ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

WATCH TOWER BIBLE AND TRACT SOCIETY OF BRITAIN V CHARITY COMMISSION [2016] EWCA CIV 154

England and Wales Court of Appeal, Civil Division, 15 March 2016

Religious Body seeks review of Charity Commission decision to commence a review of its operations.

Key words: Review, England and Wales, Charity Commission, Power to Remedy, Order Unlawful

1. This case dealt with a judicial review of a decision of the Charity Commission (the Commission) to order an Inquiry into matters concerning the Watch Tower Bible and Tract Society of Britain, a registered charity in the UK (the charity). The Commission's decision to initiate the inquiry (the Inquiry Decision) arose out of three criminal trials against former members of congregations of Jehovah's Witnesses in respect of historic sex offences. The Commission also sought and obtained a production order for material of relevance to its Inquiry.

2. The appellants sought judicial review of both the decision to initiate the inquiry and the production order. In a previous hearing on 12 December 2014, Dove J refused the appellants permission to apply for judicial review on the sole ground that the appellants should have appealed to the First-tier Tribunal (FTT). The judge did not adjudicate on the substantive issues.

3. Two issues were raised by this appeal:

    1. Whether the FTT had power to provide an effective and convenient remedy in relation to the appellants' complaint that the Inquiry Decision was unlawful. The argument before the Court of Appeal focused on the particular complaint that the proposed inquiry was too broad and disproportionately interfered with the appellants' religious beliefs and practices contrary to articles 9 and 11 of the European Convention on Human Rights (the Convention).

    2. Whether the jurisdiction exercisable by the FTT under section 320 of the Charities Act 2011 (the Act) to entertain an appeal against a section 52 production order included a power to address a complaint that the order was unlawful.

3. In response, the Commission argued that the decision of Dove J that no judicial review was available to the appellants should be upheld.

4. The Court of Appeal rejected the appellant's first contention. The FTT could and should adjudicate on the matter (at [24]):

> The FTT would have to give reasons in order to decide the appeal. That is what is required by the common law (see English v Emery Reinbold & Strick Ltd [2002] EWCA Civ 605, [2002] 1 WLR 2409) and article 6 of the Convention. The judge was right to regard the fact that the Commission is a responsible public body as a relevant but not decisive factor…Frequently, the court allows its judgment to speak for itself and does not grant relief because it knows that, as a responsible public body, the defendant will conscientiously seek to comply with the terms of the judgment without the need to be told to do so by order of the court. Nor do I consider that the limitations of judicial review in the event of disagreement as to whether the Commission had given proper effect to the decision of the FTT are a good reason for holding that the court should not insist on the statutory appeal route. First, why should it be assumed that there is a real risk that the decision of the FTT will not be expressed with sufficient clarity for the Commission to know what it may and may not do? Secondly, even if the appellants were to succeed in the present judicial review claim, the possibility of a further judicial review claim could not be ruled out altogether. The court would (i) quash the Commission's Inquiry Decision; or (ii) decline to quash it and instead make a declaration about the legally permissible scope of the inquiry; or (iii) decline even to make a declaration and instead allow its judgment to speak for itself. It would then be open to the Commission to exercise its discretion to open a new inquiry and define its scope in a manner consistent with the court's judgment (or if there had been no quashing order, to tailor the scope of the existing inquiry). If the appellants were dissatisfied with what the Commission did in the light of the judgment, they could start fresh judicial review proceedings. The possibility of fresh judicial review proceedings is often present where the court is unable or unwilling to prescribe with precision what the public body has to do. In my view, this is not a reason for saying that a statutory appeal is not an effective and convenient form of redress against a public body such as the Commission.

5. In relation to the second issue on appeal, the focus of the argument before Dove J (and before the Court of Appeal) was whether the FTT had jurisdiction under section 320 of the Act to determine the appellants' complaint that the production order was unlawful on the grounds that it was disproportionate, in breach of the Data Protection Act 1998 (the DPA) and/or in breach of article 8 of the Convention. Dove J held that section 320 provided the appellants with a convenient and effective remedy for all of their complaints in relation to the production order. The Court of Appeal disagreed and allowed the appellants' appeal on this issue. This meant, that although the FTT could determine the Inquiry issue, it had no jurisdiction to determine the production order issue. This would have to be taken to the High Court for determination.

6. This bifurcation of jurisdiction was not convenient but necessary, given the interpretation put by the Court of Appeal on section 320 of the Act. As the Master of the Rolls put it, the situation was one for parliamentary attention (at [38]):

> There remains the question of why Parliament should have intended to exclude from section 320 the right to appeal a section 52 order on the general ground that the order was erroneous in fact or law. No explanation has been proffered. It seems to me that a possible explanation is that section 52 orders were seen as ancillary to the efficient discharge by the Commission of its functions (the conduct of a section 46 inquiry is a good

example) and that Parliament either did not envisage that there would be much scope for appeals against such orders or (perhaps more likely) did not wish to permit appeals on the grounds of illegality save in the particular circumstances stated in section 320(2). As against that, it may be said that Parliament must be taken to have known that (as the present case demonstrates) there was nothing to stop an individual from seeking judicial review of a section 52 order. Notwithstanding this, I consider that Parliament may not have wished to sanction a general right of appeal against section 52 orders for the simple reason that they would be likely to impede the efficient discharge by the Commission of its functions. Suffice it to say that excluding section 52 orders from the ambit of a general right of appeal would not be irrational. It makes sense that Parliament would have intended to limit the right of appeal to orders purportedly made under section 52 which did not relate to the charity in question or were not relevant to the discharge of the Commission's functions. That does not make section 320 a dead letter. It does, however, narrowly define the boundaries of an appeal against a section 52 order.

7. Therefore, the appellants were unsuccessful on the first issue of the appeal, and successful on the second issue of the appeal.

IMPLICATIONS

This case illustrates the complexity of legislation concerning review of the Charity Commission and ability to provide remedies.

VIEW THE CASE

This case may be viewed at: http://www.bailii.org/ew/cases/EWCA/Civ/2016/154.html

Read more notable cases in The Australian Nonprofit Sector Legal and Accounting Almanac series.

Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

Date of creation: April 2020

Number of case: 2020-43