

**CHARITY COMMISSION FOR ENGLAND AND WALES  
ENGLISH PEN**

**DECISION MADE ON 21 JULY 2008**

**APPLICATION FOR REGISTRATION OF ENGLISH PEN**

**Issues before the Commission**

- 1 The Commission considered an application for registration by English PEN, a company limited by guarantee and incorporated by Memorandum and Articles of Association on 17 March 2006 ("the Company"). If the Company is established as a charity it should be registered in the Central Register of Charities in accordance with section 3 (2) of the Charities Act 1993.

**Decision**

- 2 The Commission considered the case put to it by and on behalf of the Company, including submissions and supporting evidence. Having considered and reviewed the application and the relevant law the Commission concluded that the Company is established for exclusively charitable purposes and should be registered as a charity.
- 3 The Commission made the decision under the Commission's review procedures. The decision was taken by Dame Suzi Leather, Andrew Purkis and Simon Wethered as Members of the Commission's Board ("the Board Members") under delegated authority.

**Background to the Decision**

**The objects of the Company**

- 4 English PEN was established as a company with the following objects:
  1. *To promote the education of the public by encouraging the understanding appreciation and development of writing in any style or form.*
  2. *To promote the human rights (as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) of writers, authors, editors, publishers and other persons similarly engaged ("the Beneficiaries") throughout the world by all or any of the following means:*
    - 2.1 *Monitoring and seeking to prevent abuses of human rights of beneficiaries;*
    - 2.2 *Obtaining redress for Beneficiaries who are the victims of human rights abuse;*
    - 2.3 *Relieving need among the Beneficiaries who are the victims of human rights abuse;*
    - 2.4 *Research into human rights issues affecting the Beneficiaries;*
    - 2.5 *Educating the public about human rights;*

- 2.6 *Providing technical advice to government and others on human rights matters affecting the Beneficiaries;*
- 2.7 *Contributing to the sound administration of human rights law;*
- 2.8 *Commenting on proposed human rights legislation;*
- 2.9 *Raising awareness of human rights issues;*
- 2.10 *Promoting public support for human rights;*
- 2.11 *Promoting respect for human rights among individuals and corporations;*
- 2.12 *International advocacy of human rights;*
- 2.13 *Eliminating infringements of the prohibitions on torture, slavery, extradition killing, arbitrary detention and disappearance*

*3. To relieve poverty and distress among the dependents, family and/or household members of Beneficiaries*

### **Preamble to the Memorandum of Association of the Company**

5 The Memorandum of Association contains a Preamble as follows:

- A. *International PEN was founded in 1921 to promote literature and defend freedom of expression.*
- B. *The PEN Charter is part of the constitution of International PEN.*
- C. *All Members of English PEN agree to subscribe to the PEN Charter.*

The PEN Charter is set out in Article 1.14 of the Articles of Association.

### **The establishment of the Company**

- 6 The Company has been established to be the successor to an unincorporated non-charitable organisation of the same name. The intention in establishing the Company was for it to be a charity. The unincorporated organisation is not and has never been a charity.
- 7 The proposed activities of the Company as set out in the Business Plan outline four programmes of work – Writers in Public, Writers in Translation, Readers & Writers and Writers in Prison which reflect the activities of the unincorporated body. They include the following:
  - Writers in Public - Public events where writers discuss their work and issues affecting the production and consumption of literature — e.g. copyright, digital transmission of texts: free speech.
  - Writers in Translation - Grants to facilitate English translations of international literature that meets the standards of the Company and shares its values and promotion of translated literature events.
  - Readers and Writers - Visits by writers to schools and prisons, where socially excluded adults and children can encounter literature, and are inspired to communicate their own experiences in writing.
  - Writers in Prison - Promoting human rights of beneficiaries by a variety of activities to include:
    - raising awareness and educating the public about human rights issues;

- relieving the needs of beneficiaries by direct aid and provision of books;
- conducting research into human rights issues affecting beneficiaries;
- obtaining information to monitor and seek to prevent abuses through letter writing to beneficiaries, consultation and sending legal observers to trials;
- sending appeals to governments and campaigning to obtain redress for victims of abuse;
- participating in public debates, conferences and government consultation on human rights issues;
- advising ministers and officials on human rights matters affecting beneficiaries

### **The preliminary issues considered by the Board Members in their review of the decision**

- 8 Before considering whether the Company is a charity the Board Members considered three preliminary issues:
- The extent to which the Commission is able to look beyond the expressed objects
  - The extent to which the Commission is able to consider past activities
  - How public benefit is assessed in relation to the objects

### **The extent to which the Commission is able to look beyond the expressed objects**

- 9 The Board Members adopted the approach of the courts and followed by the Commission in applications for registration as a charity. The courts have held themselves to be entitled to look at the circumstances in which the organisation came into existence and the sphere in which it operated,<sup>1</sup> whether the wording of the governing document is ambiguous<sup>2</sup> or not.<sup>3</sup> This is more fully reflected in Part 4 of *“The Analysis of the law underpinning Charities and Public Benefit”*<sup>4</sup>.

### **The extent to which the Commission is able to consider past activities**

- 10 The Board Members considered it reasonable to take account of the background material relating to the unincorporated body of the same name and to include consideration of past activities. The reasons for this were:
- The Company will take over some of the assets and activities of the existing unincorporated body of the same name.
  - The Preamble in the Memorandum of Association states: *All Members of English PEN agree to subscribe to the PEN Charter* and it was not clear how this might impact upon the purposes and public benefit.
- 11 They noted that the courts have considered past activities. In *McGovern v Attorney-General*, the court considered the charitable status of Amnesty

<sup>1</sup> Incorporated Council of Law Reporting v Attorney-General [1972] Ch. 73 (Court of Appeal), Sachs J at p.91

<sup>2</sup> McGovern v Attorney General [1981] 3 All ER 493

<sup>3</sup> Southwood v Attorney-General [2000] WL 877698 (Court of Appeal (Civil Division)), Chadwick LJ

<sup>4</sup> Available on the Commission’s website

International Trust, and in doing so took into account the statute of a related unincorporated association. In *Southwood v Attorney-General*, the court considered a range of material, including a number of background and briefing papers which described the proposed activities and the purposes of the organisation.

- 12 The Board Members recognised that past activities are informative but they are not determinative of charitable status. They noted that, at the time of their consideration, no activities had been undertaken by the Company and the documents produced by the existing unincorporated body do not have the sanction of the directors of the Company.
- 13 The Board Members noted the assurances of the directors that the Company will be distinct from the existing unincorporated non-charitable body and that the Company will only further charitable purposes. The Board Members recognised that where there are no current activities of the Company, it is possible, in appropriate cases, to base decisions on an understanding of how an organisation will operate and on the basis of assurances given by the trustees of a charity. However, before accepting such assurances, they considered it appropriate to look at the activities of the unincorporated organisation and the relationship between the Company and the unincorporated organisation.

#### **How is public benefit assessed in relation to the objects?**

- 14 To be a charity, an organisation has to be established for charitable purposes only. A charitable purpose is one that falls within the descriptions of purposes in section 2 (2) of the Charities Act 2006 (“the 2006 Act”) and is for the public benefit s.2 (1) (b). Where any of the descriptions of purposes has a particular meaning under charity law, it retains the same meaning s. 2(5). The meaning of Public benefit, apart from the removal of the presumption in relation to some purposes, remains as it is currently understood by the law (s.3).
- 15 Section 3 (2) of the Charities Act 2006 provides that the public benefit requirement is to be satisfied in relation to “*any such purpose*”. In assessing public benefit, the public benefit related to each of the purposes must be considered. This reflects the approach taken in *McGovern v Attorney General*<sup>5</sup>.
- 16 The Board Members noted that the Company was established for three charitable purposes: the promotion of education; the promotion of human rights; and the relief of poverty. All these fall within the descriptions of charitable purposes in section 2(2) of the 2006 Act. They looked at each individual object in turn and considered whether it was for public benefit.

#### **To relieve poverty and distress among the dependents, family and/or household members of Beneficiaries (Object 3)**

##### **Activities**

- 17 The Company will relieve poverty and distress among the dependants and family of its beneficiaries by the provision of grants and practical support.

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<sup>5</sup> [1981] 3 All ER 493 at 509

### **Purpose**

18 The relief of poverty is a purpose falling within the descriptions of charitable purposes at section 2 (2) (a) of the 2006 Act. It may include alleviating social and economic circumstances caused by poverty. The provision of financial and practical support is capable of relieving poverty.

### **Public benefit**

19 Prior to the introduction of the Charities Act 2006, the law presumed charities for the relief of poverty to be for the public benefit. The 2006 Act requires that a purpose falling within section 2 (2) must be for public benefit to be a charitable purpose.

20 The beneficiaries of the Company are identified in its objects as “*writers, authors, editors, publishers and other persons similarly engaged throughout the world.*” The principle is that a beneficial class must be an “*appreciably important class of the community*”<sup>6</sup> and that any restrictions on who can benefit must be legitimate, proportionate, rational and justifiable given the nature of the organisation’s purposes<sup>7</sup>. The Board members accepted that given the aims of the Company, the restrictions were justifiable.

21 In conclusion, the Board members accepted this purpose of the Company is charitable.

### **To promote the education of the public by encouraging the understanding appreciation and development of writing in any style or form (Object 1)**

### **Activities**

22 The Company proposes to educate the public through the following activities:

- Wide ranging programme of public events where writers and non-writers discuss their work, issues affecting the production and consumption of literature and develop a shared understanding of literature (Writers in Public)
- Grants to facilitate translation of international literature. The works being selected through a steering committee of distinguished writers, translators and international literature specialists and exploring the themes of freedom of expression and human rights (Writers in Translation Programme)
- Visits by writers to schools and prisons so those who are socially excluded can encounter literature (Readers & Writers Programme)

### **Purpose**

23 The advancement of education is a purpose falling within the descriptions of charitable purposes at section 2 (2) (b) of the 2006 Act. The Board Members noted the law in relation to advancing education, which it has previously considered in its decision on The Millennium College (UK) Limited.<sup>8</sup> They also noted that promoting a specific point of view is not capable of advancing education in accordance with charity law but may be a means of furthering other charitable purposes<sup>9</sup>.

24 The Board Members considered the information before them and noted the directors’ assurances that none of the education is directed towards

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<sup>6</sup> *Verge v Somerville* [1924] AC 496, 499

<sup>7</sup> Analysis of the law underpinning *Charities and Public Benefit* Part 3.

<sup>8</sup> Available on the Commission’s website

<sup>9</sup> *Re Bushnell* [1975] 1 WLR 1596; *Re Hopkinson* [1949] 1 All ER 346

promoting particular views nor will it promote a narrow interpretation of human rights through its education activities. The Board Members were satisfied that the Company's activities were capable of advancing education as that purpose is understood in charity law.

### **Public Benefit**

- 25 The Company's activities are open to all and not restricted to its membership. The directors assert that they are concerned with the promotion of the literary education of the public and not the interests of writers. The Board Members were satisfied that the educational activities are not carried out through the membership or for the benefit of the membership.
- 26 In conclusion, the Board Members accepted this purpose of the Company is charitable.

### **To promote the human rights (as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) of writers, authors, editors, publishers and other persons similarly engaged ("the Beneficiaries") throughout the world (Object 2)**

### **Activities**

- 27 The Company undertakes a wide range of means to further the promotion of human rights as set out in Object 2. The activities in the Writers in Prison programme include:
- raising awareness and educating the public about human rights issues;
  - relieving the needs of beneficiaries by direct aid and provision of books;
  - conducting research into human rights issues affecting beneficiaries;
  - obtaining information to monitor and seek to prevent abuses through letter writing to beneficiaries, consultation and sending legal observers to trials;
  - sending appeals to governments and campaigning to obtain redress for victims of abuse;
  - participating in public debates, conferences and government consultation on human rights issues;
  - advising ministers and officials on human rights matters affecting beneficiaries

### **Purpose**

- 28 The advancement of human rights is a purpose falling within the descriptions of charitable purposes at section 2 (2) (h) of the 2006 Act. The Board Members concluded that the activities were all means that are capable of promoting human rights as that purpose is understood in charity law and endorsed the Commission's current guidance on this purpose.<sup>10</sup> The Writers in Prison programme encompasses all of these various means. However, the Board Members also noted that some of activities of this programme were aimed at changing the law, government policy or administrative decisions. Accordingly they needed to consider whether these activities amounted to a political purpose which would prevent the Company from being a charity, or whether they were ancillary to the promotion of human rights and activities a charity could carry out.

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<sup>10</sup> RR12 The Promotion of Human Rights

- 29 The Board Members looked at the individual elements of the human rights object and the activities undertaken in relation to each of the means to further that purpose, in order to determine if the Company is established for exclusively charitable purposes. It was recognised that some of the activities may overlap and there may not always be clear distinctions in the context of any particular issue or campaign undertaken by a human rights charity.

### **Public benefit**

#### **The beneficial class**

- 30 The objects define the beneficial class as “*writers, authors, editors, publishers and other persons similarly engaged throughout the world*”. The Board Members accepted that this class is particularly vulnerable to having the right to freedom of expression unlawfully interfered with.
- 31 The Commission’s guidance RR12 *The Promotion of Human Rights* recognises the benefit to the community in promoting human rights.<sup>11</sup> Where benefit is not to the public generally, it can be to a particular section of the public where restricting the benefit in that way is reasonable and relevant to the charitable purposes.
- 32 The Board Members concluded that the beneficiary class for the promotion of human rights is the public and that public benefit could be delivered by the protection of the rights of a smaller class who are vulnerable.

#### **The extent to which any political activities carried on by the Company may be ancillary to the promotion of human rights**

- 33 If an organisation has a political purpose, as this is understood in charity law, it cannot be a charity even if it has other purposes which are charitable purposes. In *McGovern v Attorney General* the court considered whether The Amnesty International Trust (“the Trust”) was a charity. The court held that a trust established for the relief of human suffering and distress would be capable of being charitable in nature but it would not be charitable if any of its main objects were of a political nature.<sup>12</sup> It held that trusts for the purpose of seeking to alter the laws of this or another country or persuading a government to alter its policies or administrative decisions were political in nature. The court decided that the expressed purpose of “*Attempting to secure the release of prisoners of conscience*” and the letter writing activities in furtherance of that purpose were inherently political and since the objects were not exclusively charitable, the Trust was not charitable. The court decided it would have no adequate means of judging whether a proposed change in the law would or would not be for the public benefit and for the court to do so would usurp the functions of the legislature.
- 34 The Board Members noted the principles set out in and the approach of the court in *McGovern v Attorney General* as follows

*“the mere fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable ... in any case where it is asserted that a trust is non-charitable on the grounds that it introduces non-charitable as well as*

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<sup>11</sup> RR12 paragraphs 10-12.

<sup>12</sup>[1981] 3 All ER 493 at 508

*charitable purposes, a distinction of critical importance has to be drawn between (a) the designated purposes of the trust, (b) the designated means of carrying out these purposes and the consequences of carrying them out... similarly, trust purposes of an otherwise charitable nature do not lose it merely because the trustees, by way of furtherance of such powers, have incidental powers to carry on activities which are not themselves charitable”*

*“the distinction is thus one between (a) those non-charitable activities authorised by the trust instrument which are merely subsidiary or incidental to a charitable purpose, and (b) those non-charitable activities so authorised which in themselves form part of the trust purpose.”<sup>13</sup>*

- 35 This approach has subsequently been upheld by the Court of Appeal in *Southwood v Attorney General* and *R v Radio Authority, ex parte Bull*<sup>14</sup>

- 36 The Commission's guidance in RR12 recognises that human rights charities engage in political activities. This confirms that international advocacy of human rights is a means of promoting human rights as it is understood in charity law and that this includes advocating the adoption of, and compliance with, international and regional codes of human rights. It is acknowledged that political campaigning to advocate the adoption of human rights legislation is open to a charity provided that it falls within the principles set out in relation to political activities (paragraphs 33-36 of RR12).

- 37 The Board Members noted that CC9 “*Speaking Out – Guidance on Campaigning and Political activity by Charities*”<sup>15</sup> confirms:

*Although organisations that are established to pursue political purposes cannot be charities, political activity may be carried out by charities, but only as a means of supporting their charitable purposes. For the same reason that a political purpose cannot be charitable, political activity can only support, or contribute to, the achievement of charitable purposes. This means that political activity cannot be the continuing and sole activity of the charity.*

- 38 The Board Members considered that in determining whether political activities are ancillary, whilst an analysis of the resources expended on such activities may be helpful, it is not on its own sufficient. To be an ancillary activity, the Board Members considered that the activity should be linked in some way to the activities the organisation was carrying out to further its purposes and its impact should be to support or facilitate or enable those activities.

- 39 The Board Members noted that some of the activities undertaken in the Writers in Prison programme are political in nature. The letter writing and

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<sup>13</sup> 1981] 3 All ER 493 at 511

<sup>14</sup> [1997] 2 All ER 561

<sup>15</sup> Available on the Commission's website



campaigning activities of the Company are similar in nature to the activities of the Trust, which were considered by the court in *McGovern v Attorney General*.

40 The Company produced evidence to show that its campaigns aimed at reversal of government decisions in calling for the release of prisoners and aimed at securing changes in law and policy are a small proportion of the Company's human rights activities. As a percentage of the overall human rights work, the estimated proportion of financial and voluntary resources dedicated to political activities is under twenty per cent. Other activities include: letter writing to beneficiaries and their dependants; sending legal observers to monitor trials; providing financial and other support; organising seminars on human rights issues; promoting public support for human rights and raising awareness of human rights issues.

41 The Board Members considered that there was potential to distinguish the Company from the particular facts of *McGovern v AG* as follows:

- The Company's objects have an express charitable purpose, the promotion of human rights. Whereas, the objects of The Amnesty International Trust included a specific purpose of "*attempting to secure the release of prisoners of conscience*", which was held to be inherently political. The political activities of the Company may be ancillary to the stated charitable purpose.
- The Company sets out a number of means to further the promotion of human rights within its objects and the Board Members noted that it engages in a range of activities to further that purpose. In *McGovern*, the court held that the main object of the purpose "*attempting to secure the release of prisoners of conscience*" was to procure the reversal of decisions of government and authorities in those countries where prisoners had been detained, whether or not in accordance with local law and this could not be regarded merely as one possible method of giving effect to that purpose. It was held to be a principal purpose and a political purpose.
- The court in *Mc Govern* found that the Trust attempted to secure the release of prisoners of conscience who are detained, with or without the sanction of the local law. However, the Company adopts an approach which is consistent with ancillary activities in furtherance of charitable purposes. The Company recognises individual states may have legitimate reasons for limiting the exercise of human rights.

42 The Board Members noted the following assurances given by the directors of the Company:

- They accept that some constraints on the right to freedom of speech and other rights are necessary and appropriate. They recognise that individual states may have legitimate reasons for limiting the exercise of some human rights. This was evidenced in the Company's Campaigns Criteria which will be published on its website.

- They will consider the following issues set out within the Campaigns Criteria before campaigning:
  - Whether the right has or will be curtailed; and
  - Whether the constraints can be justified in terms of Article 10.2 of the European Convention on Human Rights; and
  - Whether those constraints are necessary and proportionate.
- The Campaigns Criteria will form the basis of internal procedures to identify beneficiaries and determine an appropriate balance between the right to freedom of expression and other interests.
- The directors agreed to review any existing campaigns and assistance to beneficiaries against the Campaigns Criteria and, if necessary, modify appeals and letter writing campaigns.
- The website will be changed to ensure it is consistent with its charitable purposes, and that the Company has a separate identity from the unincorporated organisation.

## **Conclusion**

- 43 In conclusion, the Board Members were satisfied that the Campaigns Criteria demonstrate the link between the activities and the promotion of human rights for the public benefit. They accepted that this purpose of the Company is charitable and that any political activities carried out are ancillary to this charitable purpose.