THE REGISTRATION OF GRANT-MAKING CHARITIES

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1. Introduction

Charitable expenditure ranges from the application of a few thousand pounds of locally-sourced funds to the sophisticated and systematic use of billions of pounds.[1] Most charities provide services to promote their purposes. However, in addition to creating direct financial impact, many larger charities influence the charitable sector by giving grants to other, smaller charities. This helps raise the profile of smaller charities and promote new initiatives, particularly in specialist fields.[2] Nearly 10% cent of all charitable expenditure is given by charities to other charities. It is this specific type of organisation, known as a 'grant-making charity', with which this article is concerned.

It is difficult to know precisely how many grant-making charities exist, but in 2016/17 approximately 12,700 grant-making 'foundations' (which includes grant-making

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1 For example, in the 2016/17 year, Save the Children International spent £1.013 billion: *The UK Civil Society Almanac 2019* <https://data.ncvo.org.uk/profile/activities> accessed 4 November 2019.

2 See, for example, para 2 of the evidence given by the Rayne Foundation to the Joint Committee on the Draft Charities Bill 2006 <https://publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we140.htm> accessed 4 November 2019.

charities as well as others[3]) spent approximately £4.3 billion in England and Wales.[4] In short, grant-making is a big industry.

Despite this, charity law has provided surprisingly little tailored regulation of grant-making charities.[5] Instead, it is generally assumed that the law of charity applies to grant-making charities as it does to 'standard' service-providing charities.[6] This article will investigate the truth of that proposition and cover two things. First, it will analyse what requirements a grant-making charity must meet to be registered as a charity in England and Wales. It will be shown that the test for the validity of a grant-making charity is slightly more refined than for standard, service-providing charities. However, it will be seen that this is more a reflection of the practicalities unique to grant-making charities than any inherent difference in nature. Second, in light of the more nuanced legal position for grant-making charities, the article will go on to offer some practical guidance on what a potential grant-making charity can include in its grant-making policy to increase the chance that the Charity Commission will accept its application for registration.

2. The Legal Criteria for a Valid Grant-Making Charity

Fundamentally, a charity is an institution that is 'established for charitable purposes only'.[7] The aims of a particular charity must fit within the list of valid charitable purposes outlined in section 3(1) Charities Act 2011 and be 'for the public benefit'.[8] Several propositions relating to how these rules apply to grant-making charities will be considered.

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3 The term 'foundation' has no precise legal definition, but it is generally understood to cover organisations endowed by philanthropists or companies to achieve a particular purpose (J Goldsworth, *Private Foundations: Law and Practice* (2011), paras 1-02 and 1-05). Most charitable foundations are grant-making charities, but an increasing number of foundations focus on directly providing charitable services, so the two terms are not entirely overlapping. For two different descriptions of charitable foundations, see A Dunn, 'The Governance of Philanthropy and the Burden of Regulating Charitable Foundations' (2012) Conv 114, and the description given on the Association of Charitable Foundations website <https://www.acf.org.uk/about/what-is-a-foundation/> accessed 4 November 2019.

4 *The UK Civil Society Almanac 2019* <https://data.ncvo.org.uk/profile/activities/> accessed 4 November 2019. This equated to approximately 7.5% of all charities and 8.8% of all charitable spending in 2016/17.

5 Dunn (n 3).

6 E.g. Dunn (n 3); L Driscoll and P Grant, *Philanthropy in the 21st Century* (2009) 22 <http://www.honorarytreasurers.org.uk/docs/PhilanthropyReport.pdf> accessed 4 November 2019.

7 Charities Act 2011, s 1(1)(a).

8 Charities Act 2011, s 2(1).

2.1 Charitable purposes

It is submitted that the judgment of the Court of Appeal in *IRC v Helen Slater Charitable Trust Ltd* [1982] Ch 49 (*Helen Slater*) outlines four propositions relevant to the validity of a grant-making charity. The first proposition is that the grant-making charity must itself have charitable purposes which permit it to make grants. The second proposition is that the grant-making charity must only make grants to organisations that are 'established exclusively for charitable purposes'.[9] The third proposition is that the trustees[10] of the grant-making charity must not know, actually or constructively, that the grant will be misapplied. The fourth proposition is that the receiving organisation must either immediately spend the grant or reinvest it as part of the assets which are used to promote its charitable purposes.

In February 1970, Mrs Helen Slater set up a charitable trust to relieve the sick, the poor and the aged, to advance education, and to allow the trustees to 'make grants to such associations, trusts, societies or corporations as are established for charitable purposes only'.[11] At the same time, Mrs Slater's husband, Mr James Slater, also set up a charitable foundation which had materially identical objectives and directors to Mrs Slater's trust.[12] In 1973, Mrs Slater decided to transfer around 85% of the trust's funds (some £639,000) to the foundation. In 1974 and 1975, the trust made two further transfers to the foundation of approximately £5,000 and £12,000 (respectively). In total, then, the foundation received around £656,000, of which approximately £578,000 was undistributed during the years of receipt.[13] The Revenue sought to tax the trust on the undistributed sums. The trust challenged this decision.

The sole question for the Court of Appeal was whether the transfers attracted an exemption for income tax and gains tax on the basis that the money *was* 'applied' by the trust for charitable purposes.[14] Oliver LJ, with whom Fox and Waller LJJ simply agreed, expressly adopted the judgment of Slade J in the High Court and held as follows:

> Any charitable corporation which, acting intra vires, makes an outright transfer of money applicable for charitable purposes to any other corporation established exclusively for charitable purposes, in such manner as to pass to the transferee full title to the money, must be said, by the transfer itself, to have 'applied' such money for 'charitable purposes,' within the meaning of

9 *IRC v Helen Slater Charitable Trust Ltd* [1982] Ch 49, 60G (Oliver LJ).

10 Used in the sense described in Charities Act 2011, s 177.

11 *Helen Slater* (n 9) 54D-E (Oliver LJ).

12 Ibid, 54F (Oliver LJ).

13 Ibid, 55A-C (Oliver LJ).

14 Ibid, 55D-E (Oliver LJ).

> the two subsections, unless the transferor knows or ought to know that the money will be misapplied by the transferee.[15]

In short, the transfers *were* exempt from income tax and gains tax.

Specifically on the issue of 'applying' funds, Oliver LJ confirmed that 'charitable trustees who simply leave surplus income uninvested cannot… be said to have "applied" it at all and, indeed, would be in breach of trust'.[16] In other words, the receiving organisation must either immediately spend the grant or reinvest it as part of the overall pool of assets which are used to promote the organisation's charitable purposes.

It is submitted that Oliver LJ's judgment, albeit given in the taxation context, provides a helpful starting point for a legal definition of a grant-making charity and contains the four propositions outlined at the start of this part of this article.

It is worth noting that although both charities in *Helen Slater* were companies limited by guarantee (despite being labelled 'trust' and 'foundation'), there is no reason for the propositions to be limited to such charities. Indeed, the High Court of Australia expressly adopted the *Helen Slater* approach in a charitable trust case.[17] It is therefore submitted that the propositions apply to grant-making charities of every form.

2.2 Grants for non-charitable purposes

It is submitted that a fifth proposition relating to the validity of grant-making charities may be derived from Scott J's judgment in *AG v Ross* [1986] 1 WLR 252: that grant-making charities may only make grants to non-charitable organisations if those grants constitute an 'ancillary means' by which the grant-making charity's purposes may be pursued.

On 1st May 1971, the North London Polytechnic (now the University of North London) was formed by the amalgamation of the Northern Polytechnic and the North-Western Polytechnic.[18] It was registered as a corporate charity.[19] Article 27 of its articles of association required there to be a students' union and on 29th November 1971 the governors duly approved the constitution for such an organisation.[20]

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15 Ibid, 60G-H. The outcome in *Helen Slater* was later confirmed by statute in Income Tax Act 2007, s 523.

16 Ibid, 59F-G (Oliver LJ).

17 *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55 [37] and [44] (majority judgment of Gummow, Hayne, Heydon and Crennan JJ).

18 *AG v Ross* [1986] 1 WLR 252, 256A (Scott J).

19 Ibid.

20 Ibid, 256B-F (Scott J).

In March 1984, the National Union of Mineworkers started a year-long strike. By December 1984, the North London Polytechnic students' union had resolved to donate £5,000 to the striking miners.[21] The Attorney-General sought an injunction restraining that payment on the basis that it would be ultra vires the purposes of the students' union.[22] An interim injunction was granted and the matter was listed for a full trial.[23]

At a preliminary hearing, Scott J held that the students' union was established to further the educational purposes of the Polytechnic. The students' union therefore held its funds exclusively on charitable trust.[24] Scott J further held that the earlier political donations made by the students' union were ultra vires and, in any event, could not affect its charitable status because the core educational purposes were not in doubt.[25]

One of the arguments made on behalf of the students' union (which wanted to avoid 'the restraints of charity'[26]) was that it could not be charitable because it affiliated itself with the National Union of Students, a non-charitable organisation. Scott J rejected this argument. In doing so, he discussed the well-known proposition that an organisation may be charitable even though some of its activities do not in themselves promote charitable purposes. Scott J then went further and held that there was: 'no reason in principle why, for the purpose of achieving its own charitable purposes, a charitable body should not ally itself with and contribute to the funds of a non-charitable organisation'.[27]

However, Scott J confirmed that a charity can only carry on non-charitable activities if those activities are 'as a matter of degree no more than ancillary means by which [the charity's] charitable purpose may be pursued'.[28] For example, a students' union could make a grant to the National Union of Students as a means of promoting general educational purposes. This is the fifth proposition identified above.

This conclusion is now reflected in the Charity Commission's guidance on giving grants to non-charities.[29] This guidance emphasises that trustees of grant-making charities must consider their own charity's purposes first and ensure that each grant 'helps (or is intended to help) to achieve [those] purposes'. It is submitted that the

21 Ibid, 254F-G (Scott J).

22 Ibid, 254H (Scott J).

23 Ibid, 255A (Scott J).

24 Ibid, 260B-261G (Scott J).

25 Ibid, 264C-265B (Scott J).

26 Ibid, 255D (Scott J).

27 This was cited with approval by Hoffmann J in *Webb v O'Doherty* (1991) 3 Admin LR 731.

28 *Ross* (n 18) 265E (Scott J).

29 See <https://www.gov.uk/guidance/draft-guidance-grant-funding-an-organisation-that-isnt-a-charity> accessed 4 November 2019.

phrase 'intended to help' is sufficiently wide to cover ancillary non-charitable means of furthering a charitable purpose.

2.3 The scope of a recipient charity's purposes

It is submitted that a sixth proposition relating to charitable validity can be derived from the decision of Brightman J in *Baldry v Feintuck* [1972] 1 WLR 552: that a grant-making charity can only give grants to organisations whose purposes are within its express or implied charitable purposes.

The North London Polytechnic students' union is not the only union to have faced a charity law challenge. On 21st October 1971, the Sussex University students' union amended its constitution simply to permit 'the promotion of any matter whatsoever of interest to its members'.[30] At a meeting on 4th November 1971, the students' union voted to make two payments, one of £500 to *War on Want* (a charity to aid refugees in what is now Bangladesh) and one of £800 to a political campaign against the government's policy of ending certain free milk supplies to school children.[31] Mr Anthony Baldry, a student at Sussex University and member of the students' union, sought an injunction to restrain these payments on the basis that they were ultra vires.

Just like the North London Polytechnic, the parties agreed that the Sussex University students' union was an educational charity.[32] Brightman J held that the original aims of the students' union were charitable and that, accordingly, the purported amendment to the constitution had no effect.[33] Therefore, Brightman J held, the political gifts would be ultra vires and an injunction was granted.[34] In reaching this latter conclusion, Brightman J held in respect of the donation to *War on Want* that:

> … it is not open to one charity to subscribe to the funds of another charity unless the recipient charity is expressly or by implication a purpose or object of the donor charity. That must be a correct conclusion, because otherwise any charity could, by a side-wind, defeat and supplant its own particular objects.[35]

Of course, as Oliver LJ noted in *Helen Slater*, the objects of the two organisations do not need to be 'absolutely identical' for the grant-making charity to be able to make a grant.[36] However, the grant must clearly support the grant-making charity's purposes.

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30 *Baldry v Feintuck* [1972] 1 WLR 552, 556A-D (Brightman J).

31 Ibid, 554E-G (Brightman J).

32 Ibid, 556A (Brightman J).

33 Ibid, 557E-G.

34 Ibid, 558C-G.

35 Ibid, 558E.

36 *Helen Slater* (n 9) 60C.

2.4 Public benefit of grant-making charities

Some commentators have suggested that the test for public benefit must be modified for grant-making charities. However, there appears to be no conceptual difference relating to the public benefit requirement for grant-making charities as opposed to other charities. Nothing in sections 1 to 4 of the Charities Act 2011 even alludes to grant-making charities, so there is no statutory difference between grant-making charities and other charities. Similarly, none of the primary cases that create and apply the two 'aspects' of the public benefit requirement (benefit to the community and benefit to a sufficiently numerous group) indicate that the public benefit analysis is conceptually any different for grant-making charities as compared to other charities.[37] It is therefore submitted that the standard principles of public benefit apply to grant-making charities. However, as will be shown, in practice, a grant-making charity may need to take greater steps than usual to prove that it is established for the public benefit. This is our seventh proposition.

There is a practical difference in making the public benefit assessment for grant-making charities. As explained above, *Helen Slater* held that a grant-making charity is only charitable if its grants are made to 'any other corporation established exclusively for charitable purposes'. In other words, as grant-making charities do not give directly to 'end users' (i.e. the public), their grants will only be charitable if the receiving organisations apply the funds for charitable purposes. Therefore, the charitable status of a grant-making charity depends on whether the *potential recipient* charities have valid charitable purposes within section 3(1) of the Charities Act 2011 and are 'for the public benefit'.

Driscoll and Grant have argued that this amounts to 'double counting' of the public benefit, as the same end benefit (e.g. a particular charitable service) justifies the charitable status of both the service-providing charity and the grant-making charity.[38] They argue that instead grant-making charities should be required to demonstrate the

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37 *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 [44] (Warren J) (private schools), as applied in *Attorney General v Charity Commission for England and Wales* [2012] UKUT 420 [30] (Warren J) (relief from poverty); *Human Dignity Trust v Charity Commission for England and Wales* [2015] WTLR 789 [104] (Judge Alison McKenna) (promotion of human rights); *HMRC v Life Services Ltd* [2017] UKUT 484 (TCC) [43] (Mann J and Judge Timothy Herrington) (private day care); and *Hipkiss v Charity Commission*, First-tier Tribunal (Charity), unreported, 23 August 2018 [29] (Judge Alison McKenna) (human organ preservation). See also W Henderson et al, *Tudor on Charities* (10th edn, 2015) para 1-043; and T Longley (ed), *Halsbury's Laws of England* (volume 8, Charities, 2015) para 5, which accepts that the 'two-aspect' approach to public benefit applies universally. The Charity Commission of England and Wales takes this approach in para 74 of its guidance: <https://www.gov.uk/government/publications/legal-analysis-public-benefit> accessed 4 November 2019.

38 L Driscoll and P Grant, *Philanthropy in the 21st Century* (2009) 22 <http://www.honorarytreasurers.org.uk/docs/PhilanthropyReport.pdf> accessed 4 November 2019.

'added value' of their grant-giving, for example by pointing to an influence in policy decisions, an increase in awareness or an increase in output.

However, it is submitted that such a test would be unduly restrictive. First, it would be very difficult for a grant-making charity to provide evidence in advance of registration that it would 'add value' in defined respects to its (potentially unknown) recipients. Second, even if the grant-making charity passed this suggested threshold for establishment, Driscoll and Grant's suggestion would require a grant-making charity to actively monitor the output of every organisation to which a grant has been made. This would impose an unnecessary administrative burden on grant-making charities and detract from their ability to give grants. Furthermore, most charities are already required to produce annual reports outlining their charitable spending and activities, so the grant-making charity would largely be duplicating this work.[39] Third, in many cases, it is likely that a grant will simply be added to a recipient's general charitable funds, in which case it would be very difficult to identify specific improvements that were directly funded by the grant-making charity. Fourth, the law has long recognised that charities may only provide indirect public benefit, for example charities promoting animal welfare.[40] Driscoll and Grant's suggestion would undermine this principle for no good reason.

That said, there are two further (and more specific) problems of applying public benefit principles in practice that may arise more frequently for grant-making charities. First, grant-making charities may wish to donate to foreign charities. Second, grant-making charities with narrow purposes may naturally tend to benefit only a limited number of other charities.

With regard to the first of these problems, if a grant-making charity donates to a registered UK charity, then an assessment of the public benefit of the latter organisation has already been made as part of its registration process. Therefore, if a grant-making charity could only donate to UK-registered charities, it would be straightforward to prove public benefit. However, what happens if a grant-making charity is able to donate to overseas charities? Although there are limited authorities directly on this issue, it seems that, at least as a matter of pure charity law[41] and practice,[42] benefit to the public abroad qualifies as public benefit under English law

39 Charities Act 2011, ss 162, 167 and 168; Charities (Accounts and Reports) Regulations 2008, regs 5–8 and 40–41.

40 Charities Act 2011, s 3(1)(k); *Helena Housing Ltd v HMRC* [2012] PTSR 1409 [78] (Lloyd LJ).

41 See the discussion in W Henderson et al, *Tudor on Charities* (10th edn, 2015) paras 1-124 to 1-142.

42 The Charity Commission of England and Wales takes this approach in para 74 of its guidance:<https://www.gov.uk/government/publications/legal-analysis-public-benefit> accessed 4 November 2019.

unless it would be contrary to UK public policy to recognise it as such. All of this would appear to be true for both grant-making charities and other charities.

However, matters are slightly more complicated from a tax perspective. Donations to overseas bodies are only charitable if the recipient applies the funds solely for charitable purposes (as defined in English and Welsh law) and the donating charity has taken reasonable steps to ensure that the payment is so applied.[43] HMRC has provided helpful guidance on what would constitute 'reasonable steps' in different situations.[44] This guidance expressly states that it is not enough for the recipient to be an established charity in its home jurisdiction. Instead, HMRC requires a grant-making charity to provide information about the receiving organisation, the decision-making process undertaken by the grant-making charity, any guarantees or assurances given by the overseas body, and the follow-up steps taken by the grant-making charity. Although this guidance primarily speaks of promoting charitable purposes, it must not be forgotten that, as a matter of charity law, a charitable purpose is one which is 'for the public benefit'.[45] In short, HMRC's guidance necessarily incorporates ideas of public benefit. Therefore, it is submitted that following HMRC's guidance is a sensible way for grant-making charities to prove their public benefit and ensure that their donations attract charitable tax relief.

In relation to the second difficulty identified – that grant-making charities with narrow purposes may naturally tend to benefit only a limited number of other charities – the general rule is that the possible recipients of benefit from the charity 'must not be numerically negligible'.[46] It is submitted that this rule clearly prohibits a charity from being set up to benefit just one stated beneficiary.[47] Therefore, a grant-making charity could not have as its stated object the aim of funding one named organisation. Similarly, a grant-making charity could not accept funds from a founder on the condition that it uses those funds solely to benefit a particular organisation in future.[48] That much is clear. But will a grant-making charity be valid if *in reality* it is likely only to give to one organisation? For example, a grant-making organisation may support organisations that research unusually rare diseases or that promote education in small and remote countries. In both cases, there may only be one possible recipient at any one time.

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43 See Income Tax Act 2007, s 457 (for charitable trusts) and Corporation Tax Act 2010, s 500 (for charitable companies).

44 See: <https://www.gov.uk/government/publications/charities-detailed-guidance-notes/annex-ii-non-charitable-expenditure#payments-to-overseas-bodies> accessed 4 November 2019.

45 Charities Act 2011, s 2(1)(b).

46 *Oppenheim v Tobacco Securities Trust* [1951] AC 297, 305 (Lord Simmonds).

47 E.g. *IRC v Baddeley* [1955] AC 572, 592 (Viscount Simmonds) and *Re Scarisbrick's Will Trusts* [1951] Ch 622, 650–651 (Jenkins LJ).

48 See the discussion of *Joseph Rowntree Memorial Trust Housing Association Ltd v AG* [1983] Ch 159 in W Henderson et al, *Tudor on Charities* (10th edn, 2015) at para 1–182.

It is submitted that two principles would likely save grant-making charities in both of these cases. First, charity law focuses on the *possible* number of recipients rather than the *actual* number of recipients. As Viscount Simonds explained nearly 65 years ago, 'a bridge which is available for all the public may undoubtedly be a charity and it is indifferent how many people use it'.[49] Similarly, charities which provide academic scholarships or prizes often intentionally select just one candidate to benefit, but such organisations retain their charitable status as long as the class of potential scholars is sufficiently broad to constitute a section of the public.[50] It is submitted that this logic would protect both grant-making charities described above. Second, as explained above, the question of public benefit for grant-making charities may be determined by looking at the public benefit provided by the recipient organisations. This effectively gives grant-making charities a second bite at the cherry. Provided that the likely recipient operates for the benefit of the public, a grant-making charity that regularly donates to it should be valid. This may be proved by following the guidance given by HMRC and discussed above.

To conclude this section, it is argued that, legally, the public benefit requirement applies equally to grant-making charities as to other charities. Furthermore, the potential practical problems that may concern grant-making charities will generally not be a barrier to charitable status. Nonetheless, a grant-making charity may have to take more steps than usual to prove that it does act for the public benefit. This confirms our seventh proposition: that the law of public benefit applies equally to grant-making charities and other charities, but grant-making charities may need to take greater steps to prove this.

2.5 Summary of propositions explored

Drawing the above strands together, it is submitted that a grant-making organisation ('A') is a valid charity if it meets the following criteria:

a. It is a charitable organisation of any kind;[51]

b. Its object is or includes making donations (proposition 1) to other bodies ('B') whose purposes:

   i. Are within A's express or implied charitable purposes (proposition 6);

   ii. Are exclusively charitable (i.e. would qualify as a charity under English law if their purposes were pursued in this jurisdiction) *or* are non-charitable but constitute an ancillary means by which A's charitable purpose may be pursued (propositions 2 and 5);

49 *IRC v Baddeley* [1955] AC 572, 592.

50 E.g. *R v Newman* (1669) 1 Lev 284.

51 See text to n 17.

iii. Can be shown to be for the public benefit (proposition 7);

iv. Require B to immediately apply or invest the received funds in B's general charitable fund (proposition 4); and

c. The trustees of A do not know, or should not reasonably be expected to know, that B will misapply the received funds (proposition 3).

3. Grant-Making Policies

Charitable trustees are afforded a wide discretion for deciding how to invest the charity's funds in line with its purposes.[52] There is also nothing in law that *requires* a charity to have a policy that might fetter that discretion.[53]

However, as explained above, a grant-making organisation may not qualify for charitable status if its purposes permit it to donate to non-charitable organisations. It is therefore crucial for a grant-making charity to carefully select the recipients of its donations. Furthermore, as discussed above, the purposes of grant-making organisations may throw up slightly different issues to those encountered by the Charity Commission in respect of other charities. Therefore, it is submitted that, in advance of applying to become a registered charity, a grant-making organisation ought to adopt a grant-making policy to submit with its registration application. This will have two benefits. First, it will assist those establishing the grant-making organisation to refine how the potential charity would work. Second, it will address some of the difficult issues associated with grant-making charities and will thereby assist the Charity Commission in deciding whether to grant charitable status to the organisation.

In light of the discussion above as to the legal requirements for valid grant-making charities, it is submitted that a grant-making policy should expressly cover the following:[54]

a. A statement that the grant-making charity only makes grants to organisations whose purposes are:

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52 The general rule is that charitable trustees will only be liable for breach of trust if they act improperly (*In re Beloved Wilkes Charity* (1851) 3 M&G 440, 448 (Lord Truro LC); *Lehtimaki v Children's Investment Foundation Fund (UK)* [2018] 3 WLR 1470 [62] (court judgment)), although note the slightly lower standard suggested by the Court of Appeal in *Marwaha v Singh* [2014] PTSR 1166 [30]–[39] (Etherton C).

53 Although note that charities are required to submit any grant-making policies with their annual reports: Charities (Accounts and Reports) Regulations 2008, regs 40(3)(m) and 41(3)(m).

54 Some of the suggestions in paras (a) and (e) are derived from D Cracknell (ed), *Charities: The Law and Practice*, loose-leaf, para E.246 (discussing international collaboration), and in the guidance provided by the Charity Commission of England and Wales <https://www.gov.uk/guidance/work-with-other-charities> accessed 4 November 2019.

i. Exclusively charitable;[55]

ii. Non-charitable, but only if those purposes are ancillary means by which the grant-maker's charitable purpose may be pursued (giving an explanation of what this means in the particular context);

iii. For the public benefit; and

iv. Within the express or implied purposes of the grant-making charity.

b. An explanation of whether the trustees of the grant-making charity invite applications for a grant or themselves survey the field of potential recipients to decide to which organisation(s) they will make a grant.

c. A statement that the grant-making charity trustees will carry out an appropriate risk assessment on any proposed donee before making a grant. This could involve:[56]

i. Recording and assessing the governance and constitutional form of the donee;

ii. Evaluating the donee's track record for delivering activities which are similar to those which the grant-making charity intends to fund;

iii. If possible, seeking independent references for the donee;

iv. Reviewing the donee's published accounts; and

v. Checking that the donee is a registered charity in its jurisdiction.[57]

d. A statement that the grant-making charity will require any potential donees to provide cost budgets and projections of how the money will be spent. Those projections should include clear outcomes that can easily be verified by the grant-making charity's trustees.

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55 Grant-making charities should take particular care when considering a grant to an organisation that operates in areas relating to social justice, human rights and democracy, as these may shade into non-charitable political activities: J Warburton, 'Charities, Grants and Campaigning' (2009) 11 CL & PR 1, 9 and 15–17.

56 The first two of these principles are suggested by the Charity Commission in its guidance on grants to non-charities: <https://www.gov.uk/guidance/draft-guidance-grant-funding-an-organisation-that-isnt-a-charity> accessed 4 November 2019.

57 This is suggested by the Charity Commission for Northern Ireland in its guidance: <https://www.charitycommissionni.org.uk/news/charities-must-ensure-they-are-complying-with-the-law-warns-regulator/> accessed 4 November 2019.

e. A statement that all grants will be made using the grant-making charity's standard-form grant contract, which should cover at least the following matters:

   i. It is a condition of the grant that the recipient will ringfence the funds and will, within a stated reasonable period, apply them to the agreed purposes and/or projects or invest them as part of a particular charitable fund;

   ii. A specified proportion of the grant must be returned if the purpose of the grant fails, either before implementation or within a specified period afterwards;[58]

   iii. The receiving charity agrees that it will not misapply the received funds;

   iv. The receiving charity agrees to provide periodic reports at specified intervals on how the grant has been spent, with appropriate receipts and/or invoices, until the funds have been exhausted; and

   v. The receiving charity agrees that it remains independent from the grant-making charity and a clause setting out how this will be achieved.

f. A statement that the grant-making charity will clearly explain its terms and conditions to any recipient to ensure they understand the limits on the donated funds.[59]

g. A statement that, where appropriate, at least one trustee will be involved in each grant-making decision. This could be as part of a face-to-face meeting or as part of the final internal decision process.[60]

It is submitted that a grant-making organisation which files a grant-making policy covering the issues highlighted above would have a good chance of satisfying the Charity Commission that it ought to be registered as a charity.

Several of the above recommendations for the content of a grant-making policy are neatly reflected by the Charity Commission's report into the donations made by the

58 E.g. 'Funds Raised for and Donated to NHS Hospitals' (1995) 3 Decisions of the Charity Commissioners 35, 36.

59 This is suggested by the Charity Commission in its guidance on grants to non-charities: <https://www.gov.uk/guidance/draft-guidance-grant-funding-an-organisation-that-isnt-a-charity> accessed 4 November 2019.

60 This was praised by the Charity Commission in its case report on the Joseph Rowntree Charitable Trust; see paras 40 and 60 of the report: <https://www.gov.uk/government/publications/the-joseph-rowntree-charitable-trust-case-report> accessed 4 November 2019.

Joseph Rowntree Charitable Trust ("JRCT") to CAGE.[61] CAGE is a company which operates to promote human rights throughout the world. Between 2007 and 2014, JRCT gave £305,000 to CAGE in instalments of different amounts. In each case, JRCT used its standard grant-making agreement. However, the Charity Commission concluded that JRCT had received insufficient information to be sure that CAGE was applying the donations for exclusively charitable purposes. In its report, the Charity Commission emphasised the following points:

a) JRCT had not properly evaluated how CAGE had used the donated funds; for example, JRCT had not assessed whether CAGE's activities were confined to promoting human rights as understood by charity law.

b) JRCT should not have funded CAGE's general operation costs. It should only have funded charitable purposes and should have used 'claw-back' provisions in its grant-making contract to recover funds spent other than for exclusively charitable purposes.

c) Although JRCT had a sound grant-making process, it did not review its due diligence sufficiently regularly or robustly, given the controversial nature of CAGE's work.

Each of these points made by the Charity Commission is reflected in the suggested grant-making policy described above (see paragraphs (c), (e)i, (e)ii and (e)iv).

4. Conclusion

The law and practice relating to the registration of grant-making charities is not entirely clear or satisfactory. However, this article has attempted to provide a structured analysis of the criteria which an organisation must meet if it is to be registered as a grant-making charity. With that guidance in mind, this article suggests that such organisations should adopt a grant-making policy in advance of applying for charitable status. Such a policy will assist both those establishing the organisation and the Charity Commission and will streamline the registration process.

61 <https://www.gov.uk/government/publications/the-joseph-rowntree-charitable-trust-case-report> accessed 4 November 2019.