



**First-tier Tribunal  
(General Regulatory Chamber)  
Charity**

**Appeal Reference: CA/2019/0014 V  
NCN: [2022] UKFTT 00331 (GRC)**

**Heard at a remote hearing (by CVP)  
On 3 & 4 November 2020**

**Before**

**JUDGE J HOLBROOK**

**TRIBUNAL MEMBER H CARTER-SHAW**

**TRIBUNAL MEMBER S REYNOLDS**

**Between**

**DR ZAKIR ABDUL-KARIM NAIK**

Appellant

**and**

**THE CHARITY COMMISSION FOR ENGLAND AND WALES**

Respondent

**DECISION AND REASONS**

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DECISION

**The appeal is allowed in part: “a period of seven and a half years” is substituted for “a period of 15 years” in paragraph 2 of the Disqualification Order dated 26 April 2019.**

**REASONS**

**Introduction**

1. Dr Zakir Abdul-Karim Naik appeals against an order of the Charity Commission by which he was disqualified from being a charity trustee for 15 years. That order (“the Disqualification Order”) is dated 26 April 2019 and was made under section 181A of the Charities Act 2011 (“the 2011 Act”). It disqualified Dr Naik from being a charity trustee and/or trustee for a charity in relation to any or all charities generally, whether registered with the Charity Commission or not. It also disqualified Dr Naik from holding any office or employment with senior management functions in any such charity.

2. The Disqualification Order is expressed to take effect when, on an appeal such as this one, it is finally determined that the Order was properly made.

3. Dr Naik appeals against the Disqualification Order on the ground that it was not lawfully made. He also appeals against the extent of the Order and its duration.

4. The Tribunal’s power to determine this appeal arises from section 319(5) of the 2011 Act and from the relevant entries in the table in Schedule 6 to that Act. In determining the appeal, the Tribunal must consider afresh the Charity Commission’s decision to make the Disqualification Order. In doing so, the Tribunal may take into account evidence which was not available to the Commission. If it allows the appeal, the Tribunal may:

- quash the Disqualification Order in whole or in part and (if appropriate) remit the matter to the Charity Commission;
- substitute for all or part of the Order any other order which could have been made by the Commission;
- add to the Order anything which could have been contained in an order made by the Commission.

5. The appeal was heard remotely (by means of HMCTS’ CVP video hearings service) on 3 and 4 November 2020. Dr Naik attended the hearing by video-link from Malaysia and he was represented by Mr J Fowles of counsel. The Charity Commission

was represented by Mr J Dixey of counsel. An agreed hearing bundle was provided, which included written submissions and a substantial amount of supporting documentary evidence and authorities. One witness statement was also provided, although no oral evidence was given during the hearing. Instead, extensive oral submissions were made by both counsel, for whose assistance we are very grateful.

6. Judgment was reserved.

### **Factual background**

7. The basic facts which have given rise to these proceedings are not in dispute and may be summarised as follows.

8. Dr Naik is an Indian national living in Malaysia. He is a renowned international speaker and author of books on Islam and comparative religion. He has at all material times been a director and charity trustee of the charitable company known as Islamic Research Foundation International (“the Charity”). He is the founding chairman of the Charity and is currently one of its four directors. The Charity was established in 2007, primarily for religious and educational purposes and purposes concerned with the relief of poverty and distress, but also for such other charitable objects as its board of trustees may think fit. Dr Naik has never been a charity trustee of another English charity.

9. In 2010, the then Home Secretary directed that Dr Naik be excluded from the UK on the grounds that his presence would not be conducive to the public good. The Home Secretary took the view that Dr Naik had engaged in unacceptable behaviour, namely (in her view) making statements that attempt to justify terrorist activity and foster hatred. Dr Naik sought to challenge his exclusion in judicial review proceedings but this challenge was rejected by the High Court in 2010<sup>1</sup> and by the Court of Appeal in 2011<sup>2</sup>. On 11 February 2019, the Home Office confirmed that, as far it is concerned, Dr Naik remains excluded from the UK.

10. The statements relied on by the Home Secretary and subsequently considered by the Courts (all of which were made by Dr Naik on various dates between 2002 and 2007) are set out at Annex A to the Charity Commission’s final statement of reasons for the Disqualification Order. They are also set out in Annex A to the judgment of the Court of Appeal.

11. The Charity’s activities have included the raising and provision of funds for the Peace TV network, which was founded by Dr Naik in 2006 and which broadcasts religious television programmes from an Islamic perspective via an online streaming service from Dubai. The Peace TV network has a very extensive audience worldwide and was formerly regulated by Ofcom, until its UK broadcast licences were surrendered in 2018 and 2019. The Charity no longer provides it with funds.

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<sup>1</sup> *Naik v Secretary of State for the Home Department and another* [2010] EWHC 2825 (Admin).

<sup>2</sup> *R (on the application of Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546.

12. In 2012, Ofcom had concluded that Peace TV had broadcast two programmes featuring Q&A sessions with Dr Naik, in which he had made statements which were potentially offensive and unjustified in breach of r.2.3 (offence), Ofcom Broadcasting Code. Those statements are set out at Annex B to the Commission's final statement of reasons.

13. In September 2018, the Charity Commission notified Dr Naik of its intention to disqualify him as a charity trustee for a period of 10 years. A provisional statement of reasons for his proposed disqualification was provided to Dr Naik. Following the receipt of representations made on Dr Naik's behalf, the Commission then carried out a review of its decision. The review process included an oral interview with Dr Naik conducted by video-link in January 2019. On 26 April 2019, the Commission made the Disqualification Order, relying on a final statement of reasons. In so doing, the Commission increased the length of the disqualification period from 10 to 15 years.

14. On 22 July 2019, Ofcom concluded that during 2017 and 2018 the Peace TV network had broadcast four programmes which breached its Code. Two of those programmes featured Dr Naik, primarily in the role of answering questions put to him. One of the programmes was found to be in breach of r.2.3 (offence), and the other in breach of r.3.2 (hate speech) and 3.3 (abusive or derogatory treatment of a religious group), as well as r.2.3.

#### **Statutory criteria for making a disqualification order**

15. Section 181A of the 2011 Act came into force on 1 October 2016. It provides that the Charity Commission may by order disqualify a person from being a charity trustee or trustee for a charity, either in relation to all charities or in relation to such charities or classes of charity as may be specified or described in the order.

16. Section 181A (6) provides:

*The Commission may make an order disqualifying a person under this section only if it is satisfied that—*

- (a) one or more of the conditions listed in subsection (7) are met in relation to the person,*
- (b) the person is unfit to be a charity trustee or trustee for a charity (either generally or in relation to the charities or classes of charity specified or described in the order), and*
- (c) making the order is desirable in the public interest in order to protect public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order.*

17. The conditions listed in subsection (7) are lettered A to F. Conditions A and B concern cautions, and convictions outside the UK, for certain offences. Condition C concerns action taken by HM Revenue & Customs, and Conditions C and D concern misconduct or mismanagement in the administration of a charity. However, only Condition F is relevant in the present case. It is:

*F that any other past or continuing conduct by the person, whether or not in relation to a charity, is damaging or likely to be damaging to public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order.*

18. Provided that the statutory criteria set out in section 181A (6) of the 2011 Act are satisfied (and assuming that the procedural requirements in section 181C have been complied with), then a disqualification order may be made for a specified period not exceeding 15 years. The disqualification period must be proportionate (see section 181B (1) and (2)).

### **The Charity Commission's Explanatory Statement on the power to disqualify**

19. In December 2016, the Charity Commission published an explanatory statement on *The discretionary disqualification power: power to disqualify from being a trustee* ("the Explanatory Statement"). This sets out the Commission's approach when making decisions about the use of the power in section 181A of the 2011 Act. It focuses on the three statutory criteria in section 181A (6) and also explains how the Commission will approach making decisions about the disqualification period. Whilst the Charity Commission also has written operational guidance to assist its staff when use of the disqualification power is being considered, it is the Explanatory Statement which sets out the Commission's approach publicly and which guides its decision-making in this regard.

20. We consider some of the Explanatory Statement's provisions in more detail later in these reasons. However, we note that it contains the following statement of general principle:

*"In [making a disqualification order], the commission is acting to protect either all charities or classes of charities from being run by persons whose conduct shows that they are unfit to be trustees. A disqualification order will aim to protect trustees, employees and volunteers of charities as well as the beneficiaries, donors and the public.*

*The commission will exercise this power in furtherance of its statutory objectives, general functions and general duties. As with the use of all of its powers, the commission will have regard to its public law duties, the duties that may arise under the Equality Act 2010 and the Human Rights Act 1998. The commission is required to have regard to the principles of best regulatory practice – to be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed."*

21. The Explanatory Statement acknowledges that it is not possible to give an exhaustive list of the factors which will be relevant when considering whether to disqualify a person as a trustee. Each case must be considered on its merits and, if it is to make a disqualification order, the Commission needs to be satisfied on the facts that there are sufficiently serious and substantial grounds that make it necessary or desirable to act. The Explanatory Statement goes on to say that:

“... in broad terms the commission considers that this power is aimed at disqualification of persons from being a trustee when their conduct, whether in relation to a charity or more generally, is such that there is a public interest in making a disqualification order so as to protect public trust and confidence in charity. The power will aim to ensure that charities are protected from persons who are not fit to run a charity and who pose a risk of damage or loss to its activities, beneficiaries and public trust and confidence. Whilst providing protection, in some instances it may also serve as a deterrent for further or wider improper conduct in the sector.”

### **The Charity Commission’s reasoning in this case**

22. Upon review of its decision to make a disqualification order against Dr Naik, the Charity Commission acknowledged that the statements relied on by the Home Secretary “are now many years old”. Nevertheless, it considered them to be relevant as evidence of both Dr Naik’s past conduct and of the likelihood that he still holds views and/or expresses views which would be damaging or likely to be damaging to public trust and confidence in charities.

23. The Commission also noted that, despite the Home Secretary’s intervention in 2010 and the subsequent consideration of his case by the UK courts, Dr Naik had nevertheless come to the attention of Ofcom in 2012 for making the statements referred to a paragraph 12 above. In addition, it was noted that two of the statements relied upon by the Home Secretary also featured in a leaflet authored by Dr Naik. The leaflet (extracts from which were set out at Annex C to the final statement of reasons) was initially published in 2008, but had been reprinted several times, including in January 2016.

24. The Charity Commission concluded that these past statements of Dr Naik can be seen as justifying or glorifying terrorist violence and/or fostering hatred. The Commission was concerned that the statements were therefore at odds with at least some of the Charity’s objectives and that Dr Naik’s conduct fell short of what would be expected of a trustee or a senior manager in the wider charitable sector. The Commission was also unconvinced that Dr Naik had done enough to repudiate the statements he had previously made or to address their republication (see paragraph 23 above). Consequently, it concluded that his continued association with the Charity, or charities in general, would be damaging or likely to be damaging to public trust and confidence in charities generally. In the Commission’s view, Dr Naik’s status, prominence and influence only served to increase the risk of such damage occurring.

25. Whilst the Charity Commission accepted that there is no evidence that Dr Naik’s past conduct had in fact damaged public trust and confidence in charities, it concluded that Condition F was nevertheless satisfied on the facts of this case because of the likelihood that, if Dr Naik were to continue as a charity trustee, such damage would follow.

26. The Charity Commission also concluded that Dr Naik was unfit to be a charity trustee. It found that the conduct for which he had been excluded from the UK is likely to impact adversely on confidence or trust which the public, beneficiaries and donors have in him and in his ability to discharge his functions as a trustee, particularly given the damage to his personal credibility. Further, the Commission concluded that, given the nature and seriousness of the conduct in question, it was clearly desirable in the public interest that a disqualification order be made to protect public trust and confidence in charities generally.

27. The Charity Commission went on to conclude that the disqualification should apply in respect of charities generally because the relevant conduct, and the Commission's findings based on that conduct, were of general application and not related to a specific charity. Although the Commission had initially proposed to disqualify Dr Naik for 10 years, it ultimately decided that it was proportionate to disqualify him for the maximum possible period of 15 years. In coming to this view, the Commission noted the age of the statements relied upon. However, it also noted the seriousness of those statements, the fact that they were still accessible and that, in its view, Dr Naik had not taken sufficient steps to repudiate or to prevent the statements being used.

### **Grounds of appeal**

28. On behalf of Dr Naik it was submitted that none of the statutory criteria in section 181A (6) of the 2011 Act for making a disqualification order have been shown to be met on the facts of this case and that, consequently, the power to make a disqualification order against Dr Naik is not engaged. In particular, it was argued that:

- a) Condition F (in section 181A (7)) is not met because:
  - i) The "past or continuing conduct" referred to in Condition F must be conduct that has occurred or been continued after 1 October 2016 (the date on which section 181A of the 2011 Act came into force);
  - ii) The proper scope of Condition F is limited to conduct in the administration of a non-charitable institution whether in relation to a charity or otherwise, but none of the conduct relied on by the Charity Commission amounts to (mis)conduct or (mis)management in the administration of an institution;
  - iii) The above narrow construction of Condition F is in any case necessitated by a reading of section 181A in accordance with section 3 of the Human Rights Act 1998.
- b) The conduct relied upon by the Charity Commission is insufficient to justify a finding that Dr Naik is unfit to be a charity trustee.

- c) There is no basis for concluding that disqualifying Dr Naik from being a trustee is desirable in the public interest in order to protect public trust and confidence in charities.

29. It was also submitted that, even if the statutory criteria for making a disqualification order are met in the present circumstances:

- a) Any such order should not relate to charities generally, but could only be justified in relation to charities whose purposes include purposes falling within section 3(1)(b) - (c), (e) - (f), and/or (h) of the 2011 Act and/or, in relation to those purposes, purposes within section 3(1)(m)(ii) - (iii).
- b) A disqualification period of 15 years is disproportionate.

### **The Tribunal's approach**

30. As we have already explained, the function of the Tribunal in this appeal is to consider afresh the Charity Commission's decision to make the Disqualification Order. We are not required to undertake a reasonableness review of the Commission's decision-making. Instead, we must determine whether the statutory criteria are met for disqualifying Dr Naik from being a trustee. This is a question of mixed fact and law. If the statutory criteria are met, we must then decide whether, as a matter of discretion, a disqualification order should be made and, if so, on what terms and for how long.

31. In deciding whether and how to exercise the power to make a disqualification order, the Tribunal should stand in the shoes of the Charity Commission and take a fresh decision on the evidence before it, giving appropriate weight to the Commission's decision as the body tasked by Parliament with making such decisions. It is therefore appropriate for us to have particular regard to the Charity Commission's Explanatory Statement, being the clearest formulation of the policy guiding its decision-making in relation to the power to disqualify. If the Commission has applied its own policy in this case, the Tribunal should give weight to the assessment it has made of the conduct in question in reaching its own decision. Nevertheless, whilst the Tribunal should afford great respect (and thus special weight) to a decision reached by the Charity Commission in reliance upon its own policy, it must be mindful of the fact that it is conducting a rehearing, not a review: the Tribunal must use its own judgment and it can vary such a decision where it disagrees with it, despite having given it that special weight.

32. It is for the Charity Commission to demonstrate that the statutory criteria for disqualifying Dr Naik from being a trustee are met. Once it has done so, however, the burden of proof rests with Dr Naik (as the party seeking to disturb the status quo) to show that a disqualification order should not be made (or that it should be made on different terms and/or for a shorter period of time).



## Findings and conclusions

### What is the proper scope of Condition F?

33. The principal thrust of Dr Naik's case is that the evidence does not provide a proper basis for making a disqualification order against him. Whilst he accepts that the Charity Commission complied with the necessary procedural requirements for making the Disqualification Order, he does not accept that there was any lawful basis for making that Order in the first place. In particular, it was submitted on Dr Naik's behalf that, (for the reasons summarised at paragraph 28 above), as a matter of law Condition F in section 181A (7) of the 2011 Act is not met on the facts of this case.

34. Dealing first with the question of 'retrospectivity', we do not accept that only conduct that has occurred or been continued after 1 October 2016 may be taken into account for the purposes of Condition F. The wording of the condition is clear and unambiguous: it refers to "any other past or continuing conduct" [emphasis added] and we are unpersuaded that there is any legal or policy reason for qualifying its literal meaning. Moreover, whilst we find that conduct occurring prior to the coming into force of section 181A of the 2011 Act may be taken into account for the purposes of Condition F, this is so only if the conduct in question is presently damaging, or is likely to be damaging, to public trust and confidence in charities. As such, it is incorrect to characterise Condition F as having retrospective effect.

35. Nor are we persuaded by the argument that the proper scope of Condition F is limited to conduct in the administration of a non-charitable institution. Again, there is nothing about the wording of the statutory provision which requires such a narrow interpretation to be given to it: any conduct by the person in question may be taken into account if it is damaging or likely to be damaging to public trust and confidence in charities.

36. As far as human rights considerations are concerned, it is accepted that Dr Naik's rights under Article 8 (right to respect for private and family life) and Article 10 (freedom of expression) of the European Convention on Human Rights are engaged in the present circumstances. However, we do not accept that, by virtue of section 3 of the Human Rights Act 1998, it is necessary to read Condition F as being limited to conduct in the administration of a non-charitable institution. Section 3 of the 1998 Act requires that, so far as it is possible to do so, primary legislation must be read in a way which is compatible with Convention rights. The rights conferred by Articles 8 and 10 are qualified rights (as are those conferred by Articles 9 and 11): it is permissible for those rights to be interfered with or restricted if the interference or restriction is in accordance with, or prescribed by, law and is necessary in a democratic society for various purposes. A disqualification order made under section 181A of the 2011 Act, in reliance on Condition F, is plainly made in accordance with the law / prescribed by law and the Charity Commission is entitled to have regard to a wide range of conduct if that conduct is damaging or is likely to be damaging to public trust and confidence.

37. For these reasons, we find that all of the conduct relied upon by the Charity Commission in deciding to make the Disqualification Order is conduct falling within the scope of Condition F provided that it has the quality of being damaging, or of being likely to be damaging, to public trust and confidence in charities generally or in specific charities or classes of charity.

Is the conduct damaging or likely to be damaging for the purposes of Condition F?

38. Dr Naik's primary ground of appeal was that, as a matter of law, the conduct relied upon by the Charity Commission for the purposes of section 181A of the 2011 Act is outside the scope of Condition F. We have rejected that argument for the reasons already explained. Dr Naik did not seek to advance a positive case in rebuttal of the allegations made against him and did not put forward an alternative argument to the effect that his conduct is not damaging or likely to be damaging to public trust and confidence in charities. Nevertheless, for the reason stated in paragraph 32 above, it is necessary for the Tribunal to consider the question of damage or likely damage in order to determine whether the statutory criteria are met for disqualifying Dr Naik from being a trustee.

39. It is helpful at this point to summarise the conduct now under review: it comprises four things:

- a) The 11 statements made by Dr Naik between 2002 and 2007 which were relied upon by the Home Secretary in 2010 to exclude him from the UK and which were subsequently considered by the courts.
- b) Statements made by Dr Naik in the two programmes broadcast in 2012 by the Peace TV network which resulted in Ofcom finding, in the same year, that the Ofcom Broadcasting Code had been breached.
- c) Additional statements made by Dr Naik in later programmes broadcast by the Peace TV network which led to a further finding by Ofcom, in July 2019, that the Broadcasting Code had been breached.
- d) Dr Naik's failure to convince the Charity Commission that he has done enough to repudiate his previous statements or to address their republication.

40. The conduct referred to a paragraph 39(c) above did not form part of the Charity Commission's rationale for making the Disqualification Order (Ofcom did not make its findings about further breaches of its Broadcasting Code until after the Disqualification Order had been made). Nevertheless, the Tribunal is entitled to have regard to such conduct for the purposes of this appeal.

41. It should also be noted that, when it originally gave notice of its intention to disqualify Dr Naik from being a trustee, the Charity Commission relied also on allegations about certain other conduct in India which had resulted in action being taken against Dr Naik by the authorities there. However, on review of its decision, the Commission concluded that insufficient information was available in order safely to rely on these allegations. We agree. We also agree with the Commission's conclusion that a further allegation, that Dr Naik had failed to ensure that the Charity operated in accordance with its governing document, should not be taken into account for present purposes.

42. The conduct on which the Charity Commission primarily relied was the making of the statements referred to at paragraph 39(a) above. Although we have not reproduced those statements in these reasons (they are available at the sources referred to at paragraph 10 above), we have considered them carefully, together with the findings made about them by the Court of Appeal. We respectfully agree with the view expressed by Carnwarth LJ that some of Dr Naik's statements were gratuitously offensive and we obviously accept the Court's conclusion that the Home Secretary was entitled to exclude Dr Naik from the UK for breaching the Government's 'Unacceptable Behaviour Policy'. The Charity Commission's subsequent conclusion that these statements (together with those which were the subject of Ofcom's review in 2012) can be seen as justifying or glorifying terrorist violence and/or fostering hatred is a finding with which we would also agree.

43. Ofcom's review in 2012 focused on comments made by Dr Naik, whilst answering questions on Islamic theology in front of an audience on programmes broadcast by the Peace TV network, about whether or not apostates should be put to death and about individuals who criticise Islam. In its decision on whether the Broadcasting Code had been breached by virtue of these comments<sup>3</sup>, Ofcom stated:

"In Item 1, a scholar on Islam, Dr Naik, expressed his views on two interpretations of Qur'anic texts on how apostates from Islam should be treated. He set out both views and said he tended to "agree more" with the interpretation of Qur'anic texts which states that a Muslim who converts to another religion and who then propagates that religion "should be put to death", as opposed to being put to death simply for becoming a non-Muslim. In Ofcom's view, it is potentially offensive for any service to broadcast comments suggesting that it is acceptable to apply a "penalty" and kill any individual for renouncing their faith.

In Item 2, Dr Naik answered a question about individuals who criticise Islam. As part of his reply Dr Naik stated that, according to the Qur'an, the appropriate response against those who "wage war against Islam" is to execute them, chop off their limbs, or exile them. Dr Naik did not specify how he defined waging war against Islam. Ofcom noted that his reply was given in response to a question about individuals who criticise Islam. Ofcom considered that for an individual to state on air that it was acceptable to execute, chop off limbs or exile anyone who waged "war against Islam", where it was not specified what this phrase actually meant in practice, was potentially offensive."

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<sup>3</sup> Ofcom Broadcast Bulletin, Issue 218, 19 November 2012.

44. Ofcom found that the potential offence caused by these statements was not justified by the context and that the broadcaster did not apply generally accepted standards. Rule 2.3 of the Broadcasting Code had therefore been breached.

45. Ofcom's subsequent review, in 2019, found that there had been further breaches of the Broadcasting Code in later broadcasts<sup>4</sup>. Again, the breaches arose from comments made by Dr Naik. One of the programmes concerned, broadcast in 2017, was described by Ofcom as consisting of Dr Naik answering questions from an Islamic perspective on the interpretation of a variety of Christian and Islamic scriptures in front of an audience of hundreds of Muslim and non-Muslim people in Nigeria. In response to one question, Dr Naik said:

" The brother asked the question that in an Islamic state if somebody comes out of Islam can he be killed? Like I said in a normal country if a person sells the secrets of his country, can he be killed? Yes, he can be killed. But by whom, by the court of law of that country. Similarly, if the country has a trial, in the trial it is proven that the person has sold the secrets of the country, he can be put to death, he can do life imprisonment. Same thing in Islamic State, in an Islamic State where Islamic Shariah is followed, in an Islamic State if the Qazi takes the trial of the person, if he's caught and he is changing the religion and if it's proven, in an Islamic State only a Qazi can see to it, that if he has done treason, if he has done apostasy he can be put to death".

46. Ofcom found that the comments made in this programme breached its Broadcasting Code in several ways, as did comments made by Dr Naik in another programme in which he discussed the Islamic perspective on marriage (in particular, child marriage for girls).

47. It must be borne in mind that, in determining that the Home Secretary had been entitled to find that Dr Naik had breached the Unacceptable Behaviour Policy, the Court of Appeal was not required to consider whether Dr Naik's conduct was damaging or likely to be damaging to public trust and confidence in charities. Nor was this a factor which featured in Ofcom's review of the various statements broadcast by the Peace TV network. However, this question is obviously crucial when determining whether Condition F is satisfied.

48. The Charity Commission's Explanatory Statement contains helpful guidance on this question. It suggests that, in many situations (particularly where the conduct in question occurred in the context of charity), any damage or likely damage to public trust and confidence will be self-evident. In other cases, however, the damage or likely damage will need to be assessed by considering a number of factors, which will vary from case to case, depending on the conduct in issue. The Explanatory Statement offers the following as a non-exhaustive list of the considerations to which regard should be had:

- The seriousness of the conduct and circumstances in which it took place.

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<sup>4</sup> Ofcom's Broadcast and On Demand Bulletin, Issue 383, 22 July 2019.

- How long ago the conduct occurred.
- Whether the conduct occurred in the person's capacity or role in a charity or another fiduciary position.
- Whether the conduct would be considered misconduct or mismanagement in the administration of the charity (whether or not it occurred in the context of a charity) or put the property (including reputation) of a charity at undue risk.
- Whether the person is currently or likely to be a trustee or connected to a charity or charities.

49. The Explanatory Statement also suggests that "likely" to be damaging denotes more than just a hypothetical or remote possibility.

50. The Charity Commission accepts that, in Dr Naik's case, there is no evidence of actual damage to public trust and confidence having been caused by the conduct on which it relies as a basis for his disqualification. Nevertheless, it argues that there is a likelihood of such damage in the future manifesting itself in one or more of four ways:

- a) A lack of public confidence that Dr Naik will discharge his obligations as a trustee in the interests of the Charity.
- b) Dr Naik might take advantage of his position as a charity trustee for ulterior purposes.
- c) The public might be misled into thinking that, if it fails to act, the Charity Commission impliedly endorses Dr Naik's statements.
- d) Public trust and confidence in charities generally might be damaged if a trustee is allowed to misuse public assets, including a charity's name and registered status, as well as its tangible assets.

51. We do not consider that possible reputational damage to the Charity Commission – which, in any event, seems unlikely in the present circumstances – is the kind of 'damage' which Condition F contemplates. Nor are we persuaded that the expression of offensive or objectionable views by a person who happens to be a charity trustee necessarily poses a risk to public trust and confidence in charities. In our view, for such a risk to arise, there would need to be some connection between the views in question, or the manner in which they were expressed, and a particular charity or charities generally. In Dr Naik's case, we find that there is such a connection: the fact that the Charity has previously provided funding to the Peace TV network, being the platform, which has been used relatively recently for broadcasting statements made by Dr Naik which are offensive or otherwise unacceptable. Although we understand that the Charity does not currently fund the Peace TV network, the fact that Dr Naik

remains one of its trustees must, in our view, make it likely that public trust and confidence in the Charity, and in charities generally, will be damaged by the reasonable apprehension that the Charity's assets might again be used to fund or facilitate similar such broadcasts in the future.

52. In reaching this conclusion, we have balanced the fact that some of the statements made by Dr Naik were made many years ago against the undoubted seriousness of the risk their dissemination still poses, and against the fact that some of them are relatively recent (see paragraphs 45 and 46, for example). We have also taken account of the fact that Dr Naik appears consistently to have avoided opportunities to repudiate his previous statements: he was criticised for this by the Court of Appeal (Gross LJ describing the explanations proffered for some of Dr Naik's statements as "troubling"). Similarly, when interviewed by the Charity Commission in 2019, the Commission's reviewers were also troubled by the following comment by Dr Naik, which we agree is indicative of the fact that he does not disavow his previous statements:

"I have taken care that I should not give a chance for anyone to split hairs or take a negative view about my statements. So, as a policy, most of the statements I have not repeated in my talks."

53. Nevertheless, in relation to the republication of the leaflet referred to in paragraph 23 above, we have also taken account of Dr Naik's assertion that he had no control over such republication. In the absence of evidence to the contrary, we accept that assertion. Republication of the leaflet was only a small part of the conduct relied upon, however, and this finding does not detract from the concerns set out in the previous paragraph.

54. Overall, therefore, whilst we acknowledge that some of the conduct relied on happened many years ago, and none of it occurred in Dr Naik's capacity as a trustee, we are nevertheless satisfied that the circumstances in which it occurred, together with its seriousness, are such that it is likely to be damaging to public trust and confidence in charities generally. We are particularly concerned that the history of repeated conduct indicates a significant risk of further recurrences in the future. Accordingly, we find that Condition F is satisfied.

#### Is Dr Naik unfit to be a charity trustee?

55. The Charity Commission argue that the conduct which led to Dr Naik's exclusion from the UK is likely to impact adversely on the confidence which the public, beneficiaries and donors have in him and his ability to discharge his functions as a trustee, and that Dr Naik is therefore unfit to be a charity trustee or trustee for a charity generally. However, it is argued on Dr Naik's behalf that the evidence in this case does not justify a finding of unfitness: the conduct relied upon is largely historic and the expression of views, where this has not resulted in a criminal conviction, is not sufficient of itself to justify such a finding. The point is also made that there has been no finding of misconduct or mismanagement in the administration of the Charity -

indeed many of the statements in question pre-date Dr Naik's involvement with the Charity and none were made whilst acting in a fiduciary capacity.

56. The Charity Commission's Explanatory Statement says that there will normally be some causal link or connection between the identified conduct and its actual or likely impact on the person's ability to be a trustee. However, it also notes that the Commission needs to ensure that charities and other trustees are protected from those whose involvement with charity poses a risk to the charity, is damaging to the charity or to the sector, and that:

"Conduct falling within conditions A-F may make a person unfit to be a trustee even where that conduct does not call into question a person's honesty, integrity or competence. Such conduct may be otherwise sufficiently serious that it calls into question a person's fitness to be a trustee because it impacts or is likely to impact on public trust and confidence."

57. In our view, where a person's conduct is such that Condition F is satisfied, they are likely to be unfit to be a trustee generally. This is certainly our view on the facts of the present case: although the relevant conduct of Dr Naik was unconnected with the administration of the Charity, his continued involvement as a trustee presents a risk to public trust and confidence in the charity sector and this makes him unfit to be a trustee, whether in relation to the Charity or charities generally.

#### Is disqualifying Dr Naik from being a trustee desirable in the public interest?

58. In our view, it also follows that, where Condition F is met and the person is unfit to be a trustee, it is very likely that disqualifying that person from being a trustee will be desirable in the public interest in order to protect public trust and confidence in charities. This view is reflected in the Explanatory Statement, which states that the public interest test:

"... provides a filter for circumstances in which the disqualification would serve no useful purpose or is otherwise not justified on public interest grounds. The commission will take account of circumstances where it is not desirable in the public interest to make a disqualification order in the particular case, even if there are concerns about the person's fitness to be a trustee."

59. We have no doubt that it is desirable in the public interest to disqualify Dr Naik from being a trustee because of the likelihood that his continued status as a charity trustee will damage public trust and confidence in charities generally. In coming to this conclusion, we have taken account of the witness evidence of Mustasam Akhtar Abbasi (one of the Charity's other trustees). Mr Abbasi expresses the view that it is in the best interests of the Charity that Dr Naik remains a trustee. Mr Abbasi believes that, given Dr Naik's prominence and standing in the Muslim world, the Disqualification Order is likely to have a negative impact on the Charity's reputation, ability to raise funds, and to attract support. However, Mr Abbasi's view fails to recognise that the test which must be applied is not what is in the Charity's best interests, but whether it is desirable

in the public interest for a disqualification order to be made. We are not persuaded that, in reality, it is in the Charity's best interests for Dr Naik to remain as one of its trustees anyway, but his continuing support for the Charity need not depend on him retaining trustee status, of course. In any event, we are satisfied that the wider public interest considerations outweigh any benefit the Charity might gain by retaining Dr Naik's services as a trustee. Nor do we accept the contention that disqualifying Dr Naik from being a trustee would be likely to undermine the trust and confidence which members of the Muslim community have in the charity sector generally. The fact that Dr Naik is well-known and has a high profile adds weight to the case for disqualifying him from being a trustee on public interest grounds.

#### What should Dr Naik be disqualified from doing?

60. The findings we have set out above lead to the inexorable conclusion that a disqualification order should be made against Dr Naik under section 181A of the 2011 Act. We must therefore go on to determine the terms in which the order should be made – both as to the extent of the disqualification and as to its duration.

61. The essential feature of a disqualification order is that it disqualifies a person from being a charity trustee or trustee for a charity. However, subsections (3) and (5) of section 181A effectively give rise to a statutory presumption that the disqualified person should also be disqualified from holding an office or employment with senior management functions in the charity or charities to which the order relates. Dr Naik accepts that there is no reason to depart from this position in his case. What he does challenge, however, is the Charity Commission's contention that the Disqualification Order should be made in relation to all charities: he argues that the conduct giving rise to his disqualification does not affect his fitness to be a trustee of a charity whose purposes are not religious, political or educational, and that he should therefore be permitted to be a trustee of charities concerned with, for example, the relief of poverty or distress, or the advancement of health or animal welfare.

62. We do not agree that the extent of the Disqualification Order should be restricted in this way. The Charity Commission's Explanatory Statement makes the point that the decision about the appropriate extent of the order should be informed by considerations which have already been made in deciding whether the person is unfit to be a trustee and whether it is desirable in the public interest to disqualify them. The overarching consideration in this regard should be the protection of public trust and confidence in charities and, in this case, we agree with the Commission's assessment that the Disqualification Order should extend to charities generally given the nature of Dr Naik's relevant conduct.

#### What is the proportionate disqualification period?

63. Finally, we turn to the question of the Disqualification Order's duration. The Charity Commission submits that the appropriate disqualification period is 15 years. Dr Naik, on the other hand, argues that this would be disproportionate, particularly



given the historic nature of much of the conduct in question and the absence of evidence that it has caused actual damage to the Charity or to public trust and confidence in charities generally. It is therefore argued on behalf of Dr Naik that any disqualification should be for a shorter period.

64. The statutory regime for disqualifying trustees does not permit a disqualification order to have indefinite or permanent effect. Instead, section 181B of the 2011 Act provides that any disqualification order must be made for a specified period not exceeding 15 years. The disqualification period must also be proportionate.

65. The Charity Commission's Explanatory Statement sets out the approach which the Commission should take when deciding the appropriate length of a disqualification. It states that:

"... the commission will consider the seriousness of the conduct which gives rise to the disqualification and of the risk to and its impact on a charity or charities. To determine this, the commission will look at all relevant information received, the facts of each case that led to the criteria for disqualification being met and the consequences to the charity in question."

66. In doing so, the Commission should take account of a range of relevant factors, including: the gravity of the conduct; the nature and extent of the risk the person poses; their level of knowledge or culpability; the extent of any loss or damage; and any equalities or human rights considerations.

67. The Explanatory Statement goes on to say that:

"... the commission will use as a reference point 3 disqualification 'bands' as an aid to inform its decision on the length of disqualification. The bands are not provided for by statute and will be applied on a case by case basis."

68. The three disqualification bands are as follows:

- Upper (over 10 years and up to 15 years);
- Middle (5 - 10 years); and
- Lower (less than 5 years)

69. The Explanatory Statement says that the upper band will be reserved for particularly serious cases. The middle band will apply to serious cases which do not merit consideration in the upper band; and the lower band will apply where the Commission has decided that, whilst the circumstances are sufficiently serious to warrant the making of a disqualification order, a relatively short period of disqualification would be proportionate.

70. The Explanatory Statement does not explain in detail how the positioning within a given disqualification band should be decided, but it does go on to say that:

“When deciding on the proportionate period of disqualification, the commission may take account of (where relevant) the existence of any aggravating or mitigating features to determine whether the banding is correct and, if so, at what point in the band the period of disqualification should sit.”

71. In its final statement of reasons for making the Disqualification Order, the Charity Commission stated its view that a 15-year disqualification is appropriate given the seriousness of Dr Naik’s previous statements; the fact that, notwithstanding their age, the statements are still accessible; and that Dr Naik had not taken sufficient steps to repudiate or to prevent the statements being used. It also noted that Dr Naik was still excluded from the UK. Although a 15-year disqualification period obviously sits within the Explanatory Statement’s upper disqualification band, it is notable that the Commission made no reference in its final statement of reasons to its own banding system. Nor did the Commission explain why it was appropriate to increase the disqualification period from the 10 years which had previously been proposed in its notice of intent. We find that the Charity Commission fell into error in both these respects. In particular, it failed to have sufficient regard to its own policy on assessing the appropriate disqualification period.

72. In our judgment, the correct approach requires the application of a four-stage process: first, the appropriate disqualification band should be identified by reference to the guidance set out in the Explanatory Statement; second, a starting point should be selected within that band; third, consideration should be given to adjusting that figure (whether upwards or downwards) to take account of any aggravating or mitigating features; and, finally, the resulting disqualification period should be reviewed to ensure that it is proportionate in the circumstances.

73. We are satisfied that the present case is sufficiently serious that a disqualification for a period within the lower disqualification band would be inadequate (and would not be proportionate). However, it is necessary to decide whether the case is ‘particularly serious’ so as to merit a disqualification period within the upper band, rather than the middle band. The Explanatory Statement offers examples of factors which might indicate that a case is particularly serious: where the person poses a serious risk to charities or to public trust and confidence in them; where the person’s culpability is significant; where their conduct has caused significant loss or damage; or their conduct was fraudulent and dishonest or grossly negligent, or indicates their total incompetence to be a trustee. Further examples given of factors likely to justify disqualification for a period within the upper band are a reckless or grossly negligent disregard for charity law and conduct which meets multiple conditions in section 181A (7) of the 2011 Act. Cases which merit disqualification for a period falling within the middle band, on the other hand, whilst still being ‘serious’ and involving some culpability on the part of the person concerned, are likely to involve conduct which poses a moderate risk to public trust and confidence in charities; moderate loss or damage; a disregard for charity law and the duties of trustees; or other reckless, negligent or incompetent conduct.

74. In our judgment, the present case falls within the middle disqualification band. The conduct which has given rise to the Disqualification Order is undoubtedly serious and the wider risks it poses to society generally are very significant indeed (hence the Home Secretary's decision to exclude Dr Naik from the UK). However, for present purposes, we must focus solely upon charities and upon public trust and confidence in charities. Objectionable and offensive as Dr Naik's past conduct may have been, there is no evidence that it has caused actual loss or damage to charities and it is hard to describe the likely damage it will cause to public trust and confidence in charities generally as being more than moderate. Dr Naik has not acted in bad faith in relation to the Charity and it has not been suggested that he has breached his legal obligations as a charity trustee. Nor is this a case involving conduct which meets multiple conditions in section 181A (7).

75. Given that each disqualification band provides for a range of possible disqualification periods and given that the Explanatory Statement envisages adjustments being made within that range to take account of any aggravating or mitigating features, we consider that a sensible starting point in any particular case is the mid-point of the range. For cases falling within the middle band, this is a disqualification period of seven and a half years.

76. The Explanatory Statement also gives examples of factors which should be taken into account as aggravating or mitigating features. It says that aggravating features would tend to indicate either a higher level of culpability or a greater than usual degree of harm or risk caused by the conduct. Mitigating features, on the other hand, would tend to point in the opposite direction. In the present case, we consider the fact that Dr Naik's conduct was deliberate, and the fact that it was repeated over a significant period of time, to be aggravating features. However, we also consider the fact that Dr Naik has acted in good faith, and the fact that he has co-operated fully with the Charity Commission to be mitigating features. Overall, we consider that these competing aggravating and mitigating features effectively cancel each other out and thus do not require any adjustment to be made to the starting point mentioned above.

77. It therefore just remains for us to consider whether the resulting disqualification period of seven and a half years is proportionate in the circumstances of this case. Given everything we have said above about the seriousness of the conduct in question and about the likelihood of it damaging public trust and confidence in charities generally, we are satisfied that it is indeed proportionate.

## **Disposal**

78. For all of these reasons, we are satisfied that the statutory criteria are met for disqualifying Dr Naik from being a charity trustee or trustee for a charity and we agree with the Charity Commission's decision to make a disqualification order against him in respect of charities generally. However, we consider that the proportionate disqualification period in this case is seven and a half years, not 15 years.

79. To the limited extent necessary to give effect to this decision, therefore, Dr Naik's appeal is allowed and we substitute the words "a period of seven and a half years" for the words "a period of 15 years" in paragraph 2 of the Disqualification Order.

Signed J W HOLBROOK

Judge of the First-tier Tribunal  
Date: 4 December 2020