[2016] UKUT 0210 (TCC)
Appeal number UT/2015/0815 TCC

CHARITY – application to register as CIO – refused – appeal to FTT(GRC) –GRC Rules - whether appeal in time – no

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Appellant

and

STEPHEN HUNT

Respondent

Tribunal: **Mr Justice Warren**

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 18 April 2016

Iain Steele, counsel, instructed by the Litigation and Review Team of the Appellant, for the Appellant

The Respondent not appearing

DECISION

Introduction

1. The issue in this appeal is when the time-limit for the Respondent ("**Mr Hunt**") to bring an appeal from a decision of the Appellant ("**the Commission**") expires under the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended) ("**the GRC Rules**"). The decision in question was to refuse an application for a Charitable Incorporated Organisation ("**CIO")** to be constituted and registered under the Charities Act 2011. Reference below to section numbers are to the sections of that Act.

Charities Act 2011

2. CA 2011 created a new type of charitable organisation referred to in the 2011 Act as a CIO which is defined in section 204 as meaning a charitable incorporated organisation. Under section 203, a CIO is a body corporate; it must have a constitution, a principal office in England or Wales and one or more members. Under section 204, a CIO's constitution must, among other matters, make provision about membership and about the appointment of one or more persons who are to be charity trustees of the CIO (that is to say, the persons having the general control and management of the CIO: see section 177).
3. Section 207 makes provision for application for the constitution and registration of a CIO. Material for present purposes is sub-section (1):

> "(1) Any one or more persons ("the applicants") may apply to the Commission for a CIO to be constituted and for its registration as a charity."

4. The Commission must refuse an application under section 207 if it is not satisfied that the CIO would be a charity at the time it would be registered: see section 208(1). If the Commission grants an application under section 207, it must register the CIO to which the application relates as a charity in the register of charities: see section 209(1).
5. The effect of registration is dealt with in section 210:

"(1) Upon the registration of the CIO in the register of charities, it becomes by virtue of the registration a body corporate –

(a) whose constitution is that proposed in the application,

(b) whose name is that specified in the constitution, and

(c) whose first member is, or first members are, the applicants referred to in section 207.

(2) All property for the time being vested in the applicants (or, if more than one, any of them) on trust for the charitable purposes of the CIO (when incorporated) by virtue of this subsection becomes vested in the CIO upon its registration."

6. Provision is made in section 319 for appeals against specified decisions, directions and orders of the Commission. These are to be found in column 1 of Schedule 6. An appeal may be brought by any person specified in the corresponding entry in column 2. Included in column 1 and the corresponding entry in column 2 are:

Decision of the Commission under section 208 to refuse an application for the constitution of a CIO and its registration as a charity	(a) the persons who made the application, and (b) any other person who is or may be affected by the decision

The GRC Rules

7. The Rules in their original form were made in 2009, long before it was possible to create a CIO. The Rules apply to a wide range of subject matters and not only to charities cases. There is, however, a section of the GRC Rules which does apply exclusively to charities cases, namely Chapter 2 of Part 3, rules 25 to 31. The relevant rule in the present case is rule 26(1):

"An appellant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of appeal so that it is received –

(a) if the appellant was the subject of the decision to which the proceedings relate, within 42 days of the date on which notice of the decision was sent to the appellant; or

(b) if the appellant was not the subject of the decision to which the proceedings relate, within 42 days of the date on which the decision was published."

The Facts

8. The facts are simple:

a. On 17 February 2015, Mr Hunt and others made an application ("**the Application**") to the Commission for a CIO to be constituted and for its registration with the proposed name "Annuity Helpline". Mr Hunt was named as the contact for the application.

b. Mr Hunt, Mr Raymond Hunt and Mr Simon Morse were named as the trustees.

c. On 15 June 2015, the Commission informed Mr Hunt of its decision to refuse the Application. The basis of the decision was that the Commission was not satisfied that that the CIO would be a charity at the time it would be registered. On 18 June, Mr Hunt sought an internal review of that decision.

d. On 31 July 2015, the Commission decided to maintain its earlier decision (I refer to this decision on review as "**the Decision**"). On that day, the Commission informed Mr Hunt of the Decision by email and Mr Hunt replied confirming receipt and stating that he intended to appeal the Decision to the Tribunal.

e. On 4 August 2015, the Commission published a summary of the Decision on its website. Under the heading "Detail" within that summary appears this:

> "This decision was published on 4 August 2015 following a decision review.
>
> The commission was not able to register the organisation as it did not consider it established for exclusively charitable purposes."

f. On 15 September 2015, Mr Hunt submitted a Notice of appeal to the Tribunal.

g. On 18 September 2015, the Tribunal wrote to the parties stating that an appeal notice has "been received by the Tribunal within the required time limit".

h. On 21 September 2015, the Commission indicated to the Tribunal that it did not consider that Notice of appeal had been submitted within the 42 day time limit. Its position was that time started to run on 31 July when Mr Hunt received notice of the Decision. The time limit therefore expired on 11 September 2015 so that the Notice of appeal was out of time.

i. On 21 September 2015, the Tribunal directed that the parties make submissions on the issue of whether the Notice of appeal was out of time and, if so, whether time should be extended. Submissions were duly filed by Mr Hunt on 1 October 2015 and by the Commission in reply on 12 October 2015.

The decision of the Tribunal

9. The First-tier Tribunal ("**the F-tT**") (Judge Jonathan Holbrook – "**the Judge**") ruled (on the basis of the written submissions) that the Notice of appeal was in time. The Judge considered that the case fell within rule 26(1)(b) because, in his view, Mr Hunt was not the subject of the Decision. The Notice was therefore just in time, having reached the F-tT on the last day of the permitted period. In reaching his decision, he said this at [9]:

> "….The subject of [the Decision] was Annuity Helpline, the organisation to which the application for registration as a charity related. The sole focus of [the Decision] was the question of whether that organisation satisfied the statutory criteria for registration as charity. This is reflected (unsurprisingly) by the fact that the heading to [the Decision] is "Annuity Helpline". There is nothing in [the Decision] which relates to Mr Hunt personally."

10. In granting permission to appeal, the Judge noted that he had been under a misapprehension. In his original decision, he had thought that the Decision related to a refusal by the Commission to register an institution in the register of charities under section 30. By the time he came to deal with the application for permission to appeal, he correctly understood that the Decision related to a refusal under section 208 for a CIO to be constituted and registered. This, in his view, made no difference to his reasoning.

The Grounds of Appeal

11. The Commission's primary ground of appeal is that Mr Hunt was "the subject of the decision to which the proceedings relate" so as to fall within rule 26(1)(a). If that is wrong, the secondary ground of appeal is that the Decision was "published" for the purposes of rule 26(1)(b) on 31 July 2015 when the Commission sent, and Mr Hunt received, notice of the Decision.

The Commission's submissions

The primary Ground of Appeal – the subject of the decision

12. Mr Steele makes a broad submission which should inform the correct interpretation of rule 26(1). He submits that it is in the public interest that any decision of the Commission should be speedily determined: any person aggrieved by a decision of the Commission should bring his appeal promptly. As a general proposition, it finds strong support from what might be seen as an analogous context of applications for judicial review: see *O'Reilly v Mackman* [1983] 2 AC 237 (*per* Lord Diplock at p 284) and *Trim v North Dorset DC* [2010] EWCA Civ 1446, [2011] 1 WLR 1901 (*per* Carnwath LJ at [23]). A construction of rule 26(1) is to be preferred under which a person (such as Mr Hunt) who has actually been informed of a decision by the Commission should be obliged to commence any appeal which he is entitled to bring within a reasonable time; that reasonable time is the one laid down in rule 26(1)(a), namely 42 days from the date when the notice of the Decision was sent to him.

13. In the context of that broad submission, he submits that, if Mr Hunt does not fall within rule 26(1)(a), then, subject to the second Ground of Appeal, time would not start to run against him until 4 August 2015 when notice of the Decision was placed on the Commission's website. The need for such publication would lead to unsatisfactory consequences. In particular, the Commission publishes on its website only some of its decisions; many are not of any interest to the wider public and are not published. If publication on the website (or some other method of general dissemination) is a requirement for a case to fall within rule 26(1)(b), then there will be many cases where an appellant falls within neither of rules 26(1)(a) and (b) and is not subject, in practice, to any time limit at all.

14. Coming to Mr Steele's more specific submissions, he points out that, if an application is refused under section 208, the intended CIO never comes into existence in the first place. That is why the only potential appellants are those set out in the second column, that is to say the persons making the application and any persona affected by the decision (see the box in [6] above). On that basis, the Judge's decision deprives rule 26(1)(a) of any meaningful application or effect in the case of a refusal under section 208.

15. Mr Steele also points out that for many of the other appealable decisions listed in Schedule 6, the potential appellants include the charity itself "if a body corporate". This is a recognition that in many cases the charity will not be a body corporate with separate legal personality and that the individuals who are able to take action (for instance by bringing an appeal) are the charity trustees. In such cases, he submits, the result of the Judge's approach would be that the charity trustees are not treated as being "the subject of the decision", so that there will be no appellant in respect of whom the section 26(1)(a) time limit applies.

16. Accordingly, the phrase "the subject of the decision" must be interpreted in a way which gives meaningful application and effect to rule 26(1)(a). There must be an identifiable person who is a potential appellant (within Schedule 6) and whose time for filing an appeal commences on the date on which notice of a decision is sent to them. As part of that submission, it is said that this will generally refer to all of the potential appellants specified in Schedule 6 save only the residual category of "any other person who is or may be affected by the decision". The more generous time limit under rule 26(1)(b) is designed to cater for this residual class of persons who, without publication, might not know of the decision and the fact that a right to appeal had arisen. It was not intended to apply to a person who has been directly notified on the decision.

17. And so, in the present case, the reference to "the subject of the decision" refers to the persons who made the application for a CIO to be constituted and registered.

The secondary Ground of Appeal – publication

18. The correct analysis, according the Commission, is that where a decision is sent to a person who has applied to constitute and register a CIO, that decision is "published" so far as concerns that person when a copy of the decision is sent to them. In other words, rule 26(1)(b) is to be read in the sense that "was published" means "was published to the appellant". If those had been the express words of the rule, I would take no persuading that it included the sending of a copy of the decision (at least if the copy was actually received). But that is not what the rule says, and it would be one perfectly ordinary meaning of the words used to read them as referring to publication to the public in general (typically by inclusion on the Commission's website).

19. However, in the context of rule 26 as a whole (and on the hypothesis that the primary ground of appeal does not succeed), the effect of the Judge's approach is that where the Commission refuses an application to constitute a CIO and register it as a charity, the time limit for filing an appeal does not begin until the decision is published on the website (or in some other public way); and this is so notwithstanding that the appellant has actually been sent a copy of the decision. If this approach is correct in relation to CIOs it is correct in relation to a raft of other decisions. This is said to have two serious and unintended consequences:

    a. First, in cases where there is a charity in existence which is a potential appellant, there could be different time limits for the same person to make an appeal. For instance, the charity itself will be subject to rule 26(1)(a). But charity trustees, who are themselves potential appellants under Schedule 6, will be subject to the different time limit under rule 26(1)(b). It cannot be right that the charity trustees

– who themselves control the charity – can effectively take advantage of the longer time limit.

b. In some cases, the time for bringing an appeal would not start to run at all, even though the potential appellant has been notified of the decision. If the decision is one of the significant number that are not published on the website (or by any other public notification), time would never begin to run against a potential appellant who does not fall within rule 26(1)(a). It may be that this is not a practical issue in relation to the refusal of an application for the constitution and registration of a CIO since all such refusals may be published. But there are plenty of applications by bodies (both incorporated and unincorporated) to be registered as charities where the result of the application is not published on the website and where, on the Judge's approach, the potential appellant would not fall within rule 26(1)(a).

Discussion

20. Mr Hunt did not appear on this appeal and has made no representations in writing. During the hearing I challenged Mr Steele's submissions, I hope robustly but not unfairly, in order that such points as Mr Hunt might have made were fully aired. I have taken account of our interchanges in reaching my decision.

21. As I have already mentioned, the GRC Rules pre-date the Charities Act 2011. It is not at all surprising that the application of those Rules to a novel situation gives rise to some uncertainty. I have no doubt, however, that rule 26 should be construed, if this can be done without doing undue violence to its language, in such a way that an applicant for the constitution and registration of a CIO, who has been served with notice of a decision of the Commission refusing their application, must bring an appeal within 42 days of the notice. As a matter of principle, it cannot, in my judgment, be correct that such a person

can simply delay bringing an appeal and seek, subsequently, a further 42 days if and when the decision is placed on the Commission's website. The applicant is the person principally concerned with the application and the person principally concerned in proceeding with an appeal. It is self-evident, in my view, that a construction of rule 26(1) under which the 42 day time limit runs from the time when the applicant receives notice of the decision is to be preferred to one under which it runs from the date when, if at all, the decision is placed on the website.

22. There are two routes to achieving that result, each of which is a sensible and reasonable approach to the language of the rule and neither of which does violence to that language. These two routes reflect each of the two Grounds of Appeal. I have not found it easy to decide which is the preferable route, but in the end, I come down in favour of the route reflecting the primary Ground of Appeal. In other words, applicants making an application for the constitution and registration of CIO which meets with a decision by the Commission to refuse the application are "the subject of the decision".

23. In reaching that decision, I consider that it is important to note that the focus of section 26(1)(a) is on the appellant and not on the subject matter of the relevant decision. In the present case, for instance, the underlying issue is whether the objects of Annuity Helpline as set out in the Application are charitable; that issue might be described as the subject matter of the appeal. To identify the subject matter of the appeal is not, however, to identify who, if anyone, is the subject of the decision; and it is to that question that rule 26(1)(a) is directed.

24. On the one hand, a person who is "the subject of the decision" cannot, I recognise, include any person who is affected by the decision. On the other hand, a person does not have to be a person about whom a decision is made, for instance a charity trustee who is suspended pursuant to section 76. Thus it is clear, in my view, that a trustee (being a

charity trustee within the statutory definition) of an unincorporated charity which is removed from the register under section 34 is "the subject of" the decision to remove it. The trust is not a legal entity, although it is an "institution" for the purposes of the legislation: see the definition in section 9(3). A decision that the institution is not charitable is essentially a decision about the status of the trustees who can properly be regarded as the subject of the decision. Although this is less clear, I think that the charity trustees of a body corporate which is a charity would also be "the subject" of a decision to remove that charity from the register. Such a decision does not simply affect them but goes to the essence of their status as charity trustees and their powers and duties as charity trustees.

25. Similarly, where the trustees of a trust apply to register the trust as a charity (so that they are persons who are or claim to be the charity trustees of the institution for the purpose of the second entry in Schedule 6) but that application is refused, the trustees are "the subject of" the decision to refuse registration just as much as they are when an unincorporated charity is removed from the register. Also, in my view, the directors of a company are the "subject of" a decision to refuse registration of the company as a charity, those directors being persons who would be charity trustees if registration had taken place. Such a decision is again one which goes to the essence of their status as charity trustees and their powers and duties as charity trustees.

26. It is, unfortunately, not clear where the dividing line is to be drawn between a person who is merely affected by a decision and one who is the subject of the decision. However, drawing on the examples which I have given, I consider that the applicants for the constitution and registration of a CIO are properly to be regarded as the subject of a decision refusing their application. Their position is closely analogous to that of the directors of an existing body corporate which seeks registration. Those directors would,

if registration were effected, become charity trustees. If registration is refused, they would not become charity trustees, but they would be persons claiming to be the charity trustees of the institution for the purposes of the second entry in Schedule 6 to which I have just referred. The decision to refuse registration in the case of an intended CIO is central to the status of the applicants as potential members of the CIO. In the present case, it is also central to the position of Mr Hunt and his co-applicants as charity trustees since, under the constitution of the intended CIO, they would become the charity trustees upon its constitution and registration. Their position is closely analogous to that of the directors of an existing body corporate which seeks registration as a charity and who are thus persons who claim to be charity trustees of the institution.

27. In my judgment, therefore, the applicants for the constitution and registration of the CIO, Annuity Helpline, in the present case are persons who are "the subject of the decision" within rule 26(1)(a). Mr Hunt, as one of the applicants, is himself "the subject of the decision": no point is taken, at least, that if the applicants together are the subject of the decision, Mr Hunt by himself is not.

28. I would add that it may be, in relation to all decisions within Schedule 6, that there is some person who is "the subject of the decision": the structure of rule 26(1), it can be argued, is based on the premise that someone is, in all cases, the subject of the relevant decision. If an appellant is such a person, they fall within rule 26(1)(a); if not, they fall within rule 26(1)(b). That is a simple binary choice. If that is the correct approach, then clearly the applicants, including Mr Hunt on his own, fall within rule 26(1)(a) since the only candidates qualifying as a person "subject to the decision" are the applicants or any other person who is or may be affected by the Decision and the choice between (i) one of the applicants (Mr Hunt) and (ii) any other person who is or may be affected, is obvious.

29. I do not decide the point which therefore forms no part of my conclusion.

30. If my conclusion that Mr Hunt is "the subject of the decision" is wrong, then I consider that the decision was published, for the purposes of rule 26(1)(b), to Mr Hunt on 31 July 2015 when the email informing him of the decision was sent and received. Rule 26(1)(b) does not make any provision about how publication is to be effected. Clearly, it is intended to include publication on some sort of public forum, such as the Commission's website, but no doubt some other formal publication, such as advertisement in the Gazette and national newspapers, would be enough. It would be entirely inappropriate for the rule to provide, in all cases, that the decision must be published specifically to the appellant. The Commission could not be expected to know the identity of all persons with a right of appeal, a class which includes in a large number of cases "any other persons who is or may be affected by the [decision/order]"; publication on a public forum is enough.

31. It does not follow from that consideration, however, that publication on a public forum is the only way in which a decision may be published to a particular appellant. The purpose of rule 26(1)(b) is to provide a time limit within which an appellant who is not "the subject of the decision" must bring their appeal. There is no sensible reason why a person who has been expressly notified by the Commission of a decision is not or is not to be treated as a person to whom the decision has been published for the purposes of the rule. To adopt a construction which resulted in such a person being able to rely on a time limit running from the date of publication on some public forum would mean that time would never start to run at all in cases where the decision is not published in that way. It is no answer to that to say that it is open to the Commission to set time running by publishing the decision on a public forum. As already explained (see [19b] above), a significant number of decisions are not published by the Commission. The Commission is entitled to take the risk that there is some person who might be affected, of whom it has not thought, and thus to decide not to publish a decision; but if there is a person who has a right of

appeal and who might well appeal (such as the applicant in the case of a refusal to constitute and register a CIO), it must, in my view, be enough to set time running for express notice of the decision to be given to that person. To construe rule 26(1)(b) in a way which did not have that result would be wrong.

32. My conclusion, by one route or the other, is that Mr Hunt's Notice of appeal was out of time. I allow the Commission's appeal and set aside the F-tT's decision that the appeal was made in time. If his appeal is to proceed, he needs to be granted an extension of time.

Extension of time

33. The GRC Rules give power for the F-tT to extend time for complying with a time limit in those Rules: see rule 5(3)(a). The grant of an extension of time is, in effect, the grant of relief from sanctions; certainly, the same principles apply to the extension of time as apply to relief from sanctions. Notwithstanding that the overriding objective (see rule 2) has not been amended so as to be aligned with the overriding objective in the CPR, the Court of Appeal has decided that the approach of the Courts under the CPR to the extension of time limits is to be applied in the tribunals: see *BPP Holdings v HMRC* [2016] EWCA Civ 121. Accordingly, the stricter (*ie* stricter than the historical) approach shown in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 is the approach to be adopted.

34. Mr Steele submits that, having allowed the Commission's appeal, I can decide whether an extension of time should be granted, contending that I have the same power as that conferred on the F-tT by rule 5(3)(a). He relies on section 12(2)(b)(ii) and 12(4) Tribunals, Courts and Enforcement Act 2007. It is, perhaps, not clear that I do have that power since the decision of the F-tT which I have set aside is that the appeal was made in time. The Judge did not need to address whether an extension of time should be granted

and he did not in fact consider what he might have done had he decided that the appeal was out of time. Section 12(2)(a) provides that the Upper Tribunal, when it has found an error of law in the decision below, may (but need not) set aside the decision. In the present case, I will set aside the decision.

35. I must, under section 12(2)(b), now either remit the case to the F-tT with directions for its reconsideration or remake the decision. This is clearly a case where there is no more for the F-tT to do in relation to the preliminary point with which it was concerned (namely whether the appeal was in time). There is no purpose in remitting the decision on this point to the F-tT under section 12(2)(b)(i). Instead, I re-make the decision under section 12(2)(b)(ii) by holding that the appeal was out of time. Section 12(4) provides that in acting under section 12(2)(b)(ii), the Upper Tribunal may make any decision which the F-tT could make if the F-tT were re-making the decision so that I can clearly decide that the appeal was out of time.

36. It is not, however, clear to me that section 12(4) permits me to make a decision whether or not to grant an extension of time. If the matter were remitted to the F-tT for it to decide (as it must) that the appeal was in time, it could, at the same time, decide whether to grant an extension of time. But a decision concerning an extension of time is not a decision which the F-tT would be making in re-making the decision which it originally made, in which case, I have no power to deal with the extension of time.

37. I do not propose to resolve this particular point. Even if I do have power to deal with the question myself, I consider that it is more appropriate for the question of any extension to be dealt with by the F-tT on the basis of rather fuller material than I have been shown and, more importantly, in the light of its own procedures and philosophies with which the judges and members of the GRC will be more familiar than I am. A discretionary matter of this sort is best dealt with by those properly experienced.

Disposition

38. The Commission's appeal is allowed and the decision of the F-tT is set aside. Mr Hunt's Notice of appeal was filed out of time. Any request for an extension of time for bringing his appeal is to be dealt with by the F-tT.

Mr Justice Warren

Release date: 3 May 2016