

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

THE CHARITY TRIBUNAL FOR NORTHERN IRELAND

Appeal Reference: 4/20

Between

GREGORY BURKE

Appellant

-and-

THE CHARITY COMMISSION FOR NORTHERN IRELAND

Respondent

Heard remotely in public by WebEx in Belfast on 25 June 2021

Before

Damien J. McMahon

Mr. J. Bryson appeared for the Appellant.

Mr. R. McCausland, of counsel, appeared for the Respondent.

DECISION

The appeal is dismissed.

The Appellant is not a person affected, or who may be affected, by the making of the Order and does not, therefore, have locus standi to bring this appeal.

REASONS

Introduction

1. This appeal was determined in a preliminary hearing, pursuant to Rule 14 of the Charity Tribunal Rules (Northern Ireland) 2010 ('the Rules'), to consider whether the Appellant had locus standi to bring this appeal and, if so, whether the appeal was out of time and, if so, whether time should be extended to admit the appeal.

2. The Appellant appealed against an Order of the Respondent made on 10 March 2020 ('the Order') made under s. 96(2) of the Charities Act (Northern Ireland) 2008 ('the Act') granting consent to a charity known as Lough Neagh Rescue Limited ('the Charity') to alter the articles of association of the Charity.
3. An appeal against the making of the Order can only be brought, pursuant to Table 1 to Schedule 3 of the Act, by the trustees of the Charity (or the Charity itself if the Charity is a body corporate) or any person who is or may be affected by the Order.
4. The Appellant submitted that he was a person who was, or may have been, affected by the making of the Order granting the said consent.
5. The Appellant attended the hearing.

The Appeal

6. The Appellant, in his written notice of appeal dated 17 June 2020, sought to have the Order quashed on the ground that he, as a member of the Charity (a fact that had to exist at the date of the making of the Order), and, therefore, he submitted, was a person affected, or who may be affected, by the making of the Order, had not been consulted concerning the application for consent to an alteration to the said articles of association, either by the Charity or by the Respondent.

Factual Background

7. The Appellant was not a member of the Charity when the Order was made (although he had been a member in the past).
8. The sole issue for determination in this appeal at this preliminary hearing was whether the Appellant was, or may have been, a person affected by the making of the Order and, if so, whether the appeal was out of time and, if so, whether time should be extended to admit this appeal for substantive hearing.
9. The term 'person affected' or who 'may be affected' is not defined in the legislative regime governing appeals to the Tribunal.
10. There is no existing binding precedent in the Tribunal, interpreting the meaning of the term 'person affected' or who 'may be affected' for the purposes of charity law in Northern Ireland. The term was, however, considered in the Tribunal in the appeal of *Fox v. The Charity Commission for Northern Ireland* (Ref. NICT9/19). This Decision is not, however, a binding precedent. The equivalent term has, however, been interpreted by both the Charity Tribunal for England and Wales and by the Upper Tribunal in that jurisdiction in proceedings that have come before those judicial bodies, with particular reference to the Upper Tribunal decision in *Nicholson* [2016] UKUT 0198 EWHC (Admin) 3446. In particular, paragraphs 44,45 and 47 of that decision, set out the approach to take on the issue of *locus standi* involving a challenge to a decision of the Respondent by an Appellant, as in the instant appeal, who maintained he was a 'person affected', or who 'may be affected', by such decision – a test that was narrower than a 'sufficient interest' test or a 'public interest' test.
11. Those authorities from the jurisdiction of England and Wales are not binding on this Tribunal but are of highly persuasive value.
12. As directed by the Tribunal, the parties adduced an agreed bundle of documents and an agreed bundle of authorities and statutory provisions, that were relied upon by the parties in support of their oral submissions in the hearing.

The Submissions of the Parties

13. It was submitted on behalf of the Respondent that there had been no need to notify the Appellant, individually or specifically, of the making of, or the intention of making, the Order, and he had not been notified. The making of the Order had been published by the Respondent on 13 March 2020. It was submitted that the Appellant was not a member of the Charity when the Order was made. It was further submitted that the authorities in both this Tribunal and in the jurisdiction of England and Wales, both in the First-tier Tribunal and in the Upper Tribunal, clearly required the Appellant to explain how the making of the Order affected his legal rights, in order to establish sufficient *locus standi*, but he had not done so. It was submitted that the statement, at paragraph 2, of the witness statement of the Appellant that he decided on 14 May 2020 to appeal the making of the Order “on behalf of the Charity” was a position contrary to the law established by the authorities; rather, the test was whether the making of the Order affected the Appellant’s *legal* rights and that the history of the Charity, or how it might be affected by the making of the Order, was irrelevant in that regard. The Respondent submitted that there was no evidence offered, on the papers, to show that the appropriate test was satisfied; indeed, it was submitted, the making of the Order did not affect the Appellant’s legal rights in any fashion: the making of the Order did not relate to the Appellant; further, any alleged effect on the Appellant’s legal rights by the making of the Order had to be identifiable, a position, it was submitted, that was not shown by the Appellant. In any event, the authorities required such alleged effect to be construed narrowly. It was not sufficient that the Appellant should merely disagree with the making of the Order. There was nothing in the Order that could affect the legal rights of the Appellant at the date the Order was made. It was submitted that the Appellant had stated in his own witness statement that he sought to appeal the Order because it was ‘wrong for the charity’, a position that is not sustainable when considering whether the Appellant has the required *locus standi* on the law as interpreted and determined in the said Decisions. It was also submitted on behalf of the Respondent that, in addition, this appeal was, indeed, out of time, not having been lodged until 17/06/2021 against the making of the Order by the Respondent on 10/03/2021, published by the Respondent on its website on 13/03/2020, there being a statutory time limit of 42 days from the date of a challenged decision made by the Respondent in which a person entitled to appeal must lodge the appeal and that the Tribunal should not exercise its discretion in the circumstances, to extend time to admit the appeal late.

14. It was submitted on behalf of the Appellant that, primarily, the Appellant was a member of the Charity and was, therefore, a ‘person affected’ and, accordingly, was entitled to bring this appeal against the making of the Order. It was submitted that the witness statement of Mr. P. McGookin, adduced by the Respondent might support an argument that the Appellant remained a member of the Charity. It was accepted, however, that the issue of whether the Appellant was an ‘affected person’ was not specific to the making of the Order, the decision under appeal. It was submitted, nevertheless, that the legal rights of the Appellant, as a member of the Charity, were affected by the making of the Order, as shown at page 64 of the agreed bundle. And that, therefore, the Appellant was a ‘person affected’. However, it was submitted that it was not necessary to show that the Appellant was a ‘person affected’ but, merely, that he was a person who ‘may be affected’. It was submitted that the authority in Nicholson assisted the Appellant in that respect, that is that a member of the Charity or someone who may be a member had sufficient *locus standi* to bring an appeal against the making of the Order. It was further submitted that the Appellant had *locus standi* greater than that of a mere member of the public in all the circumstances, not least the history of the Charity. It was further

submitted that Rule 17(2) of the charity Tribunal Rules (Northern Ireland) 2010 ('the Rules'), dealing with the time limit to lodge an appeal, was badly drafted and in particular, was silent on the question of notification of a decision of the Respondent. It was accepted on behalf of the Appellant that, if so, there was no time limit on lodging an appeal against a decision of the Respondent. It was also accepted that no application had been made by, or on behalf of the Appellant, to extend the time permitted to admit this appeal, as required by Rule 17(9) of the Rules, providing the requisite information to support such application. However, no issue was taken on behalf of the Respondent at the hearing regarding this discrete matter.

Findings and Conclusions

15. This appeal is dismissed. The Appellant is not a person affected, or who may be affected, by the making of the Order by the Respondent.
16. The test for determining whether a person is a 'person affected' or who 'may be affected' by a decision of the Respondent is set out in the decision of the Tribunal in *Fox* and in the decision of the Upper Tribunal of England and Wales in *Nicholson*. While neither decision ('the said Decisions') is binding on the Tribunal in this appeal, both are of highly persuasive value for the purposes of this appeal and are adopted as a correct statement of the law to be applied in Northern Ireland in determine whether an Appellant has any, or any sufficient *locus standi*.
17. Based on the said Decisions, it is necessary to focus upon the particular decision, namely, in the instant appeal, the making of the Order. To be affected by the making of the Order, the Order must relate to the Appellant in some way and, secondly, the Appellant's legal rights must have been impinged or affected by the making of the Order. Further, to be a person who 'may' be affected, there must be an identifiable impact on the Appellant's legal rights which is likely to occur. It is insufficient that the Appellant merely disagrees with the making of the Order however sincerely he holds that opinion.
18. Despite the submission of the Appellant to the contrary, the Appellant was not a member of the Charity on the date of the making of the Order and had not been a member since March 2013. However, a previous Order made by the Respondent to remove the Appellant as a member of the Charity was void *ab initio*. Nevertheless, a fresh application made by the Appellant for membership of the Charity in 2015 was rejected by the Charity – a decision that remained valid.
19. The Order was of nothing more than the Commission giving consent, that was required in the particular circumstances, pursuant to s. 96(2) of the Act, to an alteration to the Articles of Association of the Charity, a corporate body, upon the application of the Charity. The Tribunal, in other previous proceedings had, in fact, considered the particular proposed amendments and found them to be in the best interests of the Charity – a position that was not upset in any appeal against the Tribunal.
20. The Order was made on 10/03/2020 and published on the Respondent's website on 13/03/2020. No convincing reason was established by the Appellant, on the evidence, on the balance of probabilities as to why, in those circumstances, he did not, allegedly, become aware of the making of the Order until 14/05/2020 since he professed to have such a keen interest in the affairs of the Charity and where the Respondent had been in ongoing direct communication with him and where the making of the Order was published on the Respondent's website on 13/03/2020. However, quite apart from that issue – that only goes only to the question of whether the appeal was out of time and, if so, whether the time for appealing ought

to be extended - the question of whether the Appellant had sufficient *locus standi*, as a 'person affected' or who 'may be affected' by the making of the Order within the interpretation of those concepts set down in the said Decisions (the only way he could bring an appeal against the making of the Order) is a different issue.

21. The fact that the Chief Commissioner of the Respondent wrote to the Appellant in the context of an ongoing inquiry by independent counsel does not, *ipso facto*, show that the Appellant is an 'affected person' or a person who 'may be affected' by the specific making of the Order for the purposes of establishing sufficient *locus standi* to bring this appeal: sufficient *locus standi* can only be established if the Appellant can bring himself within the definition of a 'person affected' or who 'may be affected' as decided in the said Decisions.
22. The Tribunal finds that it is not correct, as asserted on behalf of the Appellant, that the issue of whether the Appellant was, or was not a member of the Charity at the date of the making of the Order, was unchallenged by witnesses from the Charity, having regard to the witness statements submitted by the Respondent.
23. The contents of an email dated 09/02/2021 to the Appellant from the Commission was in the context of a review of complaints made to the Respondent and cannot assist the Appellant in establishing sufficient *locus standi* to appeal the making of the Order.
24. The witness statement of the Appellant stated that another person, Mr. T. McKee, had advised him, on 14/05/20, that the Respondent had 'renewed' its decision to grant regulated consent to the Charity. However, the witness statement of Mr. McKee did not, in fact, state that alleged fact.
25. It was submitted on behalf of the Appellant that the concept of a person 'who may be affected' is broad. However, the said decisions confirm that the test is, in fact, to be interpreted narrowly.
26. The Tribunal declined to accept the submission made on behalf of the Appellant that publication of the making of the Order on the Respondent's website was insufficient to amount to notification to him. Whatever about any potential merit in that submission, it could only arise if the Appellant was a 'person affected' or was a person 'who may be affected by the making of the Order: the Appellant did not fall within either category by reference to the said Decisions.
27. The Tribunal found merit in the submission on behalf of the Respondent that even if the Appellant had been specifically notified of the making of the Order, that did not, *ipso facto*, mean that he was a 'person affected' or was a person who 'may be affected', unless he came within the interpretation set out in the said Decisions.
28. The nature of the Order is such that it could not have any impact, within the terms of the said Decisions on the Appellant since he was not a member of the Charity when the Order was made on 10/03/2020 in that the Order was not personal to the Appellant and did not relate to him. Accordingly, in those circumstances, the making of the Order could have no identifiable impact on any legal rights that might be claimed by the Appellant in the circumstances.
29. Since the Tribunal determined that the Appellant had no, or not sufficient, *locus standi* to bring this appeal, it was not necessary to make a formal determination whether this appeal was out of time or, if so, whether the Tribunal, acting judicially, should exercise its discretion to extend the time for bringing the appeal. However, it is fair and appropriate to set out the Tribunal's thinking on this issue, that may assist parties in the future where this question might fall for determination.

30. This appeal was out of time: it was an appeal against a decision made by the Respondent on 10/03/2013, published in public on the Respondent's website on 13/03/2020. Accordingly, the appeal should have been lodged by the Appellant, if sufficient *locus standi* could be shown, within 42 days of 10/03/2020 or, arguably, within 42 days of 13/03/2020: the legislation does not envisage the time limit for lodging an appeal being 42 days from when an Appellant allegedly heard of the decision under appeal or had that decision drawn to his attention by another person. The Appellant was advised of the making of the Order on 14/05/2020. However, even then, the appeal was not lodged until 17/06/2020.
31. While there is a discretion in the Tribunal to extend time, that can only be on the basis of there being a rational reason for so doing and covering a specific time period between the decision of the Respondent being challenged and the date when the appeal was actually lodged, otherwise, conceivably, there might be no requirement for a time limit at all. In exercising its discretion, the Tribunal must act justly and fairly between not only the Appellant but the Respondent too: the Respondent must have the ability to make decisions delegated to it by legislation and a time limit set within which those decisions may be challenged by a person entitled, in law, to do so. This approach is clearly one that must be adopted in the public interest and, indeed, in the interests of the administration of justice.
32. The Tribunal, in exercising its discretion, in appropriate cases, may wish to have regard to decisions of the Upper Tribunal in England and Wales in *Data Select Limited v. HMRC* [2012] UKUT 187 (TCC) and *Leeds City Council v. HMRC* [2014] UKUT 0350 (TCC) (albeit, again, these are decisions that do not bind the Charity Tribunal for Northern Ireland, but that are of highly persuasive value) when deciding whether to allow an appeal to be admitted out of time. The types of questions that arise when a Tribunal is considering whether to exercise its discretion to admit an appeal out of time include:
- a) what is the purpose of the time limit?
 - b) how long was the delay?
 - c) is there a good explanation for the delay?
 - d) what will be the consequences for the parties of an extension if time?
 - e) What will be the consequences for the parties of a refusal to extend time?
33. Had it been necessary, in considering those questions, I would not have found it appropriate, fair or just, on the written and oral submissions on behalf of the Appellant, on the balance of probabilities, to extend the time to admit this out of time appeal.

Right of Appeal

34. Since the Tribunal concluded that determination of the preliminary question in the appeal, namely whether the Appellant was not a person affected, or who may be affected, by the making of the Order, and, therefore, did not have the necessary *locus standi* to bring this appeal, substantially disposes of the appeal, the parties, and each of them, are advised that either party to these proceedings has a right of appeal from this decision of the Tribunal to the High Court. This is subject to a request being made by any party wishing to appeal being made to the Tribunal in writing within 28 days of the date upon which the notification of this decision is sent to the parties to seek permission from the Tribunal to appeal, stating the name and

address of the applicant and that of any representative of the applicant; that identifies the decision to which the request relates and that states the grounds upon which the Applicant or Respondent seeks to rely before the High Court.

Dated 15 November 2021

Signed:

A handwritten signature in black ink, appearing to read 'Damien J. McMahon', with a wavy, stylized underline.

**Damien J. McMahon
President**

Note:

The decision of the Respondent that was under appeal in these proceedings was made by the Respondent on 10 March 2020. This date correctly appears throughout the Decision save that, in two separate places in the Decision, the said date is referred to, in error, as '10/03/2021' and '10/03/2013', respectively.