Appeal number: CA/2014/0004

FIRST-TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER

JOHN NICHOLSON AND OTHERS **Appellant**

- and -

THE CHARITY COMMISSION FOR ENGLAND AND WALES **Respondents**

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in Chambers on 16 May 2014

RULING ON THREE OUT OF TIME APPLICATIONS FOR CONSOLIDATION WITH THE ABOVE APPEAL

1. On 11 March 2014, John Nicholson and five others applied to the Tribunal in respect of the Charity Commission's decision of 31 January 2014, pursuant to section 34 of the Charities Act 2011, not to accede to their request that it remove certain charities from the Register of Charities. Those charities are JNF Charitable Trust (225910), JNF Educational Trust (2902667) and KKL Charity Accounts (1105598).

2. Shortly after the Tribunal had accepted Mr Nicholson's Notice of Appeal, he asked if Mr Tony Greenstein and Mr Ayed Abu Equtaish could also be added as Appellants in respect of the same decision by the Charity Commission. Following a telephone directions hearing on 30 April 2014, directions were issued permitting this step. Mr Greenstein's and Mr Equtaish's appeals were duly submitted and have been consolidated with Mr Nicholson's appeal. It is intended that the three appeals will proceed together. There is a preliminary issue to be decided in respect of all three cases in due course, which is whether any of the Appellants are persons who are or may be affected by the Charity Commission's decision so as to have a right of appeal to the Tribunal. The parties will be making representations on that issue before I rule on it.

3. On 13 May 2014 Mr Nicholson forwarded to the Tribunal Notices of Appeal from Selma James, Sam Weinstein and Michael Kalmanovitz and asked for these to be permitted to proceed out of time and to be consolidated with the three other appeals in relation to the same decision. I invited the Charity Commission's representations on this application and it submitted that it would be contrary to the overriding objective to permit these appeals to proceed and that the Tribunal should refuse the applications.

4. The Tribunal may, by virtue of rule 5 (3) (a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, allow an appeal to proceed out of time if it decides to exercise its discretion so to do.

5. The Upper Tribunal has considered how the First-tier Tribunal should exercise its discretion in this regard. In *Data Select v HMRC* [2012] UKUT 187 (TCC), Mr Justice Morgan held that the correct approach to an application to proceed out of time was for the Tribunal to consider the overriding objective of dealing with cases fairly and justly, and all the circumstances of the case, including the matters referred to at CPR rule 3.9, before balancing the various factors and reaching its conclusion.

6. Morgan J commented at [34] that

> *"Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit?*

(2) how long was the delay?(3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

7. CPR rule 3.9 has, subsequent to the decision in *Data Select*, been amended to give effect to the recommendations of Sir Rupert Jackson in his *Review of Civil Litigation Costs*. With effect from 1 April 2013, CPR 3.9 provides as follows:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
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> (a) for litigation to be conducted efficiently and at proportionate cost; and
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> (b) to enforce compliance with rules, practice directions and orders."

8. In considering an application for an extension of time in *HMRC v McCarthy and Stone* [2014] UKUT B1 (TCC), Upper Tribunal Judge Sinfield referred to the decision of the Court of Appeal in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and also to the Court of Appeal's subsequent decision in *Durrant v Avon & Somerset Constabulary* [2013] EWCA Civ 1624, in which it was noted that the judgment in *Mitchell* was a

> "… clear endorsement of a tougher, more robust approach towards enforcing compliance with rules, practice directions and orders and thus towards relief from sanction."

Judge Sinfield concluded in *McCarthy and Stone* that:

> 43. I agree that the CPR do not apply to tribunals. I do not, however, accept that the differences in the wording of the overriding objectives in the CPR and UT Rules mean that the UT should adopt a different, ie more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR. The overriding objective in the UT Rules requires the UT to avoid unnecessary formality and seek flexibility in proceedings.
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> 44. An informal and flexible approach may mean that a self-represented litigant is granted relief from a failure to comply with the rules, including time limits, in circumstances where a more experienced and better resourced party is not. That difference in treatment between different parties does not mean that the UT is applying dual standards but only that the level of experience and

> resources of a party are factors which should be taken into account in considering all the circumstances of the case. Such factors will, however, carry less weight than the two principal matters which must be considered in the new CPR 3.9.
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> 45. The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach to time limits are as applicable to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the courts should apply the new approach to CPR 3.9 in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the UT Rules.
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> 46. The new CPR 3.9 does not contain a long list of factors to be considered as the old one did. The new version now provides that the court will consider all the circumstances of the case to enable it to deal justly with the application including the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.
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> 47. As the Court of Appeal recognised in *Mitchell* at [49], regard must still be had to all the circumstances of the case but the other circumstances should be given less weight than the two considerations which are specifically mentioned. In this case, applying the principles of the new CPR 3.9, as explained in *Mitchell* and *Durrant*, means that, in considering whether to grant relief from a sanction, I should take account of all the circumstances, including those listed in the old CPR 3.9, but I should give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with the UT Rules, directions and orders."

9. In considering all the circumstances of the applications now before me, I note that the three out of time appeals were made, by my calculation, some two and a half months after the expiry of the time limit for making an appeal. I take into account the fact that they are all made by litigants in person, although I also bear in mind that Mr Nicholson, who has co-ordinated the appeals on behalf of all of the Appellants and indeed these Applicants, is a barrister and so can be assumed to have some knowledge and experience of litigation. My impression is that there is a large number of people who support these applications to the Tribunal and that there are strong issues of conviction and principle at stake for those involved. However, in the context of litigation, it is not necessarily the case that "the more the merrier" because there is a risk that the proceedings will become unwieldy if repeated applications on the same issue are permitted to proceed. I note that these three applications raise the same points that others have already been made in the proceedings and that there would be no significant impact upon the issues that the Tribunal must in any event decide if they were not permitted to proceed.

10. I must also consider what implications there would be for the Respondent if I allowed these applications. The Charity Commission has already filed its Response to

Mr Nicholson's appeal, it has been required to file additional Responses to Mr Greenstein and Mr Equtaish's appeals, and if I were now to allow these three appeals to proceed then it would be required by the Tribunal's Rules to file three further Responses. The combined effect of this would be a significant delay in progressing the appeals to a hearing.

11. Ms James and Mr Weinstein are both members of the International Jewish Anti-Zionist Network and the reason given by both for their late applications is that "Our co-ordinator was unable to tell us in time because he was going through a long illness during the relevant period". Mr Kalmanovitz is the co-ordinator of the International Jewish Anti-Zionist Network (UK) and states that "I was recovering from two operations and complications from those operations at the relevant time. Subsequently I only heard about the appeal at a late date". I am of course sorry to hear about Mr Kalmanovitz's health problems and I wish him a good recovery. I accept the reason given by all three Applicants for their late applications, but nevertheless I am bound by the decision of the Upper Tribunal in *McCarthy and Stone* to "give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with the UT Rules, directions and orders".

12. I have taken into account the fact that the substantive issue (the request to de-register the three charities) will in any event be considered in the context of the other appeals, that these applications raise no new issues with regard to the dispute about standing, that there would be a considerable burden on the Respondent in having to respond to multiple new appeals, and that the timetable for moving the consolidated appeals forward would be delayed by the late addition of new cases. Having taken all the circumstances into account, and bearing in mind the need for litigation to be conducted efficiently and for compliance with the Tribunal Procedure Rules, I have concluded that it would not be fair and just to allow these appeals to proceed out of time and, accordingly, I refuse these applications.

PRINCIPAL JUDGE
16 May 2014