

Neutral Citation No: [2024] NIKB 90	Ref: McB12623
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 23/014377
	Delivered: 25/10/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

DISABLED POLICE OFFICERS' ASSOCIATION OF NORTHERN IRELAND
Appellant

and

CHARITY COMMISSION FOR NORTHERN IRELAND
Respondent

**Mr McMillen KC with Mr Wilson (instructed by KRW Law LLP Solicitors) for the
Appellant**

Mr McCausland (instructed by the Charity Commission for NI) for the Respondent

McBRIDE J

Introduction

[1] The appellant, the Disabled Police Officers' Association of Northern Ireland ("DPA") applies for permission to appeal the decision of the Charity Tribunal dated 26 October 2022, when it dismissed the DPA's application for a review of the Charity Commission's decision dated 14 February 2014 to open a statutory enquiry into the affairs of the DPA.

[2] The Charity Tribunal determined that the decision of the Charity Commission was not a "relevant action" as defined by the Charities Act (Northern Ireland) 2022 ("the 2022 Act") and therefore the extended rights of appeal granted under the 2022 Act did not apply and the review was accordingly out of time.

Representation

[3] The appellant was represented by Mr McMillen KC and Mr Wilson of counsel. The Charity Commission was represented by Mr McCausland of counsel.

[4] This application involved a multiplicity of interweaving procedural and substantive legal issues. I am very grateful to all counsel for their detailed and comprehensive skeleton arguments and the clarity brought to the issues in dispute during oral submissions.

Background

[5] On 14 February 2014, the Charity Commission decided to open a statutory enquiry into the affairs of the DPA in accordance with its powers under the Charities Act (Northern Ireland) 2008 (“the 2008 Act”). A statutory enquiry is a necessary pre-requisite to disqualification of a trustee of a charity.

[6] On 22 January 2015, staff employed by the Commission decided to remove Mr Crawford as a trustee of DPA.

[7] Mr Crawford appealed the Charity Commission’s decision to remove him as a trustee to the Charity Tribunal. On 19 October 2015, the Charity Tribunal upheld the Charity Commission’s decision.

[8] Mr Crawford appealed to the High Court and the High Court remitted the case to a differently constituted Tribunal.

[9] When the matter was relisted before the Charity Tribunal, Mr Crawford asked it to determine as a preliminary issue whether the Charity Commission’s decision to remove him as a trustee was lawfully taken. He challenged the lawfulness of the decision to remove him as a trustee on the following grounds:

- (i) The decision was made by staff rather than the Commission.
- (ii) The statutory enquiry, which is a necessary pre-requisite to the exercise of a power to remove a trustee of a charity, was unlawfully made as it was not made by the Commission, or by a lawfully constituted committee of the Commission pursuant to Schedule 1 to the 2008 Act.

[10] On 16 November 2017, the Charity Tribunal held that the Charity Commission’s decision to remove Mr Crawford as a trustee was lawfully made.

[11] On 12 December 2017, the Charity Commission gave permission to Mr Crawford to appeal this decision to the High Court.

[12] The High Court heard Mr Crawford’s appeal in conjunction with several other appeals from the Charity Tribunal in the case of *McKee and others v The Charity Commission*, as all the appeals raised the same question of law, namely whether the functions attributed to the Charity Commission could be lawfully discharged by staff of the Commission.

[13] On 16 May 2019, the High Court ruled in *McKee and others v The Charity Commission* [2019] NICh 6, that the functions attributed to the Charity Commission could not be lawfully discharged by Commission staff.

[14] The High Court noted at para [32] of the judgment that the Crawford appeal raised a second issue, namely whether the decision to institute the statutory enquiry was lawfully made. After determining the key issue about whether decisions made by the Commission staff were lawful, the court invited submissions from counsel in relation to the second question which arose only in the Crawford appeal.

[15] The second question raised in the Crawford appeal was left in abeyance at counsel's request. This matter has never been determined by the High Court.

[16] The High Court ruling in *McKee* was appealed to the Court of Appeal and the Court of Appeal affirmed the High Court ruling.

[17] Following the judgments in *McKee*, the 2022 Act was introduced to address the ultra vires decisions made by the Charity Commission staff. The broad effect of the 2022 Act was to ratify decisions made by Charity Commission staff and to extend time for appeal in respect of such ratified decisions.

The 2022 Act provisions

[18] Section 1(1) of the 2022 Act provided as follows:

“1.—(1) In this section “relevant action” means any decision made or purported to be made, or other thing done or purported to be done, by a member of the Commission's staff before 16 May 2019 if—

- (a) it was made or done, or purported to be made or done, in connection with the exercise or discharge of any of the Commission's functions, and
- (b) the persons by whom it could lawfully be made or done did not include members of the Commission's staff acting in their capacity as such.

(2) Every relevant action is to be treated as, and as always having been, a decision made, or thing done by the Commission (subject to subsections (3) to (6)).”

Section 1(7) provides for refreshed rights of appeal in respect of relevant actions.

[19] On 15 April 2022, the DPA applied to the Charity Tribunal under section 1 of the 2022 Act, for a review of the Charity Commission’s decision dated 14 February 2014 to institute a statutory enquiry into the affairs of the DPA.

[20] The DPA’s grounds of appeal were, in summary:

- (i) The decision was unlawful as it was made by Commission staff.
- (ii) The decision was not made in compliance with the statutory duties set out in section 9 of the 2008 Act.
- (iii) At the date the decision was made, the Commission had not delegated any of its powers to a sub-committee of Commissioners.

[21] The DPA applied for a direction that the Tribunal hold a preliminary hearing to consider the question whether a lawfully constituted committee, which satisfied the statutory requirements of Schedule 1 para 9 of the 2008 Act, took the decision to institute a statutory enquiry and, if no such committee existed, whether the decision was ultra vires and void.

[22] The Charity Commission applied for a direction that the appeal was out of time and further submitted that the DPA could not avail of the extended rights of appeal granted under the 2022 Act as the decision was not made by staff but rather was made by Commissioners and was not, therefore, a “relevant action” – giving rise to refreshed rights of appeal. The Charity Commission further asked that the Charity Tribunal require the DPA to request a direction to extend time to appeal.

Tribunal directions – Preliminary Hearing

[23] The Tribunal declined to hold the preliminary hearing as requested by the DPA but rather held a directions hearing on 17 October 2022. The Tribunal records at para [9] of its decision that:

“By consent, the focus of the ... directions hearing addressed only the question of whether the decision was a “relevant action” within the terms of the 2022 Act. As the Tribunal’s determination of that question would determine how these proceedings might progress.”

Accordingly, the Tribunal held a preliminary hearing to determine the question whether the Charity Commission’s decision to institute a statutory enquiry was a “relevant action.”

[24] The Tribunal decision further records at para [10] that the “direction hearing” was never intended to, and did not, address the determination of the substantive issues, namely whether the respondent was justified in instituting a statutory

enquiry on 14 February 2014 into the applicant and whether that decision was lawfully made by the respondent.

Tribunal decision

[25] The Charity Tribunal determined that the Charity Commission's decision dated 14 February 2014 to institute a statutory enquiry into the affairs of the DPA was not a "relevant action" and, therefore, the DPA did not have refreshed rights of appeal under the 2022 Act and, accordingly, the appeal was out of time.

[26] At para [26] the Tribunal found that the decision was not a relevant action "since it was satisfied, on the balance of probabilities, on the written evidence and the written and oral submissions of the parties, and the written and oral submissions of the Attorney General, that the impugned decision was made by the respondent and not by staff of the respondent."

[27] At para [27] the Tribunal rejected the submission of the DPA that the decision was a "relevant action" because staff of the Charity Commission prepared and made a recommendation to institute a statutory enquiry, this meant staff were involved in making the decision to institute a statutory enquiry.

[28] At paras [29] and [30] the Tribunal, again, reiterated that it had made no decision on the substantive issues and that "the substantive application currently still subsists."

[29] On 3 November 2022, in accordance with the provisions of section 14(4) of the 2008 Act, the DPA sought the Charity Tribunal's permission to appeal to the High Court as an appeal may only be brought with leave of the Tribunal or if the Tribunal refuses, permission of the court.

[30] On 3 February 2023, the Charity Tribunal refused leave to appeal to the High Court.

[31] On 4 May 2023, leave to appeal was granted by McAlinden J and accordingly this court does not need to engage with the interesting arguments advanced about whether this court should grant leave.

Submissions of the DPA

[32] The DPA submitted that the Charity Commission erred in determining the preliminary issue, whether the decision of the Charity Commission to institute a statutory enquiry was a "relevant decision", at a directions hearing. Secondly, it submitted the Tribunal erred in finding that the decision of the Charity Commission was not a "relevant action." Thirdly, the DPA submitted that the Charity Tribunal, without hearing any evidence or submissions, erred in determining one or more of its substantive grounds of appeal.

[33] The DPA's grounds of appeal, in summary, were:

- (i) The decision was unlawful as it was made by Commission staff;
- (ii) The decision was not made in compliance with the statutory duties set out in section 9 of the 2008 Act; and
- (iii) At the date the decision was made the Commission had not delegated its powers to a subcommittee of Commissioners in accordance with Schedule 1 para 9 of the 2008 Act.

The applicant submits that the Charity Tribunal determined grounds (ii) and (iii) of its appeal grounds when it decided at para 26 "that the impugned decision was made by the Respondent (Commission)." It further submits it erred in doing so without hearing evidence about disputed matters of facts regarding whether resolutions were passed or decisions made at Board meetings to delegate Commission functions to a sub-committee of Commissioners and without hearing legal submissions on whether such actions complied with Schedule 9 para 1 of the 2008 Act.

Respondent's submissions

[34] The respondent submitted there had been no determination by the Charity Tribunal of the substantive issues set out in grounds (ii) and (iii) of the DPA's appeal. The respondent further submitted that the DPA ought now to apply to the Charity Tribunal to extend time for appeal and if this was granted the appeal on the merits in relation to the substantive issues could be heard and determined. Such an approach it submitted would render this appeal unnecessary and would thereby avoid a waste of time and resources. The respondent, therefore, sought an adjournment of this application to allow the DPA to apply for an extension of time to the Charity Tribunal.

[35] Secondly, the respondent submitted that the Charity Tribunal did not err in determining that the decision of the Charity Commission was not a "relevant action" as the decision was made by Commissioners and not by Commission staff. It submitted that the decision document referred to as the "risk assessment form" was signed by three named commissioners and, therefore, it did not qualify as a "relevant action" under the 2022 Act.

[36] Thirdly, the respondent submitted that if the decision had been made by staff, under section 1(7) of the 2022 Act it would be treated as having been made by the Commission. In those circumstances, the DPA's first ground of appeal would be extinguished in any refreshed appeal, and the DPA could no longer rely on this as a ground to challenge the decision.

Consideration

[37] I consider the following questions fall for determination:

- (i) Did the Tribunal err in determining the preliminary issue at a directions hearing?
- (ii) Did the Tribunal err in determining that the decision to institute a statutory enquiry was not a “relevant action” under the 2022 Act?
- (iii) Did the Tribunal determine the substantive issues set out in grounds (ii) and (iii) of the DPA’s appeal and if so, did the Tribunal err in making such a determination without hearing evidence or submissions in relation to this issue?
- (iv) Do any grounds of challenge remain open to the DPA in a future appeal?
- (v) Should the DPA now make an application to extend time?

Question 1 Did the Tribunal err in determining the preliminary issue at a directions hearing?

[38] In accordance with rule 14(1) of the Charity Tribunal Rules (Northern Ireland) 2010 the Charity Tribunal is entitled to hear preliminary issues and, indeed, the DPA had previously asked the Charity Tribunal to determine a different question as a preliminary issue.

[39] It is appropriate to conduct a preliminary enquiry where it serves to dispose of a case more efficiently. In this case, I consider that it was appropriate for the Tribunal to conduct a preliminary enquiry on the question whether the Charity Tribunal’s decision was a “relevant action” or not, as the answer to that question had the potential to dispose of the appeal.

[40] The Charity Tribunal directed on 30 August 2022, that a remote oral directions hearing take place by Webex on 17 October 2022. As appears from para [9] of its decision the parties agreed that the directions hearing would address only the question whether the application was a “relevant action” within the terms of the 2022 Act.

[41] I am, therefore, satisfied that no one was taken by surprise that the Tribunal addressed this preliminary issue at the directions hearing. I am further satisfied that all the parties were given necessary notice and time to make submissions on this preliminary issue and all the parties and representatives were present and made oral and written submissions at the 17 October 2022 directions hearing in relation to the preliminary issue.

[42] In effect the Charity Tribunal at the preliminary hearing was going to determine ground (i) of the DPA's appeal - namely whether the decision was made by Commission staff. I am satisfied the Tribunal could determine this preliminary issue without delving into the DPA's other substantive grounds of appeal which concerned whether the Commission had delegated its authority to a subcommittee of Commissioners in compliance with the 2008 Act. The preliminary issue related solely to whether Commission staff made the decision. I am satisfied this issue could be determined on the evidence available to the Tribunal as it only involved consideration of the decision document, namely the risk assessment form and a consideration of the statutory provisions. It was a discrete issue which could be disaggregated from the other substantive grounds of appeal. Accordingly, I am satisfied the Tribunal did not err in determining this as a preliminary issue.

[43] Accordingly, I do not consider this ground of appeal is made out.

Question 2 Did the Tribunal err in concluding the decision to institute a statutory enquiry was not a "relevant action?"

The Tribunal's findings

[44] The Tribunal found that the decision was not a "relevant action" because it was satisfied on the basis of the written evidence and the oral submissions that the decision was made "by the respondent (Charity Commission) and not by staff of the respondent (Charity Commission)."

[45] The Tribunal further rejected the submission of the applicant that the decision was a "relevant action" because staff of the Charity Commission were involved in preparing and making a recommendation to the Commission as set out in the risk assessment form dated 30 January 2014. The Tribunal rejected this argument because it held "to decide otherwise would mean that the respondent could not have any staff carrying out any functions of the respondent of any nature. This simply cannot have been the intention of the legislature as a matter of statutory interpretation."

Question 2 Consideration

[46] The decision to institute a statutory enquiry was contained within a document entitled "Risk Assessment Form." This document contained information relating to the DPA. In particular, it contained an assessment of risk rating, a summary of concerns, a summary of factual matters, a number of conclusions and a recommendation to commence a statutory enquiry. The document was signed by the enquiry's manager who was a member of Commission staff. In the next section, the Head of Compliance and Enquiries signed off the document. The final section read:

“Commissioner agreement is required for the institution of statutory investigations. The Commissioner’s (Quorum) must review this form and consider if the actions proposed are appropriate, proportionate and consistent. If authorisation is granted a statutory investigation will be commenced.”

[47] The Commissioner’s comments are then recorded as “agree to opening a statutory 22 inquiry.” This is signed and dated 30 January 2014. The final part of the document reads:

“We, the Commissioners, confirm our authorisation for the institution of a statutory enquiry.”

[48] The document is then signed by three named Commissioners and dated by each 30 January 2014.

[49] Section 1(1) of the 2022 Act defines “relevant action” as “any decision made ... by a member of the Commission’s staff.”

“Member of the Commission’s staff” is defined in section 1(11) as:

“any person working for the Commission under paragraphs 4(1)(a) or (b) or 5(1) of Schedule 1 to the 2008 Act (employees, service-providers and secondees).”

[50] Para 4(1)(a) and (b) and 5(1) of Schedule 1 to the 2008 Act provides:

“Staff

4–(1) The Commission may with the approval of the Department and the Department of Finance and Personnel as to numbers and as to remuneration and other terms and conditions of employment –

- (a) employ such staff as the Commission considers necessary;
- (b) employ the services of such other persons as the Commission considers expedient for any particular purpose.”

[51] Para 1 of Schedule 1 to the 2008 Act deals with the terms of appointment for members of the Commission. It provides:

“1. The members of the Commission shall hold and vacate office as such in accordance with the terms of their respective appointments.

2–(1) An appointment of a person to hold office as a member of the Commission shall be for a term not exceeding 5 years.

(2) A person holding office as a member of the Commission –

(a) may resign that office by giving notice in writing to the Department, and

(b) may be removed from office by the Department on the ground of incapacity or misbehaviour.

...

3 The Department may, with the approval of the Department of Finance and Personnel, pay to or in respect of members of the Commission –

(a) remuneration;

(b) allowances and fees; and

(c) sums for the provision of pensions.”

[52] The 2022 Act therefore provides a clear dichotomy between the Commission and Commission staff. As noted by the Court of Appeal in *McKee and others v The Charity Commission* [2020] NICA 13 at para [28]:

“The effect of section 6, considered in tandem with paragraph 4(a) of Schedule 1, is that the Commission consists exclusively of the appointed chair, deputy chair and members, while engaged staff have the status of its employees. Thus, there is a clear division between these two groups.”

[53] The decision to institute a statutory inquiry, contained within the risk assessment form, was not signed by commission staff but rather was signed by three named Commissioners. Accordingly, I am satisfied the decision was made by Commissioners and not by staff of the Commission.

[54] Secondly, I reject the applicant’s argument that because the risk assessment form had been prepared by Commission staff and staff made a recommendation to

institute a statutory enquiry, that this resulted in the decision being the decision of staff. As Carswell LCJ noted in *Belfast Telegraph Newspapers Ltd for Judicial Review* [2001] NICA 20:

“[The staff] may properly be entrusted with the responsibility of carrying much of an investigation, by delegation from the Commission, as was held in *R v The Commission for Racial Equality, ex parte Cottrell and Rothon* [1980] IRLR 279. They may also in my opinion conduct preparatory work for the Commissioners who have to make the decision in question, in the course of which they may well express their views. This is a well-recognised part of the work of senior officers in all branches of the public service. The deciders may be influenced by those views and may rely quite heavily upon their officers’ advice, based upon their experience and judgment. The important matter, however, is that in the end the deciders reach their own decision, accepting whatever opinions and arguments they think fit from their officers, but making up their own minds at the conclusion of the process.”

[55] Accordingly, it is my opinion that whilst staff can greatly assist the Commission in decision making, this does not detract from the distinction between staff being “advisers” and the Commissioners being the “deciders.” Having regard to the risk assessment form, I am satisfied that the Commission staff merely advised, and the decision to institute the enquiry was made by the Commissioners.

[56] Finally, I do not accept the DPA’s argument that Commissioners who act without authority thereby become a member of staff. In my opinion such a person remains a Commissioner, albeit one acting without authority.

[57] I am therefore satisfied the Charity Tribunal did not err in finding that the decision to institute a statutory enquiry was not a “relevant action”, as it was made by Commissioners and not by Commission staff. Accordingly, the DPA does not have refreshed rights of appeal, and any appeal is now out of time.

Question 3 Did the Tribunal determine the DPA’s second and third grounds of appeal and if so did it err in not hearing evidence and submissions?

[58] Ground (ii) of the DPA’s appeal alleged that the decision of the Charity Commission was not made in compliance with the statutory duties set out in section 9 of the 2008 Act and ground (iii) of the DPA’s appeal was that the decision to institute a statutory enquiry was unlawfully made because the Commissioners who signed the risk assessment form to institute the statutory enquiry did not constitute a lawfully constituted committee of the Commission pursuant to Schedule 1 to the

2008 Act, because at the time the decision was made the Commission had not delegated these powers to a sub-committee of Commissioners.

[59] The DPA submits the Charity Tribunal determined the merits of grounds (ii) and (iii) of its appeal when it made a finding at para [26] that the decision to institute the statutory enquiry was lawfully made by the Commission.

[60] The applicant submits the Charity Tribunal erred in making its finding at para [26] in the absence of hearing oral evidence and submissions in respect of contested factual matters. The DPA submits the Tribunal could only properly have determined the decision was made by the Commission if it had considered evidence relating to records of the Commission and of the Board detailing when, and if, a resolution had been passed delegating its functions to a sub-committee of Commissioners. The DPA further notes that no one, neither the Charity Commission nor the Attorney General argued or presented evidence that the decision was taken by the Commission itself, and in the absence of such evidence and submissions, the Tribunal erred in making its determination at para [26].

[61] Whilst at first blush, para [26] appears to indicate the Charity Tribunal found the decision to institute a statutory enquiry was made by the Commission. It is my view that the Charity Tribunal only decided the preliminary issue, namely that the decision was not a “relevant action” because it was made by Commissioners and not Commission staff. I am satisfied the Tribunal did not turn its mind to the substantive question whether the Commissioners who signed the risk assessment form comprised a lawfully constituted subcommittee of the Commission or otherwise had delegated authority to act or the question whether the Charity Commission’s decision was made in compliance with its statutory duties under section 9 of the 2008 Act. Indeed, the Charity Tribunal was at pains to point out in several parts of its decision, that it had not decided the substantive issues - see, in particular, paras [29] and [30]. In addition, in a subsequent hearing dated 12 December 2022, when the DPA sought leave to appeal the Tribunal decision the Tribunal at paras [13]-[18] again stated that it had not “made a determination of the substantive application.” Further the Attorney General submitted, at this subsequent hearing, the impugned determination did not amount to or dispose of the application. Accordingly, I am satisfied that there has been no determination of the DPA’s second and third ground of appeal.

[62] I also accept that the DPA’s second and third grounds of appeal cannot be determined without the Tribunal hearing further evidence. In the absence of such evidence, I am satisfied the Tribunal could not have made a determination on these issues, and I am satisfied that it did not make such a determination notwithstanding the wording of para [26].

Question 4 *Do any grounds of challenge remain open to the DPA?*

[63] As set out above the DPA had three grounds of appeal. The first ground of appeal was dealt with as a preliminary issue and for the reasons outlined above, I am satisfied the Tribunal did not err in determining this issue as a preliminary issue and did not err in finding the decision was not made by Commission staff. If the Tribunal had found the decision had been made by Commission staff, the DPA would have had refreshed rights of appeal. The effect of section 1(2) of the 2022 Act however is to ratify decisions made by Commission staff. Accordingly, in any subsequent appeal on the merits of the decision I consider this ground of challenge would be extinguished and DPA's challenge to the Charity Commission's decision would be limited to its two other grounds of appeal.

[64] For the reasons outlined, I consider grounds (ii) and (iii) of the DPA's grounds of appeal against the decision of the Charity Commission have not yet been determined on the merits.

Question 5 *What is the way forward? Should the DPA make an application to extend time to appeal?*

[65] This has been a very long running saga. In my opinion, there are two options to be explored by the DPA. Firstly, there are extant proceedings before the High Court as the *McKee* High Court and Court of Appeal decisions did not deal with the second limb which arose in the *Crawford* case, namely whether "a statutory enquiry under section 22 was lawfully instituted and whether the impugned decision was unlawful as the institution of a lawful statutory enquiry was a necessary pre-condition to exercise the power to remove Mr Crawford as trustee of the charity."

[66] It is open to the DPA to consider reviving this extant issue. I note that the High Court proceedings were brought by Mr Crawford and not the DPA. The DPA is an unincorporated association and not a legal person and, therefore, it can only bring proceedings by means of a representative action. It may be that Mr Crawford can continue his challenge in his own name on behalf of the DPA or, alternatively, the proceedings can be amended so that he is named as a representative of the DPA. This is clearly a matter for the parties to consider. I further note that there are other parties involved in the High Court proceedings who will also need to be notified if these proceedings are to be revived.

[67] Secondly, as the Charity Tribunal noted, the DPA can make an application to the Charity Tribunal to extend time for appeal. In accordance with the Charity Tribunal rules, an applicant can seek leave to extend time. As I have observed, there are several substantive issues which have not been determined on the merits and this has been acknowledged by the Charity Tribunal. I, therefore, consider sympathetic consideration should be given to an application by the DPA to extend time so that the merits of its appeal can be heard and determined.

Conclusion

[68] I affirm the decision of the Charity Tribunal. The DPA can now seek to either revive the High Court proceedings or alternatively make an application to the Charity Tribunal to extend time for appeal.

[69] I will hear the parties in respect of costs.