

**BETWEEN:**

**NAGENDRAM SEEVARATNAM**

**Appellant**

**AND**

**THE CHARITY COMMISSION FOR ENGLAND AND WALES**

**Respondent**

**AND**

**HER MAJESTY'S ATTORNEY GENERAL**

**Intervening Party**

## **1. Decision**

- 1.1 The Appellant has appealed against the Respondent's Order under section 18(2)(i) of the Charities Act 1993 ("the Act"<sup>1</sup>) made on the 27<sup>th</sup> March 2008, removing him from the position of trustee, officer and agent of the charity Sivayogam.
- 1.2 This is the decision notice of the Tribunal pursuant to rule 38(2) (a) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules"). The Tribunal's decision to quash the Respondent's Order was unanimous. The written reasons for the Tribunal's decision, given pursuant to rule 38(2) (b), are set out below.
- 1.3 The Tribunal now makes the Order attached at Annexe A to this decision.
- 1.4 The Tribunal is required by rule 38(2) (c) to notify the parties of any right of appeal against this decision and the time within which, and manner in which, such right of appeal may be exercised. These matters are addressed at paragraph 8.1 below.

## **2. Representation:**

The parties were represented as follows:

**The Respondent:** Robert Pearce QC, instructed by the Legal Department, Charity Commission for England and Wales;

**The Appellant:** Edward Grieves of counsel, instructed by Birnberg Peirce & Partners.

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<sup>1</sup> References to the Act are to the Charities Act 1993, as amended by the Charities Act 2006.

### **3. Background & Procedural History**

#### (i) Background

3.1 The Appellant is the founder and was a charity trustee, agent and officer of a charity called Sivayogam (“the charity”). He is a Tamil gentleman aged 72 years and unfortunately suffers from poor health. In the past, he has worked in various accountancy roles in the public sector in Sri Lanka, Nigeria and Papua New Guinea, before moving to London in 1987 and working for a short time in Local Government. Immediately prior to his removal from office he held the position of “Executive Chairman” of the charity and was its official correspondent for the purposes of communication with the Respondent. He undertakes religious duties and is regarded as a Guru at the Hindu Temples run by the charity.

3.2 The charity was established by a Declaration of Trust dated 23<sup>rd</sup> June 1995. The purposes of the Charity (following subsequent amendment) are:

*“(1) To advance the Hindu (Saiva) religion in particular but not exclusively by: (a) meditation and yoga practice (b) the provision of facilities including training for those aspiring to practice the Hindu (Saiva) religion (c) the establishment of centres including ashrams and temples in the United Kingdom.*

*(2) To advance the education of the public in the Hindu (Saiva) culture in particular carnatic music (vocal and instrumental), Tamil dance and literature.*

*(3) The provision of recreational facilities in the interests of social welfare with the object of improving the conditions of life for the persons who have need of such facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances.*

*(4) The relief of poverty, hardship and distress.”*

3.3 The charity was entered onto the register of charities under number 1050398 in November 1995. The charity’s main activities are the running of two Hindu Temples in London (where the Appellant legitimately continues to undertake his activities as a religious leader, notwithstanding his removal as a trustee agent and officer of the charity) and the making of payments to certain organisations for the relief of need in Sri Lanka. The charity’s income is entirely voluntary, consisting of donations from its devotees and supporters. The charity has an income of approximately £500,000 per annum, out of which it has made payments to organisations in Sri Lanka of approximately £300,000 in the period 2004 to 2007 [A10/3305]<sup>2</sup>. Page: 2

3.4 In January 2006, following the receipt of complaints about the charity, the Respondent wrote to the charity trustees outlining a number of areas of regulatory concern and requesting a meeting. The Tribunal heard that there had been an earlier “Evaluation” case in respect of the charity, which had been closed in November 2005, following correspondence with the Appellant. A new case in the

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<sup>2</sup> Throughout this decision, references to documentary evidence appear in this format, which denotes whether the document was part of the trial bundle (TB), produced by the Appellant (A) or Respondent (R) and the volume number / page number.

Respondent's Compliance and Support Department was opened in January 2006, and the Respondent's concerns at that time were briefly described in a letter to the Appellant dated 6 January [R1/4] as: "alleged links between the charity and the LTTE (a proscribed organisation); a lack of independence on the trustee body; and whether the charity's funds were being properly applied". Throughout the whole of 2006, the Appellant continued to engage, on behalf of the charity, in a dialogue with the Respondent (consisting of letters, telephone calls and meetings with the Respondent's officers). As a result of a further complaint, the Respondent's regulatory concerns were subsequently widened to include the subject matter and costs of some litigation in which the charity had recently been involved. In the course of these dealings, the Appellant voluntarily informed the Respondent that he used to be a member of the LTTE (the Liberation Tigers of Tamil Eelam, often referred to as the "Tamil Tigers") but that he had been suspended by the LTTE leadership in 1990. The LTTE was proscribed under the provisions of the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001 on 29 March 2001<sup>3</sup>. The Tribunal notes that the Appellant's admission that he had been involved with the LTTE (prior to its proscription) was made in his prompt reply to the Respondent's letter, dated 9 January 2006 [R1/6]. In this letter, the Appellant also referred to the problems caused by the "propaganda" and "mischief-making" of his brother in law in making repeated complaints about him and welcomed the suggestion of a meeting with the Respondent.

3.5 The Tribunal notes that many of the material issues in this appeal have as their back drop the complex political, military and humanitarian situation in Sri Lanka over a period of years during which the LTTE was both proscribed and not proscribed. The Tribunal further notes that the Appellant, his family and friends have been profoundly affected by the turbulent events in Sri Lanka. The Tribunal heard that during its period of engagement with the Appellant and the charity, the Respondent had no formal "country guidance" upon which its officers or Board members could rely as a guide to the issues inevitably raised by this complex backdrop. The Respondent's officers told the Tribunal that they had undertaken their own independent research for the purposes of this inquiry, a process much criticised on behalf of the Appellant. They seemed unaware, for example, of the existence of the international monitoring mission from 2002 to 2008<sup>4</sup>. As they had often not kept on file the details of the websites they had visited, the Tribunal was unable to assess the adequacy of the research they conducted.

3.6 The Tribunal asked the parties to agree a joint statement, for the use of the Tribunal, describing the material history of Sri Lanka over the relevant period, but unfortunately there was no agreement between them on the contents of such a statement. The Respondent sought to involve the Foreign and Commonwealth Office in agreeing a statement, which did not ultimately prove helpful. This contentious process served to highlight for the Tribunal the complexity of the issues and the dangers inherent in the Respondent's approach, allowing its officers to conduct unguided independent research. Eventually a document was produced which had been substantially agreed by the parties (the document made it clear

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<sup>3</sup> SI 2001/1261

<sup>4</sup> A9/2836 describes the Sri Lanka Monitoring Mission, which was an autonomous international organisation operating between 2002 and 2008, staffed and funded by 5 Nordic countries under the auspices of the 2002 ceasefire agreement between the Sri Lankan Government and the LTTE.

where there was disagreement), which the Tribunal used as a touchstone for its consideration of the situation in which the Appellant and the charity found themselves. The Tribunal was also greatly assisted by the evidence of a Sri Lankan MP, who was not required to attend for cross-examination by the Respondent. His witness statement [TB1/225] gives useful background about both the historical and the current situation in Sri Lanka, which the Tribunal accepted.

3.7 On 16 March 2007, there was a meeting between the Respondent's officers and the Appellant at the charity's premises in Tooting. On 28 March 2007, the Respondent opened a formal inquiry into the charity under s.8 of the Charities Act 1993 and used its powers under s. 18(1)(i) of the Act to suspend the Appellant from acting as a trustee, officer and agent of the charity, pending consideration of his removal. Such suspension orders may not run for more than 12 months by virtue of s. 18(11) of the Act. Section 18 (13) of the Act requires the Respondent to review such an order at such intervals as it thinks fit. At the same time as suspending the Appellant, the Respondent also used its powers under s. 18(1) (iv) and (vi) of the Act to restrict certain future dealings with the assets of the charity by the remaining charity trustees so that, inter alia, they could not send funds to Sri Lanka without the Respondent's prior authority. In June 2007, the Appellant requested a certificate for leave to appeal his suspension as required by s.16 (3) of the Act. That request was considered by member of the Commission's Board, who refused it. The Appellant did not take that matter further.

3.8 On 12 October 2007, the Respondent sent a number of formal written questions to the Appellant [R2/735] together with a direction pursuant to sections 8 (3) (a) and 8 (3) (b) of the Act, requiring him to answer the questions and attaching a penal notice so that if he did not answer them he risked proceedings for contempt of court. (This action was much criticised by the Appellant's counsel, as he said the Appellant had already answered the questions put months previously). Following receipt of his replies dated 11 November [R2/743], on 31 December 2007 the Respondent gave the Appellant the statutorily required notice of its intention to remove him as a trustee, officer and agent of the charity [R2/781].

3.9 On 27 March 2008, the Respondent formally removed the Appellant from the positions of trustee officer and agent of the charity, relying on its powers under s.18(2)(i) of the 1993 Act (see paragraph 4.1 below). The decision was taken by four members of the Board, pursuant to a delegated authority from the full Board. The Tribunal heard that all the case papers were made available to the Board members to look at if they wished, and that they had received legal advice on their decision-making process from the Respondent's Executive Director of Legal Services and Compliance, Kenneth Dibble. The Respondent declined to provide the Appellant or the Tribunal with a copy of that advice on grounds of legal privilege, although it was specifically referred to in Mr Dibble's evidence. Prior to the Board members' decision, the Appellant had made representations in writing, in person and on the telephone [R3/53]. The Board members also considered written representations from the charity's Deputy Chairman, Secretary, Treasurer, a former trustee (who had resigned in protest at the Appellant's suspension) and three members of the charity, all opposing the Appellant's removal. They also referred to the receipt of representations from the charity's

“ombudsmen” in 2007. The Tribunal notes that the undisputed witness statement [TB1/284] filed on behalf of the Appellant by the Temple priests, refer to them having sent a letter to the Respondent’s Customer Service Manager dated 9 May 2007, in which they requested the Appellant’s reinstatement. The witnesses state they received no acknowledgement or reply from the Respondent. Another undisputed witness statement [TB1/246] refers to the submission of a petition for the Appellant’s reinstatement, containing over 1000 signatures, and sent to the Respondent in May 2007. The witness states “*The Commission did not even acknowledge our letter and so we didn’t send the rest of the hundreds of signatures that we obtained later.*” It therefore appears that these representations were not considered by the Board members.

- 3.10 The grounds given by the Respondent’s Board members for exercising the power to remove the Appellant [R3/7] were as follows:

*“Misconduct/Mismanagement (section 18(1)(a) of the Act):*

*(A) failure to discharge his duty of care as a trustee and duty to act in the best interests of the Charity, consequently hindering or preventing the other trustees from meeting their duties to the Charity;*

*(B) failure to discharge his duty of care as a trustee and duty to act in the best interests of the Charity by failing to dissociate the Charity from the LTTE and supporting its cause to the Charity’s beneficiaries;*

*(C) failure to take reasonable and adequate steps to ensure that the application of the Charity’s funds in Sri Lanka was proper and in accordance with charity law.*

*Protection of Charity Property or its Application (section 18(1)(b) of the Act):*

*(D) Placing the proper use of Charity assets at risk through inadequate safeguards for funds transferred to Sri Lanka; the Charity’s participation in various litigation; inadequate internal financial controls, damage to reputation of the Charity”.*

- (ii) Procedural History

- 3.11 The Appellant applied to the Charity Tribunal (as it then was) in May 2008, asking the Tribunal to quash the removal order dated 27 March 2008. There followed the usual staged exchange of documentation between the parties and disclosure by the Respondent. At the first directions hearing in November 2008, it was agreed between the Appellant, the Respondent and the Attorney General (who had by then intervened, but who played no further part in the proceedings following that directions hearing) that the Respondent should file an additional “concise” document, clarifying the precise facts and matters it relied upon in support of its decision to remove the Appellant from office. This was in order that the Appellant might better understand and respond to the Respondent’s case. The Tribunal approved this course of action. That

document was duly produced by the Respondent in December 2008 and thereafter was treated by all parties as the formal basis of Respondent's case (albeit that during the course of this appeal the Respondent conceded certain aspects of its case in favour of the Appellant). That document is hereafter referred to as the "Facts and Matters Document".

- 3.12 The Facts and Matters Document ran into fifteen pages. The Appellant replied to it at some length and his counsel made a number of additional disclosure requests both prior to and during the hearing itself. Not all of these resulted in disclosure. At the hearing of this appeal, the Respondent asserted that it had fully complied with its disclosure obligations under the Charity Tribunal Rules 2008 (which were then applicable) and the Tribunal was not asked to make any ruling on the issue of further disclosure.
- 3.13 It was agreed between the parties (and approved by the Tribunal) that the Respondent should open the hearing and present its case first. Although the Appellant would in the normal course of events open an appeal hearing, it was agreed that it would be fairest to reverse the usual order of proceedings in the particular circumstances of this case.
- 3.14 During the hearing of this appeal, counsel for the Respondent submitted that the Tribunal's power to consider evidence which had not been available to the Respondent when it made its original decision (see paragraph 5.4 below), should be interpreted by the Tribunal as allowing it to consider any new grounds for the Appellant's removal which might emerge during the course of the hearing itself. This approach was objected to by the Appellant's counsel. The Tribunal considered the respective arguments and ruled against the Respondent in this regard, taking the view that, in order for the hearing to be fair, the Appellant needed to be able to prepare his case in response to a finalised set of grounds, made known to him in advance of a hearing. The Respondent also sought to rely upon the judgement in the Sakooni Sweets litigation (see paragraph 6.94 below) which had come into its possession in January 2009, however its counsel was unable to explain why it had not applied for permission to amend the Facts and Matters Document in advance of the hearing so as to give the Appellant and the Tribunal reasonable notice of its intention to rely on this new evidence. In the circumstances, the Tribunal ruled that it should treat only those grounds which were set out in the Facts and Matters Document (subject to the concessions mentioned above) as being justiciable by it.
- 3.15 Although the Appellant had made his application to the Tribunal in May 2008, this matter was not heard until June 2009. There were three principle reasons for the delay in listing the appeal for a hearing. Firstly, the Appellant's original solicitor was obliged to withdraw from representing him for professional reasons and the Appellant inevitably needed some time to arrange alternative representation. (He was ultimately represented by counsel and solicitors on a pro bono basis, an application for legal aid on exceptional grounds having been refused). Secondly, the listing of the final hearing was delayed by the Tribunal at the Appellant's request, in order to accommodate a period of religious observance which required him to reside at the Temple.

Thirdly, this appeal involved considerable preparation time for the parties, with the final hearing bundle amounting to some 22 lever arch files of documentary evidence. Two of the Appellant's associates from the Temple converted all the evidence to electronic format and, of their own initiative, provided it to the Respondent and the Tribunal members on memory sticks. The Tribunal found this a particularly useful method of managing the large volume of documentation in this case and expresses its gratitude to those involved in that work.

- 3.16 The final hearing of this appeal was held over a period of seven days in June 2009, with a further two days listed in August for some remaining legal arguments and both parties' closing submissions. The Tribunal reserved its decision.
- 3.17 On 5 June 2009, the Respondent made a specific direction under s.19A of the Act directing the trustees to conduct a review of their due diligence and monitoring procedures in respect of grants and donations. In its statement of reasons pursuant to s.19C of the Act, it stated that the trustees as a whole had failed in their duty of care to the charity in this area. The Respondent also lifted the freezing orders on that date. The inquiry into the charity under s.8 of the Act was closed on 10 July 2009.

#### **4. The Law**

- 4.1 (i) Removal from position of trustee agent and officer: s. 18 Charities Act 1993

In order to remove the Appellant from office as a trustee, officer and agent of the charity, the Respondent relied upon its powers under s.18 (2) of the Charities Act 1993, which provides:

*"(2) Where, at any time after they have instituted an inquiry under section 8 above with respect to any charity, the Commission is satisfied that:*

*(a) that there is or has been any misconduct or mismanagement in the administration of the charity; and*

*(b) that it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of property coming to the charity,*

*The Commission may of its own motion do either or both of the following things -*

*(i) remove any trustee, charity trustee, officer, agent or employee of the charity who has been responsible for or privy to the misconduct or mismanagement or has by their conduct contributed to it or facilitated it;*

*(ii) by order establish a scheme for the administration of the charity."*

- 4.2 Before ordering the removal of a trustee, the Commission must give notice of its intention to do so to that trustee and to each of the other trustees of the charity. In this case, the Commission exercised its discretion not to give separate public notice of its intention. Notice to the trustee whose removal is

proposed (and any public notice) must be given no less than one month before an order can be made, inviting representations to be made about the proposal. The Commission is obliged to consider any such representations before making a final decision. A removed individual is thereby disqualified from acting as a trustee of any charity, although he may seek a waiver from the Respondent which, if made after a 5 year period has elapsed, can only be withheld by the Respondent if there are special circumstances.

(ii) The Terrorism Acts 2000 & 2006

- 4.3 The Tribunal heard evidence that the LTTE was proscribed under the provisions of s.3 of the Terrorism Act 2000<sup>5</sup>. The Terrorism Act 2000 made it a criminal offence for a person to undertake particular activities in relation to a proscribed organisation, namely professing membership of such an organisation (s.11); inviting non-financial support for such an organisation (s.12); wearing or displaying the insignia of such an organisation in a public place so as to arouse reasonable suspicion that he is a member or supporter of that organisation (s.13). The Terrorism Act 2006 additionally makes the glorification of terrorism an offence and expands upon the grounds for proscription.
- 4.4 Section 11(2) of the 2000 Act creates a specific defence for a person charged with the membership of a proscribed organisation for that person to prove that he has not taken part in the activities of the organisation at any time when it was proscribed.
- 4.5 It is important for the Tribunal to acknowledge that the Appellant has not been charged, tried or convicted of any offences under this legislation.
- 4.6 The Respondent published its Operational Guidance concerning Charities and Terrorism (OG 96) in August 2007. This document is considered further at paragraph 6.28 below.

(iii) The Human Rights Act 1998

- 4.7 The Respondent is a public authority under s.6(3) of the Human Rights Act 1998 (“the HRA”). Section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.
- 4.8 Section 2 of the HRA requires the Tribunal to take into account relevant European law in determining a question that has arisen in connection with a Convention right, so far as it is relevant in the opinion of the Tribunal to the proceedings before it. Although there is little or no European jurisprudence which touches directly on the main subject matter of this appeal, it was agreed between the parties that the Tribunal should proceed as though the HRA were engaged by the process of removing a charity trustee from office. The Tribunal was content to adopt this approach.

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<sup>5</sup> See footnote 3 above.

- 4.9 Section 3 of the HRA provides that, so far as it is possible to do so, primary and subordinate legislation must be read and given effect to in a way which is compatible with a Convention right conferred by the European Convention on Human Rights (“ECHR”). In the context of this appeal, the Tribunal has, in particular, considered the Appellant’s right to a fair hearing (ECHR Article 6), his right to freedom of thought etc (ECHR Article 10) and to a private and family life (ECHR Article 8). It was accepted by the Respondent that Article 8 rights include matters pertinent to the Appellant’s reputation, however the Respondent’s counsel asked the Tribunal to consider that Article 8 confers a qualified right only, so that the right to a private and family life does not exist independently of the fiduciary obligations of the trusteeship of charities and therefore the right could be interfered with by the Respondent in pursuit of the legitimate aim of the regulation of charities.
- 4.10 In relation to the Appellant’s right to freedom of thought and expression under ECHR Article 10, the Respondent’s case was that, whilst the Appellant is free to express himself freely as an individual, his duties as a charity trustee must take precedence over such rights whenever there is an irreconcilable conflict between the two. The Respondent’s submission on this point was therefore that if the legitimate expression of the Appellant’s personal beliefs was ever inconsistent with his position as a charity trustee, he had to give up being a charity trustee.
- 4.11 The Appellant’s counsel asked the Tribunal also to consider ECHR Article 3, which protects the right to life of the Appellant (and those of his associates affected by the Respondent’s decision). This was in view of the alleged risk of persecution should they now return to Sri Lanka. He argued that the effect of the Respondent’s conduct had been to render certain individuals associated with the charity *refugees sur place*, as it is now impossible for them to return to Sri Lanka safely following the wide (international) dissemination of information about the Respondent’s actions, including details of the allegations on which they were based. It was accepted by the Respondent that its officers had given information about the inquiry and the use of its powers against the Appellant directly to the Sri Lankan High Commission (the “SLHC”), although it had not proactively sought media coverage. It was accepted by the Respondent’s witnesses that in certain respects the SLHC was given more information about the Respondent’s concerns in 2007 than the Appellant himself was given [R11/3191]. It was accepted that the Respondent had not specifically considered the application of ECHR Article 3 in making its decision.
- 4.12 It was also suggested on behalf of the Appellant that the Respondent had breached its own data protection guidance by communicating certain information to the SLHC, however this is not a matter in respect of which this Tribunal can make any formal finding. In view of the Appellant’s concerns, the Tribunal has agreed not to refer to certain witnesses by name in its decision.

## **5. The Jurisdiction of the Tribunal**

### (i) Statutory Jurisdiction

5.1 The jurisdiction of the former Charity Tribunal transferred on 1 September 2009 to the First-tier Tribunal (Charity) under the provisions of the Tribunals Courts and Enforcement Act 2007. The Transfer of Functions of the Charity Tribunal Order 2009<sup>6</sup> (effecting the transfer of the jurisdiction) is available under “Rules and Legislation” on the Tribunal’s website [www.charity.tribunals.gov.uk](http://www.charity.tribunals.gov.uk). Although this appeal was heard prior to 1 September, this decision is published subsequent to the transfer. This means that the procedural rules affecting any subsequent hearings<sup>7</sup> and the relevant onward appeal routes have altered since this appeal was commenced. The route for onward appeals is described in paragraph 8.1 below.

5.2 The transfer of the jurisdiction into the First-tier Tribunal (Charity) does not affect the legal basis of this appeal, which is founded as follows. Section 2A of the Act provides that:

*“(4) The Tribunal shall have jurisdiction to hear and determine -*

*(a) such appeals and applications as may be made to the Tribunal in accordance with Schedule 1C to this Act, or any other enactment, in respect of decisions, orders or directions of the Commission.”*

5.3 The Schedule referred to in that section sets out in a table format the following matters: in column 1, which particular decisions, directions or orders of the Charity Commission may be appealed; in column 2, who may bring such an appeal; and in column 3, what powers the Tribunal may exercise on determining that appeal. The relevant entries in relation to this appeal are as follows:

1.	2.	3.
Order made by the Commission under section 18(2) of this Act in relation to a charity.	The persons are – (a) The charity trustees of the charity, (b) (if a body corporate) the charity itself, (c) in a section 18(2)(i) case, any person removed by the order, and	Power to – (a) quash the order in whole or in part and (if appropriate) remit the matter to the Commission, (b) substitute for all or part of the order any other order which could have been made by the Commission, (c) add to the

<sup>6</sup> SI 2009/1834

<sup>7</sup> The Transfer of Functions Order (article 2(3) of Schedule 4) allows for the previous rules to be applied, or for the Tribunal Procedural Rules to be disapplied, in order to ensure that proceedings are dealt with fairly, but only in relation to proceedings which were pending prior to 1 September 2009.

	(d) Any other person who is or may be affected by the order.	order anything which could have been contained in an order made by the Commission.
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5.4 Schedule 1C paragraph 1 sub-paragraphs (4) and (5) of the Act set out the relevant approach and the powers of the Tribunal in determining such an appeal:

- “(4) *In determining such an appeal the Tribunal -*
- (a) *shall 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 the Table”.*

5.5 Schedule 1C paragraph 5 provides that:

- “References in column 3 of the Table to the power to remit a matter to the Commission are to the power to remit the matter either -*
- (a) *generally, or*
  - (b) *for determination in accordance with a finding made or direction given by the Tribunal”.*

(ii) Case Law

5.6 The Tribunal was referred to the authorities of *Jones v Attorney General*<sup>8</sup>, *Scargill v Charity Commissioners*<sup>9</sup> and *Weth v Attorney General*<sup>10</sup>, which decisions established a two-stage approach to the hearing in the High Court of statutory appeals under the Act. The two stage approach comprised, firstly a review of whether the order could be said to have been wrongly made in any respect. If not, then the appeal would fail. If it was wrongly made then the Court would proceed to a rehearing so as to give the Appellant an opportunity to challenge the findings of fact upon which the order had been made by the Respondent. In the cases cited, there had been agreement to move directly to

<sup>8</sup> [1974] 1 Ch 148

<sup>9</sup> Ch D Neuberger J 4/9/98 (Unreported)

<sup>10</sup> Ch D Neuberger J 29/4/99 (Unreported)

stage two for various reasons. It was accepted by counsel that these authorities were not strictly binding on the Tribunal given the new statutory appeal regime under the amended Act, however the Tribunal's approach was broadly in line with stage two of the two- part test. For this reason, the Respondent's counsel invited the Tribunal to reject the Appellant's arguments as to procedural unfairness. However, he accepted that the means by which the Respondent's evidence was acquired was a relevant consideration for the Tribunal to the extent that the Tribunal must ask itself whether the evidence presented could be relied upon. This approach was also accepted by the Respondent's Executive Director of Legal Services and Compliance in his evidence to the Tribunal, in which he agreed with the Appellant's counsel that "*There are circumstances in which sort of gross unfairness to an individual clearly touches on the evidence and unpicks the evidence base*". The Respondent's counsel submitted that, following the earlier authorities, the burden of proof lay on the Appellant to show that the removal order was "wrongly made". The Appellant's counsel submitted that the burden of proof must lie with the Respondent. In the context of the substantive re-hearing with which it was tasked, the Tribunal concluded that the onus was on the Respondent to prove the facts on which it relied to the civil standard.

- 5.7 The Respondent's counsel further submitted that the Tribunal must consider whether the order was rightly made as of the date when it was actually made rather than as of the date of the hearing. This was on the basis of Mr Justice Lewison's judgement in *Seray-Wurie v The Charity Commission and the Attorney General*<sup>11</sup> where the relevant charitable company had, by the time of the appeal hearing, ceased to exist, so the Court decided it could not therefore reinstate a removed director to it. The Tribunal has adopted this approach.
- 5.8 The Tribunal has followed the previous authorities in defining "*any misconduct or mismanagement in the administration of the charity*" for the purposes of the Act. In *Scargill* these terms were described by Mr Justice Neuberger (as he then was) as "*ordinary English words*" and given their natural meaning. The Tribunal has adopted this approach.
- 5.9 The Respondent's counsel submitted that, although the Tribunal must consider whether the order was rightly made as at the date it was made, it should consider the suitability of any remedy as at the date of the appeal. The Tribunal accepted this argument.
- 5.10 It follows that, when determining this appeal, the Tribunal's task is to decide "afresh" whether there were sufficient grounds for the removal of the Appellant as trustee, officer and agent of the charity, as of 27 March 2008. It may consider fresh evidence to the extent that it throws light on the situation as of March 2008. Accordingly, this appeal proceeded by way of a substantive re-hearing rather than a procedural review of the original decision. In considering the scope of the hearing, the Tribunal had regard to the decision of the Court of Appeal in *E.I. Du Pont Nemours & Co v S.T. Du Pont* [2006] 1 WLR 2793 in which Lord Justice May said at paragraph 96:

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<sup>11</sup> [2008] EWHC 435 (Ch)

*“...the scope of a rehearing ...will normally approximate to that of a rehearing “in the fullest sense of the word” such as Brooke LJ referred to in Tanfern's case [2000] 1 WLR 1311 , para 31. On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves”.*

(iii) Procedural Fairness

5.11 In his closing submissions, counsel for the Respondent invited the Tribunal to attach no weight at all to the Respondent’s final decision, but rather to make its own decision, based entirely on the evidence which it had heard. The Tribunal notes that this approach is expressly envisaged in Lord Justice May’s judgement referred to above. Counsel for the Appellant was content for the Tribunal to adopt this approach (although he complained on behalf of his client that the Respondent should have made its position on this point clear either prior to or early on in the hearing, as it would clearly affect his conduct of the Appellant’s case. The Tribunal has now reviewed the transcript and notes that Mr Pearce did in fact mention this approach on the first day of the hearing. It is unfortunate that there was a misunderstanding between counsel on the point, however it does not appear to the Tribunal that any injustice to the Appellant arises from this). The main implication of the Tribunal not being asked to attach any weight to the Respondent’s original decision in reaching its own is that it is unnecessary for the Tribunal to consider whether the Respondent was justified in relying upon the evidence it did in support of its original decision (although the Tribunal must itself decide if it is satisfied of the relevant facts on the balance of probabilities). The Tribunal observes that the question of the reasonableness of the Respondent’s original decision (including the issue of its proportionality) is, however, relevant to the exercise of the Tribunal’s power to award costs. The Tribunal has accordingly considered certain issues relating to the reasonableness of the original decision, where relevant, in this decision.

5.12 The Tribunal notes that the grounds relied upon by the Respondent to justify the Appellant’s removal have, in relation to certain of the allegations, altered materially as between the Appellant’s suspension (March 2007), the notice of intention to remove (December 2007), the decision to remove (March 2008), the Facts and Matters Document (December 2008) and the hearing (June 2009). One particular allegation (see paragraph 6.48 below) had apparently been abandoned by the Respondent after the drafting of the Facts and Matters Document but prior to the commencement of the hearing, although this had not been communicated to the Tribunal or the Appellant and only became apparent from the contents of the witness statement filed by Louise Edwards on the Respondent’s behalf. Certain other matters were the subject of explicit concessions by the Respondent’s counsel during the hearing of the appeal itself. The Tribunal acknowledges that (despite the criticism of the Respondent made by the Appellant’s counsel) the making of such concessions, where relevant, was the appropriate course for the Respondent to take; being

*functus officio*<sup>12</sup> the Respondent had no power to discharge its earlier order in any event. The aspects of the Respondent's case in which concessions were made are referred to at the relevant points in this decision.

- 5.13 The Appellant and certain of his witnesses were not tendered for cross-examination at the hearing. The Tribunal did not therefore have the advantage of hearing from the Appellant directly. The Tribunal had earlier ruled that the witness statements in the bundle would stand as evidence in chief, and that witnesses would attend to give live evidence only if the opposing party requested them to attend for cross-examination. The Tribunal's approach to this issue is considered further at paragraphs 6.2 and 6.3 below.
- 5.14 The Appellant's counsel cross-examined the Respondent's witnesses (at some length) and made his closing submissions on the basis that the Respondent had treated the Appellant in a manner which was so procedurally unfair and disproportionate that the removal order could not properly stand. The Tribunal was mindful of the fact that this appeal was in nature a substantive re-hearing rather than a procedural review, however it permitted the Appellant's counsel's approach to cross-examination because, in the Tribunal's opinion, procedural unfairness in the course of the Respondent's evidence gathering processes could, in principle, affect the reliability and/or the weight of the evidence upon which the Tribunal was now invited to rely in determining this appeal. The Tribunal also allowed the cross-examination because of its relevance to the Tribunal's specific costs jurisdiction, as mentioned above. This issue is referred to further in this decision where relevant.
- 5.15 The Tribunal also considered it appropriate to allow this line of cross-examination because it was clear that the issue of procedural fairness in the conduct of the inquiry had not previously been aired. The Tribunal notes that the Appellant was able to mount a meaningful challenge to the allegations made against him only once he was able to view the evidence upon which they were based, and disclosure of the Respondent's documents was provided to him only under the auspices of the Tribunal's formal disclosure processes. The Tribunal understands that the Board members who made the decision to remove the Appellant did not have the benefit of guidance from their legal adviser as to the procedural integrity of the processes by which the evidence had been obtained. The Respondent's Executive Director of Legal Services and Compliance, Kenneth Dibble, gave evidence to the Tribunal that the Board members would have been unaware that key evidence upon which they were asked to rely as fact had been gathered by means which no longer accorded with the Respondent's own best practice in such matters. He explained that the Respondent had, since these events, improved its own investigatory procedures so that (for example) meetings during an inquiry are now tape recorded so that that disputes as to what had been said at the meeting should not arise. Mr Dibble agreed with the Tribunal that the Respondent's Board should in future be advised of any such matters.

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<sup>12</sup> i.e. it had exhausted its legal powers in this matter.

- 5.16 The Respondent's conduct of this matter arguably constituted a breach of the Appellant's rights under ECHR Article 6, because the Appellant had not had a hearing that allowed him to challenge the evidence (there being no disclosure under the Respondent's informal internal review process) and in any event the Board members do not of course constitute an independent tribunal. It was accepted that the Appellant's right to a rehearing before the Charity Tribunal has the effect of curing any such breach, because the European jurisprudence has regard to the entire legal process including the exercise of onward appeal rights. The Tribunal notes that this was the approach adopted by Mr Justice Lewison in the *Seray-Wurie* decision referred to at paragraph 5.7 above.
- 5.17 At the hearing of this appeal, the Respondent's grounds for removal of the Appellant were helpfully grouped by its counsel into issue headings A – G. The Tribunal has gratefully adopted this formulation. The Appellant's counsel argued that, in relation to all the grounds apart from B, the Appellant had been working appropriately with the Respondent to address its concerns prior to his removal and had never been told that these ongoing issues might later be relied upon to remove him from office. He asserted that the Appellant's removal from trusteeship on those grounds constituted a wholly disproportionate response to the regulatory issues they raised. He argued that it was the Respondent's evident concern that the charity was directly funding the LTTE that had led the Respondent to harden its stance towards the Appellant, but that as that initial concern was no longer relied upon, the removal should now be quashed as disproportionate. The Respondent's counsel, on the other hand, invited the Tribunal to look at the totality of the Appellant's conduct as supporting the decision to remove him, and invited the Tribunal to dismiss the appeal.

## **6. The Evidence**

- 6.1 In relation to each ground, the Tribunal has evaluated the witness statements, the documentary evidence, the oral evidence given (reviewed with the benefit of the official transcripts) and the legal submissions made by both counsel most carefully. These are each referred to where appropriate below.
- 6.2 As mentioned above, the Appellant and several of his witnesses were not tendered for cross examination, although their attendance had been requested by the Respondent<sup>13</sup>. Once this was known (at the close of the Respondent's case) the Tribunal drew counsels' attention to part 32 of the Civil Procedure Rules (which would have governed this situation in the High Court) and invited their submissions on the admissibility and/or weight which the Tribunal should attach to the witness statements in respect of which this situation pertained. The Respondent's counsel did not seek to argue that the relevant witness statements were inadmissible in evidence. The Tribunal was content to adopt this approach, being mindful of its power to consider evidence which would not be admissible in a civil trial in England and Wales (originally under rule 29(3) (a) of the Charity Tribunal Rules 2008, now under

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<sup>13</sup> Some others attended the hearing to give evidence on behalf of the Appellant but were, in the event, not required for cross examination and were released by the Tribunal.

rule 15(2) of the Rules). The Respondent's counsel produced for the Tribunal a very helpful table, setting out those aspects of the relevant witness statements which were accepted by the Respondent and those which were contested. He invited the Tribunal to attach no weight to the evidence of a witness where there was a material issue in dispute which it had not been possible to test in cross examination. Where there was no material issue in dispute, he invited the Tribunal to attach the same weight to the witness statement as if the evidence had been given on oath but there had been no cross examination. The Appellant's counsel agreed with this analysis. The Tribunal has adopted this approach and refers to it where relevant in its consideration of the evidence below.

- 6.3 The Respondent's counsel submitted further that the decision of the Appellant not to tender himself for cross examination should be regarded as relevant to the issue of any remedy which the Tribunal might grant him were his appeal to be allowed. This issue is considered at paragraph 6.120 below. The Tribunal also observes that the Appellant's decision not to be cross examined may be relevant to the exercise of the Tribunal's jurisdiction as to costs. This issue is considered at paragraph 7 below.

**Ground A: That the Appellant assumed a position of dominance in relation to the charity.**

- 6.4 The Board members' decision to remove the Appellant referred to his "*failure to discharge his duty of care as a trustee and duty to act in the best interests of the Charity, consequently hindering or preventing the other trustees from meeting their duties to the Charity*".
- 6.5 The Respondent's case as stated in the Facts and Matters document was that the Appellant occupied a dominant role in the management and administration of the charity and, in particular, took control of its accountancy and legal matters. The Respondent was aware that the Appellant had expressed his intention to retire as a trustee in 2006 [R10/2785] and, following the Board meeting to discuss removal, two of the Board members telephoned the Appellant to ask him more about his specific intentions in this regard [R3/53].
- 6.6 The documentary evidence presented to the Tribunal in support of this ground included the minutes of a trustee meeting dated 21 April 2006, in which the Appellant referred (in rather robust terms) to the primacy of his executive powers [A9/3045] and also to the notes of a meeting with the Respondent's officers in January 2006 in which the Appellant referred to the importance of his position as founder of the charity and to its roots in the charitable work of his family [R1/12]. In subsequent correspondence, the Respondent sought the Appellant's assurance that the trustee body would not continue to comprise related individuals [R1/19], however the Appellant's reply [R1/27] took issue with the Respondent's standard approach, pointing out that the strict religious and life-style requirements for a trustee of this religious charity were found in few families in the UK. In February 2006, the trustees resolved not to disturb the present trustee board composition [R8/2385] (although additional non-related trustees were subsequently appointed in April and August of that year).

- 6.7 The Respondent's counsel also referred the Tribunal to the dominant role of the Appellant in relation to the two sets of litigation in which the charity had engaged and to a trustees' resolution dated 25 March 2005 authorising the Appellant to represent the charity in court [A9/3025<sup>14</sup>]. These issues are considered further under grounds D and E below.
- 6.8 The Respondent's witness Joanne Bell's oral evidence to the Tribunal was that she had, during her period of involvement, discussed the issue of dominance with her manager; however, she did not think it had been recorded anywhere as a specific regulatory concern and the Tribunal did not see any documents from this period raising it as such. Ms Bell told the Tribunal that she was not sure why she had not pursued the issue. The Respondent's witness Louise Edwards' told the Tribunal was that she had not spoken to the other trustees about this concern before it was included as a ground for suspension. She accepted in cross-examination that the minutes of the meetings she had seen did not record all the discussions amongst the trustees and said she now realised that some of the day to day administration had in fact been delegated.
- 6.9 The Tribunal also considered the witness statement of the charity's administrator. His witness statement made clear that he had played a very substantial role in relation to the running of the charity, both as a trustee and its treasurer from the charity's formation until November 2006, and subsequently as its paid administrator. In his correspondence with the Respondent in 2006, the Appellant had suggested to the Respondent's officers that they should meet with the then treasurer (who subsequently became the administrator), advising them that any such meeting would have to be in the evening. The Tribunal heard that the Respondent's case officer made a file note to find out more about the treasurer's role, but that in fact she had never done so.
- 6.10 In 2006, the Appellant had provided the Respondent with a file containing numerous documents created by the administrator in Tamil, but the Respondent's officers did not arrange to have these translated. Consequently, it appears to the Tribunal that the Respondent was largely unaware of the administrator's significant role in the running of the charity until the hearing of this appeal (when the content of his witness statement was largely accepted by the Respondent and appropriate concessions in respect of Ground C were made). This was because its officers neither met with him nor translated the documents which were created by him and supplied to the Respondent by the Appellant.
- 6.11 The Tribunal further notes that although the Respondent was on notice that not all the trustees wrote or spoke good English, its officers continued to communicate with the charity trustees at all times in English only.

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<sup>14</sup> The resolution required the Appellant to consult with the Board of Trustees, or, at short notice, any of the trustees before exercising his authority.

- 6.12 The Tribunal has asked itself whether the Respondent gained a false impression of the dominance of the Respondent by failing to interact with other key players in the charity, by failing to consider the evidence provided to it, and by failing to take into account sufficiently the linguistic and cultural issues which pushed the Appellant centre stage in his dealings with the Respondent. His role as a Guru perhaps inevitably meant that his fellow trustees were deferential to him, but the Respondent appears not to have considered this. Certainly it seems to the Tribunal that it would have been difficult for the Respondent to form a fair judgement about the interaction between the Respondent and his co-trustees without taking the opportunity to observe them in action and in so doing using the services of an interpreter. Kenneth Dibble's evidence to the Tribunal was that the Respondent does have a budget for the translation of documents. He said he would generally expect documents to be provided to the Respondent in English but said there was a discretion to have documents translated if necessary, in order to be fair. The Respondent did not adequately explain to the Tribunal why its officers did not use interpreters, have documents translated, or take steps to speak to the other trustees when investigating this ground for removal.
- 6.13 The Tribunal received an undisputed witness statement [TB1/274] from an independent financial adviser who said he had been involved with Sivayogam since its inception and had often attended trustee meetings on Saturday mornings at the Temple. He said he had witnessed heated discussions and disagreements. He disagreed with the view that the Appellant was dominant and noted that the Respondent had not asked to speak to him during its inquiry, despite his role as an advisor to the charity.
- 6.14 The Tribunal also had regard to documentary evidence demonstrating the active involvement of the other trustees at R7/1951; R7/1957; R1/148; R4/10; and A9/3082.
- 6.15 The Respondent's counsel submitted that the Appellant's dominant conduct either amounted to misconduct or mismanagement in its own right or, alternatively, that it contributed to the justification for the Appellant's removal on other grounds. Where relevant, the Tribunal has considered whether the Appellant's alleged dominance contributed to the other grounds for removal.

#### **The Tribunal's Findings on Ground A:**

- 6.16 The Tribunal finds that the Appellant was indeed a dominant presence in the life of the charity, but not to the point where this constituted misconduct or mismanagement in the administration of the charity in its own right. The Tribunal does not find that the Appellant was hindering or preventing the other trustees, as alleged in the original grounds for removal.
- 6.17 The Tribunal concludes that the Appellant's dominance (such as it was) arose as a result of his professional background, language skills and his status in the religious and cultural life of the charity. The Tribunal concludes that the Respondent's conduct of the inquiry did not sufficiently take into account these factors. The Tribunal concludes that the Respondent's officers did not

investigate the issues sufficiently to form a fair picture of the governance of the charity because they did not meet other key players (such as the administrator) or use interpreters to communicate with other trustees, or translate documents which would have given them a better flavour. The Tribunal was particularly concerned that the Respondent's officers formed this view of the Appellant whilst ignoring the linguistic difficulties of the other trustees, despite being on notice that some of the trustees did not speak English.

- 6.18 The Respondent's Board members may not have been aware that its officers had not used interpreters or translated relevant documents when they made their decision on this ground. In the circumstances, the Tribunal concludes that they were unable to consider the key issue of whether there was deference to the Appellant within the charity or inappropriate dominance by him. A culturally sensitive inquiry by the Respondent would have explored these points before reaching a conclusion.
- 6.19 The Tribunal notes that the Respondent's action in removing the Appellant on grounds of dominance in circumstances where the remaining trustees were unhappy about it did not suggest that this particular problem would thereby be resolved. The Respondent subsequently made an Order in June 2009, pursuant to s.19A of the Act, directing trustees to take certain action. This suggests that in over a year since his removal, it had not been possible for the Respondent to agree a voluntary course of action with the remaining trustees. This undermines the Respondent's case on this ground, as the removal of the "dominant" trustee did not achieve the desired result.
- 6.20 The Tribunal concludes that in all the circumstances it is not satisfied on the balance of probabilities that the Appellant's conduct constituted misconduct or mismanagement in relation to this ground. The Tribunal finds that the Appellant did take a lead role in relation to the conduct of the litigation and the charity's internal financial systems. The issues relating to those grounds are considered where relevant below.

**Ground B: That the Appellant failed to follow the Respondent's guidance with regards to Charities and Terrorism and in particular that he failed to take sufficient steps to dissociate himself and the charity from a perceived connection with the LTTE.**

- 6.20 The Board members' final decision to remove the Appellant referred to his:

*"(B) failure to discharge his duty of care as a trustee and duty to act in the best interests of the Charity by failing to dissociate the Charity from the LTTE and supporting its cause to the Charity's Beneficiaries".*

- 6.21 The Tribunal heard that allegations of connections with the LTTE had been made by the Appellant's brother-in-law (in the context of a long-running family dispute); by the SLHC; and by the solicitors acting for the other side in

the EA litigation (see Ground D below). An anonymous complaint from a “well wisher” had also been made, to which little or no weight was given [R1/133]. The Tribunal heard evidence from Joanne Bell that the Respondent now operates a national intelligence model to evaluate complaints of this nature, but that at the relevant time she was simply asked by her manager (in the Compliance and Support team) to focus on the allegation that funds were being transferred to the LTTE. She told the Tribunal there was no written case direction sheet and she relied on verbal direction from her manager. She accepted that the Appellant’s brother in law had made a number of complaints about the Appellant (to other bodies in addition to the Respondent) and she was shown the note of a telephone conversation she had made, in which the Appellant had asked for her help in defending himself/the charity from this campaign [R7/1569]. She said she was aware that there was a bad relationship between the Appellant and his brother in law, and that there were issues concerning the political situation in Sri Lanka which needed to be considered. She said she carried out some research into these by herself, without the benefit of any guidance from colleagues. She said that the credibility of the person making any complaint was a relevant issue to be taken into account by the Respondent. In cross examination, Louise Edwards was shown an article published by the brother-in-law, in which he wrote that the LTTE had warned him about the Appellant, that he was a bad man who said bad things about the LTTE [R1/338]. Both of the Respondent’s case officers were referred in cross-examination to unexplained inconsistencies in the brother-in-law’s statements to the Respondent and to the Court in the EA litigation concerning his own dealings with the LTTE [R7/1612].

6.22 Ms Bell emphasised that her role was to evaluate a complaint and to see if there was any evidence to “back it up”. The second complaint, from the SLHC, took the form of a letter dated 6 September 2005 [R1/1]. It referred to an earlier meeting between one of the Respondent’s officers and the High Commissioner and alleged that the annual Chariot Festival hosted by the Sivayogam charity “*bears the hallmarks of a fund-raiser for the LTTE in the semblance of a religious festival*”. Although the documents had apparently become separated in the Respondent’s files, the SHLC appears also to have sent the Respondent a LTTE calendar (which it was said by the author had been on sale at the Chariot Festival) and an anonymous, undated statement from a person describing the charity’s Tamil devotees in racist language. Louise Edwards told the Tribunal she did not personally find the SLHC allegations credible. She said she had informed her manager of this although it was not recorded in the note of that conversation [R11/3341]. On the contrary, the Tribunal saw an internal document in which the complaint from the SLHC had been assessed as “mostly reliable” on an intelligence assessment form completed by one of the Respondent’s officers [R11/3657]. An earlier internal memo dated 23 November 2005 transferring the file to a new case officer [R11/3334] included the comment “*The Sri Lankan High Commission would like to be kept informed of the outcome...*” which suggests that the Respondent’s officer’s approach to the SLHC did not involve any consideration of the complexity of the relationship between the Tamil diaspora and the SLHC. This is, once again, a situation in which the Respondent had

apparently failed to provide its officers with official guidance, with the result that they were permitted to act on their own initiative.

- 6.23 At the hearing of the appeal, the Respondent did not ask the Tribunal to find that the allegations made by the complainants were in fact true, but rather to accept them as evidence that there were rumours in circulation and to assess the Appellant's conduct against this background. The Respondent, in this regard, appeared to assert that the mere existence of rumours gave rise to a duty on the part of the Appellant to dissociate from them – whether or not they were credible. As the Respondent did not ask the Tribunal to find that the rumours were true, the complainants were not called as witnesses and the Appellant was unable to challenge what they had said about him in a public forum. The Tribunal notes that a number of the witness statements filed in support of the Appellant stated that (a) the witness had not previously heard of a rumoured connection between the Appellant and the LTTE and (b) that they only became aware of the rumours because the Respondent's actions had given them currency. The Tribunal notes that such evidence is contained in six undisputed witness statements [TB/246, 258, 260, 264, 274, and 279].
- 6.24 The high water mark of the Respondent's initial regulatory concerns under this ground appears to have been the concern, referred to in the paragraph 9 of the reasons for the original decision, that "*the charity was funding the LTTE.*" This allegation had been made to the Respondent in 2005, however, by the time the Respondent suspended the Appellant in March 2007, the reasons given by the Respondent for doing so refer to him knowingly making public his support for the LTTE both to the Respondent and to the local Tamil community, rather than actually providing the LTTE with financial or some other means of other support. The Tribunal notes that the evidence for the allegation of making public his support for the LTTE came entirely from the Appellant's own comments to the Respondent during the course of their correspondence and meetings. The Tribunal heard no evidence that the Respondent had investigated these concerns by speaking to anyone other than the complainants and the Appellant himself, for example by speaking to the charity's devotees, beneficiaries or to the Appellant's fellow trustees directly.
- 6.24 The Respondent informed the Appellant that it was not appropriate for a charity trustee to express support for a proscribed organisation while acting as a charity trustee. However, the Appellant regarded the allegations made against himself and the charity in this regard (although the precise details of these were unknown to him until disclosed through the Tribunal's processes) as malicious falsehoods and he consistently told the Respondent that no one would believe them. He took the view that if no reasonable person would believe the allegations, there could be no need for him to take steps to dissociate the charity from them. He told the Respondent's officers that if there was in fact no association, he could not in any event dissociate. The Tribunal found there to be much logic in this argument. It was not at all clear to the Tribunal how strong or widespread a "perceived connection" would have to be before the Respondent would say that a duty of dissociation arose. Neither was it clear to the Tribunal who needed to have the perception (i.e. the Respondent alone, the Respondent plus third parties, and/or the general public)

in order to found the duty of dissociation. Neither was it clear to the Tribunal whether the perception had to be a reasonable one in all the circumstances.

- 6.25 The Respondent's witnesses took differing views as to how cogent the alleged links between a charity and a proscribed organisation would have to be in order to generate a duty of dissociation. Kenneth Dibble's evidence was that the Respondent was concerned with relevant or material links between a charity and a proscribed organisation rather than any link at all.
- 6.26 The Respondent's case as stated in the Facts and Matters Document relied on the following evidence.

(i) Failure to Dissociate

- 6.27 The Respondent's Risk and Proportionality Framework Document [R10/2883] describes links to "terrorism" and support for proscribed organisations by charities as "zero-tolerance" issues for the Respondent. After hearing the witness evidence, the Tribunal remained unclear what "zero tolerance" meant for the Respondent in the context of the particular allegations in this case, which were not relied upon by the Respondent as being credible.
- 6.28 The Risk and Proportionality Framework also states: "*Our assessment of concerns that come to our attention involves evaluating the likelihood of a risk occurring and the potential impact on the charity and more widely. This is informed by our past casework experience. We also take time to validate and verify the reliability and credibility of concerns, including allegations, along with the source of the concern*".
- 6.29 The Tribunal considered the Respondent's guidance OG96 [R11/3539] which states, inter alia, that:
- *Any links between a charity and terrorist activity are totally unacceptable. 'Links' in this case might include fundraising or provision of facilities, but also includes formal or informal links to organisations 'proscribed' under the Terrorism Act 2000 and any subsequent secondary legislation. We will assess rigorously any allegation of links between a charity and terrorist activity, and where there are grounds for an inquiry it will be conducted as a matter of the highest priority.*
  - *Where a charity's activities may give, or appear to give, support or succour to any terrorist activity, we expect the charity's trustees to take all necessary steps immediately to disassociate the charity from the activity.*
  - *We expect trustees to be vigilant to ensure that a charity's premises, assets, volunteers or other goods cannot be used for activities that may, or appear to, support or condone terrorist activities. Examples include the use of a charity's premises for fundraising or meetings.*
  - *Charities should take all necessary steps to ensure that their activities could not be misinterpreted. We expect trustees of charities to take all necessary steps to ensure that their activities are transparent, for example including transfer of assets abroad. We hold trustees accountable for ensuring that*

*procedures are put in place to ensure that terrorist organisations cannot take advantage of a charity's status, reputation, facilities or assets.*

- 6.30 The allegation of “failure to dissociate” clearly stems from the second bullet point above. The Tribunal notes that that bullet point as drafted is specifically concerned with a charity’s activities (rather than opinions) and with the support of “terrorist activity” (rather than a political stance). The policy appears therefore to draw the distinction (evident in the Terrorism Acts) between privately held beliefs and active support for terrorism. The Tribunal further notes that the required dissociation is said to be “from the activity” which suggests that the charity has to be able to stop doing something currently within its control and would not seem to apply, therefore to a merely historical connection. The guidance seems to the Tribunal to be aimed at a situation which is markedly different from one where an individual charity trustee expresses a personal opinion - however bullishly, repeatedly, or (arguably) inappropriately - in the context of his role as correspondent for a charity with its regulator, which supported the political aims rather than the terrorist activity of a proscribed organisation.
- 6.31 The Respondent’s counsel put his case in relation to this issue on the basis that the Appellant’s conduct in dealing with the Commission evidenced a failure on his part to dissociate the charity from the LTTE. Further, that his conduct must be assessed on the footing that he was aware that it was being alleged by others that the charity was associated with the LTTE, and that (whether or not he believed the allegations made to be true), these “widely known” allegations subjected him to a duty (as set out in the Respondent’s guidance) to do all that he could to diminish the possibility of the allegations being, or being perceived to be, true.
- 6.32 The Respondent’s counsel produced (after the close of evidence) a print out from a BBC website in 2005 in which the Appellant had expressly refuted suggestions that he was connected to the LTTE. The Tribunal was reluctant to take into account this fresh evidence (of which the Appellant had no advance disclosure), however it observes that the print out demonstrated not only (a) that there were allegations but also (b) that the Appellant had refuted them in a very public way. This did not in any event seem to take the Respondent’s case further than the formal evidence had done. The Tribunal regarded it as evidence of public dissociation of the sort that the Respondent appeared to have required. The Tribunal also saw [A9/2944] the Appellant quoted in a local paper in May 2007, in which he said “*When you say disassociate yourself, there is a presumption that I was already associated...Now if I am not associated, how can I disassociate?*” He also was reported to have said “*I am not in favour of funding organisations that cause bloodshed, violence or kill. We have been funding orphanages*”.
- 6.33 As mentioned above, it was not, by the time of the Appellant’s removal, being suggested that the charity or the Appellant was involved in any activity which actually supported terrorist activity. The nature of the connection then perceived by the Respondent to exist between the Appellant and the LTTE was difficult for the Tribunal to grasp, relying as it did partly on third party

allegations (which it was not suggested by the Respondent were in fact true), and partly on the Appellant's own increasingly fractious statements when dealing with the Respondent's officers. Louise Edwards' evidence to the Tribunal was that if the Appellant expressed support for the LTTE, and it is a proscribed organisation, therefore he promoted terrorism. This approach did not seem to the Tribunal to accord with either the criminal law or with the Respondent's stated policy.

6.34 The Tribunal notes that despite voluminous correspondence and several meetings, the Respondent's officers never specified for the Appellant exactly what the required act of dissociation should consist of (for example, the adoption of a trustees' policy document, a formal statement in a newsletter, displayed on a notice board or on a web site). Perhaps understandably, the Appellant became increasingly frustrated and entrenched in his dealings with the Respondent over this issue, as he clearly did not understand what was required of him. Whilst the Tribunal has some sympathy with the Appellant's frustration, it records here its disapproval of the Appellant's eventual descent into abuse of the Respondent's officers.

(ii) Supporting the LTTE to the charity's beneficiaries

6.35 The Respondent's case was that, during a visit to the charity's premises in September 2006, the Respondent's officer Joanne Bell had seen a framed photograph of Velupillai Prabhakaran (now deceased, but then the leader of the LTTE) on display and that the Appellant had expressed his support for the LTTE during that meeting.

6.36 This was a potentially serious allegation given that the display of the insignia of a proscribed organisation in a public place is a criminal offence under s.13 Terrorism Act 2000.

6.37 The Respondent's witnesses said that the Appellant denied this allegation as soon as he became aware of it, but the Respondent could not find any record of the terms of his denial nor a record of when it was made. Ms Bell's evidence (both in her written statement and orally to the Tribunal) was that she had seen the photograph when she visited the toilet during the meeting. She said she had recognised Prabhakaran because she had seen pictures of him on the internet and on LTTE calendar held on the Respondent's file. She said he was a "*fairly identifiable chap*". She said she did not at that time comment or ask any questions about the photograph because she did not wish to upset the positive tone of the meeting then in progress. She said she did mention it to her manager at lunch time but that neither her manager nor the other colleague in attendance that day took any steps to verify what she said she had seen or to discuss the matter with the Appellant after lunch. The Tribunal had sight of the contemporaneous notes made by Ms Bell during her visit to the charity's premises that day [R10/2801], which did not mention the photograph at all. The written minutes of that meeting [R1/186] do mention the photograph, but these minutes were not given to the Appellant to approve (as she said this was not the standard procedure).

6.38 Although the Tribunal accepts that the Respondent's inquiries are not conducted under the auspices of the Police and Criminal Evidence Act 1984, the Tribunal was concerned by the lack of rigour displayed by the Respondent's officers in relation to this issue. Clearly such a serious allegation should have been corroborated, properly recorded, and put to the Appellant at the relevant time. His response should also have been recorded. These issues are considered further at paragraph 7 below. A number of the Appellant's witnesses denied that there was ever a photograph of Prabhakaran on display at the Temple, and the Tribunal had particular regard to the undisputed witness statement of a Local Authority Councillor who had known the Appellant for eight years and stated he had regularly visited the Temple in Tooting. He said at paragraph 12 of his witness statement that the Chariot Festival "*is not a LTTE event and I have seen nothing to indicate as much. I know what Prabhakaran looks like and the LTTE flag and insignia and I have never seen any of them there in 8 years, including at the Tooting premises*" [TB1/ 279].

6.39 The Facts and Matters Document stated that the Appellant "must have been aware of the picture and was in a position to secure its removal". The Tribunal noted that no evidence was presented to it which specifically linked the Appellant (as opposed to the trustee body as a whole or other persons operating at the charity's premises, such as the Temple's priests) to the alleged photograph of Prabhakaran. The presentation of the Respondent's officers' evidence on this point did not provide the Tribunal with an opportunity reasonably to conclude whether, if the photograph existed, the Appellant was aware of it and so whether it amounted to misconduct on the part of the Appellant, as opposed to the trustee body as a whole or other persons.

(iii) Supporting the LTTE to the Respondent

6.40 In its Facts and Matters Document, the Respondent also relied upon allegations that at a meeting with the Respondent's officers in March 2007, the Appellant had expressed his support for the LTTE. In particular it was alleged that at that meeting he had (a) invited one of the Temple's priests to look at the letter he had received from the LTTE leadership (the letter which he said suspended him from membership of that organisation in 1990); (b) that he had admitted meeting senior figures in the LTTE on a recent visit to Sri Lanka; (c) that he had said he had been approached by members of the Tamil community in the UK who had asked him about his history of involvement with the LTTE and that when asked directly he had told them the story; and (d) that he had stated that, rather than being harmed by the rumours, the charity was placed in a "top position" amongst its supporters by the rumours of a connection with the LTTE.

6.41 The Tribunal heard a great deal of cross-examination about the minutes of the 16 March 2007 meeting. The minutes of that meeting, dated 22 March [R1/355], were substantially disputed by the Appellant. The meeting had not been tape recorded and the Respondent's officers' minutes of it were not sent to the Appellant for comment or agreement. As noted above, the Respondent regards the Police and Criminal Evidence Act as best practice, but the

Respondent has no positive duty to accord with its procedures. Louise Edwards told the Tribunal that the Respondent's practice now is to warn people that it is a criminal offence under s.11 of the Act to supply false or misleading information to the Respondent, but that she had given no such warning to the Appellant because when she had seen him in March 2007 it had been a meeting rather than an interview. She accepted in response to the Appellant's counsel that there was no information in the public domain to explain to charities the difference between a meeting and an interview under the Respondent's procedures. The Tribunal notes that s.11 of the Act applies whatever the status of the meeting.

- 6.42 The Appellant's case was essentially that the meeting minutes had been embellished by the officers concerned, so as to give a falsely negative impression of what the Appellant had said and how he had behaved at the meeting to their superiors. The Tribunal saw contemporaneous notes from the meeting (the Respondent's officer James Dix had placed his notes on the file), but Louise Edwards told the Tribunal it was not usual practice at the Commission to preserve original notes, so hers would have been destroyed. No explanation was provided to the Tribunal for the absence of Rachel Baxter's notes from the file. The Tribunal heard that the formal notes of the meeting were created by James Dix in draft and then amended by Louise Edwards, who told the Tribunal she had added to them from her personal notes and recollections "*some days*" after the meeting. She could not recall exactly when she had finalised them but it appeared from her evidence to the Tribunal that they were written either at the same time as or after the decision to open the inquiry and suspend the Appellant, which had been taken on 20 March. She said the minutes had been agreed with James Dix and Rachel Baxter and were a "team effort". She denied the suggestion made by the Appellant's counsel that this had coloured their final contents. In answer to a question from the Tribunal she confirmed that the Respondent's operational guidance to its staff required minutes to be written within 24 hours of a meeting, although this had not been possible in this case.
- 6.43 It was accepted by Ms Edwards that the formal minutes of the 16 March 2007 [R1/355] meeting differed in a number of respects from the contemporaneous notes thereof [A10/3316]. Her evidence was that, whenever there was a material difference between the contemporaneous notes and the formal minutes, the formal minutes were to be preferred as the accurate record. She maintained this view notwithstanding cross examination about the delay in writing the final minutes during which her recollection may have faded, the discussions between the officers in producing the final minutes which may have affected her recollection, and the chain of events and decisions taken following the meeting which may have caused her to interpret matters differently. She told the Tribunal that she had a special technique for remembering such things, which made her evidence reliable in this regard (although the technique was not universally successful as she said she could not remember details of other events in the same way. The Tribunal also noted that in relation to a subsequent meeting with the charity trustees, her evidence was that the contemporaneous note was to be preferred to the formal

minute). The Appellant's counsel described her evidence in this regard as "bizarre" and "entrenched".

- 6.44 The allegation (a) at paragraph 6.40 above was disputed by the Appellant as soon as he became aware of it. His denial is recorded in a note of his telephone conversation with Louise Edwards on 28 March 2007 [R1/377] when she rang him to say that she was going to send him the order suspending him. The Appellant contacted the Respondent's customer services officer the day after receiving the order, requesting an immediate decision review. The Appellant subsequently stated in correspondence that he had asked the priest to look "for" the letter not "at" it. The contemporaneous notes of the meeting that day merely state "*in 1990 suspended for good reason – suspension letter with credentials*". The formal minutes, on the other hand, state "*.. he appeared proud that the letter was signed by Prabhakaran himself...he asked [the priest] if he had seen this letter amongst his papers and when he said he had not, suggested that he look at it*". Louise Edwards accepted in her evidence to the Tribunal that some of the conversation between the priest and the Appellant during the meeting had been in Tamil. She also accepted that the Appellant could be difficult to understand at times. She said that she had not asked the priest what he had understood to have been said to him by the Appellant. The Tribunal read a witness statement from the priest concerned confirming the Appellant's version of events. The priest attended for cross-examination at the request of the Respondent and (through an interpreter) confirmed his written evidence that he had been asked to look "for" "the document rather than "at" it by the Appellant.
- 6.45 Louise Edwards' evidence to the Tribunal was that she had not considered taking an interpreter to the meeting. She was referred to correspondence with the Appellant where the need for an interpreter had been raised. She was aware that certain documents in this case had not been translated by the Respondent and said that, with the benefit of hindsight, she now thought they should have been translated.
- 6.46 Counsel for the Respondent closed on this issue by referring the Tribunal to Ms Edwards' evidence that the Appellant had spoken of the letter with pride, so that it was not only what he said but how he said it that was material. As noted above, the disputed minutes of the meeting refer to the Appellant being proud [R1/357], although this is one of the examples of a key issue not having been recorded in the contemporaneous notes [A10/3316].
- 6.47 Louise Edwards' original evidence to the Tribunal was that the meeting in March 2007 was regarded by her as having taken place "in public" because she thought the priest in attendance was an employee of the charity. She altered her position on this when cross-examined by the Appellant's counsel. The Respondent's Executive Director of Legal Services and Compliance told the Tribunal that a meeting between a charity trustee and the Respondent's officers on the charity's premises should not be regarded as having taken place in public. The Tribunal asked the Respondent's counsel whether the Respondent was prepared to concede that the meeting had in fact been in private, however he "reserved his position" on this point. The Tribunal prefers

the view that the meeting was not held in public. Louise Edwards told the Tribunal that in any event it was not appropriate for a charity trustee to encourage an employee to view material linked to a proscribed organisation. She said there was a difference between merely describing his suspension letter to the Respondent and encouraging someone else to look at it. The Tribunal has not seen the letter referred to. The Appellant has suggested that it has been lost.

- 6.48 The allegation at (b) in paragraph 6.40 above regarded the Appellant's admission that he had had a meeting with senior LTTE figures in Sri Lanka. This was in the Facts and Matters Document but was no longer relied upon by the Respondent by the time of the hearing. There had been no application by the Respondent to amend the Facts and Matters Document, however Louise Edwards' witness statement asserted that the Respondent had accepted that the Appellant had seen these people at a family occasion in Sri Lanka and that it was not pursuing the allegation that this amounted to misconduct. Louise Edwards' explanation to the Tribunal about this discrepancy was that the Facts and Matters Document and her witness statement had been drafted by different people. Clearly it was regrettable that the Appellant was put to the trouble of preparing his case in respect of a key allegation which was no longer relied upon by the Respondent.
- 6.49 The allegations at (c) and (d) in paragraph 6.40 above stemmed from the Appellant's own comments and, as noted above, the Tribunal heard no independent evidence of the Appellant discussing the LTTE with members of the public, devotees or members of the charity. Ms Edwards' evidence to the Tribunal was that, when asked about the history of his involvement with the LTTE, the Appellant could have chosen to stay silent rather than explain that he used to be involved but was no longer regarded as a member of that organisation. The Tribunal doubts that an act of dissociation through silence was envisaged by the Respondent in drawing up its guidance. Indeed, it appeared to the Tribunal that silence by the Appellant on this issue, when asked directly about alleged links with the LTTE might be more corrosive to the reputation of the charity than a frank explanation of the historical position. The Tribunal heard oral evidence from a priest at the Temple, who said that he had been unaware of the Appellant's historical link to the LTTE until the Respondent's allegations became known. He said he had found out about the matter from looking at websites, not from discussions in the Temple.
- 6.50 It was also alleged that the Appellant had supported the LTTE in his comments at the meeting. The minutes of the meeting state that "*LE asked about the impact his links with the LTTE has on the charity's reputation. [He] said he is close to the leadership of the LTTE and is respected by the leadership and therefore this puts the charity in 'top position'*". In subsequent correspondence with the Respondent, the Appellant stated that he was describing the views of others when referring to "top position"[R2/743].

## **The Tribunal's Findings on Ground B:**

6.51 The Respondent, as stated above, did not ask the Tribunal to find that the allegations made were in fact true, although the Tribunal has seen some evidence that the Respondent's officers had originally concluded that certain allegations were credible (notwithstanding the taint of racism). The Respondent's approach to this issue at the hearing sought to divorce the two issues of, firstly, the demonstrable truth of a rumour and, secondly, whether it had sufficient credibility to give rise to a duty to dissociate. The Tribunal regarded this as a key issue because it finds that it is only if a rumour has a reasonable degree of credibility that a charity can be said to have a duty to dissociate from it. The Appellant's case throughout was that the rumours lacked any credibility.

### **(i) Failure to Dissociate**

6.52 The Tribunal finds that the Appellant made a number of unwise and unguarded statements in his dealings with the Respondent. It also notes, however, that he was apparently never warned that his own statements might be used against him or advised of his right to obtain legal advice. Given the nature of the allegations against him (especially at the beginning of the inquiry) the Tribunal considers that it would have been appropriate for the Respondent to have advised him of this. The Respondent's counsel put his case on the basis that the Tribunal was entitled to draw inferences about the Appellant's conduct generally from the manner in which he had dealt with the Respondent. He asserted that the Respondent did not need to undertake independent research into the Appellant's communication with third parties because it was entitled to conclude that the manner in which he communicated with the Respondent's officers was representative of how he dealt with others. He submitted that this was a matter of proper inference for the Tribunal. The Tribunal rejects this argument. The Tribunal cannot, by drawing such inferences, be satisfied on the balance of probabilities that the Appellant behaved in a manner which gave rise to a duty of dissociation or that he breached the alleged duty to dissociate.

6.53 The Tribunal has considered the Respondent's guidance in relation to dissociation and concludes that it is insufficiently precise on the questions of:

- (i) how cogent or credible the allegations of links between a charity and a proscribed organisation have to be in order to generate a duty of dissociation;
- (ii) what type of action is required by a charity to satisfy the Respondent that there has been a dissociation in the event that one is required; and
- (iii) the distinction to be made in respect of an individual trustee who is entitled to his personal views, as opposed to the public actions of a charity,

for the Tribunal to find that there has been a specific breach of the Respondent's guidance by the Appellant. The Respondent invited the Tribunal to "endorse" the guidance, however in the context of this case the

Tribunal is unable to do so. In relation to this ground as a whole, the lack of clear guidance as to the legal nature of the alleged duty and also what constitutes a link and a dissociation therefrom, was of concern to the Tribunal.

(ii) Supporting the LTTE to the Charity's Beneficiaries

6.54 In relation to the allegation about the photograph, as stated above, there was a material factual dispute about what had been seen by the Respondent's officer. The Tribunal must decide whether any contested facts are proven on the balance of probabilities. This was a serious allegation which in all fairness should have been investigated, if appropriate corroborated, properly recorded, and put to the Appellant at the relevant time. The Tribunal must now decide if the allegation is proven on the balance of probabilities, weighing up on the one hand the Respondent's lack of evidence other than Ms Bell's evidence of her contemporaneously unrecorded sighting, the lack of subsequent investigation and corroboration by the Respondent and the failure to record the Appellant's denial, as against the undisputed evidence from the Appellant's witnesses, who denied that there was ever such a photograph.

6.55 In all the circumstances, the Tribunal is not satisfied to the relevant standard that the photograph Ms Bell said she saw was of Prabhakaran. Furthermore, as stated above, even if it were possible to be so satisfied, the Tribunal did not have evidence presented to it which specifically linked the photograph to the Appellant, because the issue was not investigated and the allegation was not put to the Appellant at the relevant time.

(iii) Supporting the LTTE to the Respondent

6.56 In relation to allegation (a) at 6.40 above, the Tribunal was concerned that the Respondent was asking the Tribunal to draw an adverse conclusion from the Respondent's reference to a document which, if it existed, was capable of founding a defence under s.11 (2) of the Terrorism Act 2000 (see paragraph 4.4 above). The Tribunal concludes that the Appellant found himself in a Kafka-esque situation in relation to this allegation, whereby although he clearly regarded the letter from the LTTE suspending him as proof of his dissociation, when he referred to it as such, the Respondent then claimed that it constituted proof of an association. Notwithstanding the Tribunal's finding of fact below, it seems to the Tribunal that the Appellant should not in any event have been penalised for asking a third party to look either at or for a document referred to for exculpatory purposes.

6.57 In relation to allegation (a) at paragraph 6.40, the Tribunal is not satisfied in any event that the Appellant asked the priest to look "at" the letter from the LTTE rather than "for" it. The Tribunal finds that there is a lack of reliable evidence regarding key events at the March 2007 meeting because of the difference between the contemporaneous notes and the formal minutes, and also because in relation to this allegation it heard direct and convincing evidence from the priest himself, which directly contradicted Louise Edward's account. This leads the Tribunal to conclude that it cannot be satisfied on the balance of probabilities that what took place was as described by Ms Edwards.

The allegation that the Appellant said this in a “proud” way was a subjective assessment by Ms Edwards, incapable of proof. As the Tribunal was not satisfied by Ms Edward’s evidence in this regard the Respondent’s case as to the manner in which the disputed statement was made clearly also fails.

- 6.58 The allegations at (c) and (d) in paragraph 6.40 above stemmed from the Appellant’s own comments and, as noted above, the Tribunal heard no independent evidence of the Appellant discussing the LTTE with members of the public, devotees or members of the charity. This absence of evidence means that the Tribunal cannot reasonably conclude that the admission by the Appellant of a personal historical connection to the LTTE when questioned directly by third parties constituted a failure to dissociate. The Tribunal is not satisfied in all the circumstances that the allegations at (c) or (d) constituted misconduct or mismanagement in the administration of the charity by the Appellant.
- 6.59 The Tribunal notes that the Respondent did not seem to have a systematised investigative process whereby it would (a) evaluate the evidence obtained, (b) reach a decision as to whether or not a particular fact was established, (c) consider whether the finding in relation to that fact allowed it to rely on a particular allegation as a ground for removal (taking into account the relevant burden and standard of proof), and (d) communicate its decision to the person under investigation. The Appellant therefore went for long periods of time without knowing whether his denials or the evidence (in his view, exculpatory) which he had provided to the Respondent had been evaluated, accepted or rejected by it unless and until it was put to him again, often months later when the process was moving up to the next formal stage. The Appellant may reasonably have considered certain matters closed and been taken by surprise by their re-emergence. This lack of due process is amply demonstrated by the Respondent’s approach to the alleged photograph of Prabhakaran. It is also evident in the process of putting formal questions to the Respondent in October 2007, then drafting the grounds for his removal, which referred to some of his replies only. In relation to the EA litigation, the Appellant had dealt with the Respondent’s concerns about the costs, only to find that 18 months later he was accused of taking control of EA at the behest of the LTTE. When asked to comment on this concern, Ms Edwards told the Tribunal that if you compare the questions and answers with what is in the grounds, then you find out what had been accepted. The Tribunal did not regard this approach as sufficiently respectful of the Appellant’s right to due process in his dealings with the Respondent.
- 6.60 The Tribunal’s concern in this case was that the absence of such procedural formality by the Respondent inevitably put the Appellant at a disadvantage in challenging what was said about him. It also undermined the Respondent’s officers’ own ability to put forward to their senior decision makers a robust case, underpinned by evidence that has been properly evaluated. For example, and as noted above, the existence of the photograph is referred to as a fact in the original statement of reasons for removal (at appendix C paragraph 21 of that document). Whilst this document also records that the Appellant had denied the existence of the photograph (albeit that his denial had apparently

not been properly recorded), the Respondent's Executive Director of Legal Services and Compliance, Mr Dibble, confirmed in his evidence to the Tribunal that the underlying evidential dispute about the photograph was not drawn to the Board members' attention in his advice on its decision-making process. Mr Dibble told the Tribunal that it was not his role to review the quality of the evidence, but rather to ensure due process. The Tribunal takes the view, however, that these issues are inextricably linked. Mr Dibble accepted that gross procedural unfairness could have the effect of "*unpicking the evidence base*". He said that he had not given the Board members specific advice about article 8 in this case, but that they had "every cognisance" of it.

6.61 It follows, in the view of the Tribunal, that the Board members would not have been able to direct themselves in this case to the necessary process of considering whether they should find that a material disputed fact was proven on the balance of probabilities. As the Tribunal has conducted a substantive re-hearing of the issues this issue need not influence the substance of its decision. The issue is, however, relevant to the reasonableness of the Respondent's decision and consequently to the Tribunal's power to award costs, which is considered further at paragraph 7 below.

6.62 The Respondent invited the Tribunal to conclude on the basis of all the evidence that the Appellant's personal support for the LTTE affected his ability to make decisions in the interests of the charity, including his ability to make decisions about the sending of funds to Sri Lanka. He also argued that the perceived links between the Appellant, the charity and the LTTE endangered the charity's property (which term was said to include its reputation). The Tribunal did not hear independent evidence which would allow it properly to reach these conclusions. For the reasons set out above, the Tribunal is unable to conclude whether rumours about support for the LTTE were in general circulation, whether anyone believed them, whether it would have been reasonable to for anyone to believe them, whether they adversely affected the charity's reputation with anyone other than the Respondent, and therefore whether there was a sufficient basis to found the alleged duty to dissociate the charity from them. The Tribunal noted the Sri Lankan MP's evidence that the allegations against the Appellant were very largely publicised in Sri Lanka. The Tribunal accepts that the Appellant suffered damage to his reputation as a result of the publicity which the Respondent's actions attracted and that the Respondent failed to give adequate consideration to this breach of the Appellant's rights under Article 8 ECHR.

6.63 The Respondent also relied under this heading on the Appellant's admission that he had had direct contact with a representative of the LTTE concerning the EA takeover and subsequent litigation. The Tribunal considers this point further under ground D below.

**C: That there were inadequate procedures for selecting and monitoring recipients of funding in Sri Lanka.**

6.64 The original grounds for removing the Appellant referred to his "*failure to take reasonable and adequate steps to ensure that the application of the*

*Charity's funds in Sri Lanka was proper and in accordance with charity law*" and to "*placing the proper use of Charity assets at risk through inadequate safeguards for funds transferred to Sri Lanka*". The Respondent Board members' reasons for removing the Appellant state that "*the trustees were unable to demonstrate that funds had been properly applied in Sri Lanka, and significant weaknesses were identified in the Charity's monitoring of these funds*". The Tribunal notes that, in the four years concerned, the charity gave 21% of its income (boosted by exceptional giving in the light of the 2004 Tsunami) to Sri Lankan organisations. In other years, its overseas grants constituted only 15% of its annual income. Grants to individual organisations were in the range £3,000 - £15,000 each per annum. Each individual grant was therefore in the range 0.75% - 3.7 % of the charity's average annual income in this period. After the freezing orders were made by the Respondent, the charity's giving to Sri Lankan organisations dipped to just 5% of its annual income.

- 6.65 The Facts and Matters Document stated that, prior to the suspension of the Appellant, the charity did not have ascertainable criteria for selecting organisations to fund; that no assessments were carried out to determine the risk of funding particular organisations; that there were no written funding agreements with the organisations (a point acknowledged by the Appellant in his letter of 11/11/07); that the charity did not obtain adequate records to show how the funds had been used by the organisations to which they were sent; that the charity's "local representatives" did not have written terms of reference or provide written reports to the charity for monitoring purposes; and that the charity did not periodically review the continuing appropriateness of funding each organisation. It also stated that the Appellant had "impliedly" rejected the charity's auditor's advice to strengthen the charity's systems.
- 6.66 It was conceded in the Facts and Matters Document that there were in fact some systems in place, but these were described as excessively informal, relying as they did on personal visits to projects from the Appellant, trustees and devotees when in Sri Lanka, so were said to be insufficient to address the risk of misuse of the charity's funds and the risk of it "being perceived that funds sent to areas controlled by the LTTE might be received or appropriated by the LTTE". The Facts and Matters Document also referred to the funding of a project named after Colonel Navam, which (presumably because of the military connotations of its name) the Respondent stated "*may not help to address any perception that the charity is linked to the LTTE*". The Tribunal notes that the statement of the Sri Lankan MP (accepted by the Respondent) refers to the Colonel Navam Academy as a "*rehabilitation centre for war victims and the disabled*" which the MP had personally visited and that he describes it as being situated within a "*designated area which was accepted by the Government as a 'peace village'*" [TB1/225].
- 6.67 At the hearing, this ground was the subject of significant concessions by the Respondent in the Appellant's favour. The Respondent accepted that the witness statement filed by the charity's administrator (previously its treasurer), together with the documents previously provided by the Appellant to the Respondent in March 2006 [the entire contents of files A5, A6 and A7]

showed that acceptable procedures were indeed in place in relation to the transfer of funding to projects at Annai Illam, the Hindu Board of Education and the London Sivayogam Orphanage. The Respondent also indicated that no challenge was to be made to the evidence provided by the administrator regarding the filed receipts from projects at Sencholai and Kantharupan.

- 6.68 The reason for these concessions being made at the hearing were that, firstly, the Appellant had provided evidence (in the form of the administrator's witness statement) which the Respondent had not previously considered. The Respondent's earlier failure to contact the administrator is considered at paragraph 6.9 above. Secondly, the Appellant had sent the Respondent a substantial bundle of documents in March 2006, which were in Tamil and the Respondent had neither had them translated into English, nor told the Appellant that he must do so if they were to be considered. In his covering letter of 1 March 2006 [R1/23] the Appellant had apologised for the documents being in Tamil and explained that this was the language the charity used to communicate with the projects in Sri Lanka. The Appellant had translated these documents for the purposes of the Tribunal hearing and served them as evidence after the Facts and Matters Document had been written. The failure of the Respondent to consider this material exculpatory evidence, which had been in its possession for two years prior to the Appellant's removal, is considered further in relation to the Tribunal's costs jurisdiction at paragraph 7 below.
- 6.69 Notwithstanding these concessions, the Respondent's counsel opened his case on the basis that the Appellant's conduct in relation to this ground still constituted misconduct and mismanagement in the administration of the charity. He submitted that the Appellant's conduct must be assessed against the background of his being aware that it was being said that funding was going from the charity to the LTTE. He submitted that the normal duties of a trustee were heightened by the fact that such allegations were being made, and further that there was a duty for the Appellant to protect the charity's reputation by adopting processes which deprived these allegations of credence. The Respondent's counsel directed the Tribunal's attention to a number of remaining areas of concern under this ground. These were: the lack of written funding agreements as the Appellant said he did not see the need for them [R1/186], (but these were put in place following his removal – see A2/594); no written job descriptions for the local representatives or written reports from them; no ongoing monitoring arrangements (for the Girl's Home). In relation to Sencholai and Kantharupan, that there were few documents despite the fact that the projects were in LTTE controlled territory, and apparently no risk assessment of continuing to fund these projects in those circumstances [R1/194 and R1/222].
- 6.70 Louise Edwards' evidence to the Tribunal was that the baseline requirement from her point of view was for a funding agreement to be in place. Beyond that, it was a matter for the trustees to consider what was required. She accepted that an exchange of letters would suffice – the guidance did not require a formal agreement binding in each jurisdiction. She said she had encouraged the charity to make payments via other organisations such as the

Sri Lankan Red Cross rather than directly to the projects with which they had a relationship but admitted she was unaware that an administration fee would be deducted from the funds sent when such an arrangement was made. She accepted that, after the freezing orders were imposed in March 2007, whenever she was contacted directly by an organisation awaiting funds, she would simply refer them back to the charity, thus generating a circular process. The Respondent's approach to the charity's overseas work was illustrated well by the process its officers adopted in order to permit the release of funding to particular projects after it had imposed the freezing orders. The Respondent contacted the SLHC on 1 June 2007 to ask it for information about the projects funded by the charity [R11/3195]. Louise Edwards accepted that she had not obtained individuals' permission to give their details to the SLHC before she did so. (The Respondent eventually received a reply from the SLHC in August 2008 which contained misleading information about the projects [R11/3197] and in which it also made a fresh allegation that the charity was involved with suicide bombers. Louise Edwards told the Tribunal that she did not take this fresh allegation into account in her inquiry. She told the Tribunal she had not taken any steps to contact the intended recipient organisations in Sri Lanka themselves. She had made a futile attempt to contact the Sri Lankan Red Cross. She told the Tribunal she had been unaware that there was a regulatory framework for charities in place in Sri Lanka which she could have checked to assess the organisations' credentials. The Tribunal was, once again, greatly assisted here by the witness statement of the Sri Lankan MP [TB1/225]. This statement was not disputed by the Respondent. He described the process of registration for Social Service Organisations with the Government Provincial Administration and the subsequent monitoring arrangements for them. He explained that registered organisations receive some Government funding. He also confirmed that this legal framework existed in LTTE-controlled areas in Sri Lanka before, during and after the ceasefire agreement. At paragraph 49 of his witness statement he stated "*Registered organisations are properly monitored in Sri Lanka. I have no reason to think otherwise. I have never heard of the LTTE appropriating money from such organisations. The LTTE had some such organisations in its territory and wanted them to exist. The LTTE had responsibility for the people in its territory. It did not steal money from them or take money that the Government was sending. This would not have made the LTTE popular with the Tamil population and the funding would have been stopped by the Government*".

- 6.71 The Respondent's counsel invited the Tribunal to contrast the way in which the charity dealt with this issue before and after the Appellant's suspension. The Tribunal notes that Louise Edwards met with the remaining trustees in April and July 2007 [R11/3344 & 3363]. (The Tribunal notes that at the July meeting, the charity brought its own tape recording equipment). As noted at paragraph 6.19 above, the Respondent made a specific direction under s.19A of the Act in June 2009, requiring the remaining trustees to take certain actions in respect of its overseas grants. This suggests that there was not a significant difference of approach prior to and subsequent to the Appellant's suspension and removal in relation to this issue.

## **The Tribunal's Findings on Ground C:**

- 6.72 The Tribunal was unclear at times whether the Respondent's required administrative arrangements were said to be a legal duty of the trustees, or merely guidance as to best practice. It was also unclear to the Tribunal whether the Respondent was prepared to leave any of the arrangements to the trustees themselves, taking into account their knowledge of the situation in Sri Lanka and the proportionality of the arrangements required in relation to the small value grants made. The Respondent's case was that there was a heightened requirement because of the rumoured connection between the charity and the LTTE, however the Tribunal finds that the Appellant (and the other trustees) consequently found it difficult to follow what was being required of them, as they did not accept that these rumours were at all credible.
- 6.73 The Tribunal was most concerned to hear that significant exculpatory evidence had been provided by the Appellant in relation to this ground but that it had never been translated and so not considered by the Respondent. Once the documents were translated and the evidence of the administrator was formally presented to the Tribunal, many of the Respondent's concerns under this ground were resolved. The Tribunal concludes that if the Respondent had worked differently with the charity at an earlier stage, it is likely that it could have resolved its concerns under this ground. The earlier provision by the charity of substantial (albeit un-translated) evidence to the Respondent demonstrates the willingness of the charity to be transparent on these issues, which contrasts with the Respondent's misplaced allegation that it had failed to address the risk of a perception that funds sent to Sri Lanka were being misappropriated by the LTTE.
- 6.74 The Tribunal also found that the Respondent's officers' "one size fits all" approach to the funding and monitoring requirements required of the charity was unhelpful in this case. The Sri Lankan organisations supported by the charity (caring for the victims and orphans of the conflict) were deprived of funds for a number of months as a result. The Tribunal concludes that, in acting in a manner which prevented the charity sending funds to these organisations, the Respondent took insufficient account of the difficult situation in which the Sri Lankan organisations were then operating; of the existing regulatory framework for charities in Sri Lanka; of the value of the informal links the trustees had developed with the organisations (such as visits from devotees and supporters) in addition to their written procedures; and of the risk that the Respondent's requirements might create a disproportionate administrative burden on both the charity and on the recipient organisations, to the detriment of both.
- 6.75 If there had remained any legitimate regulatory concerns following a proper examination of the evidence originally provided to it, the Tribunal concludes that it would have been appropriate for the Respondent to work with the charity to improve its processes before considering exercising its regulatory powers. As it was, the Respondent exercised its regulatory powers without considering the evidence with which it had been provided.

- 6.76 The Respondent also invited the Tribunal to conclude that the Appellant's dominance of the charity had resulted in it adopting inadequate procedures in relation to its overseas grants. The Tribunal notes that the arrangements for overseas funding were substantially operated by others within the charity rather than the Appellant in any event, but that the Respondent was unaware of this because it did not contact the charity's administrator as it was invited to do. The Tribunal also notes that the Respondent eventually issued a direction under s.19A of the Act, some two years after removing the Appellant, in order finally to achieve the administrative framework it required of the charity and lift the freezing orders. This suggests that the removal of the Appellant had little effect in relation to this ground.
- 6.77 In all the circumstances, the Tribunal is not satisfied that the Appellant's conduct in relation to this ground constituted misconduct or mismanagement in the administration of the charity.

#### **Ground D: The Attempted acquisition of EA and the EA litigation**

- 6.78 The original grounds for removal of the Appellant referred to his having placed "*the proper use of Charity assets at risk through...the Charity's participation in various litigation*" but did not refer specifically to the misconduct or mismanagement alleged in relation to Sivayogam's attempted acquisition of an organisation called Eelapatheswarar Aalyayam ("EA").
- 6.79 This matter was not raised in the formal direction to answer questions sent to the Appellant in October 2007 [R2/735]. The Respondent had not, therefore, given the Appellant a full opportunity to comment on the evidence on which it relied before including such evidence in the grounds for the Appellant's removal from office. The Tribunal notes that the last time the EA issue had been discussed with the Appellant by the Respondent was in October 2006, some 18 months prior to his removal.
- 6.80 The Tribunal heard that EA is a Temple in Wembley, London. Its trustees signed a document in February 2005, purporting to transfer its assets and liabilities (including the lease of the Temple premises) to the charity. The trustees of the charity also signed a document consenting to the transfer of assets and liabilities and in early March 2005 the charity took over the running of the EA Temple. Later that month, the landlords of the Temple premises excluded the charity by changing the locks and the charity obtained a temporary injunction requiring the landlord to let it back in. Two of the EA trustees filed witness statements for the final hearing of that matter, alleging that their agreement to transfer the EA assets to the charity had been obtained under duress whilst they were held captive by the LTTE in Sri Lanka. The witness statements alleged that the Appellant was complicit in the detention; the Appellant denied this. At a hearing in April 2005, when both sides were legally represented, the charity was unsuccessful in its application for the injunction to continue and Mr Justice Tugendhat awarded costs against the

charity of nearly £19,000 [R1/60]<sup>15</sup>. The total amount paid out of the charity's funds in relation to this litigation was over £27,000. The Tribunal had the benefit of reading the judgement. It notes that the Judge made no findings in relation to the allegations of duress [R7/1551]. The judgement noted that the documents signed were said to have been preparatory to subsequent documentation effecting a formal transfer of assets, however he also did not make a finding of fact on that issue.

- 6.81 The Facts and Matters Document asserted that the Appellant was “*primarily responsible for the steps taken by the charity in connection with the acquisition of the assets of EA and in connection with the EA litigation*”. The Tribunal notes that this allegation is closely tied to Ground A, alleging inappropriate dominance by the Appellant of the charity's affairs. The basis of this conclusion by the Respondent seems to derive principally from comments made by the Appellant to the Respondent's officers at a meeting in January 2006 and subsequent correspondence. The Appellant also admitted to the Respondent that he had been contacted by telephone at the Temple by someone he believed to be speaking on behalf of the LTTE. He had been asked to confirm that the charity was willing to take over EA, which he had. In correspondence with the Respondent, the Appellant had explained that there was a dispute between two groups of individuals about the right to run the EA Temple, and that he had been asked to assist at short notice in resolving the dispute by agreeing to the charity taking the EA Temple over in order to ensure that the Temple was run in accordance with the appropriate religious principles.
- 6.82 The Respondent relied upon the fact that the Appellant had said the charity did not take legal advice in connection with the transfer. The Tribunal notes that, in a letter written by the Appellant dated 1 March 2006 [R1/23], the Appellant had stated that the charity had not taken professional advice regarding the proposal to take over EA because “*the matter appeared very simple and straightforward, particularly when the transfer was to be done legally...*” This tends to support the explanation also apparently given to Tugendhat J, that the charity regarded the documents signed as preliminary to a further legal process. In any event, the Respondent was then silent for many months on this issue, before it was resurrected in March 2008 as a ground for removal. The Respondent asserted in the Facts and Matters Document that the trustees' decision to agree to the EA takeover, and their failure to take legal advice in connection with it, plus their decision to commence the litigation (i.e. the application for an injunction) all constituted misconduct and mismanagement in the administration of the charity and that the Appellant was either responsible for it, or privy to it, or contributed to it or facilitated it, thereby causing loss to the charity.
- 6.83 It was not at all clear to the Tribunal exactly what role the charity's solicitors played in the takeover arrangements. Whilst it appears that no written advice was received by the charity in advance of it signing the documents in February

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<sup>15</sup> Although the charity is unincorporated, the proceedings were brought and orders made in the name of the charity itself.

2005, a solicitor was clearly involved, because the documents which were signed have a solicitor's stamp on them. The Tribunal notes that the Appellant had referred in correspondence to oral advice obtained by the charity's then-solicitor (the Appellant refers in his 16 October 2006 letter [R1/194] to advice received from "the council" although the Tribunal suspects this was in fact advice from "counsel"). The Appellant also says in that letter that that he has recently spoken to the solicitor, who would be happy to answer any further questions from the Respondent directly. It appears that no further questions were in fact asked. It is of course surprising that there appears to have been no prior "due diligence" exercise to identify the assets and liabilities of EA, no consideration of the position of any EA employees (such as the statutory consultation process required by TUPE), and no attempt to seek the landlord's consent to the assignment of the lease. This may have been because it was anticipated that these steps would follow later, but the Tribunal has insufficient information on which to form a view on this point. It is undoubtedly the case that, had the documents signed in February 2005 been effective in law, it could have led to a situation whereby the charity acquired substantial legal liabilities. As it was, the enterprise caused the charity to acquire a not inconsiderable liability for costs.

- 6.84 The charity instituted an investigation into the unsuccessful legal proceedings by its own "ombudsmen," which investigation exonerated the Appellant from blame. The Respondent then advised the trustees to take legal advice as to whether they should seek restitution of the £27,000 from the Appellant personally, however the advice received (that there was no reasonable prospect of success in a restitution claim) was given by the same firm of solicitors which had been involved in advising the charity during the litigation. Although the Respondent pointed out to the trustees that it was inappropriate for them to have taken advice from the same firm (due to the potential conflict of interest), neither the charity nor the Respondent's officers appear to have pursued the issue thereafter. The Facts and Matters Document refers to the alleged misconduct of the trustees in failing to obtain independent professional advice on the restitution issue, however as the Appellant had by then been suspended, it is difficult to see how he could be held responsible for this.
- 6.85 As stated above, the Appellant himself told the Respondent that he had been contacted directly by the LTTE about the transfer. The Appellant's admission is contained in a letter dated 1 March 2006 [R1/23] in which he explained that the LTTE often tries to resolve disputes within the Sri Lankan Tamil community and that he regarded its role in this matter as that of a "facilitator". The Tribunal heard no independent evidence of the Appellant's dealings with the LTTE in relation to this issue, so the only evidence consists of his own admission.

### **The Tribunal's findings on Ground D:**

#### **(i) The EA Transfer Documents**

- 6.86 In relation to the transfer documents, the Tribunal does not conclude that just because there was no written advice in advance of the signature of the

documents in February 2005, that it follows no legal advice was received at all. The Tribunal notes the solicitor's stamp on the documents and the absence of further inquiry on that point by the Respondent. It also notes that the letter from the Appellant suggests that the legal requirements would be attended to later on in the process.

6.87 In closing, the Respondent's counsel invited the Tribunal to infer that the Appellant himself had drafted the documents signed by all parties in February 2005. This was not an allegation which had been set out in the Facts and Matters Document. Counsel relied on an alleged similarity between the format of the EA documents and other documents drafted by the Appellant. The Tribunal had heard no evidence to support this view and accordingly rejects such a conclusion.

6.88 The relevant questions for the Respondent in relation to this issue may have been whether such advice as the charity received on signing the documents (in view of the appearance of the solicitor's stamp) had been adequate in the circumstances and/or whether any such advice was in fact followed by the charity trustees, however the Respondent does not seem to have considered these issues. Notwithstanding the absence of adequate investigation by the Respondent, the Tribunal concludes that the trustees' initial decision to go ahead with a precipitous takeover of EA, without written legal advice at the initial stage (as admitted by the Appellant) did constitute misconduct and mismanagement in the administration of the charity, because they did not satisfy their duty of care in relation to the charity by considering (and taking appropriate advice on) the possible liabilities involved for the charity before agreeing to the transaction.

#### (ii) The EA Litigation

6.89 The Tribunal is concerned that the extent to which the failure of the litigation was the personal responsibility of the Appellant or that of his solicitors does not seem to have been fully explored by the Respondent in its investigation. In relation to the application for the injunction, the Appellant's October 2006 letter appeared to refer to counsel's advice and the Appellant specifically invited the Respondent's officer to speak to the solicitor, which she did not. It is not therefore possible for the Tribunal to conclude, on the basis of evidence, that any conduct by the Appellant during the currency of those proceedings constituted misconduct or mismanagement in the administration of the charity.

6.90 The Respondent's counsel accepted in closing that the Respondent had not followed up the matter of the restitution of the charity's costs as assiduously as it might have done. The Tribunal notes that the Respondent had a legitimate area of concern here, regarding the award of costs against the charity in the EA litigation and whether its trustees ought to reimburse the charity for that loss; however the Respondent failed to investigate this issue by speaking to relevant third parties and it also failed to appraise the Appellant sufficiently of its concerns at the relevant time, so as to allow him to provide it with any explanation. In the circumstances, the Tribunal concludes that there is no evidence of misconduct or mismanagement by the Appellant in relation to

either the conduct of the litigation, the award of costs against the charity, or the failure to take adequate steps to investigate the possibility of a restitution claim.

6.91 The Facts and Matters Document alleges misconduct and mismanagement by the trustees as a whole in relation to this ground, but asserts that the Appellant was either responsible for it or party to it. The Tribunal finds that the Appellant played a key role in the decision to go ahead with the EA takeover and the litigation. However, the Tribunal concludes that this was for the variety of reasons explored above under ground A and does not find that there was inappropriate dominance of the issue by the Appellant.

(iii) The Appellant's contact with the LTTE

6.92 With regard to the admission by the Appellant that he was contacted directly by the LTTE, the Tribunal concludes that it was most unwise of the Appellant to involve the charity in this issue at the behest of the LTTE. However, the Tribunal also notes that the contact from the LTTE was apparently unsolicited by the Appellant (so that it should not be viewed as a "link" with a proscribed organisation in breach of the regulatory guidance); that he himself volunteered the fact that he had received such contact to the Respondent; and that the Respondent did not suggest that this course of conduct had been repeated between 2005 and 2008 or would be repeated in future. The Tribunal does not therefore find that the Appellant's conduct in this regard constituted misconduct or mismanagement in the administration of the charity.

6.93 Having concluded that there was misconduct and mismanagement in relation to the original decision to take over EA, the Tribunal went on to consider whether it had been necessary or desirable for the Respondent to remove the Appellant for the purpose of protecting the property of the charity. The Tribunal finds that in 2008, nearly three years after the decision in relation to the EA takeover, it was not necessary or desirable for the Respondent to remove the Appellant from office in order to protect the charity's property in relation to this ground. This issue is considered further under paragraph 7 below.

### **Ground E: The Sakooni Sweets Litigation**

6.94 The original grounds for removal of the Appellant referred to his having placed "*the proper use of Charity assets at risk through...the Charity's participation in various litigation*".

6.95 The Facts and Matters Document explained that this litigation concerned the charity's alleged consent to alterations to the ground floor entrance to its premises in Tooting and subsequent dispute about the nature of the alterations between it, the ground floor lessee and the landlord. Prior to the commencement of the litigation in 2000, the charity's then solicitor obtained counsel's opinion concerning its proposed action for trespass. There was then a change of solicitors, who apparently did not take counsel's advice again until 2007, by which time the charity's own costs had spiralled to over £90,000.

(The Tribunal understands that the original firm of solicitors in fact re-paid some of the charity's costs after the Appellant complained to the Law Society about their failure to progress the matter). In 2007, counsel estimated that the charity, if successful (of which there were "reasonable to good" prospects) might be awarded damages of £30,000. The charity successfully defended a strike-out claim in January 2007 and thereafter commenced negotiations for settlement with the Defendants, however the suspension of the Appellant apparently caused these to cease and the charity was ultimately unsuccessful at trial. The Tribunal has had the benefit of reading Mr Recorder Hearn's judgement [R10/2954]. The claimants in this action were the Appellant and others on behalf of the charity. The judge ordered costs (later assessed at £116,500) against the Appellant (and another) personally, giving him liberty to apply for a further order that the charity should pay the costs. The Respondent, following correspondence with the charity's then solicitor, declined to make an order authorising the repayment of the trustees from the charity's funds [R10/3017] and the Tribunal understands that there has therefore been no further application to the court. The Tribunal also heard evidence that the charity's own legal costs in this matter are in the region of £90,000 (although the solicitor's final bill has been disputed by the charity) [TB1/552].

- 6.96 The Facts and Matters Document asserted that, prior to his suspension, the Appellant was "*primarily responsible for the steps taken by the charity in connection with the Sakooni Sweets litigation*". The evidence relied on for this assertion was a telephone conversation between Louise Edwards and the Appellant on 29 March 2007, in which she had recorded that he had given her the "impression" that he thought only he could deal with the litigation. The Respondent also relied upon the Appellant's own comments at a meeting on 16 March 2007 [R1/355] in which he had stated that the charity relied on intuition in its decision to litigate this matter, knowing that God wanted them to win. As noted in relation to Ground B, the minutes of this meeting were substantially disputed by the Appellant. The contemporaneous notes record a far longer conversation than the written minutes (in which the role of intuition played a smaller part) and noted that the Appellant agreed to send the Respondent further details of the reasons why the charity was pursuing the litigation. It is clear from both sets of notes, however, that the charity had had a dispute with its former solicitor over the conduct of this matter, and that its current solicitor had been in correspondence with the Respondent regarding advice under s.29 of the Act. It is also recorded in both sets of notes that the Appellant had acted against counsel's advice in defending the strike out claim, but had been vindicated. The Respondent also relied in respect of this ground on Louise Edward's note of a telephone conversation with another trustee on 16 April 2007 (shortly after the Appellant's suspension), in which she recorded him as having said that he was not aware of the details of the litigation [R1/399]. On 29 March 2007 she had a similar conversation with this trustee, but recorded him as saying that he had only recently been appointed and that these proceedings pre-dated his involvement with the charity [R1/383]. The Tribunal also saw trustee meeting minutes dated 6 January 2007 [A9/3076] where the Sakooni Sweets litigation was discussed

and the other trustees were encouraged by the Appellant to attend the forthcoming hearing.

- 6.97 The Facts and Matter document asserted that the actions of the trustees in commencing and conducting the Sakooni Sweets litigation amounted to misconduct and mismanagement because the legal costs were disproportionate to the value of the claim; it further pointed to the charity's failure to obtain advice on merits and quantum for a period of seven years as constituting misconduct and mismanagement. The Respondent's counsel opened his case on this ground on the basis that, although the Appellant could not be held responsible for events which followed his suspension, he had set the charity on the path which ultimately led to the case being lost. The Tribunal notes that at the time of his suspension the Appellant was engaged in settlement negotiations with the other parties in this matter. The solicitors acting for the charity contacted the Respondent to ask how were they to receive instructions following his suspension [R1/401] and it appears that once the other side heard of the Appellant's suspension, they withdrew from negotiations so that the matter went to trial.
- 6.98 As noted above, the Tribunal had the benefit of the reading Mr Recorder Hearn's judgement (which was not available to the Respondent's Board when it took its decision to remove the Appellant). The Respondent's counsel invited the Tribunal to draw inferences from the judgement about the Appellant's conduct, however for the reasons set out in paragraph 3.14 above, the Tribunal declined to do so.

#### **The Tribunal's Findings on Ground E:**

- 6.99 It is clear from the documents the Tribunal saw that two successive firms of solicitors had acted for the charity in this matter. There was correspondence between the solicitors and the Respondent's legal department [A2/436] and with Louise Edwards [R1/401]. As with the EA litigation, the Tribunal finds that the Respondent did not fully investigate whether there was a problem with the adequacy of the advice received by the charity or a failure by the charity to follow it. This was, in the Tribunal's view, a key issue which inevitably affected the question of whether the Appellant's conduct amounted to misconduct and mismanagement in the administration of the charity.
- 6.100 It seems to the Tribunal that the fact that the charity's costs were allowed to spiral out of control, and for the value of the claim to have been lost sight of, suggests that either the solicitors failed to give the charity appropriate costs information at relevant intervals or that the trustees had failed to heed such advice. The Tribunal is unable, in the absence of relevant evidence, to conclude that either scenario is proven on the balance of probabilities. The Tribunal does conclude, however, that the charity trustees were in breach of their duty of care to the charity in failing to take steps to settle the matter once they were advised that the likely value of the claim exceeded their own costs by such a margin. This key phase of the litigation occurred after the Respondent had suspended the Appellant and accordingly the Tribunal does not find that it constitutes misconduct or mismanagement by the Appellant.

- 6.101 The Tribunal finds that the Appellant played a key role in dealing with the litigation on behalf of the charity, however the Tribunal does not have evidence upon which it may properly conclude that the Appellant was inappropriately dominant up to the point of his suspension. The Tribunal has already made findings about the reasons for the Appellant's influential role under Ground A above.
- 6.102 The Tribunal notes with some concern the comments of the Appellant that intuition played a role in the decision to litigate and also his statement that he had relied on his belief that God wanted the charity to win. These comments, combined with his admission that he had acted against the advice of his barrister in relation to defending the striking out action, leads the Tribunal to conclude that the Appellant's conduct did amount to misconduct and mismanagement in relation to this ground because it demonstrated that he was personally prepared to take risks in relation to the litigation that a reasonable charity trustee would not have taken.
- 6.103 Having concluded that there was misconduct and mismanagement in relation to the Sakooni Sweets litigation, the Tribunal went on to consider whether it had been necessary or desirable for the Respondent to remove the Appellant for the purpose of protecting the property of the charity. The Tribunal finds that it was not necessary or desirable for the Respondent to remove the Appellant from office in relation to this ground in March 2008. The proceedings were at an advanced stage at that point and, arguably, the removal of the Appellant frustrated the settlement negotiations in which he was then involved. It does not seem to the Tribunal that, without forming a conclusion as to whether the Appellant or the solicitors had brought about the situation which the charity was then in, the Respondent could reasonably have concluded that it was necessary or desirable to remove the Appellant for the purpose of protecting the property of the charity. It also does not seem to the Tribunal that the charity's assets were then at risk, given that the Appellant (rather than the charity) was personally a party to the proceedings and that he had no comfort in relation to costs from the Respondent or the court. The Tribunal notes that the costs order was made against the Appellant personally and that the charity's funds may not now be used to reimburse him without a further order of the Respondent or the court.

#### **Ground F: Breach of Suspension**

- 6.104 The Facts and Matters Document stated that, having been suspended in March 2007, the Appellant subsequently breached the terms of the suspension order by sending e mails giving instructions to solicitors acting in the Sakooni Sweets litigation.
- 6.105 In opening, the Respondent's counsel described this ground as of marginal significance in the overall scheme of events.
- 6.106 The Tribunal notes that Louise Edwards sent an e mail to the Appellant on 18 April 2007 [R1/418] stating that she would take no further action on this point,

but that the issue was then resurrected in the reasons for the Appellant's removal and further relied upon in the Facts and Matters Document.

### **The Tribunal's Findings on Ground F:**

- 6.107 It is undoubtedly the case, in the Tribunal's view, that acting in the administration of a charity whilst suspended from doing so constitutes misconduct and mismanagement in the administration of the charity. However, the Tribunal notes that Appellant was at the relevant time heavily involved in negotiations to try to avert the Sakooni Sweets litigation being lost; his own solicitors were in correspondence with the Respondent because they disagreed with the Respondent's advice as to the extent to which the Appellant could continue to be involved in that litigation, and the Appellant desisted from instructing his solicitors or playing any part in the settlement negotiations when clearly advised to do so.
- 6.108 Having found that the Appellant's conduct in relation to this ground constituted misconduct and mismanagement, the Tribunal went on to consider whether it was necessary or desirable for the Respondent to remove the Appellant for the purpose of protecting the property of the charity on this ground. The Tribunal concludes that it was not, as the Appellant had desisted when clearly instructed to do so and it was not suggested that he had repeated this conduct during the year of his suspension.

### **Ground G: The Finances of the Charity**

- 6.109 The original grounds for removal refer to the Appellant "*placing the proper use of Charity assets at risk through... inadequate internal financial controls...*".
- 6.110 This ground was the subject of significant concessions by the Respondent at the hearing of the appeal. It no longer relied upon the Facts and Matters Document paragraphs 68 and 69.3 or 71-2. It also no longer relied upon certain aspects of Louise Edward's witness statement, namely paragraphs 119.1, 119.3, 119.4, 119.5, 122 – 6.
- 6.111 This meant that the grounds related to alleged breaches of the Charities Accounting SORP concerning (a) the charity's failure to account for donations for specific projects as restricted funds and (b) the suggestion that there were improper arrangements whereby the Appellant had loaned funds to the charity but failed to account for these as related party transactions, were no longer relied upon as grounds for removal at the hearing.
- 6.112 The continuing grounds relied upon were that the charity relied, to an inappropriate degree, upon short-term loans from supporters. Furthermore that there were inappropriate contractual arrangements in relation to some loans (for example, the repayments being due to third parties rather than to the lender) which could render the charity vulnerable to financial abuse. The

Respondent also relied upon the alleged inappropriateness of the charity's cash-based internal financial systems.

- 6.113 At the hearing, counsel for the Appellant drew the Tribunal's attention to the fact that the Respondent had sent its own forensic accountant, Sophie Bell, to the charity's premises some six months earlier, but that the resulting report had never been disclosed to the Appellant. Louise Edwards told the Tribunal that this was because the report had not been completed (due to pressure of other work), however she accepted that she had obtained some facts and figures from Sophie Bell in order to put them into her own witness statement for the Tribunal. Counsel for the Appellant understandably complained about this situation, as his client had therefore not been given the opportunity to prepare his case in relation to the data apparently available to Louise Edwards but not disclosed to him by the Respondent. In the circumstances (quite properly) the Respondent's counsel indicated that he would not rely on those aspects of Louise Edward's statement which were based on this undisclosed information.
- 6.114 Subsequently, a report signed by Sophie Bell and dated 10 July 2009 was presented to the Tribunal by the Appellant's counsel [A10/3334]. The Tribunal was told that it had not in fact been disclosed by the Respondent but obtained by some other (obscure) means, however the Respondent's counsel confirmed that the authenticity of the document produced to the Tribunal was not in dispute. Kenneth Dibble told the Tribunal he did not know how the report came to be in the Appellant's possession.
- 6.115 The Respondent had originally raised concerns about large amounts of cash being handled within the charity and that cash donations were apparently used for the charity's expenses without being banked. There was no suggestion that the funds donated to the charity in cash ever went astray. Sophie Bell's report found that there had been substantial improvements in the charity's cash handling procedures and she recommended that the trustees continued to review the arrangements on a regular basis. The charity had explained to the Respondent that it had had to pay the Temple priests in cash because the priests had been unable, for a period, to open bank accounts in the UK. Once this problem was resolved, the level of cash transactions within the charity was appropriately reduced.
- 6.116 The Respondent had also raised concerns about the charity's apparent over-dependence upon interest-free loans from its supporters. This concern was based in part upon the acceptance by the charity of loans, the terms of which did not accord with the charity's published policy. The other concern was whether this was a sound financial strategy for the achievement of the charity's goals. The Sophie Bell's report dealt with this issue by recommending that the trustees review their procedures, taking into account a list of specific concerns. Sophie Bell's report also gave advice to the trustees on strengthening the charity's procedures for authenticating expenses claims; accounting for restricted funds; and SORP compliance. She asked the trustees to undertake a review of their systems and to consider the guidance she had

given them. She said the Respondent would monitor their progress in October 2009.

### **The Tribunal's Findings on Ground G:**

6.117 The Tribunal would have particularly welcomed the opportunity to hear from the Appellant as to the financial model which allowed for the charity's dependence on short-term, interest-free loans, however it was not given this opportunity in view of the Appellant's decision not to give oral evidence. The Tribunal can well understand why this particular funding model is of concern to the Respondent.

6.118 However, it appears to the Tribunal that these issues could have been resolved by appropriate discussions with the charity trustees and the issuing of guidance at an earlier stage. The Tribunal concludes that the internal financial systems of the charity were not so poor as to constitute evidence of misconduct or mismanagement in the administration of the charity by the Appellant.

### **Ground H: General Matters:**

6.119 The Respondent's counsel drew the Tribunal's attention to the discretionary nature of its powers. As set out at paragraph 5.4 above:

“(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 the Table”.*

6.120 He invited the Tribunal to exercise its discretion in favour of leaving the removal order in place because (i) the Appellant had indicated his intention to retire (so it would not be in the interests of the charity to restore him to office if he did not intend to exercise it); (ii) that the Appellant was in a position of conflict of interest regarding the Sakooni Sweets litigation costs and it would not be in the interests of the charity for the Tribunal to restore him to trusteeship in those circumstances; (iii) the Appellant's status as the charity's founder and spiritual leader was undisturbed by the Respondent's order so there was no imperative for the Tribunal to restore him to office for those reasons. As noted at paragraph 6.3 above, he also invited the Tribunal to consider the Appellant's failure to give oral evidence when considering the issue of remedy.

6.121 The Tribunal received a letter from the charity trustees dated 18 August 2009 [A10/3341] in which they said they would welcome the Appellant's reinstatement as trustee. They said they would consider it “*a privilege to work along with him*” and that “*the priests, the congregation and the Hindu community too shall be happy to learn that justice has been done*”.

## **The Tribunal's findings on Ground H:**

- 6.122 The Tribunal accepts that it has discretion whether to allow or dismiss the appeal and further that if the Appellant's appeal is successful, then its power to award certain remedies is discretionary.
- 6.123 In respect of the submissions at paragraph 6.120 above, the Tribunal takes the view that, (i) notwithstanding his stated intention to retire, the Appellant is entitled to be vindicated and to have his reputation restored if the Tribunal finds that the grounds for removal are not proven to the relevant standard. In relation to (ii) the Tribunal repeats its observations at paragraph 6.103 above, that the charity's assets are not currently at risk. The Appellant, even if restored to the office of trustee, would need to manage the conflict of interest arising from any attempt to meet the costs order out of the charity's own funds. The Tribunal takes the view that the Respondent's order under s.26 of the Act would be required to permit this, in view of the legal disability which prevents him benefiting from the charity in this way. In relation to (iii) the Tribunal observes that it would not, in any event, be concerned to restore the Appellant to office for the purpose of permitting his religious role. In the circumstances of this case, the Tribunal does not consider that the Appellant's failure to give evidence to the Tribunal is relevant to the exercise of its discretion as to a remedy.

## **7. Outstanding issues**

- 7.1 For the reasons set out above, the Tribunal allows the Appellant's appeal and now makes the Order at Annexe A, quashing the Respondent's Order.
- 7.2 Rule 10 (1) (c) provides that the Tribunal may make an order in respect of costs where the Charity Commission is the Respondent and a decision, direction or order of the Charity Commission is the subject of the proceedings, and if the Tribunal considers that the decision direction or order was unreasonable. The Tribunal may make such an order on its own initiative. The Tribunal has indicated at section 6 above the respects in which it considers that its jurisdiction to award costs against the respondent is engaged.
- 7.3 The Tribunal notes that it has also heard evidence in relation to some additional issues which may be relevant to the exercise of its costs jurisdiction. These are:
- (i) The question of whether the Respondent's decision was a proportionate exercise of its powers. The Tribunal notes that Louise Edwards accepted that removing a trustee was an unusual step and that the Appellant's counsel alleged that the Respondent's actions were disproportionate and constituted harassment of the Appellant;
  - (ii) The question of the reasonableness of the Respondent's actions during its dealings with the Appellant and, in particular, its alleged breaches of the Appellant's article 8 rights; the alleged breach of his rights under the Data

Protection Act; the failure to consider the risk of persecution of the Appellant and his associates in Sri Lanka by communicating information to the SLHC;

- (iii) The apparent inconsistency of the Respondent's approach to the Appellant as opposed to others who had alleged links to the LTTE. During the course of the hearing it became apparent that, despite its "zero tolerance" approach, the Respondent had, after it had removed the Appellant, registered a charity with a trustee who had already admitted to the Respondent that he had had certain recent dealings with the LTTE. The Respondent's Head of Legal Compliance, James Kilby, attended to explain this to the Tribunal, accepting that there had been a failure of the Respondent's procedures for cross referencing details of individual trustees. He told the Tribunal that the matter would be further investigated by him. This issue raised for the Tribunal the question of whether the Respondent had been even-handed towards the Appellant in dealing with the complaints about him whilst allowing the registration of another charity with apparently stronger links to the LTTE.

- 7.5 The Tribunal takes the view that all these concerns are sufficient to engage the Tribunal's costs jurisdiction referred to above. It invites the parties to make written representations as to (i) the appropriate exercise of its power to award costs and (ii) the appropriate basis for any such assessment, in accordance with the attached order. The Tribunal invites the Respondent specifically to make the representations required by rule 10 (5).

## **8. Right to Appeal**

- 8.1 The Tribunal is required by rule 38(2) (c) to notify the parties of any right of appeal against this decision and the time within which, and manner in which, such right of appeal may be exercised.
- 8.2 The right to appeal against this decision now consists of the right to apply to the Upper Tribunal rather than the High Court, by virtue of schedule 1 paragraph 10 of the Transfer of Functions of the Charity Tribunal Order 2009.
- 8.3 Rule 42 provides that a person seeking permission to appeal must make a written application to the Tribunal for permission to appeal, so that it is received no later than 28 days after the receipt of the Tribunal's written decision. Such an application must identify the alleged error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for exercising this right are available on the Tribunal's website [www.charity.tribunals.gov.uk](http://www.charity.tribunals.gov.uk).
- 8.4 The Tribunal hereby extends the time for applying for permission to appeal (relying on rule 5 (3)(a) ) so that the relevant written decision for the purposes of any application for permission to appeal will be the Tribunal's decision on the exercise of its costs jurisdiction, to be published following the receipt of the written submissions referred to at paragraph 7.5 above.

Signed:

Alison McKenna,  
Principal Judge, First-tier Tribunal (Charity)

Stephen Claus  
Tribunal Judge

Susan Elizabeth  
Tribunal Member

Dated: 13 October 2009