IN THE FIRST-TIER TRIBUNAL (CHARITY) **CRR/2014/0005**
GENERAL REGULATORY CHAMBER

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

Applicants

- AND -

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

DECISION ON AN APPLICATION FOR REVIEW

TRIBUNAL:
JUDGE ALISON MCKENNA
HELEN CARTER
SUSAN ELIZABETH

Sitting in public at Fleetbank House, Salisbury Square, London on 10 March 2015

Richard Clayton QC and of Lee Parkhill of counsel, instructed by Richard Cook, in-house solicitor at the Watch Tower Bible and Tract Society of Britain, for the Applicants

Ian Steele of counsel, instructed by the Legal Department of the Charity Commission for England and Wales, for the Respondents

DECISION

The Application for Review is dismissed

REASONS

Background

1. The Applicants are charity trustees of The Manchester New Moston Congregation of Jehovah's Witnesses, registered charity number 1065201 ("the Charity"). The Charity is an unincorporated association governed by a constitution. It was registered as a charity in 1997, with objects as follows: "*The practice and advancement of Christianity founded on the Holy Bible, as understood by the denomination of Christians known as Jehovah's Witnesses, including the teaching of the good news of God's Kingdom by Jesus Christ within the congregation area and the holding of meetings*". The Charity's income is around £6,000 per annum.

2. The Applicants' application to the Tribunal is for a Review, pursuant to s. 321 of the Charities Act 2011 ("the Act"), of the Respondent's decision dated 30 May 2014. This was a decision to open a statutory inquiry into the Charity, pursuant to s. 46 of the Act. Reviewable decisions (including a decision to open an inquiry) involve a review by the Tribunal, applying the principles that the High Court would apply on an application for judicial review. The Tribunal may dismiss the application or, if it allows it, may (but need not) exercise the power in column 3 of schedule 6 to the Act, to direct the Respondent to end the inquiry.

The Respondent's Engagement with the Charity

3. The Respondent's engagement with the Charity arose from its concern about a former trustee, Mr Jonathan Rose. The Respondent had initially engaged with the Charity when, in 2012, it was informed that Mr Rose was awaiting trial for sexual offences against children. The Respondent closed its operational case when it was informed that Mr Rose had resigned as a trustee and that the Charity had adopted a Safeguarding Policy prepared by the umbrella charity the Watchtower Bible and Tract Society of Britain (registered charity number 1077961) ("the Watchtower").

4. In October 2013, Mr Rose was convicted of sexual offences against children who had been, at the time of the offences some ten years beforehand, beneficiaries of the Charity and members of the Manchester New Moston Congregation. Mr Rose was sent to prison for nine months. In November 2013, the Respondent became aware that it had been alleged during Mr Rose's trial that the Elders of the Congregation had been aware of complaints of a similar nature about Mr Rose made in 1995. This had not been mentioned to the Respondent during the first operational case. The Respondent opened a second operational case on the basis of this information in December 2013.

5. Following Mr Rose's release from his prison sentence in about February 2014, the Respondent heard from different sources, firstly, that Mr Rose had been accepted back into the Congregation/Charity and, secondly, that there had been a "disfellowshipping hearing", at which Mr Rose's victims (now adults) had been forced to attend a public meeting and answer questions (including from Mr Rose himself) about the offences for which he had been convicted. The Respondent was informed that the purpose of this "hearing" was to allow the Elders/charity trustees to decide whether Mr Rose could remain a member of the Congregation/Charity.

6. The Respondent's officers had initially asked to meet with the Charity in January 2014. The Charity agreed to the meeting but the Respondent's officers then invited a police officer to attend the meeting without first having asked for the Charity's agreement. Unsurprisingly, the Charity cancelled the meeting when it discovered (from the agenda) that a police officer would be attending. The meeting was then re-arranged for a date in March 2014, without a police officer being invited. The Respondent's officers did not produce prompt minutes of that meeting, with the result that the Charity produced its own minutes and sent them to the Respondent. The Respondent did not accept the Charity's minutes and produced a different set of minutes some time later. It follows that, by the time of the Tribunal hearing, there were two records of the meeting between the parties, neither of which was agreed to be accurate. Charity trustee Mr Halls described the March 2014 meeting only briefly in his witness statement to the Tribunal. The Respondent's officers present at the meeting did not make witness statements for the Tribunal.

7. At the Tribunal hearing, Mr Clayton put to the Respondent's witness Mr Sladen a version of events at the March 2014 meeting on which Mr Sladen could not possibly comment (not having been there himself and not having previously seen the disputed minutes). Mr Clayton then realised (as a result of intervention by the Tribunal) that the version of events he had put to the witness ("on instructions") was not supported by either set of minutes (nor indeed by the witness statement of charity trustee Mr Halls). In those circumstances, he quite properly withdrew his suggestion to the witness. Taking all these factors into account, it was not possible at the hearing for the Tribunal to make factual findings about what was said or agreed between the parties at an important meeting. This is a lost opportunity and the Tribunal hopes that the Respondent will review its approach to evidence-gathering to ensure that such a situation does not occur in a Tribunal hearing again.

8. The Tribunal has, however, seen copies of the correspondence between the parties following the March 2014 meeting. On 29 April 2014 the Respondent's officer wrote to the Charity (and to the Watchtower in similar terms) as follows:

> "*Further to my meeting with you on 20 March last, I have received a further complaint about your Congregation. The complaint relates specifically to Mr Jonathan Rose, but is also about the conduct of the trustees. You should be aware that I have also written to Watch Tower to ask them for their response to this..*
>
> *I understand from the complaint that Mr Rose is out of prison (he was released in February) and has been able to attend the Congregation's Hall without anyone managing his attendance there. That he has also been involved in preaching; and knocking on doors in the community spreading the word of the Jehovah.*

I wish to know if this is correct, or not? I also wish to know what conditions Mr Rose has in place in terms of the management of the Congregation; and what procedures the elders have placed on him? In doing so, I also wish to know what advice you have received from Watch Tower in respect of such monitoring of him?

I also wish to know if Mr Rose had been disfellowshipped when he went to prison; and if he is still disfellowshipped?

I was also quite alarmed to have heard that the elders have been holding meetings with the 3 victims and others at the Congregation's Hall; where the victims (all female) have 'had' to attend (without any support) to be spoken to by 8 male elders, plus Mr Rose, who led the meetings. Where he was able to ask direct questions of their abuse by him; when the abuse has actually been discussed previously in a UK court of law, which found Mr Rose guilty and for which he was sentenced for.

I therefore wish to know, for what purpose were the meetings held; who was present; what was the outcome of the meetings; and confirmation as to whether Watch Tower is aware of these meetings?

I would be grateful for an urgent response, within 7 days please, of this email".

9. The Charity's reply of 5 May 2014 was as follows:

"*…I would like to correct a few points.*

Since Mr Rose's release from prison he has not participated in our house-to-house ministry.

Regarding supervision of Mr Rose at congregation meetings: Our meetings are open to the general public and, as you observed when you visited the Hall, it is an open space where all can be seen. Mr Rose has attended meetings with his wife and children and has sat with them usually near the front of the Hall. Most of the trustees are present at each meeting and observe and manage the behaviour of all present.

We have not permitted Mr Rose to participate in meetings since his release.

We confirm that Mr Rose is no longer a member of the congregation and therefore has no share in the congregation's activities whatsoever. Mr Rose did appeal this decision and this could not be heard until his release from prison. A decision confirming the original assessment has recently been made and the congregation informed that he is no longer one of Jehovah's Witnesses.

Procedures were in accordance with the long-standing practices of Jehovah's Witnesses and questions regarding these may be directed to out headquarters in London".

10. The Watchtower's reply of 6 May 2014 was as follows:

"*…First, we would like to correct any apparent misinformation that you may have received and confirm with you that Mr Rose has not been involved in any house-to-house preaching organised by the*

Congregation subsequent to his release from prison. We also wish to emphasise that the Congregation's trustees are well aware of their responsibilities in connection with any attendance by Mr Rose at religious services in the congregation's Kingdom Hall and will carefully apply the restrictions contained in the congregation's Child Safeguarding Policy, of which you have a copy. As this is a place of public worship, and hence open to the public they do not believe they can do more. Nevertheless, the elders will always comply with any restrictions imposed on Mr Rose by the courts or the Police.

You ask whether or not Mr Rose has been disfellowshipped from the community of Jehovah's Witnesses. We can confirm that he is no longer one of Jehovah's Witnesses and is therefore not able to share in any of the activities of the Congregation. The Congregation has also been notified of this. Due to circumstances, we understand that in the interests of justice it was not possible to address this matter completely prior to his trial and imprisonment.

We also want to restate that in harmony with our guidelines and procedures complainants are perfectly at liberty to attend or decline to attend any disciplinary proceedings".

11. On receipt of these responses, the Respondent's case officer referred the case to its Pre-investigation and Monitoring Team ("PIAM") on 29 May 2014, to consider whether a statutory inquiry should be opened. The role of PIAM is to "examine in greater detail causes for concern that appear to be the most serious and may meet the threshold for an inquiry". Consequently, an inquiry was opened on 30 May 2014. The Charity was formally notified of the opening of the inquiry by letter dated 5 June 2014. We consider the decision to open the inquiry in more detail at paragraphs 13 to 20 below.

12. Subsequent to the opening of the inquiry, in a letter dated 10 July 2014, Mr Cook of the Watchtower informed the Respondent that the "disfellowshipping hearing" for Mr Rose had in fact been carried out by the Elders of a different Congregation, so the Charity had played no role in that process. Mr Cook (who is the in-house solicitor at the Watchtower) later elaborated on his own letter in a witness statement for the Tribunal. He explained that the "Circuit Overseer" had taken advice from a body called "The Christian Congregation of Jehovah's Witnesses" (a non-charitable unincorporated association which provides spiritual guidance to congregations) about this issue. In accordance with that advice, he says "*The Trustees of the New Moston Congregation…did not select the elders who conducted the disfellowshipping and had no control over the process they followed*". He comments further that "*My letter told the Commission that the disfellowshipping process does not oblige victims to attend hearings. I also expressed regret that the elders considering Mr Rose's case appeared to have created the impression that attendance was essential. As the Trustees of the Charity had no connection with the events of Mr Rose's disfellowshipping, the disfellowshipping of Mr Rose cannot provide any grounds for an inquiry in respect of the Charity*".

The Decision to Open the Inquiry

13. On 30 May 2014, the Respondent's PIAM officer Mr Sladen completed a "Decision Log" document, setting out his assessment of "*whether the information established by the Commission during the course of our engagement so far suggests*

there are grounds to open a statutory inquiry in accordance with the Commission's stated policy and general approach to regulation".

14. Mr Sladen recorded the "headline facts" of the case at paragraph 15 of the Decision Log as follows:

> "*• 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 "disfellowshipping";*
>
> *• 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".*

15. Mr Sladen identified "the regulatory issues in this case" at paragraph 9 of the Decision Log as follows:

> *"• Whether the charity's trustees were effectively discharging their duties and responsibilities as trustees – meaning charity trustees – in properly safeguarding the charity's beneficiaries;*
>
> *• Whether the charity's policy and general approach to safeguarding is fit for purpose;*
>
> *• Whether the charity's approach to doctrinal "disfellowshipping" practices in the safeguarding context can be said to cause such potential harm to beneficiaries as to outweigh any public benefit considerations;*
>
> *• Whether all of the above can lead the charity into serious disrepute in the eyes of the public that is so great that the Commission is bound to intervene via its formal use of powers of remedy and protection".*

16. It is unfortunate that the Decision Log also includes at paragraph 20 a description of certain conduct by the trustees of the Charity which it is now accepted was wrongly attributed to them. It was in fact a description of the conduct of the trustees of a completely different Jehovah's Witness charity and not related to this case at all. In his witness statement for the Tribunal, Mr Sladen explains this error by saying that he had inserted paragraph 20 into the Decision Log at the suggestion of one of the Respondent's lawyers, without first checking the relevant facts for himself. The Tribunal hopes that the Respondent will review its procedures so that that this situation could not arise again.

17. Mr Sladen considered at section 4 of the Decision Log certain factors related to human rights, equality and diversity, and the principles of best regulatory practice (which we describe further at paragraph 36 below).

18. Mr Sladen concluded at paragraph 39 of the Decision Log:

> *"Having weighed up the factors in this case I have decided that the criteria set out in the Commission's policy have been met and there are grounds to open an inquiry into this charity to explore the concerns in more detail and to establish the facts. My view is that it is 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."*

19. His decision was reviewed and approved by his senior officer, Dave Walker, also on 30 May 2014, with the effect that an inquiry pursuant to s. 46 of the Act was opened on that date.

20. The Respondent wrote a letter to the Charity dated 5 June 2014, informing it of the decision to open the inquiry. We note that the 5 June letter was written by Harvey Grenville, an officer not involved in the decision to open the inquiry. We note that the concerns expressed in Mr Grenville's letter were not precisely the same as those recorded in the Decision Log. Whilst we note that the statutory right to a Review by the Tribunal arises in relation to the Respondent's decision to open an inquiry rather than the terms in which any subsequent letter about it is expressed, we were concerned that the Decision Log and the letter informing the Charity why it was to be inquired into did not to express the Respondent's concerns in identical terms. We hope that the Respondent will review its practice in this area so that charities are always given full and accurate information about the nature of the regulatory concerns which have led to the opening of an inquiry.

The Issue for the Tribunal

21. The Upper Tribunal has considered the scope of a "review" by the First-tier Tribunal in *Regentford v Charity Commission for England and Wales* [2014] UKUT 0364 (TCC). It held at [37] that the issue for the Tribunal is whether the decision to open the inquiry was one that no reasonable decision maker could have made at the time it did so, and that this will include consideration of a range of fact-sensitive issues and the nature of the challenge made to the Charity Commission's decision.

22. The Applicants' challenge to the Respondent's decision in this case raises a number of facets of the central question of whether it was reasonable for the Respondent to have opened an inquiry into the Charity at the time it did so. The Applicants have also alleged unlawful conduct by the Respondent, due to an alleged breach of s. 6 (1) of the Human Rights Act 1998.

The Legal Framework for Charity Inquiries

23. Section 46(1) of the Act provides as follows:

> *"The Charity 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".*

24. Section 14 of the Act gives the Respondent the following five objectives:

> *"1 The public confidence objective*

The public confidence objective is to increase public trust and confidence in charities.

2 The public benefit objective

The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.

3 The compliance objective

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

4 The charitable resources objective

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

5 The accountability objective

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

25. The Respondent also has statutory general functions at s. 15 of the Act and general duties at s. 16 of the Act. Section 15 (1) includes the following general function:

> *"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".*

26. Section 16 includes the following duties:

> *"1. So far as is reasonably practicable the Commission must, in performing its functions, act in a way—*
> *(a) which is compatible with its objectives, and*
> *(b) which it considers most appropriate for the purpose of meeting those objectives"*
>
> and
>
> *"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)".*

27. The Respondent has published guidance on its approach to statutory inquiries, in particular: the "*Risk Framework*", a document called "*Application of the Charity Commission's Risk Framework*" and its internal operational guidance OG 117. The "*Application*" document sets out at paragraph G4 the criteria to be considered when deciding whether to open an inquiry. This includes cases where the regulatory issues are serious, where there is evidence or serious suspicion of misconduct or mismanagement, and where the risk to the charity or to public confidence in charity more generally is high. The Respondent has also published its *Strategy for Dealing with Safeguarding Vulnerable Groups including Children Issues in Charities* in which it makes clear that "*we undertake investigations about trustee conduct in the most serious cases in order to protect the charity and its beneficiaries, using our regulatory powers where necessary and proportionate to do so*".

28. Sections 6 (1) and 7 (1) of the Human Rights Act 1998 provide that:

> *6 (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
>
> *7 (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may …(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.*

The Parties' Submissions

29. The Applicants' case changed during the course of these proceedings so that of the original six (later said to be seven) grounds of appeal, only three were relied upon by the time of the final Tribunal hearing. The first ground was also amended, so that it was no longer submitted that the Respondent had misconstrued or misapplied s.16.4 of the Act. The grounds relied upon by the Applicants at the Tribunal hearing were therefore as follows:

> Ground 1: 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;
>
> Ground 4: The Commission erred in law in its approach to the duties of Trustees;
>
> Ground 6: The Commission has breached the Trustees' right not to be discriminated [against] contrary to Article 14 HRA (*sic)*.

Ground 1

30. The Applicants' case in relation to ground 1 was that the Respondent's decision to open the inquiry was a breach of the Applicants' right to freedom of religion, including the right to manifest their religion in worship, teaching, practice and observance, as guaranteed by Article 9 (1) of the European Convention on Human Rights ("ECHR"). It was also their case that the decision to open the inquiry was a breach of their right to freedom of association under Article 11 (1) ECHR and a breach of s. 6 (1) of the Human Rights Act 1998. Mr Clayton referred the Tribunal to the decision of the Grand Chamber of the European Court of Human Rights in *Fernandez Martinez v Spain* (2015) 60 EHRR 3 as authority for his submission that Article 9 must be interpreted in the light of Article 11, so as to safeguard the

"associative life" of religious communities from unjustified State interference. He argued that the right to manifest one's religion encompasses an expectation that believers will be allowed to associate freely with others, without arbitrary State intervention.

31. The Respondent had submitted that the opening of the inquiry did not constitute an interference with the Applicants' Article 9 rights because it imposed no limitations on the rights of Jehovah's Witnesses and the charity trustees remained free to practice their religion and to associate with others in the same manner as they would have done had the inquiry not been opened. Mr Clayton submitted that this approach was incorrect because the European Court of Human Rights in *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 had held that State action which fell short of restricting freedom to worship could still amount to an interference with Article 9 rights where the State's action had adversely affected the "internal life of the religious community".

32. Mr Clayton submitted that the opening of the statutory inquiry was "plainly" an interference with the Applicants' Article 9 rights on this basis. He argued that the Respondent's inquiry was concerned with the practice of "disfellowshipping" (which is mentioned as a "regulatory issue" in the Decision Log – see paragraph 15 above) which is a religious practice, and that there is no role for the State in determining the legitimacy of such practices.

33. Mr Clayton also submitted that the Respondent's press release making public the opening the inquiry represented an interference with the Applicants' Article 9 rights, relying on the European Court of Human Rights' decision in *Leela Forderkreis E.V. v Germany* (2009) 49 EHRR 5.

34. The witness evidence filed on behalf of the Applicants did not identify the particular respects in which it was said that the Applicants' Article 9 and 11 rights had been infringed by the opening of the Respondent's inquiry. The Tribunal considered the submissions at paragraph 25 of Mr Clayton's skeleton argument to be the Applicants' statement of the alleged interferences. These were (a) identifying a concern that Mr Rose's conviction did not automatically bar him from membership of the Charity; (b) initiating an inquiry based on the incorrect factual assertion that beneficiaries are at risk of further harm with regard to the Applicants' practices; (c) initiating an inquiry based on information supplied by a police officer who was inadequately informed about the correct factual position; (d) initiating an inquiry on the basis that the Applicants do not carry out DBS checks when they are not required to do so; (e) criticising the Applicants for their handling of the allegations about Mr Rose in 1994; and (f) failing properly to assess the material supplied to it when deciding to open the inquiry. Mr Clayton submitted that the Tribunal is required to take a "broad approach" to assessing any interference with the Applicants' right to manifest religious belief, following the European Court of Human Rights' decision in *Eweida v United Kingdom* (2013) 57 EHRR 8.

35. Mr Clayton accepted that the rights guaranteed by articles 9(1) and 11(1) ECHR were qualified by articles 9 (2) and 11 (2), but submitted that the Tribunal was bound to conduct an "exacting analysis" of the factual case advanced to justify interference, following the Supreme Court's decision in *Bank Mellat v HM Treasury* [2013] UKSC 39. He submitted that the decision to open the inquiry was not "necessary in a

democratic society" and not proportionate, because a less intrusive measure could have been used.

36. With reference to the Decision Log, Mr Clayton referred the Tribunal to Section 4, in which Mr Sladen had considered the issue of whether a decision to open an inquiry would interfere with the Charity's human rights. Mr Sladen had recorded at paragraph 37 that:

> *I have considered whether the Commission's opening of an inquiry constitutes an unjustified interference with the rights and beliefs of members of the charity , and in particular its trustees, to manifest their religion or beliefs as guaranteed by Art 9 (2) ECHR, or whether it infringes their rights under art 9 (2) taken together with Art 14 ECHR. I have concluded that there is no unjustified interference. The Commission has imposed no limitations on the rights of Jehovah's Witnesses to manifest their religion or beliefs whether the inquiry is opened or not. In the alternative, to the extent that there may be doctrinal issues which are in conflict with the legal duties of trustees, the matter is prescribed by law. Further, any interference can be objectively justified on the basis that the Commission has a legitimate aim in the form of its statutory duties to institute inquiries in furtherance of its objectives and functions (s. 14 – 16, s. 46 of the Charities Act 2011).*

Mr Clayton submitted that Mr Sladen had applied the wrong test at this point, concluding that there was no "unjustified interference". As he had not applied the correct two-stage test in the Decision Log by asking himself "(i) was there an interference? and (ii) if so, was it justified?" Mr Clayton submitted that he should be understood to have accepted on behalf of the Respondent that there *would* be an interference with the Applicants' rights in opening the inquiry.

37. The Respondent's principal case in relation to ground 1 was that there was no interference with the Applicants' Article 9 or Article 11 rights in the decision to open the inquiry. Mr Steele accepted that, if there were found to have been an interference with those rights, then the Tribunal should consider whether it was a proportionate interference. However, he submitted that neither the Applicants' grounds nor their witness evidence had provided the Tribunal with any indication of the nature of the alleged interference with the Applicants' rights which was said to arise from the opening of the inquiry. In relation to the submission that the Respondent should have used less intrusive measures than an inquiry, he submitted that this argument could only be understood to be that the Respondent should have conducted its inquiries on a non-statutory basis. However, he noted that information which had not initially been forthcoming from the Charity had been provided after the opening of the inquiry (the information about the involvement of third parties in disfellowshipping Mr Rose) and submitted that this tended to support the Respondent's view that the opening of the inquiry had "concentrated the Charity's mind" on the issues.

38. With regard to the *Hasan and Chaush v Bulgaria* authority, Mr Steele submitted that the approach of the Court was to look for a material adverse effect on the life of the religious community, but here none had been cited. Mr Steele submitted that the Decision Log showed that the Respondent was not interested in disfellowshipping as an abstract concept and did not seek to determine its legitimacy as a religious practice. He pointed out that Mr Clayton had accepted in his skeleton argument that what had happened at the disfellowhipping in this case was inappropriate and suggested that it

had not been in accordance with usual policy. In which case, Mr Steele asked rhetorically, how could the Respondent's interest in a religious practice which was not even endorsed by the religious community concerned found a claim for breach of Article 9 rights? Similarly, he submitted, the Applicants' case that the disfellowshipping process was nothing to do with them because it was carried out by others was inconsistent with their claim that their own human rights had been breached by the Respondent's interest in the issue.

39. Mr Steele denied that the Respondent had breached s. 6 (1) of the Human Rights Act 1998, and he also commented that s. 7 (1) of the Human Rights Act was not engaged here because there was no evidence that the Respondent *proposed* to interfere with the Applicants' rights. He reminded the Tribunal that, if the Respondent were to exercise its powers consequent upon the opening of the inquiry in the future, then the Applicants would have a *de novo* right of appeal to the Tribunal in respect of those matters.

40. With respect to the press release about the Respondent's decision to open the inquiry, Mr Steele pointed out that the facts in *Leela Forderkreis E.V. v Germany* were completely different, because in that case the German Government had interfered with Article 9 rights (albeit that the Court found the interference justified) by issuing a public warning about a religious group which it regarded as dangerous. On any analysis, Mr Steele submitted, this was not what the Respondent had done in this case.

41. With respect to Mr Clayton's submission that the Respondent should be taken to have accepted that there was an interference with the Charity's human rights because of the terms in which Mr Sladen had written up the Decision Log, Mr Steele accepted that Mr Sladen had rolled up two questions into one. However, he submitted that the Decision Log was not a document written by a lawyer (although we know Mr Sladen took legal advice because of paragraph 20) and so it may well not withstand forensic analysis. Nevertheless, the meaning was clear that Mr Sladen did not consider that the opening of an inquiry infringed the Charity's human rights. Mr Steele also commented that Mr Clayton's submission about Mr Sladen's terminology in the Decision Log had not featured in the Applicants' grounds nor had it featured in Mr Clayton's skeleton argument, and the suggestion that the Respondent was bound by the terms of it had been raised for the first time whilst Mr Clayton was making his oral submissions during the hearing.

42. Mr Steele concluded on ground 1 by submitting that, if the Tribunal found there was an interference with the Applicants' human rights arising from the opening of the inquiry, the Respondent's case was that the interference was justified under Articles 9 (2) and 11 (2) ECHR because the inquiry was opened to pursue the legitimate aim of investigating potential misconduct and seeking to preserve public trust and confidence in the charitable sector. Given the nature of the Respondent's concerns, he submitted that the legitimate aims of protecting public safety, protecting public health and morals and the prevention of crime were also engaged by the decision to inquire into the Charity. He referred the Tribunal to the European Court of Human Right's decision in *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 in which it was held that Article 9 is not a "trump card" which prevents the State from taking any action in respect of the activities of a religious group and that "*States have the power to inquire into whether a movement or association is using supposedly*

religious aims in order to pursue activities that may harm the population or public safety."

Ground 4

43. The Applicants' case in respect of ground 4 was that the Respondent's decision to open the inquiry was based on a misunderstanding by it of the duties owed by charity trustees in the context of safeguarding. It was submitted that, as the Applicants had not themselves conducted the disfellowshipping proceedings but had asked third parties to conduct them, no reasonable public authority could have concluded that there was a regulatory concern as to whether "*the charity's trustees were effectively discharging their duties and responsibilities as trustees*" (as set out in the Decision Log – see paragraph 15 above).

44. The Tribunal asked Mr Clayton whether the Charity had initiated the disfellowshipping process and whether it had been carried out by others on behalf of the Charity? The Tribunal also asked Mr Clayton for his submissions as to whether charity trustees are entitled as a matter of law to delegate such functions to third parties and whether, if they are so permitted, a duty of care would attach to the terms of appointment and the conduct of the delegates acting on the charity's behalf? Mr Clayton replied that this was a small charity and its trustees were not sophisticated people. He said they had taken advice from the Christian Congregation umbrella body and, if it was felt they had fallen into legal error, then it was regrettable but they may not have been well-advised.

45. The Respondent's submission in relation to ground 4 was that it had not yet reached a concluded view about whether the Charity had breached any relevant duties in relation to safeguarding, as this was yet to be considered in the inquiry. However, the Respondent's concern about whether the charity trustees were in breach of their duties was justified on the basis of the information it had received to the effect that the Charity had allowed a victim of sexual abuse to be questioned in public by her convicted abuser. Mr Steele pointed out that Mr Cook's letter in July 2014 was the first the Respondent had heard of the Charity asking third parties to carry out the disfellowshipping of Mr Rose. As neither the Charity nor the Watchtower had provided this information when asked directly about the disfellowshipping in April 2014 (see paragraphs 8 to 10 above) the Respondent had obviously been unable to take this information into account in reaching its decision to open the inquiry. He pointed out that the Respondent's officer had told the Charity expressly in her April 2014 letter that she was "alarmed" by the reports she had heard about the disfellowshipping hearing but the Charity had not, even in the face of that statement, responded to say that others had conducted the proceedings. Mr Sladen's evidence to the Tribunal was that, even if he had known about the third parties' role when he was completing the Decision Log, it would not have changed his view that an inquiry was merited in the circumstances of this case.

46. In any event, Mr Steele submitted, the question for the Tribunal is whether the Respondent had acted reasonably on the basis of the information before it on 30 May 2014, not whether it had acted reasonably in the light of information only volunteered later. In relation to the Tribunal's questions about whether the Charity could properly delegate the disfellowshipping function to others in any event and, if so, whether the Charity retained responsibility for the processes carried out on its behalf, Mr Steele said that these were the issues that needed to be considered further in the inquiry but

that the disfellowshipping of Mr Rose was clearly an issue for the Charity to decide upon and manage.

Ground 6

47. The Applicants' case in respect of ground 6 was that there had been a difference in treatment by the Respondent of the Charity and many other charities in which there had been sexual abuse allegations. Mr Clayton submitted that this difference of treatment amounted to discrimination as to the enjoyment of the Applicants' Article 9 and Article 11 rights, so as to engage Article 14 ECHR. He submitted that the Applicants were able to point to a surprising number of disparities between the Respondent's treatment of Catholic and Church of England charities on the one hand and Jehovah's Witness charities on the other. Mr Clayton informed the Tribunal that the European Court of Human Rights has "routinely decided Article 14 cases in favour of Jehovah's Witnesses".

48. The Respondent relied on witness evidence from its in-house lawyer Kait White in which she explained some of the factors which may have resulted in different approaches by the Respondent to apparently similar issues. She referred to the "*Application"* document (see paragraph 27 above) and explained that the perceived level of risk in any case may be considered to have been lowered by factors such as whether the charity trustees had reported the incident to the Commission themselves and whether another regulator was already involved in the case. She explained that there were different governance structures and regulatory frameworks for some religious charities, for example the majority of Church of England charities are excepted from registration under s. 30 (2) of the Act. She emphasised that the Commission's response to each case depended on its assessment of the particular nature and level of risk in that case and she commented on cases where the Respondent had engaged with other religious groups in relation to safeguarding issues. Ms White concluded that the Applicants had not demonstrated how the circumstances of the other religious charities which they had identified gave rise to regulatory concerns equivalent to those in this case. She did not accept that there was any valid comparison to be made between the charities cited by the Applicants and this Charity.

49. Mr Clayton submitted that the Respondent had not provided to the Tribunal a sufficient explanation to rebut the Applicants' contention that there had been inconsistent treatment of Jehovah's Witness charities compared with other religious charities. When asked by the Tribunal where the burden of proof lay in relation to this point he said that where a party has extensive knowledge of comparable cases it is up to them to explain the differences. He submitted that the Respondent should have taken the opportunity in this case to dispel any concerns amongst Jehovah's Witnesses that the Respondent treats them differently, but it had not done so. He submitted that there are 140,000 Jehovah's Witnesses in the United Kingdom but there had only been three historical sex abuse cases amongst them in 3 years, so one needed to keep a sense of proportion and that the judicial process in this case should seek to assuage the Jehovah's Witnesses concerns.

50. The Respondent's case in relation to Ground 6 was that the Applicants had made an allegation of direct discrimination against them by the Respondent, which

was denied. As the Respondent denied that the Applicants' rights under Articles 9 and 11 ECHR were infringed in this case, it also denied that Article 14 ECHR was engaged, because it is not a freestanding right. Mr Steele submitted that the question for the Tribunal in respect of this ground was "would the Respondent have opened an inquiry on these facts were it not for the fact that the Applicants are Jehovah's Witnesses?" He submitted that the Applicants bore the burden of proof to show that this was the case, but that they had pointed to no cases where the Respondent had acted differently towards another charity where the material facts were similar to those in this case. He pointed to the evidence before the Tribunal about other Jehovah's Witness charities in respect of which the Respondent's engagement had not involved the opening of a statutory inquiry. He also commented that Kait White's evidence about the Respondent's treatment of other charities involving sexual abuse allegations had been served on the Applicants' lawyers months before the hearing but the first suggestion that the Respondent was required to provide more and had failed to do so had been made at the hearing itself.

Submissions on Remedy

51. In respect of the remedy sought by the Applicants, Mr Clayton submitted that the Tribunal should adopt the approach of the High Court and exercise its discretionary power in favour of the public interest. He submitted that in this case there was no public interest in the Respondent's inquiry remaining open because it was now accepted that the Applicants had not themselves conducted the disfellowshipping process which had caused the concern. He further submitted that the Tribunal was entitled to take the view that the public interest lay in the rebuilding of the relationship between the parties in circumstances where the continuation of the statutory inquiry served no practical purpose.

52. Mr Steele's submission in respect of the powers available to the Tribunal was that, if the Applicants' case is upheld, the Tribunal should not direct the Respondent to close the inquiry. He said it was clear from the evidence before the Tribunal that the inquiry had flushed out information from the Charity which had not previously been forthcoming and there was clearly therefore a practical purpose to its continuation.

53. Finally Mr Steele submitted that if the Applicants' case were to be dismissed by the Tribunal, it would be helpful for the parties and the Upper Tribunal to know whether, in the event that the Tribunal had allowed the application, it would have been minded to leave the inquiry open. This was because there is already an appeal in the Upper Tribunal concerning the pre-hearing directions in this matter.

Conclusions

Ground 1

54. We accept Mr Clayton's submission that Articles 9 and 11 ECHR protect the "associative" rights of religious groups and that the State has no role in determining the legitimacy of religious practices such as disfellowshipping. However, we also accept Mr Steele's submission that Article 9 ECHR is not a "trump card" which prevents the State from inquiring into potentially harmful activities by religious

groups. We note that the Congregation and the Charity are one and the same entity in this case, so that whilst the Congregation understandably wishes to follow its religious practices, its status as a registered charity brings with it, in exchange for public recognition and tax reliefs, a requirement to maintain certain standards of behaviour. It also brings with it the risk that, if there are concerns about its activities, these might be inquired into by the Respondent. We consider that there were significant grounds for concern about the Charity on the basis of the information held by the Respondent on 30 May 2014. We also consider that the Charity's religious nature by itself presented no bar to the Respondent opening a statutory inquiry to consider these concerns in more detail.

55. Taking both the broad approach to the nature of the Charity's associative life and the exacting analysis of the facts advocated by Mr Clayton, we have not found any evidence which supports his submission that the opening of the inquiry materially affected the internal life of the Charity as a religious community. In order to succeed on this point, we consider that the Applicants would have needed to tell us how their associative life had been disrupted by the Respondent's decision, but they did not provide any evidence of this. In the circumstances we reject this submission.

56. We note that s. 46 of the Act contains no statutory threshold which must be crossed before an inquiry can be opened. It is not a necessary step for the Respondent first to have formed a concluded view of any facts, or even to have formed a provisional view that there had been misconduct or mismanagement in the charity before opening an inquiry. The Respondent is, however, required to take a reasonable and proportionate decision based on the facts in front of it at the time it decides so to act. The issue of whether the Respondent acted reasonably in hindsight, in the light of the information that the Charity chose to supply later, is not the question for the Tribunal. It is similarly immaterial that the Respondent opened the inquiry on the basis of the apparently erroneous understanding that the Charity had conducted the disfellowshipping hearing itself, as the reasonableness of the Respondent's decision can only be judged on the basis of the information which had been provided to it at the relevant time.

57. At the time the Respondent opened the inquiry, we note that it was dealing with a situation in which the Charity had failed to answer the direct questions put to it about the treatment of the complainants during the disfellowshipping of Mr Rose. The Charity had also confirmed that the disfellowshipping had been conducted in accordance with long-standing Jehovah's Witness practices. In those circumstances, it does not seem to us that the Respondent was in any sense obliged to continue to correspond informally with a charity about which it had serious concerns but which was not answering its questions. We consider that as the information about the involvement of third parties in the disfellowshipping of Mr Rose was provided to the Respondent only after the inquiry was opened, this tends to support the Respondent's conclusion that its engagement with the Charity needed to be moved onto a statutory footing to be more effective. However, looking at the situation on 30 May 2014 as we are required to do, we regard the decision to open the inquiry as having been both reasonable and proportionate in this regard.

58. We have considered Mr Sladen's Decision Log carefully. We find that it sets out clearly the issues of concern for the Respondent and the regulatory implications arising from those issues, as at the time of writing. We find that Mr Sladen made a clear case, with regard to the statutory framework for charity inquiries and the

Respondent's own guidance, for the opening of a statutory inquiry to "*explore the concerns in more detail and to establish the facts*". We regard his decision as a reasonable one in the circumstances of this case.

59. We take Mr Clayton's point that Mr Sladen did not explicitly demonstrate that he had asked himself the right questions in the right order about the human rights issues. However, we find that Mr Sladen did consider the relevant points and, having considered them, appropriately concluded that the opening of the inquiry did not interfere with the Charity's human rights. We find that this is demonstrated by his entry in the Decision Log, as if he had not concluded that there was no breach of Article 9 (1) ECHR, he would not have needed to go on to consider the matters which he refers to as "in the alternative" in the latter part of paragraph 37. In considering this part of the Decision Log (see paragraph 36 above) we take into account the fact that Mr Sladen is not himself a lawyer and also that the Respondent's "Desk Guidance" on which he relied was, in our view, less than clear on the question of whether the opening of an inquiry could by itself be seen to breach human rights.

60. Paragraph 20 of the Decision Log appears to have been inserted at a late stage in the decision-making process because its contents are not referred to in the "headline facts" or "regulatory issues" sections and they do not appear to have featured in the considerations leading Mr Sladen to decide to open the inquiry. In noting above that the Respondent is not required to reach any concluded views on the facts before deciding to open an inquiry, we find that the mis-information contained in paragraph 20 of the Decision Log did not vitiate the reasonableness (as we find) of the Respondent's decision. We make our finding in this regard on the facts of this case, where we are satisfied that other clearly-defined regulatory issues justified the opening of the inquiry. However, in another case, the inclusion of incorrect information in the Decision Log which had not even been checked by the writer might well lead us to take a different view. We reiterate out concern about the circumstances leading to the inclusion of paragraph 20 in the Decision Log.

61. With regard to the submission that the Respondent's press release about the opening of the inquiry breached the Applicants' human rights, we note that the right of application to the Tribunal is in respect of the decision to open the inquiry, rather than in relation to any administrative action taken by the Respondent in connection with the inquiry. It follows that we do not think the Tribunal has any jurisdiction to review the question of whether the issuing of the press release breached the Applicants' human rights. If we are wrong about that, then we would agree with Mr Steele that the Respondent's press release in this case is plainly distinguishable from the *Leela Forderkreis* case in which the German Government issued a public warning about an organisation about which it had reached a concluded view. We have no hesitation in rejecting the Applicants' submission on this point.

62. If we are wrong about any of the above conclusions so that the opening of the inquiry did constitute an infringement of the Charity's human rights, then we would regard the infringement as one having minimal impact on the Applicants in view of the absence of evidence from them on the point. We would also regard the interference as justified under Articles 9 (2) and 11 (2) ECHR for the reasons advanced by Mr Steele and referred to at paragraph 42 above.

63. As we are satisfied that the Applicants have not established that there was any breach of their human rights by the Respondent's decision to open the inquiry, it

follows that we find no unlawful conduct or proposed unlawful conduct by the Respondent so as to infringe s. 6 (1) or s. 7 (1) of the Human Rights Act 1998. It also follows that, as we have found that there is no infringement of Articles 9 and 11 ECHR in the decision to open the inquiry, the Applicants' claim that there was discrimination in the enjoyment of those rights so as to infringe Article 14 ECHR is dismissed.

Ground 4

64. We are not persuaded that the Respondent's decision to open the inquiry was based on a misunderstanding by it of the duties of charity trustees in the safeguarding context. As noted above, the Respondent had not reached a concluded view on this point but it had raised this issue as one of the concerns into which it wished to inquire further. Also noted above is the fact that, at the time the Respondent made its decision to open the inquiry, it did not know about the involvement of third parties in the disfellowshipping of Mr Rose.

65. We are satisfied that as of 30 May 2014, the description of the disfellowshipping process that the Respondent had received, the Applicants' failure to reply fully to the specific questions put to them about it, and their confirmation that it had been conducted in accordance with long-standing practices of Jehovah's Witnesses together raised serious questions about the charity trustees' ability to comply with their legal duties both to the Charity itself and to its vulnerable beneficiaries. We consider that it was reasonable for the Respondent to have decided to open the inquiry to look further into those concerns in the circumstances.

66. We tend to think that that the information about the involvement of third parties, belatedly provided to the Respondent by the Watchtower, raised more questions about the charity trustees' conduct than it answered. There are further causes for concern arising from the Charity's delegation of the disfellowshipping function to others, over whom, we were told, it had "no control". Mr Clayton accepted at the hearing that the charity trustees may have been wrongly-advised about their duties in this regard, and so it now appears that it may have been the Charity's advisers, rather than the Respondent, who had misunderstood the duties of trustees in the safeguarding context.

Ground 6

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 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 reasons 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.

Remedy

70. We have decided to dismiss the Applicants' application for Review for the above reasons.

71. Mr Steele asked us to consider whether, if the application had succeeded, we would have been minded to direct the Respondent to close the inquiry. We agree that it would be helpful to the parties and to the Upper Tribunal to record our thoughts on this, although they are by their nature speculative. We consider that, if we had decided to allow the application on any of the above grounds, we would not have been minded to direct the Respondent to close the inquiry. This is because we consider that there are significant on-going grounds for concern about the Charity's conduct of safeguarding matters. We take into account (i) the Charity's failure to be entirely frank with the Respondent about the questioning of victims in the disfellowshipping of Mr Rose at the relevant time; (ii) the delay in volunteering the information that third parties had been involved in the disfellowshipping of Mr Rose; and (iii) the Charity's insistence in these proceedings that there was no legitimate cause for concern by the Respondent about the conduct of those proceedings because of the appointment of third parties to conduct them. The Charity did not appear from the evidence before us to accept that best practice in safeguarding for charities relates not only to the protection of children but also of vulnerable adults, nor did it appear to have considered whether the Charity might have a safeguarding role in respect of adults who had been abused as children in the Congregation.

72. The Charity also did not seem to us to have considered whether Mr Rose might yet present a risk to children currently in the Congregation. We note in this regard Mr Cook of the Watchtower's letter of 6 May 2014 in which he was sanguine as to Mr Rose's attendance at a public place of worship. However, we understand that the crimes for which Mr Rose was convicted took place after Mr Rose "befriended" his victims' families and visited their homes, having met them through the Congregation. We also note in this context that Mr Rose pleaded not guilty when charged, has challenged his disfellowshipping by the Congregation twice, and has been described as "unrepentant" following his conviction. It seems to us that, in these circumstances, the adequacy of the Charity's arrangements for the safeguarding of members of the Congregation who will come into contact with Mr Rose through the Charity should be considered further.

73. Finally, we were concerned that, although Mr Clayton accepted in his skeleton argument that the disfellowhipping process for Mr Rose was poorly-handled, there was other material before us which suggested that the arrangement of a confrontation

of an accuser by their accused, as happened in Mr Rose's case, is official guidance for Jehovah's Witness Congregations. We particularly noted the "Elders' Handbook" paragraph 39 in this regard.

74. These are all the matters which lead us to the view that, if we had allowed the Applicants' application for Review, we would not have been minded to exercise our discretion to direct the Respondent to close its inquiry. We recognise that we have not heard submissions in relation to them and that this is an essentially hypothetical exercise, but it seems to us that these matters would merit further consideration by the Respondent in the context of a statutory inquiry.

ALISON MCKENNA

PRINCIPAL JUDGE
9 April 2015