



**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

Appellants: Abdul Razzaq (1) Javaid Malik (2)	Tribunal Ref: UT/2016/0046
Respondent: The Charity Commission for England and Wales	

DECISION NOTICE

Tribunal: Judge Alison McKenna, sitting in Chambers on 5 December 2016

DECISION

The Decision of the Upper Tribunal is to allow the appeal by Mr Razzaq and Mr Malik.

The Ruling of the First-tier Tribunal dated 15 February 2016 in case number CA/2014/0016 involves an error on a point of law.

The First-tier's Ruling dated 15 February 2016 is set aside.

The Upper Tribunal is not in a position to re-make the Ruling. The application for joinder under rule 9 is remitted to the First-tier Tribunal for determination by a fresh Tribunal in accordance with the directions below.

This decision is given under section 12 (2) (a) and (b) (i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

It is directed that:

- (1) The application for joinder may be considered at an oral hearing or on the papers. The parties are directed to inform the First-tier Tribunal office within two weeks of the date of issue below whether they agree to determination on the papers.
- (2) The remitted application for joinder should be determined by a Judge not previously involved in this case.
- (3) If the parties wish to make further written submissions to put before the new Tribunal, these should be sent to the First-tier Tribunal office within one month of the date of issue below.
- (4) These Directions may be supplemented by later directions by a Judge of the General Regulatory Chamber (Charity) of the First-tier Tribunal.

REASONS

1. The Appellants applied to the Upper Tribunal (Tax and Chancery Chamber) for permission to appeal against the Ruling of Judge McMahon sitting in the First-tier Tribunal (General Regulatory Chamber) (Charity) and dated 15 February 2016 (reference number CA/2014/0016).
2. The background to this appeal is that the First-tier Tribunal had dismissed, on 8 January 2016, an appeal made by Mr Anique against an order of the Charity Commission dated 9 September 2014. That Order (made pursuant to s. 69(1) (c) of the Charities Act 2011) had served to vest the legal title to charity land (the Blackheath Jamia Mosque) in new holding trustees. The Appellants are both members of the Mosque. Mr Razzaq had acted as Mr Anique's McKenzie Friend during the First-tier Tribunal proceedings and Mr Malik had been a witness. Neither of the Appellants had been formally joined as parties to the appeal during the proceedings which the First-tier Tribunal determined.
3. Mr Anique decided not to make an application for permission to appeal against the First-tier Tribunal's decision. An application for permission to appeal was, however, made by Mr Razzaq and Mr Malik. They also made an application dated 5 February 2016 to be joined as parties to the First-tier Tribunal proceedings under rule 9 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. Their reason for making the rule 9 application was in order to obtain the necessary standing to apply for permission to appeal against the Tribunal's decision of 8 January, with which they strongly disagreed.
4. Judge McMahon considered the application for joinder and refused it on the basis that the Tribunal's decision of 8 January had disposed of the appeal so that there were now no extant proceedings to which Mr Razzaq and Mr Malik could be joined. He concluded that there was no basis in law on which he could entertain the rule 9 application and so he did not determine the strength or weakness of their case to be joined as parties. Understandably in these circumstances, he also did not determine the application for permission to appeal or rule formally on whether the application had been made in time.

5. Judge McMahon subsequently refused the Appellants' application for permission to appeal and I also initially refused them permission from the Upper Tribunal.

6. During the course of preparation for the oral renewal hearing, I drew the parties' attention to the Court of Appeal's decision in relation to joinder under CPR rule 19 in the case of *Prescott v Dunwoody Sports Marketing* [2007] EWCA Civ 461, and in particular to Lord Justice Lawrence Collins' judgement at [23] in which he concluded that "*in my judgment the power under CPR 19.2 in relation to joinder and substitution exists after judgment as well as before...*". The Appellants relied upon a First-tier Tribunal decision, *Corke v The Information Commissioner* EA/2014/0012, to make substantially the same point, namely that the discretionary power to join a new person as a party to proceedings survives judgment so as to allow a new party to be joined only in order to pursue an appeal. Neither of these decisions had been brought to the attention of Judge McMahon before he made his Ruling on 15 February 2016.

7. Following an oral hearing in which the Appellants renewed their application in reliance upon the decisions in *Corke* and *Prestcott*, I granted permission to appeal on the basis that there was an arguable error of law in Judge McMahon's failure to consider (i) whether (as Judge Warren had decided in *Corke*) rule 9 applied in conjunction with rule 2 provided a basis for considering a rule 9 application made after judgment; and (ii) whether, notwithstanding the different wordings of CPR rule 19 and the Tribunal Procedure Rules rule 9, *Prescott v Dunwoody Sports Marketing* was authority for a general proposition which bound the First-tier Tribunal.

8. The Charity Commission has filed a Response supporting this appeal on the narrow question of whether the First-tier Tribunal had the power to join a party to proceedings following the making of its substantive decision. The Charity Commission urges me to remit the question of whether discretion should be exercised to join Mr Razzaq and Mr Malik to these particular proceedings to the First-tier Tribunal (whilst making clear that it has "significant misgivings" about that issue).

9. The Charity Commission has helpfully set out its analysis of the two points on which I gave permission to appeal, as follows. In relation to the *Prescott* point, it accepts that the Civil Procedure Rules may be referred to as a guide to issues of principle by Tribunals without being strictly applicable to Tribunal cases. It notes the different wording of CPR 19 and FTT rule 9, the differences between the applicable overriding objectives and finally that the facts in *Prescott* involved judgment in default (which procedure is anathema to Tribunals). It submits that *Prescott* should not, in view of these distinctions, be viewed as establishing a general principle by which the First-tier Tribunal is bound but rather as persuasive authority only. In relation to the *Corke* point, it notes that Judge McMahon did refer to the overriding objective in his Ruling. The Charity Commission submits that Judge Warren was correct in *Corke* to rely on rule 2 to interpret rule 9 (which is silent on the question of whether joinder may be made after the substantive determination of the issues) as remaining in play after judgment, and to conclude that fairness and justice required him to interpret rule 9 as permitting joinder in the circumstances of that case.

10. The Appellants' Reply raises the question of whether their application for permission to appeal was made in time. This is a matter of dispute between the parties and I do not understand Judge McMahon to have ruled on that matter, so it remains to be determined (if necessary) in due course. The Appellants also address the question of whether they are to be regarded as "persons affected" under column 2 of Schedule 6 to the Charities Act 2011, and

make submissions as to the merits of their putative appeal against the First-tier Tribunal's substantive decision. These matters have not yet been formally determined by the First-tier Tribunal and so they are not before me in this appeal. It follows that I have no power to determine them now, as the Appellants urge me to do.

11. Having considered the parties' submissions carefully, I have concluded that this appeal should be allowed. I find that there was an error of law in the First-tier Tribunal's conclusion (at paragraph 10 of Judge McMahon's Ruling) that it had no power to entertain the rule 9 application because the substantive proceedings had been concluded. I am satisfied that the First-tier Tribunal should have decided that it did have the power to consider the Appellants' application for joinder and that it should have proceeded then to rule on the merits of the case before it.

12. I consider that the First-tier Tribunal's power to consider an application for joinder after judgment must be derived from a process of interpretation of rule 9 of the Tribunal Procedure Rules. I am satisfied that it is permissible to interpret rule 9 as permitting joinder following judgment. It seems to me that such an interpretation may be reached either by relying on the Court of Appeal's decision in *Prescott* as persuasive authority from a higher court on a matter of procedure, or by praying in aid the overriding objective in order to achieve fairness and justice in the circumstances of the case, as did Judge Warren in *Corke*. The First-tier Tribunal's decision in *Corke* does not of course set a precedent and it was not appealed. Nevertheless, both approaches seem to me to provide a permissible basis for concluding that the First-tier Tribunal retains jurisdiction to consider a joinder application following the conclusion of the substantive proceedings, and I find accordingly.

13. A decision to allow joinder of a new party to proceedings (particularly when an application is made after judgment) will inevitably turn upon a close examination of the particular circumstances of each case. I am for that reason not persuaded by the Charity Commission's submission that I should take this opportunity to set out guidelines for the First-tier Tribunal to follow in any future such cases. I am also not persuaded by the Appellants' argument that I should proceed to re-make the rule 9 application myself now. I find I am not in a position to re-make the Ruling without hearing further argument about the circumstances of this case, and so I now remit it to the First-tier Tribunal for determination in accordance with the directions given above.

Upper Tribunal Judge Alison McKenna

Date: 5 December 2016

Issued to the parties on: 9 December 2016