Neutral Citation Number: [2016] EWCA Civ 154

Case No: C1/2014/4190

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE DOVE
CO39742014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2016

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE McCOMBE
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

WATCH TOWER BIBLE & TRACT SOCIETY OF BRITAIN & OTHERS	**Appellant**
- and -	
THE CHARITY COMMISSION	**Respondent**

- -
- -

Richard Clayton QC and Lee Parkhill (instructed by **Sharpe Pritchard LLP**) for the **Appellant**
Iain Steele (instructed by **Litigation and Review Team**) for the **Respondent**

Hearing date: 10/02/2016

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Judgment

Master of the Rolls:

1. The appellants are a registered charity ("Watch Tower") and its trustees. The respondent ("the Commission") is the statutory regulator and registrar of charities in England and Wales under the Charities Act 2011 ("the 2011 Act"). The Commission wishes to investigate concerns in respect of Watch Tower regarding safeguarding of vulnerable beneficiaries, in particular children who are subject to or make allegations of sexual abuse by individuals who are connected with Jehovah's Witness congregations.

2. On 27 May 2014, the Commission initiated an inquiry under section 46 of the 2011 Act to investigate *inter alia* (i) Watch Tower's handling of safeguarding matters, including the creation, development, substance and implementation of its safeguarding policy; and (ii) the administration, governance and management of the charity by the trustees and whether or not the trustees have fulfilled their duties and responsibilities as trustees under charity law.

3. 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. I should say that none of these was connected with Watch Tower.

4. On 20 June 2014, the Commission issued a Production Order under section 52 of the 2011 Act ("the Production Order") 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, or complaint about, abuse of or by a person who is or has been a member of the charity or a congregation charity.
>
> (c) All documents created on or after 1 June 2011 setting out or recording advice and/or guidance provided by and/or on behalf of the charity to a congregation charity, and/or a charity trustee, officer, agent or employee of any 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 practice for the internal disciplinary proceedings of the charity and any congregation charity, including but not limited to disfellowship proceedings."

These proceedings

5. The appellants seek judicial review of (i) the decision to initiate the inquiry and (ii) the Production Order.

6. In relation to the Inquiry Decision, their case is that the proposed inquiry is unlawful on the grounds that (as summarised in their skeleton argument):

"(1) the Commission is interfering and/or is proposing to interfere with the Appellants' 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 the Appellants' 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 the Appellants' 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 the Appellants to implement;

(4) the Commission has breached the Appellants' 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 the Appellants 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 the Appellants a fair opportunity to meet the case against it; and

(7) in the circumstances the decision to initiate the inquiry was irrational."

7. In relation to the Production Order, their case is that it too is unlawful in that (quoting again from their skeleton argument):

> "(1) the scope of the Order is disproportionate;
>
> (2) the information sought requires the Appellants to produce documents containing personal information and sensitive personal information as defined by the Data Protection Act 1998; and unless the data subject consents to his personal data being processed, the conditions in Schs 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."

8. 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.

The issues arising on the appeal

9. Two issues are raised by the appeal. The first is whether the FTT has power to provide an effective and convenient remedy in relation to the appellants' complaint that the Inquiry Decision was unlawful. The argument before us has focused on the particular complaint that the proposed inquiry is too broad and disproportionately interferes with their religious beliefs and practices contrary to articles 9 and 11 of the European Convention on Human Rights ("the Convention"). The second issue is whether the jurisdiction exercisable by the FTT under section 320 of the 2011 Act to entertain an appeal against a section 52 production order includes a power to address a complaint that the order is unlawful.

10. By a Respondent's Notice, the Commission seeks to uphold the decision of Dove J on the additional basis that the appellants have no arguable grounds for seeking judicial review anyway.

The statutory framework

11. 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."

12. 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)"

13. 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".

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

> "(1) The Commission may by order –
>
> (a) require any person to provide the Commission with any information which is in that person's possession and which –
>
> (i) relates to any charity, and
>
> (ii) is relevant to the discharge of the functions of the Commission or of the official custodian;
>
> (b) require any person who has custody or control of any document which relates to any charity and is relevant to the discharge of the functions of the Commission or of the official custodian—
>
> (i) to provide the Commission with a copy of or extract from the document…"

15. Section 319 provides:

> "(1) Except in the case of a reviewable matter (see section 322) an appeal may be brought to the Tribunal against any decision, direction or order mentioned in column 1 of Schedule 6.
>
> (2) Such an appeal may be brought by--
>
> (a) the Attorney General, or
>
> (b) any person specified in the corresponding entry in column 2 of Schedule 6.
>
> (3) The Commission is to be the respondent to such an appeal.
>
> (4) In determining such an appeal the Tribunal-
>
> (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."

16. 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)."

17. Section 321(1) provides:

"(1) An application may be made to the Tribunal for the review of a reviewable matter.

(2) Such an application may be made by-

(a) the Attorney General, or

(b) any person mentioned in the entry in column 2 of Schedule 6 which corresponds to the entry in column 1 which relates to the reviewable matter.

(3) The Commission is to be the respondent to such an application.

(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

(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."

18. Section 322 provides:

> "(1) In this Chapter references to reviewable matters are to-
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> (a) decisions to which subsection (2) applies, and
>
> (b) orders to which subsection (3) applies.
>
> (2) This subsection applies to decisions of the Commission-
>
> (a) to institute an inquiry under section 46 with regard to a particular institution;
>
> ……"

General principles concerning alternative remedies to judicial review

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* [2003] EWCA Civ 1128, [2004] 1 WLR 185 at paras 30 and 31; per Lord Phillips MR in *R (G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [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.

The first issue: the decision to initiate the Inquiry

20. The case advanced by Mr Richard Clayton QC is as follows. 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 tribunal 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 tribunal 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). The complaint that the appellants make in these proceedings is about the vagueness and lack of definition of the scope of the inquiry. It is submitted that the FTT would not have jurisdiction to

grant relief in relation to that complaint by, for example, identifying how the scope should be varied or clarified.

21. Mr Clayton submits that, when bringing its judicial review claim, the appellants were entitled to have regard to the Upper-tier Tribunal ("UTT") decision of *Regentford v Charity Commission* [2014] UKUT 0364 (TCC) 0364. In that case, the intervener submitted that, even if the FTT upheld a challenge to a decision by the Commission to open an Inquiry, it would generally be inappropriate for it to direct the Commission to close the Inquiry. The UTT said at para 41:

> "We have concluded that the decision to open the inquiry was a reasonable one in the circumstances and that the FTT was correct to dismiss the application before it. We agree with the Intervener's submissions at [35] above and conclude that it would generally be inappropriate for the FTT to direct the Respondent to end an inquiry in circumstances where there are significant causes for concern about a charity. We conclude that we should not set aside the FTT's decision in this case."

22. Dove J said that the FTT would have power to provide the equivalent relief to that provided by a court in judicial review proceedings. He said:

> "35. The process would operate as follows. On the assumption that the Claimant's contentions on the merits were accepted, it would [be] open for the First-tier Tribunal to conclude that it was an error of law for the Defendant to have opened an inquiry of the breadth which they did and in directing the Defendant to bring the inquiry to an end, they would have to explain in the reasons that they offered why that was, leaving it then open to the Defendant to initiate an inquiry with a narrower scope in accordance [with] the reasons for dismissing and ending the existing broad-scoped inquiry.
>
> 36. Alternatively, they could conclude that the Defendant 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 the elements of that inquiry would not be consistent with the Defendant'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 the Claimant's submissions. The Defendant would then be obliged to respect that decision as to the parameters of the section 46 inquiry in undertaking it.
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> 37. So far so good. But, says the Claimant, what happens if they did not do that or if there is a dispute about the true perimeters which have been identified by the First-tier Tribunal? In my view, there is an answer to this contention.
>
> 38. The first answer, which is not complete, is that the Defendant is a responsible public body which should be expected to respect and properly apply the decision of the First-tier Tribunal. I accept however that that is, with respect to the Defendant, not a sufficient answer in and of itself.

> 39. In my view in the instance of intractable disagreement, whilst it is clear that the First-tier Tribunal would not have jurisdiction to act, nevertheless at that point judicial review would be available in relation to the investigative steps and insofar as the decision of the First-tier Tribunal had not been properly respected, this court would have jurisdiction to entertain the Claimant's application both in relation to the application of the First-tier Tribunal's decision and the Defendant's actions in that regard."

23. Mr Clayton criticises this passage in two principal respects. First, there is no reason to suppose that the FTT would indeed provide detailed reasons for its conclusion on the appellants' 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 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 decision; 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.

24. I do not accept these criticisms to the judge's analysis. 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. As Mr Steele points out, it is consistent with the approach to the grant of relief taken by the Administrative Court. 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.

25. For all these reasons, I reject the appellants' submissions in relation to the first issue.

The second issue: the Production Order

26. The focus of the argument before the judge (as before us) was on whether the FTT would have jurisdiction under section 320 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.

27. The judge held that section 320 provided the appellants with a convenient and effective remedy for all of their complaints in relation to the Production Order. He dealt with the issue as follows:

> "21. It is to be noted that the power of the First-tier Tribunal on an appeal directly mirrors the power which is provided to the Defendant under section 52. It is to my mind therefore entirely clear that the First-tier Tribunal has a jurisdiction to deal with the Claimant's complaint about both the breadth and the proportionality of the order.
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> 22. Turning specifically to the complaints raised in relation to the human rights aspect and Article 8, there is in my view no doubt that Article 8 is potentially very obviously engaged in relation to the extent of the documentation which has been sought. There is equally in my view no doubt that the deliberations and decisions of the First-tier Tribunal would also need to accord with the requirements of the Human Rights Act 1998. In particular, section 6 of the 1998 Act would apply to the Tribunal and require them to take that directly into account in reaching any conclusions on any appeal against the production order.
>
> 23. Thus, in concluding whether under section 320(2) that information or documents were relevant to the discharge of the functions of the Commission, compliance with Article 8 and other relevant elements of the Human Rights Act would have to be considered in assessing the extent to which, if at all, the order is to be upheld.
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> 24. In my view, similar considerations apply in relation to the data protection legislation relied upon. The definition of the Defendant's functions under section 15 does not clothe the Defendant with authority to act unlawfully or in breach of other legislation, such as the data protection legislation, which will govern its operations. This point applies with equal force to the discharge of the function of exercising the power under section 52 and therefore also applies with equal force to the appeal jurisdiction in the First-tier Tribunal.
>
> 25. It follows from what I have set out that I am entirely satisfied that as a matter of statutory construction and therefore as a matter of law all of the Claimant's complaints raised in these proceedings can be raised before the

> First-tier Tribunal and that they will have to consider them in exercising their powers under the appeal provisions which I have set out above."

28. Mr Steele supports the judge's reasoning and conclusion. The following is a summary of his submissions. The interpretation of the phrase "relevant to discharge of the functions of the Commission" must be realistic and not unduly narrow. When considering whether the information or document sought by a section 52 order is relevant to the discharge of the Commission's functions, the tribunal must examine whether the Commission acted lawfully in issuing the order. It is no part of the Commission's functions to act unlawfully or to require a charity to act unlawfully. If the tribunal were to conclude that the Commission had not acted lawfully in issuing the order, it is difficult to see how the tribunal could be satisfied that seeking the information or document was nevertheless relevant to the discharge of the Commission's functions.

29. Mr Steele submits that the 2011 Act creates a hierarchy of rights of challenge of decisions, directions and orders of the Commission before the tribunal. Section 319 provides for a full appeal on both fact and law. In determining such an appeal, the tribunal must consider afresh the decision, direction or order appealed against, and may take into account evidence which was not available to the Commission. The tribunal has wide powers to grant relief where it allows an appeal. Section 320 provides for a right appeal against a section 52 order. The tribunal does not have the power to consider the order afresh, but it may take into account evidence which was not available to the Commission. Section 321 provides for a review of a number of specified "reviewable matters" and for the application of judicial review principles on such a review. This is not a de novo appeal and, by implication, it is a process in which fresh evidence will rarely be admitted.

30. Mr Steele submits, therefore, that a section 320 appeal is part way between a full merits appeal under section 319 (the widest form of challenge) and a review under section 321 (the narrowest form of challenge). Parliament cannot have intended the grounds of challenge in a section 320 appeal to be narrower than the grounds of challenge in a section 321 review. If a section 320 appeal cannot be made on the grounds that the section 52 order is unlawful, such an order is the only form of decision, direction or order mentioned in column 1 of Schedule 6 which cannot be challenged before the tribunal on grounds of unlawfulness. This cannot have been intended by Parliament. If a section 52 order cannot be challenged on grounds of unlawfulness, section 320 is a dead letter. It is the only kind of decision by the Commission which cannot be challenged before the tribunal on the grounds of error of law.

31. Mr Steele has a fall back argument. He submits that the grounds of challenge sought to be made by the appellants in this case are that the Production Order was made in breach of the appellants' procedural rights under article 8 of the Convention and in breach of the DPA. Section 3(1) of the Human Rights Act 1998 (the "HRA") provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights". It follows, he says, that section 320 must be interpreted to require the tribunal to entertain a HRA challenge to a section 52 order.

32. By parity of reasoning, Mr Steele submits that the same interpretative outcome is required by the DPA. The DPA was enacted in order to implement Directive 95/46/EC

on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The object of the Directive was to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with regard to the processing of personal data (article 1(1)). The protection of personal data as embodied in the DPA is thus a fundamental right under EU law and in domestic law. It follows that the same interpretative obligation arises in respect of section 320 in relation to the DPA as in relation to Convention rights under the HRA.

33. Attractively though Mr Steele presented his submissions, I am not able to accept them. Section 52 and section 320 must be read together. But the critical question is what is the scope of an appeal under section 320. On such an appeal, the tribunal must consider whether the information or document (a) "relates to" a charity and (b) is "relevant to the discharge of the functions of the 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, there can be little doubt that this is what the two phrases mean.

34. As Mr Clayton points out, the interpretation for which Mr Steele contends 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". It may be said that it is *implicit* in section 52 that the power to make an order is restricted to making an order for the production of information or documents relevant to the *lawful* discharge of the functions of the Commission. But in my 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 focus is on *relevance* to the discharge of the Commission's general functions described in section 15. As a matter of ordinary language, section 320 requires the tribunal to focus on the connection between the order and the discharge of these functions. It is required to ask whether, as a matter of fact, there is any connection between the order and the discharge of one or more of the functions. It may allow an appeal only if satisfied that there is no such connection. That is consistent with section 320(2)(a) which requires the tribunal to consider whether there is any connection between the order and the charity itself. This too is a factual question. On Mr Steele's interpretation, the focus would not be on that connection. Instead, it would be on whether the decision to make the order was lawful and/or whether the way in which the Commission reached its decision to make the order was unlawful. I would hold as a matter of ordinary language that this is not what section 320 means.

35. In my view, if Parliament had intended that the tribunal was required under section 320 to consider whether the section 52 order was lawful (e.g. whether it was disproportionate, in breach of Convention or DPA rights), it would surely have listed it among the "reviewable matters" subject to a judicial review type process pursuant to section 321 or provided for a full appeal under section 319 (save for section 319(4)(a)). Either of these routes would have enabled a person to challenge a section 52 order before the tribunal on grounds of illegality. It is significant that section 319 does not identify the grounds on which an appeal may be brought. It is, therefore, implicit that an appeal may be brought under section 319 on the ground of any error of fact or law. On the other hand, section 320 permits an appeal only on the grounds stated in section

320(2). It was clearly not intended to confer a general right of appeal on the grounds of error of fact or law. And yet, if Mr Steele is right, section 320 does indeed confer a right of appeal on the grounds of *any* error of fact or law. If it had been intended to confer such a general right of appeal, I do not consider that Parliament would have expressed the grounds of appeal in the terms of section 320(2). If the purpose of section 320 was to confer a general right of appeal (subject only to the bar on considering the order afresh (section 319(4)(a)), one would have expected section 320 to be confined to subsection (1). That is all that would have been necessary. Instead, Parliament introduced the limitation that is found in subsection (2), and reinforced the point by stating in subsection (3) that an appeal can *only* be allowed if the tribunal is satisfied that the information or document does not fall within subsection (2)(a) or (b).

36. The judge said that the definition of the Commission's functions in section 15 "does not clothe [it] with authority to act unlawfully or in breach of other legislation". I agree. But I do not see how this sheds any light on the meaning and scope of section 320. The whole point of conferring a right of appeal is to enable challenges against the wrongful discharge of functions to be made. The scope of a right of appeal must depend on the true meaning and effect of the provision which confers the right of appeal.

37. Nor do I accept that Mr Steele's hierarchy of rights of challenge sheds any light on the problem. It is true that a section 320 appeal lies somewhere between a section 319 appeal and a section 321 review. That of itself does not provide the answer to the question.

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 proferred. 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.

39. I conclude, therefore, that the words "relevant to the discharge of the functions of the Commission" should be given their ordinary and natural meaning. Section 320 does not permit an appeal on the grounds that a section 52 order was unlawfully made.

40. I would also reject Mr Steele's alternative argument based on section 3 of the HRA. The statutory provision which he says is incompatible with the Convention is section

320 because (for the reasons I have given) it does not permit challenges to section 52 orders on Convention grounds. There is a very short answer to this submission. Subject to any article 6 or article 14 considerations, the Convention does not prescribe *how* a victim of breaches of Convention rights should be able to vindicate his or her rights. All that is required is that the state provides a mechanism whereby those rights can be determined by an independent tribunal. There is nothing wrong with a system which provides for the determination of those rights by different independent tribunals. That is the position here. It is not in dispute that, if section 320 does not provide an appeal to the tribunal on the grounds of illegality, the appellants can in principle challenge the Production Order by judicial review proceedings (as they have done). The answer to Mr Steele's alternative argument in so far as it is based on the DPA is the same.

41. Mr Steele relies on *Hounslow LBC v Powell* [2011] 2 AC 186, [2011] UKSC 8 in support of his alternative argument. This was a possession claim in which the defendant tenant filed a defence alleging that the decision to seek an order for possession was in breach of his rights under article 8 of the Convention. One of the issues was whether section 127(2) of the Housing Act 1996 (which permitted a landlord to bring an introductory tenancy to an end by obtaining a possession order from the court) could be read and given effect so as to permit the tenant to raise his article 8 Convention right by way of defence. The Supreme Court concluded that it was possible to read and give effect to section 127(2) compatibly with article 8 rights so as to enable the judge in the county court to deal with a defence which relied on a breach of article 8. By parity, Mr Steele submits that section 320 of the 2011 Act can and should be read and given effect so as to enable a challenge to a section 52 order to be raised on Convention or DPA grounds.

42. But the *Hounslow* case is readily distinguishable. Unless section 127(2) could be read and given effect as to enable a tenant to raise an article 8 defence, there was no independent tribunal before which that defence could be raised. That is not the case in relation to section 320. The claimants can raise their challenge to the section 52 order by way of judicial review proceedings.

The Respondent's Notice

43. In these circumstances, it is unnecessary to deal with the issues raised by the Respondent's Notice.

Overall Conclusion

44. For the reasons that I have given, I would dismiss the appeal in relation to the Inquiry Decision, and allow the appeal in relation to the Production Order.

Lord Justice McCombe:

45. I respectfully agree with the Master of the Rolls in rejecting the appellants' submissions in relation to the first issue.

46. On the second issue, I confess to a considerable degree of hesitation and, indeed in the end, indecision as to which of the arguments on the point of construction of section 320 should prevail. Happily, as will appear hereafter, I do not find that my indecision has any effect on the outcome of the appeal on this point.

47. During the hearing of the case and until receipt of the draft of the judgment of the Master of the Rolls, I felt confident in the correctness of Dove J's decision on the point. In particular, it seemed to me that the judge was correct in finding that, in determining whether information and/or documents were "relevant" to the discharge of the Commission's functions, it would be necessary for the Commission itself and for the Tribunal on appeal to consider compliance with Article 8 of the Convention and any issues raised under the DPA – and indeed any other issues as to the lawfulness of the Commission's order. It seemed to me that, having regard to the definition of the Commission's functions under section 15 of the 2011 Act, it could not be "relevant" to their discharge to make an order under section 52 requiring production of material to which the Commission was not lawfully entitled: see paragraphs 23 and 24 of the judge's judgment. This was an argument that Mr Steele attractively supported in his submissions for the Commission before us.

48. The arguments, however, gave rise to questions in my mind as to whether there might be differences between issues arising under the DPA and under Article 8. In the case of the DPA it might be said that the Commission could ask for documents (broadly) relevant to its functions and yet find itself faced with an objection under the DPA. In such a case, might it not well be that the order for production was not unlawful – and, therefore, relevant to the Commission's functions, but yet there might be a valid objection to compliance with it because to do so would constitute a breach on the part of the person to whom the order was directed on the grounds that compliance would be unlawful on its part? On the other hand, would it be relevant to the discharge of the Commission's functions, the Commission being a public body, for it to make an order which infringed the rights of third persons under the Convention? What would be the position if the Commission ordered the production of a document that was clearly the subject of legal professional privilege?

49. I was also troubled by the obvious inconvenience caused by the bifurcation of the functions of the court and of the Tribunal in this area. It seems odd that the Tribunal should be the proper forum for resolving issues under the Convention, if raised in objection to the Commission's decision to institute an inquiry under section 46 of the Act, and yet be jurisdictionally incompetent to decide such an issue in relation to a document ordered to be produced by order made under section 52.

50. I did and do not find a ready answer to these questions. However, the dilemma did lead me to think that Dove J may have been incorrect in his decision on this part of the case. As the Master of the Rolls recalls in paragraph 19 of his judgment, the remedy of judicial review should not be used if other means of redress are "conveniently and effectively" available to the party asking for review. In my judgment, this is not a case in which such a means of redress is conveniently and effectively available. This is so either because the construction of the Act is such that the Tribunal does not have jurisdiction, for the reasons given by the Master of the Rolls, or because, as it seems to me, such jurisdiction is in doubt in view of what I find to be the obscure meaning of the inter-related provisions of the Act for these purposes.

51. There can be no doubt that the High Court can effectively determine the matters sought to be raised by the appellants in resistance to the Production Order in this case and those matters concerning that Order should, therefore, be determined there rather than in the Tribunal, whose jurisdiction is (at best) doubtful.

52. I would add that I respectfully agree with the Master of the Rolls' rejection of Mr Steele's alternative argument as to the incompatibility of section 320 with the Convention for the reasons given in paragraphs 40 and following of the judgment above.

Lord Justice David Richards:

53. For the reasons given by the Master of the Rolls in his judgment, I agree that the appeal should be dismissed in respect of the Inquiry Decision but allowed in respect of the Production Order.