Council* [2009] UKSC 8 per Baroness Hale at [33]:

> “... The only remedy available is judicial review and this is not well suited to the determination of disputed questions of fact. This is true but it can be so adapted if the need arises: see R (Wilkinson) v Broadmoor Special Hospital Authority [2002] 1 WLR 419. That the remedy is judicial review does not dictate the issue for the court to decide or the way in which it should do so ...”

Mr Clayton submits that if it were otherwise, the FTT would have to adopt a different approach in relation to charities than it does in tax appeals and that cannot be correct, in relation to which he referred me to *Gora & Ors v Customs and Excise Commissioners, Dannatt v Same* [2004] QB 93 at [37] – [39].

55. On the other hand, Mr Steele submits that having unsuccessfully sought permission to appeal paragraph [3] of the December Directions (both from the FTT and the UT), it is not open to the Charity to dispute that the FTT was correct in law to manage the scope of cross-examination by assessing whether cross-examination on any particular matter would advance the Charity’s pleaded case, by reference to such arguments as were advanced by the Charity in its Schedule. He says that the FTT applied the correct legal test and did not arrive at a decision which is perverse and therefore, it is not necessary to concern oneself with the extent to which section 321(4) requires the FTT to adopt the practice in the Administrative Court.

56. However, if it is considered relevant, Mr Steele says that where the FTT is discharging a judicial review jurisdiction, the correct starting point is that it will only hear cross-examination of witnesses if and to the extent that there is an identifiable, important dispute of fact between the parties on which the claim turns and therefore, the cross-examination is necessary in order to resolve the case fairly. He adds that it would have been particularly inappropriate for the FTT to have embarked upon a fact finding exercise where the decision under challenge was merely a decision to open an inquiry and the Commission itself had not made any findings of fact regarding the matters of

potential concern which prompted it to open an inquiry.

57. In any event, Mr Steele submitted that the question for the FTT was whether the Commission's decision to open an inquiry had been lawful. He submitted that judicial review involves a judge reviewing a decision and not making it and referred me to a short passage in the judgment of Lord Neuberger MR (as he then was) in *Bubb v Wandsworth LBC* [2012] PTSR 1011 at [24] where he held:

> "I accept that it is, as a matter of principle, open to a judge, hearing a judicial review application, to permit one or more parties to adduce oral evidence. That was made clear by Lord Diplock in his speech in *O'Reilly v Mackman* [1983] 2 AC 237, 282H-283A. However, for reasons of both principle and practice, such a course should only be taken in the most exceptional case. As its name suggests, judicial review involves a judge reviewing a decision, not making it; if the judge receives evidence so as to make fresh findings of fact, for himself, he is likely to make his own decision rather than to review the original decision. . . ."

58. In this regard, he also referred me to *R (APVCO 19 Ltd) v HM Treasury* [2015] EWCA Civ 648. The appeal was concerned with an application for judicial review of retrospective tax legislation, which the appellants had argued was incompatible with their right to protection of property under Article 1 of Protocol No. 1 and the right to a fair trial under Article 6. Andrews J had refused the claimants permission to cross-examine the respondents' witnesses. She held that cross examination was not necessary in order to deal with the matter fairly and justly and that the issue she had to determine was a legal one and the witnesses spoke only to the factual background. Vos LJ (as he then was), with whom Floyd and Black LJJ agreed, upheld the judge's reasoning and conclusion. At [35] Vos LJ stated:

> "I can deal briefly with the appeal against the judge's decision to refuse cross examination. She made a case management decision in the context of her rolled up hearing, which seems to me to be unimpeachable. Indeed for the reason I have given, I would have made the same decision. No error of law or principle has been identified in her reasoning. In my judgment, cross examination of the respondents' witnesses on the measures taken in relation to other SDLT schemes is and was wholly inappropriate. I would therefore dismiss that part of the appeal."

59. Mr Steele also referred me to *R (N) v M & Ors* [2003] 1 WLR 562 in which a patient had applied for judicial review of a decision to administer anti-psychotic drugs. Dismissing the appeal the Court of Appeal held that before a court could give permission for the treatment to which the patient did not consent it had to be satisfied that the proposed treatment was both in the patient's best interests and medically necessary for the purposes of article 3 ECHR. Dyson LJ who gave the judgment of the court stated that cross examination should only be ordered if it is necessary to enable the court to determine a factual dispute itself (see [36]) and went on to add at [39]:

> "We suggest that it should not often be necessary to adduce oral evidence with cross examination where there are disputed issues of fact and opinion in cases where the need for forcible medical treatment of a patient is being challenged on human rights grounds. Nor do we consider that the decision in R (Wilkinson) v Broadmoor Special Hospital Authority [2002] 1 WLR 419 should be regarded as a charter for routine applications to the court for oral evidence in human rights cases generally..."

60. Mr Steele says that the circumstances in this case can be distinguished from those in the *Croydon* case because in that case the central issue of whether the individual was a "child" was for the court to decide whereas the FTT in this case was not a fact finding tribunal. He also says that the *Gora* decision is of little assistance here. The tribunal in that case was concerned with finding primary facts.

61. He submits that in this case, it is clear that the cross examination sought could not have assisted the Charity in establishing any of their grounds for review of the inquiry decision. First, in relation to Ground 1, the alleged disproportionate interference with human rights, the FTT decided that there was no such interference. The Charity was refused permission to appeal. Mr Steele says that the proper witnesses to provide evidence of factual matters concerning any interference would have been from the Charity itself. Cross examination of the Commission's witnesses could not have assisted. In relation to Ground 4, whether the Commission erred in law in its approach to the duties of trustees, by the time of the hearing it was accepted for the purposes of the proceedings that the Charity did not carry out the dis-fellowshipping procedure itself. The hearing proceeded on the basis that the Charity was correct in this and therefore, there was no factual dispute. In relation to Ground 6, an allegation of direct discrimination under Article 14, that the Charity had been targeted for an inquiry as a result of religious belief, the FTT was not persuaded on the evidence that the Commission would not have opened an inquiry were it not for the fact that the Charity was a Congregation of Jehovah's Witnesses or that the Commission had acted inconsistently in this case when compared with other cases. The Charity did not seek to cross examine Mr Sladen on his express reasons for opening the inquiry.

62. Lastly, Mr Steele submits that Mr Clayton's criticisms of the Cross Examination Ruling are wrong. He says that Judge McKenna applied the correct test at paragraph 1, as to whether live witnesses and the proposed cross examination were necessary for a fair and just determination of the parties' pleaded cases and went on correctly to draw a distinction between the FTT's task on a review under section 321 where it must determine whether it was lawful for the Commision to open a statutory inquiry and on an appeal under section 319 where the FTT has a broader role. At paragraph 10 she set out the issues and determined that they were legal in nature and did not require cross examination and in doing so used similar language to that in *APVCO* case and revealed no error of law. Lastly, Mr Steele says that the way in which the judge dealt with whether the proposed cross examination would "advance the [Charity's] case" was consistent with the requirement in the December

Directions at paragraph 3 which the Charity unsuccessfully sought to appeal and once again there is no error of law.

Conclusion:

63. First, I agree with Mr Steele that it is unnecessary to decide whether the terms of section 321(4) of the 2011 Act when properly construed requires the FTT to adopt the procedure as well as the approach in judicial review cases. It seems to me that it is clear from the authorities to which I have been referred that although cross examination is unusual in judicial review cases even where human rights issues arise, it is not unheard of and may be permitted where there are disputed facts. Further, it seems to me that it would be surprising if the FTT were to take a radically different course when conducting a review under section 321 in the light of the fact that it is required to apply the principles applicable on an application for judicial review. Therefore, just like the High Court on such an application, on a review, the FTT is not itself a fact finder and it seems to me that it would be unusual for cross examination to be permitted, although it is not prohibited. In the circumstances, therefore, it is not necessary to address Mr Clayton's submission that if cross examination were not permitted on a review, the FTT would have two different and inconsistent procedures.

64. Secondly, it seems to me that there is nothing in the "advancing their case" point. It seems to me that it arises directly from paragraph 3 of the December Directions and should be understood in that light. In the absence of any other explanation, Judge McKenna was entitled to take the reference to mean putting the case to the witnesses. To the extent that, as a result, Judge McKenna decided that Mr Clayton should not be permitted to put submissions to Mr Sladen and Ms White, she did not err in law. In any event, it seems to me that the "advancing the case" points related to Issue 6 which the Judge dealt with separately.

65. Thirdly, I agree that references to whether the decision to open the inquiry was reasonable were made in error. The relevant question was whether the decision was lawful which Mr Steele accepts. However, it does not seem to me that the Cross Examination Decision is wrong as a result.

66. Fourthly, was Judge McKenna wrong to term Issues 1 - 6 "technical legal reasons"? In my judgment, the judge did not err in law in her approach. She applied the correct legal test and did not arrive at a decision which was perverse. She was entitled to determine in the circumstances, including the content of the witness statements and the documentation exhibited to them relating to the treatment of other charities, that disputes of fact which might warrant cross examination did not arise and that the issues were legal. In my judgment, Judge McKenna was within the proper ambit of her discretion to decide as she did. Accordingly, I dismiss the appeal.

The Substantive Appeal

The FTT's treatment of the issues

67. Mr Clayton says that the gist of the Charity's case in relation to Article 14

before the FTT was that they had been treated differently compared with other charities which have also experienced sex abuse cases, often much more serious than the allegations in this case, and that no explanation has been given for "targeting" the Jehovah's Witnesses by initiating an inquiry; and the Commission's decision to do so was not proportionate. The two grounds of appeal are that the FTT erred in law in holding that Article 14 ECHR was not engaged because it was not satisfied that the Appellants' rights under Article 9 and 11 were infringed; and in failing to find that the treatment of the Charity could not be justified.

68. It is common ground that it is unlawful for a public authority such as the Commission to act in a way which is incompatible with a Convention right: section 6 Human Rights Act 1998. Therefore, if the decision to open a review of the Charity was taken in contravention of such a right, it would be unlawful. At the hearing before the FTT three grounds of appeal against the decision to open an inquiry were relied upon, two of which are relevant for these purposes. They were: ground 1 that the decision to initiate the inquiry was disproportionate and/or disproportionately interfered with the Trustees' rights of religion and of association in accordance with Articles 9 and 11 of Schedule 1 to the Human Rights Act 1998; and ground 6 that the Commission breached the Charity's right not to be discriminated against contrary to Article 14 ECHR.

69. Ground 1 therefore was concerned with an alleged direct breach of either or both Article 9 (the right to freedom of religion including the right to manifest their religion in worship, teaching, practice and observance) or Article 11 (the right to freedom of association) and as a result a breach of section 6(1) Human Rights Act 1998. In relation to ground 1, the FTT stated at [55] of the Substantive Decision that it had not found any evidence to support the submission that the opening of the inquiry had materially affected the internal life of the Charity as a religious community and rejected Mr Clayton's submissions in that regard. The FTT went on to conclude that there was no infringement of the Charity's article 9 and 11 rights as a result of the decision to open the inquiry: see [62] and [63] of the Substantive Decision. An application for permission to appeal in relation to these findings was refused.

70. In relation to Ground 6 the FTT records at [47] of the Substantive Decision that the Charity argued that there had been a difference in treatment of the Charity and many other charities in which there had been sexual abuse allegations and that the difference in treatment amounted to discrimination as to the enjoyment of the Charity's Article 9 and 11 rights so as to engage Article 14. Article 14 is in the following form:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

At [49] of the Substantive Decision, the FTT recorded that Mr Clayton on behalf of the Charity submitted that the Commission had not provided

sufficient explanation to rebut the Charity's contention that there had been inconsistent treatment of Jehovah's Witness charities compared with other religious charities and that he further submitted that where a party has extensive knowledge of comparable cases it is up to them to explain the differences.

71. The FTT went on to deal with Ground 6 with which this appeal is concerned in the following way:

> "67. As noted above, we are not satisfied that the Applicants' rights under Articles 9 and 11 ECHR were infringed by the opening of the inquiry and so it follows that Article 14 ECHR is not engaged in this case because an applicant can only show discrimination as to the enjoyment of their human rights under Article 14 if she or he has first shown that their human rights have been infringed.
>
> 68. As to the Applicants' allegation of direct discrimination against them on grounds of religion, we are not persuaded on the evidence that the Respondent would not have opened an inquiry in this case were it not for the fact that the Charity is a Congregation of Jehovah's Witnesses. We consider that there would be strong grounds for opening an inquiry into any charity which had allowed, in a charity setting, a vulnerable beneficiary or former beneficiary to come into contact with a person who had been convicted of abusing her, regardless of any religious connotations.
>
> 69. We are not satisfied that the cases we were referred to by the Applicants demonstrate that the Respondent has acted inconsistently in this case when compared with its actions in other cases of charities facing complaints by beneficiaries about sexual abuse. We accept Ms White's evidence that there is a range of variable factors in every such case which may or may not lead to the Respondent to conclude that the opening of a statutory inquiry is justified. We find that the Applicants have not identified comparable cases from which to show discriminatory treatment and we reject the Applicants' submission that the decision to open the inquiry was motivated by reason of discrimination against them on the grounds of their religion. We do not accept Mr Clayton's submission that the Respondent needed to do more to disprove the Applicants' assertions."

72. It is not in dispute that in order to rely upon Article 14 ECHR a claimant must first establish that the treatment complained of fell "within the ambit" of one of the substantive articles of the ECHR and that it is not necessary to show a breach of that substantive article*:* *Palau-Martinez v France* (2005) 41 EHRR 9

at §29 and *M v Secretary of State for Work and Pensions* [2006] 2 AC 91. In particular, the following passages in the speeches of Lord Nicholls and Lord Walker in the latter case were drawn to my attention. Lord Nicholls held:

> "13. The extended boundary identified in the Strasbourg jurisprudence is that, for article 14 to be engaged, the impugned conduct must be within the "ambit" of a substantive Convention right. This term does not greatly assist. In this context "ambit" is a loose expression, which can itself be interpreted widely or narrowly. It is not a self-defining expression, it is not a legal term of art. Of itself it gives no guidance on how the "ambit" of a Convention article is to be identified. The same is true of comparable expressions such as "scope" and the need for the impugned measure to be "linked" to the exercise of a guaranteed right.
>
> 14. The approach of the ECtHR is to apply these expressions flexibly. Although each of them is capable of extremely wide application, the Strasbourg jurisprudence lends no support to the suggestion that any link, however tenuous, will suffice. Rather, the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa. In other words, the ECtHR makes in each cased what in English law is often called a "value judgment".

Lord Walker stated:

> "6o. ... Though there is no simple bright-line test, general guidance can he derived from the Strasbourg case law, and it does not in my opinion lead to the conclusion that even a tenuous link is sufficient. Nor does it lead to the conclusion that precisely the same sort of approach is appropriate, whatever substantive article is in point. That is particularly important, I think, in considering the ambit of article 8.
>
> 61. Some Convention rights have a reasonably well-defined ambit (or scope). Article 11 (freedom of assembly and association) is one example. In *National Union of Belgian Police v Belgium* I EHRR 578 the Belgian Government failed to consult a municipal police union about legislation affecting public sector employment rights. The union's direct claim under article 11 failed, but article 14 was engaged (though on the particular facts the article 14 claim also failed). Another example is article 2 of the First Protocol (headed "Right to education," but commencing in a negative manner, "No person shall be denied the right to education"). This article sets an undemanding standard, but its ambit is one in which discrimination is particularly likely to occur, and so it is a field in which claimants are more likely to succeed under article 14 than under the substantive article. The

> well known case of *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 (in which proportionately fewer grammar school places were available for girls than for boys) was decided under domestic law years before the commencement of the 1998 Act, but in Convention terms it would have been a classic example of discrimination amounting to a breach under article 14, although there was no breach under the substantive article (since there is no general right to grammar school education). The *Belgian Linguistic Case* 1 EHRR 252 provides (on the fifth question, paras 26—32) an early example under the Convention, although the facts were complicated and the discrimination was on the grounds of language rather than gender. As I shall seek to demonstrate, article 8 is very different because of its much wider and much less well-defined ambit."

73. Mr Steele on behalf of the Commission accepts, therefore, that to the extent that the [67] of the Substantive Decision proceeds on the premise that it is necessary to show that there has been a breach of another substantive right before Article 14 is engaged it contains an error of law. However, he says that in any event, Article 14 was not engaged and what might be termed the error in [67] is of academic interest because the FTT went on at [68] and [69] to consider the alleged discrimination on the assumption that Article 14 was engaged so that the error made no difference. He also says that it was entitled to accept Ms White's evidence as to the Commission's treatment of other cases.

74. Mr Clayton referred me in this regard to *R (SG and Ors) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 and, in particular, to the passage in the judgment of Lord Reed JSC as follows:

> "7. The general approach followed by the European Court of Human Rights in the application of article 14 was explained by the Grand Chamber in *Carson v United Kingdom* (2010) 51 EHRR 369, para 61:
>
> > "in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."
>
> 8. A violation of article 14 therefore arises where there is: (1) a difference in treatment, (2) of persons in relevantly similar positions, (3) if it does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> 9. In practice, the analysis carried out by the European Court of Human Rights usually elides the second element - the

> comparability of the situations - and focuses on the question whether differential treatment is justified. This reflects the fact that an assessment of whether situations are "relevantly" similar is generally linked to the aims of the measure in question: see, for example, *Rasmussen v Denmark* (1984) 7 EHRR 371, para 37."

In fact, the passage which Lord Reed JSC quoted from *Carson v United Kingdom* begins at [61] with the following additional sentence:

> "The court has established in its case law that only differences in treatment based on an identifiable characteristic, or "status" are capable of amounting to discrimination within the meaning of art.14."

75. I was also taken to *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 itself for the proposition that in order to justify discrimination on religious grounds it is necessary to have "very weighty reasons". I was referred to the following passages:

> "3. For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and nor disproportionate in its adverse impact.
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> …
>
> "The scope of article 14
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> 10. Article 14, upon which Ms Carson relies, does not prohibit all discrimination but only in certain respects and on certain grounds:
>
> > "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The principle that everyone is entitled to equal treatment by the state, that like cases should be treated alike and different cases should be treated differently will be found, in one form or another, in most human rights instruments and written constitutions. . . . The scope of article 14 is narrower in two ways. First, it has a restricted list of the matters in respect of which discrimination is forbidden. They are "the enjoyment of the rights and freedoms set forth in [the] Convention". Secondly, it has a restricted list of the grounds upon which discrimination is forbidden. They are "any ground such as [the enumerated grounds] or other status.

…

29. ... Question (i) reflects the fact that article 14 is confined to discrimination as to a list of particular matters and, as Stanley Burnton J said in this case [2002] 3 All ER 994, 1010, para 52 it would be logical to add the question of whether the discrimination was on one of the specified grounds. Unless the claim satisfies these requirements, article 14 is not engaged at all. Question (ii) identifies the nature of the claimant's case. It identifies the real or hypothetical person in comparison with whom he complains he is being treated differently.

…

50. Discrimination must always be on some ground. Completely blind, motiveless malevolence may be anti-social and abhorrent but it cannot amount to discrimination, because it is indeed indiscriminate. Two types of discrimination which are universally recognised in human rights instruments are discrimination on the grounds of sex or race, and statutory prohibitions on these types of discrimination were introduced in the United Kingdom by the Sex Discrimination Act 1975 (preceded in employment law by the Equal Pay Act 1970) and the Race Relations Act 1976."

…

"Suspect" grounds of discrimination

55. The proposition that not all possible grounds of discrimination are equally potent is not very clearly spelled out in the jurisprudence of the Strasbourg court. It appears much more clearly in the jurisprudence of the United States Supreme Court, which in applying the equal protection clause of the Fourteenth Amendment has developed a doctrine of "suspect" grounds of discrimination which the court will subject to particularly severe scrutiny. They are personal characteristics (including sex, race and sexual orientation) which an individual cannot change (apart from the wholly exceptional case of transsexual gender

> reassignment) and which, if used as a ground for discrimination, are recognised as particularly demeaning for the victim.
>
> …
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> 57. ... Where there is an allegation that article 14 has been infringed by discrimination on one of the most sensitive grounds, severe scrutiny is called for. As my noble and learned friend, Lord Nicholls of Birkenhead, put it in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 568, para 19:
>
> > "where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified."
>
> 58. In its judgments the European Court of Human Rights often refers to "very weighty reasons" being required to justify discrimination on these particularly sensitive groundsMr Clayton submits, therefore, that it was for the Commission to justify why there were no other inquiries opened in relation to any other religious bodies in relation to sex abuse, it failed to do so and on the evidence before it, the FTT was wrong to find as it did at [68] and [69]. Mr Clayton submitted that the broad brush approach revealed in [69] of the FTT decision falls far short of the level of scrutiny necessary in a case of this kind in relation to the defence of justification of a suspect category of discrimination which required "very weighty reasons." ..."

76. Mr Clayton submits, therefore, that it was for the Commission to justify why there were no other inquiries opened in relation to any other religious bodies in relation to sex abuse, it failed to do so and on the evidence before it, the FTT was wrong to find as it did at [68] and [69]. Mr Clayton submitted that the broad brush approach revealed in [69] of the FTT decision falls far short of the level of scrutiny necessary in a case of this kind in relation to the defence of justification of a suspect category of discrimination which required "very weighty reasons."

77. He also submits that the FTT erred in law in the following respects: by wrongly rejecting the analysis carried out by the ECtHR referred to in *R (SG) v Secretary of State for Work and Pensions* which usually elides the second element—the comparability of the situations—and focuses on the question whether differential treatment is justified; by holding that the Charity had not identified comparable cases from which to show discriminatory reasons and by failing to provide any reasons to explain the specific respects in which the cases were different, but simply asserting its conclusion, contrary to the well-established obligation to provide proper reasons; in rejecting the Charity's submission that the decision to open the inquiry 'was motivated by reasons of discrimination against them on the grounds of their religion', a claimant not being required to prove bad faith or an intention or desire to discriminate and as a result, the FTT applying the wrong legal test; the FTT also applied the wrong legal test by

failing to hold that the burden lay on the Commission to prove "very weighty reasons" for the difference in treatment between the Charity and the Church of England and the Roman Catholic Church; and it failed to scrutinise with appropriate and exacting rigour the factual basis for the Commission's assertions.

78. Mr Clayton submits that at no stage in his evidence before the FTT did Mr Sladen provide any grounds for his subjective belief 'that the Commission would be prompted to take the same action against any charity that was subject to the concerns identified in this case' nor did he provide any objective basis for that belief and that his failure to do so is important because the evidence before the FTT demonstrates that, in fact, the Charity has been treated differently from the Church of England and the Roman Catholic Church. Mr Clayton says that the failure is especially surprising in the light of the fact that he stated in his Decision Log that:

> "All decisions regarding whether the Commission will open a statutory inquiry are taken by one small team (Pre-Investigation Assessment and Monitoring) and are signed off by the manager or senior manager of that team. I am a member of that team. This, together with the fact that I have considered and followed the Commission's Risk Framework, Risk Tool Application Guidance and our operational guidance 117, ensures that the Commission adopts a consistent approach to deciding whether to open a statutory inquiry."

79. Mr Clayton submits that it is trite law that the burden of proving justification lies on the public body seeking to rely upon the decision and that once the applicant has shown a difference in treatment it is for the public body to justify it: *Markin v Russia* (2013) 56 EHRR 8. He says that the Commission has failed to provide proper evidence to justify its approach, in particular, in relation to the twelve cases highlighted in Mr Cook's witness statement and it has chosen to disclose its own documentation in relation to various examples relating to the Church of England and the Roman Catholic Church but not those of the charity concerned.

80. He pointed to the second witness statement of Ms Kathryn White of 8 January 2015, in which she states amongst other things that press articles about sex abuse would not necessarily be picked up by the Commission, that it concentrates on public interest and confidence and the discharge by charity trustees of their duties as a result of appropriate policies and her note that Church of England charities are exempted from registration and as a result the Commission does not have an exhaustive list of them. She went on to state that as a result, she was unable to say how many other charities related to the Church of England the Commission has engaged with in relation to safeguarding issues. Mr Clayton criticises this approach and says that the FTT erred in law in failing to draw adverse inferences against the Commission on the basis that justification under Article 14 taken with article 9 requires "very weighty reasons" and the burden of proof lay on the Commission which it failed to discharge. He concludes therefore, that the FTT was not entitled to come to the findings it did at [68] and [69].

81. As I have already mentioned, Mr Steele submits that despite the reference in [67] of the Substantive Decision to a need for a breach of a substantive right to engage Article 14, the error was not material because: the decision that Article 14 was not engaged was nevertheless correct; and the FTT went on in any event at [68] and [69] to consider the alleged discrimination on the assumption that article 14 was engaged.

82. In relation to his first submission that article 14 was not engaged, he referred me to *Gallagher v Church of Jesus Christ of Latter-Day Saints* [2008] 1 WLR 1852 a case in which a rating and valuation decision in relation to a Mormon temple was appealed on the grounds that the phrase "place of public religious worship" in the Local

Government Finance Act 1988 should be given a different meaning from that applied for the purposes of an earlier rating and valuation statute, with the effect that the Mormons' buildings would be exempt from non-domestic rating. It was said amongst other things that to do otherwise would constitute discrimination against Mormons on the basis of their religion contrary to Article 9 and 14. Lord Hoffmann considered the issue of the interaction of articles 9 and 14 in that case as follows:

> "13. In order to constitute discrimination on grounds of religion, however, the alleged discrimination must fall "within the ambit" of a right protected by article 9, in this case, the right to manifest one's religion. In the present case, the liability of the temple to a non-domestic rate (reduced by 80% on account of the charitable nature of its use) would not prevent the Mormons from manifesting their religion. But I would not regard that as conclusive. If the legislation imposed rates only on Mormons, I would regard that as being within the ambit of article 9 even if the Mormons could easily afford to pay them. But the present case is not one in which the Mormons are taxed on account of their religion. It is only that their religion prevents them from providing the public benefit necessary to secure a tax advantage. That seems to me an altogether different matter.
>
> 14. For example, I do not think that a Sabbatarian could complain that he was discriminated against because he was unable, on religious grounds, to provide services on the Sabbath and therefore earned less than people of a different religion. A case which in my opinion is very much in point is *M v Secretary of State for Work' and Pensions* [2006] 2 AC 91, in which a woman would have been able to secure a reduction in her liability for the maintenance of her child if she had been living with a male partner. She was unable to qualify because, on account of her sexual orientation, she chose to live with a female partner. The House of Lords decided that the alleged act of discrimination did not fall within the ambit of article 8 (her right to family life and in particular her right to live with a female partner) because loss of the opportunity to gain a financial advantage was too remote from interference with the right in question. The same seems to me true of this case."

83. Mr Steele submits despite the opening of the inquiry, the members of the congregation who form the Charity remain free to practise their religion and to associate with each other in the same manner as before. He says that it should be noted that the Charity was refused permission to appeal against the FTT finding that there was no breach of Articles 9 and 11. He submits that at most there is a tenuous link between the opening of the inquiry and the rights protected by Articles 9 and 11 and that the mere fact that the inquiry is into a charity established for the advancement of religion is not sufficient to engage Article 14.

84. Secondly, Mr Steele says that the Charity's assertion that the FTT was wrong to reject its contention that the Charity as a Jehovah's Witness charity had been treated differently from other religious groups in comparable situations should be rejected because it was an issue of fact for the FTT to determine, it asked itself the right questions and reached a conclusion on the evidence before it which was not perverse. The issue was one of direct discrimination in the sense that it was argued that the Charity had been treated less favourably than other charities on the ground of religion.

85. Mr Steele points out that in the light of the allegation of direct discrimination, the FTT was required to consider Mr Sladen's reasons for opening the inquiry and took account of his Decision Log containing his "headline facts" and his evidence that he was not influenced by the fact that the members and trustees of the Charity are Jehovah's Witnesses or otherwise were part of a religious group or held religious beliefs. That evidence was not challenged and it was not a matter upon which it was sought to cross examine Mr Sladen. Accordingly, Mr Steele says that the FTT was entitled to reach the conclusion it did at [68].

86. Nevertheless, the FTT went on to consider the Charity's contention that discrimination could be inferred from the fact that the inquiry had been opened in relation to the Charity but the Commission had not done so in the case of other religious charities and came to its conclusion at [69]. Mr Steele says that that finding was plainly open to the FTT on the evidence before it for the reasons it gave. He submits that the Charity was unable to show that any case in which there has been no statutory inquiry was factually comparable with the circumstances of its case. None of the other cases shared the "headline facts" on which Mr Sladen relied, including, in particular, the fact that a person who had been convicted of sex offences against children had been allowed, as part of an internal hearing, to question his victims in an apparently intrusive way. Furthermore, he says that the assertion of differential treatment failed to focus on the Commission's regulatory role which is concerned with the public trust and confidence in charities, the discharge by charity trustees of their duties; and as a result, appropriate policies/procedures and not dealing with the sexual offences directly.

87. Mr Steele submits that the logic of the Charity's argument is that the Commission should not open a statutory inquiry into one charity without reviewing all other charities to identify those that may be in materially similar situations which would be bizarre and unworkable and would emasculate section 46 of the 2011 Act. He also emphasises that in order to establish direct discrimination for the purposes of Article 14 it is necessary to show that the difference in treatment was because of religious beliefs rather than, in this case, the serious and unusual safeguarding and policy issues raised. The Commission is not aware of any other case in which a convicted sex offender has been allowed to question his victims as part of a charity's internal procedures.

88. He also submits that in the light of the FTT's permissible and, he says, correct finding that there had been no discrimination against the Charity, the issue of whether any discrimination could be justified did not arise and therefore, the Charity's submissions on the test for justification including a requirement to provide "weighty reasons" and the burden of proof are irrelevant.

89. He says that there are two potential circumstances in which justification would be relevant. The first is if it had been shown that there was interference with the Charity's Article 9 rights. In those circumstances, it would be appropriate to move on to consider whether the interference was justified under article 9(2). However, that situation does not arise here because the FTT held that there was no breach of article 9 rights. The second would arise if direct discrimination had been established. In this regard, he reminded me of the passages in *Carson v United Kingdom* quoted by Lord Reed in *R (SG and Ors) v Secretary of State for Work and Pensions* including the additional sentence, and in addition, referred me to *Palau Martinez v France* (2005) 41 EHRR 136 at [38] + [39] and *M & C v Romania* (App No 29032/04, 27 September 2011).

90. He also relies on the passages in the judgment of Baroness Hale in *R(E) v Governing Body of JFS & Anr* [2010] 2 AC 728 at [58] and [59] at which she drew attention to and endorsed the "but for" test in relation to discrimination. The question is whether there has been less favourable treatment on a prohibited ground or to put it another way, the party would have received the same treatment "but for" that prohibited ground. She also made clear at [62] that the discriminator's motive is irrelevant and that the relevant question is what caused him or her to act as they did. Mr Steele says that the FTT asked the right question namely, "why has the inquiry been opened?" He says that it also gave the right answer, namely "it is a result of the issues arising from the nature and conduct of the "dis-fellowshipping" hearing and not because of the religious denomination of the Charity."

91. Mr Steele pointed out that Mr Sladen's evidence before the FTT was in summary, that: he was the manager of the relevant team and that all decisions in relation to the opening of an inquiry were reviewed by him or by his line manager; the role of the team was to carry out an independent examination of cases that might merit a statutory inquiry; he recorded his decision in the Decision Log which set out the details he had considered and the reasons for his decision; that his key concern had been what happened after Mr Rose had been released from prison when as part of an internal disciplinary process, Mr Rose was permitted to interview his victims in an apparently intrusive way; the dis-fellowshipping procedure had been handled sufficiently poorly to raise questions about whether the Charity trustees were properly performing their roles and responsibilities; that the inquiry was connected with the Commission's compliance, public confidence and accountability objectives; and that he had considered the issue of religious discrimination. In particular, at paragraph 96 of his witness statement of 11 November 2014 he stated that his decision to open the inquiry was not influenced by the fact that the Charity's members were Jehovah's Witnesses or more generally that they were part of a religious group or held religious beliefs. He stated expressly that he "did not take their religious beliefs into account in [his] decision to open the Inquiry. . ." That evidence was never challenged.

92. Lastly, Mr Steele reminded me of paragraph 64(3) of the skeleton argument on behalf of the Charity at which it is stated that the FTT erred in law in failing to draw an adverse inference against the Commission in relation to its approach towards disclosure. He points out that it was never asked to draw such an inference; there was no criticism of Ms White's witness statement at the Substantive Hearing save briefly in reply; and this amounts to a new argument on appeal. He submits that it cannot be an error of law not to draw an adverse inference which the FTT was not asked to do.

Conclusion:

93. It is quite clear from [67] of the Substantive Decision that the FTT applied the wrong legal test in relation to the operation of Article 14, or that at least, it used the wrong terminology to describe it. It is settled law that in order to bring article 14 into play it is necessary merely to be within the "ambit" of another substantive right and not to have breached another right. If the latter were the case, there would be no room from Article 14, as has been pointed out on numerous occasions.

94. In any event, in my judgment, the FTT was perfectly entitled to come to the decision it did both at [68] and [69] respectively based on the evidence before it. Therefore, as Mr Steele puts it, the error of law at [67] is of academic interest only. As Mr Steele points out, the aspects of Mr Sladen's evidence which were relied upon at [68] were not

challenged at the Substantive Hearing or intended to be the subject of cross examination had the Cross Examination application been granted. In my judgment, it was open to the FTT to decide that in the light of that evidence, which included the "headline facts" set out in the Decision Log, the "but for" test referred to by Baroness Hale in *R(E) v Governing Body of JFS & Anr* (supra) was satisfied. On the basis of the unchallenged evidence before it, the FTT was entitled to decide that the difference in treatment was because of the conduct of the "dis-fellowshipping" meeting and not religious beliefs. Such a conclusion is consistent with the approach adopted in *Carson v United Kingdom* (supra).

95. Equally, in my judgment, the FTT was entitled to come to the conclusions set out in [69] based on the facts before it and it cannot be said that it erred in law in doing so. The FTT was entitled to decide on the evidence that the Charity was unable to show a factually similar case in which an inquiry had not been opened. As Mr Steele pointed out, none of the other cases shared the fact that a person convicted of sex offences against children had been permitted to question his victims in an apparently intrusive way. In my judgment, therefore, the FTT did not err in law in finding that there was no discrimination. I do not consider that the fact that the European Court of Human Rights usually elides the comparability of situations with the question of whether the treatment pursues a legitimate aim means that the FTT was wrong to approach this matter on its facts as it did.

96. Furthermore, in the light of the permissible finding that there was no interference with article 9 rights and no direct discrimination, it was not necessary to consider whether the conduct could be justified. I agree with Mr Steele therefore that issues in relation to the burden of proof and "weighty reasons" are therefore irrelevant.

97. Lastly, it is not necessary to deal with the assertion made in the skeleton argument on behalf of the Charity that the FTT erred in law in failing to draw an adverse inference in relation to the Commission's approach to disclosure. This is not a separate ground of appeal and therefore the issue does not arise. If it had, I would have agreed with Mr Steele that the FTT was never asked to draw such an inference and that this is a new and impermissible argument on appeal.

98. In conclusion therefore, in my judgment, the FTT did not err in law in its conclusions at [68] and [69] and therefore, the error at [67] is of no practical consequence. It was entitled to decide that there was no direct discrimination on the grounds of religion, the inquiry having been opened on the basis of unusual and distinctive factual reasons set out in Mr Sladen's "headline facts" and that there were no other comparable cases from which to infer discrimination on the grounds of religious beliefs. Accordingly, I dismiss the Substantive Appeal.

Mrs Justice Asplin

RELEASE DATE: 4 April 2017