IN THE FIRST-TIER TRIBUNAL (CHARITY) **Appeal no: CA/2014/0022**
GENERAL REGULATORY CHAMBER

BETWEEN:

WILFRID VERNOR-MILES AND OTHERS

Appellants

- AND -

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

TRIBUNAL:

JUDGE PETER LANE CP

JUDGE ALISON MCKENNA
MARGARET HYDE OBE

Sitting in public at Field House, London on 12 May 2015

Matthew Smith of counsel for the Appellants, instructed by Payne Hicks Beach

Kenneth Dibble, Chief Legal Adviser and Head of Legal Services, Charity Commission, for the Respondent

DECISION

1. The appeal is allowed and the Tribunal directs the Charity Commission to rectify the register of charities so as to include the Independent Press Regulation Trust.

REASONS

Background

2. The Appellants are the trustees of the Independent Press Regulation Trust ("IPRT"). They are Wilfrid Vernor-Miles, Christian Flackett and Richard Rees-Pulley. Mr Vernor-Miles is a solicitor, Mr Flackett is an investment manager and Mr Rees-Pulley is an accountant.

3. IPRT was established by a Declaration of Trust dated 8 November 2013. Clause 1 is an interpretation clause, which defines "the Objects" as *"the objects of the Charity as set out in clause 3.1 of this Deed"*. The other provisions of the Deed, for example, clause 17 on the amendment of the Deed and clause 18 on Dissolution also refer back to the "Objects", as defined.

4. Clause 3 of the Declaration of Trust, in its entirety, reads as follows:

> *"3.1 The Objects of the Charity are to promote, for the benefit of the public, high standards of ethical conduct and best practice in journalism and the editing and publication of news in the print and other media, having regard to the need to act within the law and to protect both the privacy of individuals and freedom of expression.*
>
> *3.2 The Trustees shall further the Objects by such means as they think fit from time to time which may include the provision of financial assistance towards the establishment and support of an independent press regulator or independent press regulators to be established and conducted for the whole of any part of the United Kingdom in accordance with the recommendations and principles set out in the Leveson report.*
>
> *3.3 The income and, at the Trustees' discretion, the capital of the Trust Fund shall be applied in furthering the Objects.*
>
> *3.4 Any part of the Trust Fund not required for application in pursuit of the Objects shall be invested in trust for the Charity or remain uninvested in the Trustees are so advised"*.

5. The Appellants now appeal against the Charity Commission's decision of 16 October 2014 to refuse to enter IPRT onto the Register of Charities. The Charity Commission's decision was made under s. 30 of the Charities Act 2011 ("the Act"), which gives rise to a right of appeal to this Tribunal.

6. The Charity Commission's reasons for refusing to register IPRT were summarised in the conclusion to its published decision as follows:

> *"28. In conclusion, although the Commission does recognise that, as descriptions of purposes, promoting the ethical or moral welfare of the community and promoting compliance with the law may provide a suitable analogy for the purposes of IPRT, the particular purpose for which IPRT is established is to promote the establishment of an independent press regulator which will be recognised as Leveson compliant under the Royal Charter. That as such a body is yet to be established and recognised, the purposes of IPRT are considered to be too vague and uncertain for*

the Commission to conclude that the purposes for which IPRT are established are exclusively charitable for the public benefit."

7. The hearing on 12 May 2015 consisted of legal submissions and, by agreement, no oral evidence was called. We would like to thank Mr Smith and Mr Dibble for their helpful written skeleton arguments and clear oral submissions.

8. The written evidence from the Appellants consisted of a witness statement from Mr Vernor-Miles and a report prepared by Dr Jonathan Heawood, who is the Visiting Fellow at the Centre for Writing and Rights at the University of East Anglia and Founding Director of the IMPRESS Project[1]. Dr Heawood's report was prepared for the benefit of the Tribunal and so had not been before the Charity Commission when it made its decision. The report (referred to in more detail below) outlined the existing regulatory regime for journalism, the background to the Leveson inquiry and its recommendations, and described the current situation whereby the body established by the Royal Charter (The Press Recognition Panel) will not be considering the approval of prospective regulatory bodies until later in 2015. Dr Heawood also gave evidence as to the public benefit said to arise from the establishment of a Leveson compliant system of press regulation, which we refer to later on in this decision.

9. The Appellants accepted that Dr Heawood did not have the status of an expert witness in legal proceedings because his own involvement in the IMPRESS Project meant he did not possess the requisite independence. However, the Tribunal may admit evidence whether or not that evidence would be admissible in a civil trial (see rule 15 (2) (a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended) and the Charity Commission made no objection to the admission of Dr Heawood's evidence and did not challenge its contents. The Tribunal was content to rely upon it and we are grateful Dr Heawood for his comprehensive and helpful report.

10. The Charity Commission did not file any witness evidence.

11. The Tribunal's role in this matter is to "consider afresh" the Charity Commission's decision (s.319 (4) (a) of the Act). If the Tribunal allows the appeal it has discretionary powers to quash the Charity Commission's decision, remit the matter to the Charity Commission and/or to direct the Charity Commission to rectify the register of charities (Schedule 6 to the Act). In determining the appeal, the Tribunal can consider evidence which was not before the Charity Commission when it made its decision (s. 319 (4) (b) of the Act).

The Legal Framework for Charity Registration

12. There was no dispute between the parties as to the legal test for charity registration to be applied by the Tribunal. The relevant statutory framework may be summarised as follows.

13. Section 1 (1) of the Act defines "charity" as an institution which is (a) established for charitable purposes only and is (b) subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. Section 2 (1) of the Act defines a "charitable purpose" as one which falls within section 3 (1) of the Act and is for the public benefit. Section 3(1) of the Act sets out a list at (a) to (l) of 12 descriptions of charitable purposes. Section 3 (1) (m) sets out the thirteenth description of charitable purposes, including "*any*

[1] See paragraph 17 below

other purposes - (i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes…under the old law". Section 3 (4) of the Act provides that "*the old law*" in section 3 (1) (m) (i) means *"the law relating to charities in England and Wales as in force immediately before 1 April 2008"*.

14. A charitable purpose must be for the public benefit. Section 4 of the Act provides that there is to be no presumption that a purpose of any particular description is for the public benefit and that any reference to public benefit is a reference to public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

15. We were also referred to the Upper Tribunal's decision in *ISC v Charity Commission* [2011] UKUT 421 (TCC), in which it was held at [82] that, when applying the statutory test, the starting point is to identify the *particular purpose(s)* of the institution. The *particular purpose* is charitable if it falls within any of the categories listed in s. 3(1) of the Act and is for the public benefit. We also note that the Upper Tribunal commented at paragraph [23] that the concept of what is for the public benefit is not fixed but necessarily changes over time. It was agreed by the parties that the question of public benefit falls to be decided on the basis of evidence before the Tribunal. Mr Smith reminded the Tribunal that public benefit had been held by the Upper Tribunal in the *ISC* case to have two aspects: firstly, a requirement that the purpose must be beneficial and, secondly, that it must benefit the public in general or a sufficient section of it.

16. The Appellants sought to draw an analogy between the purposes of IPRT and trusts for the maintenance of proper standards in the medical profession, trusts to promote the ethical and moral improvement of the community, trusts for the promotion of compliance with the law or the advancement of human rights of conflict resolution and trusts for objects of general public utility. It was accepted by the Charity Commission that promoting ethical standards within the media industry may be analogous to the promotion of moral improvement of the community if the purpose is sufficiently clear and unambiguous and it is for the public benefit. The parties referred the Tribunal to decisions of the High Court in *Re Hood* [1931 [Ch] 240, *Re Price* [1943] Ch 422, *Re Scowcroft* [1898] 2 Ch 638 and *Re South Place Ethical Society* [1980] 1 WLR 1565 and to the Charity Commission's published decision about *Public Concern at Work* in 1994. The parties also referred the Tribunal to the recognition of trusts for the ethical and moral improvement of the community in both the leading charity textbooks, *Tudor* and *Picarda.*

Evidence

17. Mr Vernor-Miles's witness statement dated 9 April 2015 explained that the IMPRESS project is "*an example of an organisation that is seeking to develop a press regulator that would be compliant with the recommendations Lord Justice Leveson made in his report following the public inquiry into the culture practices and ethics of the UK press*". He also stated that "*Any application of funds by the trustees of IPRT would be strictly consistent with* [*the] Objects, whether to the Impress Project or any other organisation or organisations who apply to IPRT. Whilst I understand that the Impress project is currently the only organisation which intends to establish a regulator consistent with paragraph 3.2 of the Declaration of Trust, it may be that there will be others.* Finally, he confirmed that *"Any application of funds by the trustees according to paragraph 3.2 may have to be limited by reference to a funding agreement. The trustees would not make unrestricted funds available to an organisation which may have wider non-charitable objects"*.

18. Dr Heawood's report describes how the system of regulation of journalism and the news media is underpinned by the right to freedom of expression in Article 10 of the European Convention on Human Rights. He explains that this is not an absolute right, but one which must be balanced against other interests, such as national security and public order. He outlines the privileged status of journalists within the legal framework, and the history of attempts by bodies such as the Press Complaints Commission to develop ethical codes for journalists. He describes the current situation thus:

> *"The Leveson Inquiry into the Culture, Practices and Ethics of the Press was launched in response to massive breaches of journalism standards …..Leveson sought to reconcile the constitutional importance of press freedom with the need for more effective regulation of journalism. He concluded that a self-regulatory body, or bodies, should have new powers and enhanced independence from newspaper publishers, and should be subject to oversight by an independent body to mitigate the risk of regulatory capture…Leveson hoped that his recommendations would be implemented through a constructive dialogue between the industry and Government. However, this dialogue broke down soon after his Report was published. So the post-Leveson legal framework, as set out in the Royal Charter on Self-Regulation of the Press, the Crime and Courts Act 2013 and the Enterprise and Regulatory Reform Act 2013, reflects the will of Parliament, Government and the courts but it has been rejected by the dominant news publishers, who have instead established a body, IPSO: The Independent Press Standards Organisation, which does not comply with the Leveson principles. An alternative body, IMPRESS: The Independent Monitor for the Press, has been established by a group of journalists and academics in order to advance the public interest in effective and independent press regulation."*

19. In respect of the public benefit test, Dr Heawood's conclusions were as follows:

> *"A body such as IMPRESS, which complies with the public interest principles of the Leveson Report, would be of considerable benefit to the public. It would promote ethical journalism, free expression, privacy, alternative dispute resolution and the education of journalists and the public. It would encourage the publication of journalism that provides the public with accurate and reliable information and which avoids harm. It would help the courts to distinguish between journalism produced according to ethical standards and other forms of expression, thereby upholding the constitutional protections for free expression, within permissible limitations. It would protect the human right to privacy, not only by offering redress for the victims of privacy breaches, but also by mitigating the risk of such breaches in future. It would promote alternative dispute resolution through its complaints-handling and arbitration schemes. It would educate journalists and the public through its standards code and the publication of guidance on the code, and by allowing publishers to display a kitemark to help the public distinguish ethically regulated journalism from other forms of expression. Any private benefit to regulated news publishers under such a system would be minimal and incidental to the public benefit".*

Submissions

20. Mr Smith's primary submission as to the Objects of IPRT was that, as a matter of construction, the *particular purpose* of IPRT is clearly stated at clause 3.1 of the Declaration of Trust and that clause 3.2, being subject to clause 3.1, cannot enlarge it. He also reminded the Tribunal that the power at clause 3.2 was discretionary in any event.

21. Mr Dibble's primary submission was that, as a matter of construction, IPRT's Declaration of Trust included a collateral purpose at clause 3.2, namely that of providing financial support to a Leveson compliant press regulator. As this imported some ambiguity into the Trust Deed, he submitted that the Charity Commission was entitled to consider the stated activities of IPRT in assessing its application for charity registration. He submitted that, whether or not the Tribunal accepted that clause 3.2 established a secondary object, IPRT had not shown that it was established for exclusively charitable purposes or for the public benefit.

22. Mr Smith and Mr Dibble both addressed the Tribunal as to the proper approach to the interpretation of a governing document the true purpose of which was unclear. It was accepted by both that there were certain circumstances in which the Tribunal was entitled to look at an institution's activities, for example where the institution was said to be a "sham" or in order to resolve an ambiguity in the governing document. However, Mr Smith submitted that, if there were an ambiguity in IPRT's governing document, then extrinsic evidence would become admissible only in order to resolve that ambiguity, and that the Charity Commission's approach in this case of seeking to "open the door" to a wide range of evidence on the back of a perceived ambiguity in the wording of the governing document was impermissible. He referred the Tribunal to Dr Heawood's evidence that there is in existence a "*recognisable corpus of journalistic ethics"* and submitted that if there was any ambiguity about the meaning of "*high standards of ethical conduct and best practice in journalism*" then Dr Heawood's unchallenged evidence could be relied upon by the Tribunal to resolve the ambiguity.

23. The Appellants submitted that the *particular purpose* of IPRT, properly understood to be limited to clause 3.1, was analogous with trusts for the maintenance of proper standards in the medical profession, trusts to promote the ethical and moral improvement of the community, trusts for the promotion of compliance with the law or the advancement of human rights of conflict resolution, and trusts for objects of general public utility. Mr Smith submitted that it was not unusual for institutions to claim more than one analogy in order to found their charitable status.

24. The Charity Commission did not accept that an analogy could be drawn by IPRT with trusts for the maintenance of proper standards in the medical profession. It referred the Tribunal to decisions of the courts regarding The Royal College of Surgeons and The Royal College of Nursing, which were held to be charitable on the basis that they were directed towards the relief of sickness. Mr Dibble submitted that there was no general acceptance that the regulation of a profession per se was charitable.

25. With regard to the claimed analogy with trusts for the ethical and moral improvement of the community, Mr Dibble described the case law in support of this purpose as "sparse" but accepted that this was the strongest analogy for IPRT to draw under the "*old law*" as required by s. 3 (1) (m) (i) of the Act.

26. Mr Smith also submitted that the Charity Commission's published decision on *Public Concern at Work* should be regarded as being part of the "*old law*". The Charity Commission had in that decision recognised as charitable an institution concerned to promote ethical standards of conduct and compliance with the law by governmental, industrial, commercial, voluntary sector and professional organisations. The Decision of the Commissioners (as they then were) concluded that "*…the purpose expressed in the objects was clearly of public benefit as the adoption by organisations of proper ethical standards in*

their business dealings would be beneficial to the community as a whole. The case for its charitable status could be supported by analogy to trusts for purposes tending to promote the mental and moral improvement of the community which had been upheld as charitable in law".

27. Turning to the analogy claimed with trusts for the promotion of compliance with the law, Mr Dibble noted that, whilst there may be some element of analogy with this purpose, the purposes of IPRT do not clearly identify the promotion of compliance with the law and the purposes seem to go beyond this purpose in any event, so there could possibly be an analogy with part only of IPRT's purpose, which he suggested was unsatisfactory.

28. With regard to objects of general public utility, the Charity Commission's case was that purposes which benefit the public are not necessarily charitable in law and there was no clear analogy here with decided case law. With respect to the decision in *Public Concern at Work*, Mr Dibble submitted that it had represented a "big leap" for the Commission in terms of its approach to analogy and was a novel approach. He reminded the Tribunal that it should consider the *particular purpose* of IPRT and that the recognition of charitable purposes proceeds on a case-by-case basis, so that it was too big a jump from the existing case law to say that the regulation of an industry was charitable as of general public utility.

29. Insofar as the Appellants sought to draw an analogy with certain charities which had been entered onto the Register (the Media Standards Trust and MediaWise), the Charity Commission's submission was that these did not establish precedent. The Appellants also sought to draw an analogy with a Canadian authority, in which a trust to provide access to the internet was accepted as charitable.

30. With regard to the public benefit test, the questions for the Tribunal were (i) was the purpose beneficial and (ii) was the benefit to be provided to the public at large or to an appreciably large section of the community? There was no dispute in this case as to the second limb of the test.

31. In respect of the first limb, Mr Smith submitted that Parliament had already recognised the public benefit in independent press regulation because it had legislated to provide for it and by all party agreement had established a Royal Commission whose task it was to approve a regulator. He referred to Dr Heawood's evidence that the only reason that there was not to be a statutory regulator was for special reasons of constitutional restraint and to his exposition of the public benefit arising from the establishment of an independent press regulator (described at paragraph 19 above). Mr Smith also emphasised the particular requirement of the Leveson recommendations that a regulator must be independent of the press.

32. Mr Smith explained that IMPRESS is not itself a charity but is "incubating" a body which will seek to be recognised by the Press Recognition Panel. IPRT had been established soon after the Royal Charter, which established the mechanism for the recognition of an independent press regulator. To that extent, he accepted that IPRT was "ahead of the curve". However, he submitted, the fact that in theory IMPRESS might not be recognised by the Press Recognition Panel when it applies in due course should not be regarded as fatal to IPRT's application for charity registration. The trustees of IPRT have the power under clause 3.2 to apply funds towards the IMPRESS project but they clearly must act reasonably and there might be a point at which they would have to decide it would not get off the ground. Nevertheless, he argued, it was not essential to IPRT's charity status that the trustees had

absolute certainty as to the outcome of the project they presently wished to fund and they had discretion to fund other projects in furtherance of their objects.

33. Mr Dibble submitted that although independent regulation of the press had been recognised in the Leveson report as being in the public interest, that was not the same thing as satisfying the charity law test of public benefit. He further submitted that, at this stage in the development of independent regulation, the Charity Commission was unable to assess whether any benefit to those in the media industry from the system of regulation proposed was purely ancillary, as there was insufficient evidence on this point.

Conclusion

34. Firstly, we were not persuaded that IPRT's purposes are unclear or ambiguous, as submitted by the Charity Commission. We have concluded, having construed the governing document of IPRT on its plain meaning as a whole document, that the Objects are clearly described at clause 3.1 only. The status of clause 3.1 as the only statement of the purposes of IPRT is clear in our view, having regard to the interpretation, amendment and dissolution clauses mentioned above. We consider that clause 3.2 is clearly expressed as a power which may be exercised in furtherance of the Objects at clause 3.1. We do not accept the Charity Commission's view that clause 3.2 represents a collateral purpose or that it serves to create an ambiguity as to the objects of IPRT.

35. In the circumstances, we have not found it necessary to have regard to extrinsic evidence in order to determine IPRT's purposes. We identify the *particular purpose* of IPRT as that set out in clause 3.1 of the Declaration of Trust

36. Secondly, we are satisfied that the *particular purpose* of IPRT, as set out in clause 3.1, is analogous to trusts tending to promote the ethical and moral improvement of the community. This is a description of a charitable purpose which was recognised under the "*old law*" referred to at paragraph 16 above, in which the courts have recognised as charitable trusts to promote temperance, promoting mental and moral discipline through the teachings of Rudolph Steiner, and promoting the study and dissemination of ethical principles and the cultivation of a rational religious sentiment. Accordingly, we are satisfied that the *particular purpose* of IPRT falls within the description of a charitable purpose under s. 3(1) (m) (i) of the Act.

37. We are not satisfied that an analogy may be drawn with trusts to promote the maintenance of proper standards in the medical profession, trusts for the promotion of compliance with the law or the advancement of human rights or conflict resolution, or trusts for objects of general public utility. We agreed with the Charity Commission's reasons for rejecting these claimed analogies, as described at paragraphs 24, 27 and 28 above. We also took the view that the Appellants' reliance on an overseas authority did not meet the definition of the "*old law*" in s. 3 (4) of the Act because that section is expressly limited to the law of charities in England and Wales. With regard to the analogy claimed with *Public Concern at Work,* we consider that this decision could possibly be regarded as falling under s. 3 (1) (m) (ii) of the Act, on the basis that a decision of the Charity Commissioners could be "*reasonably regarded as analogous to…*" a purpose falling under sub-paragraph (i). We consider that the Charity Commission's decision in that case could not be regarded as falling under the "*old law*" by itself because we take the view that only the decision of a court or tribunal could be said to constitute the "*old law*". However, as we are satisfied that IPRT's

purposes do fall under s. 3 (1) (m) (i) by analogy with decided case law, we do not need to decide that point in order to determine this appeal.

38. It remains for us to consider whether IPRT is established for the public benefit. We note that there was no evidence to suggest that a non-ancillary private benefit would accrue to those in the media industry from the proposed activities of IPRT. On the contrary, Dr Heawood's unchallenged evidence (see paragraph 19 above) was that any private benefit would be incidental to the public benefit. In those circumstances we took the view that it was wrong in principle to ask the Appellants to prove a negative, as the Charity Commission's submission on this point appeared to require.

39. We acknowledge that IPRT is involved in supporting the IMPRESS project, which is as yet some way away from being accepted as a Leveson complaint regulator, but we also note that IPRT has the power to support alternative bodies seeking recognition as regulators as a means of furthering its Objects. If IMPRESS does not succeed in being recognised as a regulator in due course, then we see the decision about whether to support another prospective regulator as one for the trustees of IPRT, exercising their discretion and acting prudently within the powers given to them in their governing document. We do not see the success or otherwise of IMPRESS itself as a question which should determine the charitable status of IPRT.

40. Finally, we are satisfied on the basis of the unchallenged evidence before us that the objects set out in clause 3.1 of the Declaration of Trust are for the public benefit under the first limb of the test described in the *ISC* decision. Dr Heawood's evidence (see paragraph 19 above) was not available to the Charity Commission when it made its decision, but we found it persuasive in its assessment of the public benefit which will result from the establishment of a Leveson compliant regulator. We agree with his conclusions. We note that Lord Justice Leveson's recommendation for the establishment of an independent press regulator was made following a thorough-going public inquiry and public outrage at some of the press practices he uncovered. We also note that his recommendations were supported by all parties in Parliament. We take into account the fact that, if such a regulator cannot be established by the Government for constitutional reasons and ought not to be established by the industry itself for reasons of propriety and public confidence, then the charity sector is uniquely placed to be able to offer both the mechanism and the means by which a benefit to the community as a whole can be achieved.

41. For all of the above reasons, we allow this appeal and direct registration of IPRT.

ALISON MCKENNA

(Signed on the original)

JUDGE ALISON MCKENNA

15 June 2015