

# Clayton Comments

Richard Clayton QC

## JUDICIAL REVIEW AND ALTERNATIVE REMEDIES: *R(Watch Tower) v Charity Commission*

### Introduction

1. On 15 March 2016 the Court of Appeal handed down judgment in *R(Watch Tower) v Charity Commission*: see [http://www.bailii.org/cgibin/format.cgi?doc=/ew/cases/EWCA/Civ/2016/154.html&query=\(title:\(+watch+\)\)+AND+\(title:\(+tower+\)\)](http://www.bailii.org/cgibin/format.cgi?doc=/ew/cases/EWCA/Civ/2016/154.html&query=(title:(+watch+))+AND+(title:(+tower+)))
2. Lord Dyson MR gave important guidance on whether and to what extent a claimant was entitled to take judicial review proceedings (as an alternative to pursuing a statutory appeal to the First Tier Tribunal (the FTT)). However, the approach taken by the Court of Appeal is open to question, and the claimants are now seeking permission to appeal from the Supreme Court.
3. An application for judicial review often regarded as a last resort and a claimant is expected to pursue an alternative remedy, if that option is available to him. This principle may have a particular importance where the claimant has the option of pursuing a statutory appeal to the FTT.
4. The Court of Appeal were asked to determine whether the judicial review should be dismissed by virtue of Watch Tower's failure to appeal to the First Tier Tribunal (General Regulatory) (Charity) (the FTT): on the ground that because either means of redress were "*conveniently and effectively available to them*", these ought to have been used before Watch Tower resorted to judicial review: see Lord Bingham in *Kay v Lambeth LBC*: see [2006] 2 AC 465 at para 30.

### Factual background

5. On 27 May 2014, the Commission initiated an inquiry under section 46 of the Charities 2011 Act in very broad terms to investigate Watch Tower's handling of safeguarding matters, including the creation, development, substance and implementation of its safeguarding policy, the administration, governance and management of the charity by the trustees and whether the trustees have fulfilled their duties and responsibilities as trustees under charity law.
6. The Commission's decision to initiate the inquiry arose out of three criminal trials against former members of congregations of Jehovah's Witnesses in respect of historic sex offences. As Lord Dyson observed in para 3 of his judgment, "*none of these was connected with Watch Tower*".

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7. There are 140,000 active Jehovah's Witnesses in the UK and about 1350 local congregations which are registered charities; and it is pertinent to point out that:
  - (1) no complaints can be made that implicates Watch Tower in the offences themselves;
  - (2) the offences themselves, on which the Commission relies to justify its investigation, took place many years ago, and the victims are now adults; and
  - (3) there is no evidence that Watch Tower has inappropriately handled sex abuse involving children.
  
8. On 20 June 2014, the Commission issued a Production Order under section 52 of the 2011 Act, again in very broad terms, requiring Watch Tower to produce:
  - (a) All documents created on or after 1 June 2011 setting out or recording an instance or allegation of, or complaint about abuse of or by a person who is or has been a member of the charity or a congregation charity.
  - (b) All documents created on or after 1 June 2011 setting out or recording a request for advice and/or guidance from a congregation charity and/or charity trustee, officer, agent or employee of a congregation charity that relates to an instance or allegation of a complaint about abuse of or by a person who is or has been a member of the charity or organisation.
  - (c) All documents created on or after 1 June 2011 setting out or recording a request for advice and/or guidance provided by and/or on behalf of the charity to a charity congregation and/or a charity trustee, officer, agent or employee of a congregation charity; and that relates to an instance or allegation of, or complaint about, abuse of or by a person or persons who is or has been a member of the charity or any congregation charity.
  - (d) All minutes of any meetings of the charity, its staff and or its members, other than minutes of charity trustees' meetings held since 1 June 2011 in which the following matters have been discussed:
    - (i) Policies and practice for safeguarding persons who come into contact with the charity and/or any congregation charity.
    - (ii) Any instance or allegation of, or complaint about abuse of or by a person or persons who is or has been a member of the charity or any congregation charity;
    - (iii) Policies and practices for the internal disciplinary proceedings of the charity and any congregation charity, including but not limited to disfellowship proceedings.

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## The statutory framework

9. The “*general functions*” of the Commission are described in section 15(1) of the 2011 Act. They include:

*3. Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.*

10. Its “*general duties*” are described in section 16. They include:

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

11. Section 46(1) provides that “*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*”.

12. Section 52 confers on the Commission the power to call for documents. It provides:

*(1) The Commission may by order –*

*require any person to provide the Commission with any information which is in that person’s possession and which –*

*relates to any charity, and*

*is relevant to the discharge of the functions of the Commission or of the official custodian ...*

13. Part 17 Chapter 1 of the 2011 Act creates the FTT (section 315), its rules of procedure (section 316) and a right of appeal from the FTT (section 317). Part 17 Chapter 2 creates three different rights of appeal to the FTT

14. Section 319 (so far as is material) provides:

*(1) Except in the case of a reviewable matter (see section 322) an appeal may be brought to the FTT against any decision, direction or order mentioned in column 1 of Schedule 6.*

*(2) ....*

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- (3) ....
- (4) *In determining such an appeal the FTT-*
  - (a) *must consider afresh the decision, direction or order appealed against, and*
  - (b) *may take into account evidence which was not available to the Commission.*
- (5) *The Tribunal may-*
  - (a) *dismiss the appeal, or*
  - (b) *if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of Schedule 6.*

15. Section 320 provides:

- (1) *Section 319(4)(a) does not apply in relation to an appeal against an order made under section 52 (power to call for documents).*
- (2) *On such an appeal the Tribunal must consider whether the information or documents in question-*
  - (a) *relates to a charity;*
  - (b) *is relevant to the discharge of the functions of the Commission or the official custodian.*
- (3) *The Tribunal may allow such an appeal only if it is satisfied that the information or document in question does not fall within subsection (2)(a) or (b).*

16. Section 321(1) (so far as is material) provides:

- (1) *An application may be made to the Tribunal for the review of a reviewable matter.*
- (2) ....
- (3) ....
- (4) *In determining such an application the Tribunal must apply the principles which would be applied by the High Court on an application for judicial review.*
- (5) *The Tribunal may—*
  - (a) *dismiss the application, or*

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- (b) *if it allows the application, exercise any power mentioned in the entry in column 3 of Schedule 6 which corresponds to the entry in column 1 which relates to the reviewable matter.*

## The proceedings

17. On 22 August 2014 Watch Tower issued judicial review proceedings in relation to both the decision to initiate the inquiry and the Production Order.
18. In relation to the inquiry decision, Watch Tower contends that the proposed inquiry is unlawful on the grounds:
- (1) the Commission is interfering and/or is proposing to interfere with Watch Tower' rights of freedom of religion under Article 9 under the Human Rights Act and freedom of association under Article 11 by commencing an inquiry with a view to changing Jehovah's Witnesses' and Appellants' religious practices, and is acting disproportionately and/or is acting disproportionately by misconstruing or misapplying s16.4 of the Charities Act 2011;
  - (2) the scope of the inquiry is so vague and undefined that it breaches Watch Tower' Article 9 and/or 11 rights because the restrictions placed on it are not 'prescribed by law' and/or in breach of the Commission's obligation under s16.4 of the 2011 Act to act transparently in performing its functions;
  - (3) the Commission is acting unlawfully in proposing that Watch Tower' Safeguarding Policy include a condition that any Elder running a Bible class must be cleared through an appropriate checking system similar to the Disclosure and Barring Service which is unlawful and/or impossible for Watch Tower to implement;
  - (4) the Commission has breached Watch Tower' right not to be discriminated against in breach of Article 14 and/or its obligation to act consistently under s16.4 of the Charities Act in performing its functions and/or in breach of the common law principle of consistency;
  - (5) the Commission has erred in law in its approach to the duties of Trustees by misconstruing or misapplying the duties owed by Watch Tower under the Companies Act 2006;
  - (6) the Commission has breached its duty to act fairly by failing to provide proper details of the allegations it is making and thereby giving Watch Tower a fair opportunity to meet the case against it; and
  - (7) in the circumstances the decision to initiate the enquiry was irrational.
19. In relation to the Production Order, Watch Tower contend:
- (1) the scope of the Order is disproportionate;

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- (2) the information sought requires Watch Tower to produce documents containing personal information and sensitive personal information as defined by the Data Protection Act 1998 (the DPA); and unless the data subject consents to his personal data being processed, the conditions in Schedules 2 and 3 require the public authority to demonstrate that processing is 'necessary' and proportionate: see the Supreme Court in **South Lanarkshire Council v Scottish Information Commissioner** [2013] 1 WLR 2421; and
- (3) the information sought breaches the procedural guarantees of Article 8 rights because prior to disclosure, the person adversely affected must be given notice and the opportunity to make representations before the order was made: see **R(TB) v The Combined Court At Stafford** [2007] 1 WLR 1524.

## The general approach of the Court of Appeal to alternative remedies

20. Lord Dyson set out the principles as follows:

*19. These principles are not in dispute and can be summarised briefly. If other means of redress are "conveniently and effectively" available to a party, they ought ordinarily to be used before resort to judicial review: per Lord Bingham in **Kay v Lambeth LBC** [2006] UKHL 10, [2006] 2 AC 465 at para 30. It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal (such as the FTT (General Regulatory Chamber) (Charity)). To allow a claim for judicial review to proceed in circumstances where there is a statutory procedure for contesting the decision risks undermining the will of Parliament; see per Mummery LJ in **R (Davies) v Financial Services Authority** [2004] 1 WLR 185 at paras 30 and 31; per Lord Phillips MR in **R (G) v Immigration Appeal Tribunal** [2005] 1 WLR 1445 at para 20; and per Moore-Bick LJ in **R (Willford) v Financial Services Authority** [2013] EWCA Civ 677 at paras 20, 23 and 36. I would also refer to the helpful and comprehensive summary of the relevant principles by Hickinbottom J in **R (Great Yarmouth Port Co Ltd) v Marine Management Organisation** [2013] EWHC 3052 (Admin) at paras 35 to 72.*

21. The Court of Appeal then went on to consider the claimant's complaint concerning (i) the production order and (ii) the scope of the statutory inquiry.

## The position concerning the production order

22. The Court of Appeal held that section 52 and section 320 must be read together; and that the critical question to be determined was the scope of an appeal permitted under section 320. On such an appeal, the FTT must consider whether the information or document (a) "relates to" a charity and (b) is "relevant to the discharge of the functions of the

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Commission". The phrases "relate to" and "relevant to" are ordinary words. They bear substantially the same meaning. "Relate to" means "connected with". A section 52 order must be connected in some way with the charity in question. "Relevant to" means "connected with" or "bearing upon" or "pertinent to". Thus a section 52 order must be connected with, bear upon and pertain to the discharge of the functions of the Commission. As a matter of ordinary language, Lord Dyson held that there can be little doubt that this is what the two phrases mean.

23. The interpretation for which the Commission contended involves reading the phrase "relevant to the discharge of the functions of the Commission" as "relevant to the lawful discharge of the functions of the Commission". In Lord Dyson's view, it is clear from section 320 that the words "relevant to the discharge of the functions of the Commission" do not bear this meaning.

## The position concerning the scope of the inquiry

24. Watch Tower contended that, having regard to the need to bring judicial review proceedings to challenge the lawfulness of the Production Order in any event, it was not convenient and/or effective to appeal their complaint about the scope of the inquiry by an appeal to the FTT. Watch Tower contended (amongst other things) that challenging the scope of the inquiry through judicial review in advance would be less costly and speedier than requiring the parties to deploy all the evidence and to argue out all of the issues before the FTT.
25. Watch Tower further submitted that, where an application for a review is made under section 321 against a decision to initiate an inquiry under section 46, the powers of the FTT are confined to a stark choice of either dismissing the application or exercising the "*power to direct the Commission to end the inquiry*" (see column 3 of Schedule 6). This restrictive remedial power is to be contrasted with the wider remedial powers conferred on the FTT in relation to an appeal under section 320 concerning a section 52 order, where it has the "power to-(a) quash the order; (b) substitute for all or part of the order any other order which could have been made by the Commission" (again, see column 3 of Schedule 6). Watch Tower submitted that their complaint concerning the vagueness and lack of definition of the scope of the inquiry could not be addressed by the FTT, which would not have jurisdiction to grant relief in relation to that complaint by, for example, identifying how the scope should be varied or clarified.
26. Dove J had said that the FTT would have power to provide the equivalent relief to that provided by a court in judicial review proceedings. He held that if the Appellants' contentions on the merits were accepted, it would be open for the FTT to conclude that it was an error of law for the Commission to have opened an inquiry of the breadth which they did and in directing the Commission to bring the inquiry to an end, they would have to

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explain in the reasons that they offered why that was, leaving it then open to the Commission to initiate an inquiry with a narrower scope in accordance with the reasons for dismissing and ending the existing broad-scoped inquiry.

27. Alternatively, the FTT could conclude that the Commission had been entitled to consider that there were significant causes for concern so as to justify the opening of the inquiry under section 46, but that elements of that inquiry would not be consistent with the Commission's duties under section 16.4 of the 2011 Act. They would make that clear in the reasoning of their decision and would have to do so in order to deal with and dismiss Watch Tower's submissions. The Commission would then be obliged to respect that decision as to the parameters of the section 46 inquiry in undertaking it.
28. However, Watch Tower submitted that difficulties would arise if there were a dispute about the true perimeters which have been identified by the FTT. First, there is no reason to suppose that the FTT would, indeed, provide detailed reasons for its conclusion on Watch Tower's complaints as to the scope of the inquiry. Secondly, assuming that the FTT allowed the application and were to give detailed reasons for its decision, whether the Commission had given proper effect to the decision might, itself, be a matter of controversy and give rise to further litigation. Judicial review proceedings to challenge the inadequacy the Commission's response to the decision (perhaps, after an appeal to the Upper Tribunal in respect of the adequacy of the FTT's reasons) would be undesirable. That is because (i) it would encourage satellite litigation; (ii) a rationality challenge would be difficult to mount since the Commission would be making broad evaluative judgments based on the content of the FTT's reasons (as opposed to any declaration relief expressed in specific terms); and (iii) judicial review would involve delay and additional cost. In all the circumstances, it is preferable to allow a judicial review challenge from the outset to the scope of the inquiry.
29. Lord Dyson rejected these submissions on the ground that the FTT would have to give reasons in order to decide the appeal, as required by the common law (see *English v Emery Reinbold & Strick Ltd* [2002] 1 WLR 2409) and article 6 of the Convention.

## The issues before the Supreme Court

30. The issues to be determined are whether the Court of Appeal erred in law in purporting to hold that:
- (1) other than in exceptional circumstances a party could not take judicial review proceedings where Parliament enacted a statutory scheme which can be appealed to the FTT; and
  - (2) that the obligation on FTT to give reasons when deciding an appeal (in accordance with the common law or article 6 of the ECHR) has the consequence that the FTT is an effective and convenient form of redress against the Commission.

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## The first ground of appeal

31. The first complaint in relation to the Court of Appeal is:

- (1) contrary to three earlier decisions of the Court of Appeal: *R(Shoemith) v Ofsted* [2011] ICR 1195; *R (Baker) v Devon County Council* [1995] 1 All ER 73 and *R v Paddington Valuation Officer, ex p Peachey Property Corporation Ltd* [1966] 1 QB 380;
- (2) it is, therefore, not open to the Court of Appeal to develop new principles contrary to settled principle;
- (3) such an approach conflicts with fundamental legal principle, as set out below;
- (4) the judicial observations to the contrary are based upon *obiter* remarks; and
- (5) if, contrary to Watch Tower's primary submission, there are two divergent approaches on the authorities, the lack of certainty as to which principle should prevail, of itself, raises issues of general public importance which, of itself, justify the grant of permission.

## The second ground of appeal

32. The second complaint in relation to the Court of Appeal concerns its holding that the obligation on FTT to give reasons when deciding an appeal (in accordance with the common law or article 6 of the ECHR) has the consequence that the FTT is an effective and convenient form of redress against the Commission; and raises the important question as to whether the FTT's narrow statutory remedial powers, nevertheless, require it to provide reasons in relation to issues which it has no power to determine.

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Richard Clayton QC carries out a wide range of advisory and litigation work in the public law and local government field: eg education, housing, social services/community care and mental health, *vires* powers and local government finance, constitutional and standards issues, public procurement, health care and human rights. He has appeared in many Supreme Court, House of Lords and Privy Council cases, most recently last year in the important Freedom of Information case, *Kennedy v Charity Commission* in 2015. Richard is ranked in Chambers Directory as a Leading Silk in Public Law, Human Rights and Local Government Law. Other recent cases of note include *R( Watch Tower) v Charity Commission* (2016) (Court of Appeal (judicial review and alternative remedy), *R(English Bridge Union v Sports Council* (2015) (whether Bridge is a sport) *R(Hall) v Leicestershire County Council* ((2015) (cuts and consultation), *R(T) v Trafford MBC* (2015) (cuts and consultation), *R v Misick* (2014) (8 day hearing before Turks and Caicos Court of Appeal) (constitutional challenge to judicial independence), *R(Hardy) v Sandwell MBC* (2014) (discretionary housing allowance and Art 14), *R(Wood) v Leeds City Council* ((2014) successful challenge to increase in allotment rents by

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Leeds Allotment Society) and *R(Bridgerow) v Chester West* (2014) (local government delegation). He has been the United Kingdom's representative to the Venice Commission, the Council of Europe's advisory body on constitutional law since 2011, is a former Chairman of the Constitutional and Administrative Law Bar Association and a former Vice Chair of Liberty. Richard is a Visiting Professor at UCL, London and an Associate Fellow at the Centre for Public Law at Cambridge University.