

Ms Sofiah Macleod, Dr Dick Pitt

By email only to:

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**Our Ref:** MM/225910/C-363017/OL

**Date:** 15 May 2013

Dear Miss MacLeod, Dr Pitt

**JNF Charitable Trust – 225910, JNF Educational Trust – 290267 and KKL Charity Accounts - 1105998**

I am writing to you as representatives of the 'Stop the JNF Campaign' (the Campaign), further to the Application dated 21 March 2013, submitted by the Campaign to the Charity Commission.

We have now had the opportunity to consider the Application and I have included below the issues we have considered and our subsequent decision, following our consideration.

**Issues**

The Commission considered:

- The Application by Stop the JNF Campaign in the UK (the Campaign) under S 36(1) (b) of the Charities Act 2011 (the Act) that JNF Charitable Trust (JNFCT), JNF Educational Trust (JNFET) and KKL Charity Accounts (KKL) (together referred to in the Application as the 'JNF charities') be removed from the Commission's Register of Charities.
- Whether the Campaign, or alternatively those legal persons who comprise the Campaign, have sufficient standing to make the S36 Application as persons affected by the registration.
- Whether JNFCT, JNFET and KKL are established for exclusively charitable purposes and whether each of them are entitled to be registered in the Register of Charities in accordance with S30 of the Act.

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## Decision

The Commission, having considered the governing document for each charity and the case put to it by the Campaign in its Application, together with other relevant information and the law, has concluded (subject to the one caveat below) that:

- JNFCT is established for exclusively charitable purposes and should remain on the Register
- JNFET is established for exclusively charitable purposes and should remain on the Register
- KKL is established for exclusively charitable purposes and should remain on the Register

The only caveat in reaching this conclusion is whether the objects of JNFCT are compatible with the requirements of the Equalities Act 2010. The Commission's understanding of the legal position, along with what trustees' duties are in this regard is set out in our guidance ['Equalities Act guidance for charities :Restricting who can benefit from charities'](#).

The Commission, having reached the conclusion that the matters contained within the Application do not impact upon the status of JNFCT, JNFET or KKL as charities, does however acknowledge that the Application submitted raises matters of potential regulatory interest for the Commission.

As a consequence, the Commission intends to raise with the trustees of JNFCT how they are satisfied that the restriction of the provision of services to people defined by a protected characteristic, is lawful. To facilitate this, the Commission in accordance with its published [risk framework](#) and its statutory objectives, functions and duties, will now refer the matter to its London Operations function to assess how, and to what extent the Commission should engage with JNFCT, JNFET and KKL.

I will continue by detailing below the factors we have taken into consideration in this case, to enable us to reach our decision.

## Charity frameworks

['Charity framework for JNFCT, charitable objects and area of benefit'](#)

['Charity framework for JNFET, charitable objects and area of benefit'](#)

['Charity framework for KKL, charitable objects and area of benefit'](#)

## Background

1. On 21 March the Commission received the Application from the Campaign pursuant to S36 (1) (b) of the Charities Act 2011 (the Act) for the removal of 'JNF Charities' from the Commission's Register of Charities (the Register).
2. The Commission has a general function pursuant to S15 (4) of the Act and power under S29 and S34 of the Act to maintain an accurate and up to date Register.
3. Before proceeding to consider the Application it had been necessary to establish that those who make the Application have standing to do so within the meaning of S36 (1) of the Act.

## Standing

4. S36 of the Act provides that:

*'(1) (b) A person who is or may be affected by the registration of an institution as a charity may, on the ground that it is not a charity apply to the Commission for it to be removed from the register*

*(2) Provision may be made by regulations made by the Minister as to the manner in which any such objection or Application is to be made, prosecuted or dealt with'*

5. The Secretary of State has not made any regulations as to the manner in which Applications are to be dealt with and the Commission has an [internal decision review process](#) that operates, if the applicant wishes to appeal against a decision made.
6. JNFCT was incorporated on 21 July 1939 and registered as a charity by the Commission on 20 June 1963. Insofar as JNFET is concerned, registration occurred on 12 October 1984 and KKL on 23 September 2004.
7. As a consequence of entering JNFCT, JNFET and KKL onto the register, a relevant decision (for the purposes of S36 (1)) was made by the Commission.
8. Schedule 6 to the Act provides that a decision of the Commission under S34 (1) (a) to enter or not enter an institution in the Register or remove or not remove an institution from the Register can be appealed to the First Tier Tribunal (Charity) by the charity trustees, the institution itself (as a body corporate) or a person 'who is or may be affected by the decision'.
9. The Act does not include a time limit within which an Application under S36 (1) (b) is to be made. The only requirement is that in order for the Commission to consider the S36 (1) (b) Application, the legal person or persons making it must 'be affected by the registration'. The Act does not include a definition of this phrase and there are no regulations as to who would meet the definition of a 'person who is or may be affected by the registration' for the purposes of S36 (1) (b).

## The Application and standing

10. The Application sets out in Section 1 how the registration of the 'JNF charities' affects the Campaign, which is the party making the Application for removal. The Application confirms that the Campaign comprises 'organisations and individuals who are UK tax payers and citizens'. These organisations and individuals are not identified.
11. As far as we can ascertain, the Campaign is not a legal entity in its own right and therefore cannot, as 'the Campaign', meet the definition of a 'person who is or may be affected by the registration'.
12. The legal persons that together comprise the Campaign may, as individuals or companies, meet the definition of a 'person who is or may be affected by the registration'.
13. The grounds identified in the Application as support for the contention that UK tax payers and citizens meet the 'affected by the registration' definition, are that:
  - The registered charities of JNFUK receive significant fiscal benefits which is a misuse of public funds and a threat to public trust in institutions such as the Charity Commission

- As British tax payers and citizens, [they] do not wish [their] institutions to be implicated in the violations of human rights and of international law that JNFUK and its charities are involved in.

14. In the absence of a definition of who those ‘affected by the registration’ are, we have considered case law and commentary.

### Case law

15. The meaning of the words ‘person who is, or may be, affected’ was considered in the 2009 case of *R (on the Application of International Peace Project) v Charity Commission*<sup>1</sup>. Lord Carlile of Berriew QC sitting as a Deputy High Court stated:

*‘A person who is or may be affected, in my judgment, means someone who has an interest that is materially greater than, or different from, the interests of an ordinary member of the public. This is a question of fact rather than a question of law.*

*My conclusion would be that the claimant is not a person who is or may be affected because there is no relationship between the claimant and the registration of the defendant, other than that of just another charity. The claimant happens to be interested in the subject area and the objects of the other charity and does not agree with the conclusion of the Charity Commission but in my judgement that is insufficient to being the claimant within the relevant category.’*

16. The qualification of having an interest materially greater than or different from the interest possessed by an ordinary member of the public was considered by Nicholls LJ in *Re Hampton Fuel Allotment Charity*<sup>2</sup> in relation to ‘any person interested in the charity’ for the purposes of S33 Charities Act 1993( now S115 of the Act). In that case the Court noted that there was no justification for the court attempting to delimit with precision a boundary which Parliament left undefined.
17. The International Peace Project (IPP) case involved two charities with opposing viewpoints operating in the same broad area but the claimant in that case could not show any material or special consequences for the IPP charity arising from the charitable status of the charity registered by the Commission.
18. In the [Town Field tribunal case](#) the Tribunal held that ‘the addressee of a decision taken by the Commission after a full consideration of the merits is a person affected by that decision for the purposes of column 2 of Schedule 1C’ (replaced by Schedule 6 of the 2011 Act).
19. The Town Field tribunal, whilst expressing the view that it is important not to ascribe too narrow a meaning to the wording in column 2 of the table in Schedule 6 (that is the persons able to bring an appeal) there was an implicit acceptance that, to be a person ‘who is or may be affected’ by a decision, it is necessary to have an interest materially greater or different to that of ordinary members of the public.

The Tribunal also stated in its decision that the threshold for standing to apply for judicial review might well be lower than that required to be a person who is or may be affected by a Commission decision for the purposes of Schedule 6.

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<sup>1</sup> [2009]EWHC(Admin) 3446

<sup>2</sup> [1989]Ch. 484,493 G

20. The Tribunal rejected the argument that the case law on 'person interested' for the purpose of authorising charity proceedings under section 33 of the Charities Act 1993 (now section 115 of the Act) had any relevance to the issue. It decided that the rationale for section 115 is not applicable to appeals to the Tribunal.

However, it agreed that the test for being a person 'who is or may be affected' by a Commission decision is 'not a technical rule of law, but a practical rule of justice affording a degree of flexibility responding to the facts of each particular case'.

21. Insofar as commentary is concerned, Jean Warburton<sup>1</sup> and Hubert Picarda<sup>2</sup> have expressed the view that the purpose of 36(1) was to protect people, especially next of kin, whose financial interests may be affected by the question whether or not a trust ought to be classified as a charity and for HMRC and rating authorities, who are affected by the registration of an institution as a charity, to make representations under the provision.

However, Picarda states that 'it is open to doubt whether such a fiscal interest is sufficient to give the ordinary tax payer a locus standi to object to a particular proposed or actual registration'.

22. The Application states the aims<sup>3</sup> of the Campaign, which include 'to educate the British public on the role of the JNF in discriminatory and racist administration of land and public services in Israel' and 'to publicise how the actions of the JNF affect the lives of Palestinians'. It is fair to say that these aims are not aligned with those of JNFCT and that as a consequence, the Campaign does have a particular interest in the outcome of a removal Application for its own purposes.

However, it is difficult to see, in the absence of a legal relationship between the two institutions, how those interests elevate the individuals or companies comprising the Campaign, into 'persons affected by the registration'.

23. The aims of the Campaign (or the interest of the individuals or companies concerned) may be pursued by the Campaign in any way it sees fit. The Application does not provide evidence to support a position that the Campaign and its interests, or its ability to pursue its aims, are adversely affected or compromised by registration of JNFCT, JNFET or KKL. As drafted, the focus of the Application is to highlight the Campaign's view of 'the set-up of the JNF [charities] for improper use'.

24. It is difficult to see how the registration of the 'JNF charities' implicates individual British citizens in what those making the Application assert to be 'violations of human rights and of international law that JNF UK and its charities are involved in'.

25. It is also difficult to distinguish individual members of the Campaign, in their personal capacity, from all the other donors to charity who might make an assertion, in respect of a registered charity that holds different views from their own, that the fiscal benefits enjoyed by those registered charities are a misuse of public funds and a threat to public trust in the Commission.

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<sup>3</sup> Text and Commentary on the Charities Act 1993 (Jean Warburton) Sweet and Maxwell 1993

<sup>2</sup> The Law and Practice Relating to Charities, 3<sup>RD</sup> Ed p 610

<sup>3</sup> See Page 6 of the Application

26. It is not clear how, adopting the test in IPP set out above, a Campaign supporter's interest would be materially greater than, or different from, the interests of an ordinary member of the public.
27. Parliament in drafting S36 (1) included a provision that members of the public may make an Application for removal of a registered charity but only where they are affected by the decision to register. In this case JNFCT has been registered since 20 June 1963, JNFET since 12 October 1984 and KKL since 23 September 2004 and whilst the period since registration does not, of itself, mean that those making the Application cannot be affected, it does mean, in the Commission's view, that the case made for standing would need to be elevated above those matters which affect all tax payers.

### **Conclusion on standing**

28. We do not find that the Application makes out a case that the Campaign (or the individuals or companies which comprise the Campaign) meet the test for standing. We are of the view that the individuals or legal entities behind the Campaign are not affected in a way that is materially greater than, or different from, the interests of an ordinary member of the public.

Accordingly, having reached the conclusion that the Application has not been submitted by a person or persons with sufficient legal standing, there is no requirement upon the Commission to go on to consider whether or not JNFCT, JNFET or KKL) are charities within the meaning of S1(1) of the Act.

29. However in accordance with the Commission's public confidence objective and as Registrar of Charities, the Commission does have an interest in ensuring that the institutions entered on its register are properly registered. Accordingly the Commission is prepared, exceptionally, to consider the question of whether an institution is properly registered as a charity, irrespective of, and without prejudice to, whether or not an individual who seeks to make an Application is 'affected' by the decision.

### **Status analysis**

#### **The Commission as Registrar**

30. The Commission has a statutory function to:

- determine whether institutions are or are not charities pursuant to section 1 (a) and (b) of the Act
- maintain a Register in accordance with section 29(1) of the Act

31. Section 1 of the Act sets out the criteria for the definition of a charity being an institution:

- (a) established for charitable purposes
- (b) subject to the control of the High Court in the exercise of its jurisdiction with respect to charities

## The Application

32. The Application asserts that 'JNF [in the context of the Application, the Commission assumes that this means JNFCT] should never have been registered as a charity in England and Wales, since:
- JNF UK set up their charities for improper use
  - KKL-JNF, of which JNF UK is a branch, is a para-statal organisation in a foreign country
  - JNF UK and its charities are involved in violations of human rights and international law
  - JNF aims were never in fact for the public benefit and ...the organisation was mistakenly registered as a charity.'
33. The Application states that 'the continued registration of the 'JNF charities':
- Damages or has the potential to damage the reputation of charities generally
  - Left unchecked is damaging public trust and confidence in the Charity Commission as an effective regulator'.

## Was JNFCT a charity upon incorporation?

34. The current objects of JNFCT are 'the relief of poverty, and the furtherance of any other charitable purposes, within the State of Israel as constituted from time to time, especially such charitable purposes as benefit persons of Jewish religion, race or origin.'
35. To be a charity an organisation has to be established only for charitable purposes as defined in s.2 of the Act, being purposes that fall within the descriptions of purposes in s.3 of the Act and which are for public benefit (as charity law understands that term).
36. In considering whether a purpose falls within a description or descriptions [S3 (3)] the Act provides that where any term used in a description has a particular meaning in charity law it has that meaning in the Act.
37. When considering whether an organisation is a charity the primary focus is upon the purposes set out in the governing document. JNFCT has purposes (set out at paragraph 34 above) which are clearly drafted and without more, exclusively charitable.
38. JNFCT is a company limited by guarantee with a registered office in England and Wales and as a result is subject to the authority and control of the High Court in England and Wales.
39. There is no evidence that JNFCT is an institution governed by the law of another state, or that the jurisdiction of the High Court is excluded in any way; or that the governing document is in a legal form originating from a foreign jurisdiction which operates in accordance with the laws of a foreign state.
40. The Application<sup>1</sup> cites the Commission's 2011 public benefit guidance which states that 'no organisation that has aims (in this context 'aims' means purpose) that are illegal, or that intentionally deceives or misrepresents its aims and so is a sham, can be a charity.'

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<sup>1</sup> Page 5 under the heading 'public benefit'

41. No evidence is produced in the Application to support the view that at establishment JNFCT had illegal purposes, or was in law a sham.
42. JNFCT has been operating as a charitable organisation since 1939 and the Commission has, at the time of registration and since when the Commission provided consent to various regulated amendments in 1955, 1960, 1968, 1988, 2006 and 2008, assessed JNFCT as established for an exclusively charitable purpose, for the public benefit.
43. There is no evidence in the Application that JNFCT is a branch of KKL JNF. The charity's current Memorandum and Articles (M&A) do not include any provisions that support external control or a lack of independence. This is the case even in circumstances where the Chairman of KKL Executor and Trustee Company Limited (KKLET) is an Honorary Officer of JNFCT and the Chief Executive and Executive Director of KKLET are invited to attend trustee meetings but are not entitled to vote.

The Honorary Officer, as a charity trustee and director of a charitable company, is under a fiduciary duty to act only in the best interest of the charity and not to act as a representative or in the best interest of KKLET.

44. One issue which could have an impact upon the charitable status of an existing charity is the impact of the Equalities Act 2010. A charity which restricts its beneficiaries to people who share a protected characteristic, but cannot justify the restriction under either of the two tests in the charities' exception (or another applicable exception) will not be able to show that it is for the public benefit and cannot therefore be a charity.

In such circumstances the Commission would consider a charity to be under a duty to change the purpose. Whether action on the part of the trustees of JNFCT is required remains to be seen but the requirement for such action, if any, does not mean that JNFCT is not a charity.

45. The Campaign, by the matters asserted in Paragraphs 32 and 33 above, seeks to include in this status review consideration of activities. The Commission takes the view, in accordance with the case law as recently summarised in the Upper Tribunal<sup>1</sup> 'that the activities in which the organisation has engaged since its formation are strictly irrelevant because those activities may or may not be intra vires, and because what matters is the scope of what is authorised by the purpose.'

Accordingly the Commission is of the view that those matters referred to in the Application which relate to activities are not relevant to this status decision but the Commission does accept that those matters may impact upon trustee duties and the operation of those charities concerned.

46. The applicants argue that the registration of the charities has a negative impact upon public trust and confidence in the Commission as regulator. The [statutory objective](#) to increase public trust and confidence is imposed on the Commission.

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<sup>1</sup> Helena Housing Limited v Revenue and Customs Commissioners [2010] UKUT 271(TCC)

Full Fact v Charity Commission [2011] Case No CA / 2011/0001

UTurn UK CIC v Charity Commission [2011] Case No CA/ 2011/0006



### **Is there evidence that JNFCT is no longer a charity?**

47. Generally once an organisation has charitable status it retains this status and charity trustees are under a duty to further its purposes for public benefit. Charity trustees cannot choose to no longer be a charity nor can the Commission remove charitable status as a regulatory response. Whether or not an organisation is a charity is a matter of law.

48. Exceptionally changing social or economic circumstances may mean that a purpose that was exclusively charitable ceases to be so. In *National Anti-Vivisection Society v IRC*<sup>1</sup>, Lord Simonds said 'If by a change in social habits and needs, or it may be by a change in the law, the purpose of an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to ask that a cy –pres scheme be established'.

In the case of a charitable company, an application for consent to amend the M&A would be applicable in similar circumstances.

49. Evidence of circumstances that would support the proposition that the objects of JNFCT have ceased to be charitable has not been provided in the Application. The Application does not provide a legal basis for the Commission to remove JNFCT on the grounds that it has ceased to be a charity, as defined in the Charities Act 2011.

### **Conclusion**

50. Having considered the Application we have concluded that:

- JNFCT is a charity established for exclusively charitable purposes and should remain on the Register.

Applying the same tests and principles, we have also reached the conclusion that:

- JNFET and KKL are charities established for exclusively charitable purposes and should remain on the Register.

In accordance with the Commission's published risk framework and its statutory objectives, functions and duties, those operational and administrative issues raised in the Application concerning principally the operation and activities of JNFCT but also relating to JNFET and KKL, will now be referred to the London Operations function to assess how and to what extent, the Commission should engage with JNFCT, JNFET and KKL.

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<sup>1</sup> (1948) AC 31 per Lord Simonds P74

## Right of appeal

51. We are committed to making decisions which, taking into account the facts and circumstances of the case, are:

- Legally correct
- Fair
- Proportionate
- Consistent

If you consider that we have got our decision wrong, you may request that the decision is reviewed through our Decision Review procedure. Our decision may also be challenged directly through the First-tier Tribunal (Charity). There is no requirement that you engage our Decision Review procedure before appealing to the Tribunal and you may approach the Tribunal direct.

The law allows only certain types of decisions to be challenged through the Tribunal. However, if it is not possible for you to challenge our decision through the Tribunal, you may still be able to challenge it through the Courts.

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52. The Commission reserves its right to defend any application for appeal, on the grounds that neither the Campaign, or any legal persons that comprise the Campaign, are not persons affected by the decision for the purposes of S34 (1) (a) or affected by the registration for the purposes of S36(1) (b).

I trust I have clarified the Commission’s position.

Yours sincerely

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