

**THE CHARITIES ACT (NORTHERN IRELAND) 2008
THE CHARITIES ACT (NORTHERN IRELAND) 2013
THE CHARITY TRIBUNAL RULES (NORTHERN IRELAND) 2010**

IN THE CHARITY TRIBUNAL FOR NORTHERN IRELAND

**IN THE MATTER OF A REFERENCE PURSUANT TO SCHEDULE 4 TO THE
CHARITIES ACT (NORTHERN IRELAND) 2008**

JOINDER DECISION NOTICE

1. This Decision is a Ruling concerning the application for joinder by seven other parties (six individuals and one charity) to a Reference pursuant to paragraph 2(b) to Schedule 4 of the Charities Act (Northern Ireland) 2008 ('the Act'), made to the Tribunal by the Attorney-General for Northern Ireland ('the Attorney-General') on 01/12/2021.

Background

2. The object of the Reference is to seek clarification by the Tribunal of one discrete issue of charity law in Northern Ireland, namely, was the Direction to produce documents issued on 03/05/2013 by a member of staff of the Charity Commission for Northern Ireland ('the Commission') to one Trevor McKee, one only of the six individuals who have applied to be joined to these proceedings along with the Attorney-General, a lawful direction pursuant to section 22(3) of the Act with which Mr. McKee was obliged to apply.
3. A Reference, by its very nature, should not be regarded as referring to a particular decision of the Commission directed to a particular person: a Reference must be a request, by the Attorney-General in this case, to seek clarification of a discrete area of charity law in Northern Ireland. Accordingly, the Reference, in this case, must be to request the Tribunal to clarify whether a direction issued by the Commission, whether by a member of staff of the Commission or by a committee of the Commission, lawfully constituted, to which power to make such direction was delegated, to any person, pursuant to section 22(3) of the Act, can be a lawful decision of the Commission and whether any person to whom such direction is issued is obliged to comply. Determination by the Tribunal of a Reference Reference is not intended to involve consideration of a specific decision or Order made by the Commission in any particular individual case.

4. On 07/04/2022, the Tribunal issued Initial Directions inviting any person who wished to be joined as a party to the Reference to apply to the Tribunal in writing by 5.00pm on 06/05/2022. The Directions set out the criteria to be joined as a party. Anyone who wished to make application for joinder was invited to state how they satisfied, in their view, those criteria. The Tribunal received seven applications for joinder (six from individuals and one from one of those individuals on behalf a particular charity, stated to be a corporate body, as Chairman of that body). Unfortunately, all of those applications were relatively sparse in setting out how each satisfied the said statutory criteria.
5. On 09/05/2022, the Tribunal issued further Directions inviting the Attorney-General to make submissions on certain issues including the question of whether any of the seven applicants for joinder could, or should, be considered a person 'affected' pursuant to paragraph 2(3) to Schedule 4 to the Act and whether the Tribunal should give permission for any of them to be joined as a party. The Attorney-General, on 08/06/2022, through her solicitor, furnished representations as directed by the Tribunal.
6. In his said representations the solicitor for the Attorney-General expressed the view that the term 'affected', although appearing in paragraph 2(3) to Schedule 4 of the Act, the statutory context of that term, where a Reference is involved, is different to the context where the scope of a right of appeal to the Tribunal is concerned, so that the approach taken by the Tribunal [which was the correct approach] in respect of the term 'affected' in *Fox* (Ref. NICT 9/19) and *Burke* (Ref. NICT 4/20) (the latter involving one of the seven applicants for joinder to the Reference proceedings), should *not* be taken by the Tribunal in determining whether any applicant for joinder to these Reference proceedings is a person 'affected' or 'likely to be so affected'. This is because, the Attorney-General submitted, Reference proceedings are more akin to public law proceedings concerning a challenge to the Commission's exercise of its regulatory functions, as opposed, as in *Fox* and *Burke*, respectively, an appeal on the basis of being a person 'affected' as the decision under appeal impinged upon the Appellant's private and financial interests. Accordingly, the Attorney-General submitted, those entitled to be joined to the determination of a reference, apart from the Attorney-General herself, who is automatically a party to the proceedings, are the Commission (which has declined to participate) and *any charity* likely to be 'affected' by the determination of the Reference by the Tribunal. The Attorney-General submitted that the Tribunal should interpret 'affected' in the context of Reference proceedings so as to allow the Tribunal to grant joinder permission only to those who, because they are 'affected', can assist the Tribunal in its task of determining the Reference. The Attorney-General confirmed that a reference by her on a question of the application of charity law in Northern Ireland, is not grounded in the factual position of a particular charity and where no identifiable legal rights are likely to be impacted.
7. The Attorney-General, in respect of the second question upon which she was requested to offer an opinion, namely, whether any of the applicants for joinder should be given permission to be joined to the determination of the Reference, submitted that she took no position on this question in respect of any of the seven applicants save that she had already communicated her view that the

Tribunal should grant permission to Trevor McKee, one of the applicants for joinder, as he was the subject of a direction under scrutiny in appeal proceedings (Ref. NICT 5/19), which appeal was ultimately withdrawn and formally dismissed in accordance with the Charity Tribunal Rules (Northern Ireland) 2010 ('the Rules'). This decision by Mr. McKee appears to have been informed by the prospect of the Attorney-General making the instant Reference. Nevertheless, it is difficult to understand why, in the context of making a Reference on a discrete question of the general application of charity law in Northern Ireland, any reference should be made to any individual.

Reference Proceedings

8. Reference proceedings are a novel legal process, probably unique to the charity law jurisdiction. Section 12(3)(a) and paragraph 2(3) to Schedule 4 to the Act applies to References made by the Attorney-General and provides that:

(3) The following shall be entitled to be parties to proceedings before the Tribunal on the reference –

(a) the Commission, and

(b) with the Tribunal's permission –

(i) the charity trustees of any charity which is likely to be affected by the Tribunal's decision on the reference,

(ii) any such charity which is a body corporate,

(iii) any other person who is likely to be so affected

9. The statutory intention behind the creation of a declaratory jurisdiction such as the Reference procedure can only have been, as in this case, to enable the Attorney-General to seek the ruling of the Tribunal on, essentially, a hypothetical question(s). Accordingly, the Act provides only for a limited class of those intimately involved in the subject matter of the Reference to be joined as parties – at the discretion of the Tribunal. Reference proceedings are not intended to be adversarial. Accordingly, a narrow approach to the question of who can be joined as a party is appropriate and proper. Since a Reference, by its nature, is concerned with hypothetical questions, potentially very large numbers of parties could be attracted if the joinder proceedings were to be construed widely with the risk of Reference proceedings becoming unwieldy. Unfortunately, there is no equivalent in the Rules to Rule 33(2) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 that apply only in the legal jurisdiction of England and Wales. That statutory Rule empowers the Tribunal in that jurisdiction to permit or request any person to attend and take part in a hearing to such extent as the Tribunal considers proper; or to make written submissions in relation to a particular issue. However, Rule 29 of the Rules (that is, the Rules governing the Charity Tribunal in Northern Ireland) give a wide discretion to the Tribunal in the conduct of proceedings before it: the Tribunal must, indeed, conduct all hearings before it in such manner as it considers most suitable to the clarification of the issues before it, and generally to the just, expeditious and economical determination of the proceedings. If appropriate Rule 29 of the Rules may provide an avenue for persons with a more remote interest in the subject-matter of the Reference who

have made application to be joined as a party(-ies) to participate should one or more of them not be given permission to be joined as parties.

10. The meaning to be given to the phrase *'likely to be affected'* is one of narrow interpretation, namely, that the Decision of the Tribunal on the Reference would be *'likely to affect'* in a direct way the constitutional arrangements or the permitted activities of charities (or any other person who considers they fall within paragraph 2(3) to Schedule 4 of the Act) by reference to the subject-matter of the Reference. The inclusion of the provision *'any other person'* in paragraph 2(3) to Schedule 4 to the Act is clearly to refer to a charity or, indeed, a non-charitable body (or any other person) also likely to experience a direct impact by the determination of the Reference by the Tribunal. The legislature cannot have intended that this provision be construed widely enough to include other persons with an indirect interest in proceedings of this nature.
11. Four of the applicants for joinder make their applications on the basis that they are, or were, trustees of a charity. Three of these are stated to be, or have been trustees of one particular charity, while one other applicant is stated to have been a trustee of another charity. The former charity in question is stated to be a corporate body (that presumably means it has its own legal personality) and application for joinder is made on its behalf by one of the individual applicants who, it is stated, is the Chairman of that charity. Each of those individual applicants for joinder. In addition, four of the individual applicants for joinder make application on the basis of having been the subject of a direction issued by the Commission. Five of the individual applicants for joinder do so on the basis of being a person affected, or likely to be affected by the determination by the Tribunal of the Reference. The charity that also makes application for joinder (being a different charity to that mentioned by the Attorney-General in the Reference) makes its application as a charity that is a corporate body on the basis that the Determination of the Reference by the Tribunal will be of relevance to 'current and future decisions' where a statutory inquiry is initiated by the Commission (presumably into that particular charity) and on the basis that the Determination will have a bearing on any reference (presumably made by this particular charity) to the Information Commissioner regarding the institution of a statutory inquiry by the Charity Commission for Northern Ireland. This last assertion was also made by three of the individual applicants for joinder.

Conclusion

12. Having regard to the submissions of the Attorney-General and the correct statutory interpretation to be applied to the seven applications for joinder, there is an argument for rejecting all of those applications (despite the Attorney-General specifically submitting that one of those applicants, Trevor McKee, but none of the other six, albeit declining to express any opinion on those applications be permitted to join the Reference proceedings) and, instead, however, to permit all seven applicants to provide written submissions to the Tribunal pursuant to Rule 29 of the Rules.

13. On a very fine balance, however, I am taking a somewhat broader view than that suggested by the Attorney-General, and have decided that those applicants for joinder who have been the subject of a direction issued by the Commission should be granted permission to be joined as parties to the determination of the Reference by the Tribunal. Those applicants, on the basis of the information provided in their respective applications by the due date pursuant to the Initial Directions issued by the Tribunal are:

- Trevor McKee
- Gregory Burke
- Thomas Stephen McAlister (in his individual capacity only)
- Robert Crawford
- Elaine Hampton

The applicant, William Allen, did not indicate in his application that he was the subject of a direction issued by the Commission, nor did the applicant charity that is a corporate body. However, both of those applicants are at liberty to provide written submissions to the Tribunal, if they wish, strictly confined to the subject-matter of the Reference in accordance with further directions to be issued by the Tribunal. Those further directions will also address those applicants who have now been joined as parties to the Determination by the Tribunal of the Reference.

Signed

A handwritten signature in black ink, appearing to read 'Damien J. McMahon', written in a cursive style.

Damien J. McMahon
President

Date: 5 September 2022