

CHARITY TRIBUNAL UPDATE- OCTOBER 2011

Introduction

In the recent conjoined cases of *R (Independent Schools Council) v The Charity Commission for England and Wales* and *H.M. Attorney General v The Charity Commission for England and Wales* [2011] UKUT 421 (TCC) the Upper Tribunal (Tax and Chancery Chamber) overturned the Charity Commission's statutory Guidance on the public benefit requirement for charitable status. Although the independent school sector may see the decision as a victory it remains to be seen what Guidance on public benefit should now be put in place. In this article I will assess how the Judgment shapes our understanding of the public benefit requirement in the independent schools sector. I will also try to predict the wider implications for charities.

Background

The Independent Schools Council (ISC) claimed that the Charity Commission's Guidance on public benefit was prescriptive, confusing and wrong in law. The Charity Commission had been putting pressure on certain independent schools do to more by way of fee remission which those schools considered to be a novel and unwarranted interference which was politically and ideologically motivated. Although the Tribunal was careful not to be drawn into an essentially political debate, the proceedings have to be seen in the context of a wider argument about whether independent schools should benefit from a privileged legal status as a charity, enjoying all the related fiscal privileges which come with that recognition. While the ISC challenged the Charity Commission's Guidance by way of judicial review, the Attorney General referred a series of questions to the Tribunal to answer in an attempt to clarify what an educational charity needs to do to be able to show public benefit.

First principles

In its analysis of the public benefit requirement the Tribunal separated questions of constitution (the governing instrument of the school) from operational concerns (what a school actually does in practise). The Tribunal stated that a school's status as a charity "depends on what it was established to do not on what it does". This is a well established principle but is one which is often missed. The question of whether an institution is 'established' for charitable purposes is to be answered only by looking at the constitution of the charity to see whether its purposes

(a) fall within one of the heads of charity law contained in section 2(2) of the Charities Act 2006 (such as ‘the advancement of education’, ‘the relief of poverty’); and

(b) satisfy the public benefit test.

Each purpose of the institution has to be a charitable purpose if the institution as a whole is to be a charity. Each purpose must show public benefit. It is not sufficient to claim public benefit because of the overall effect of the institution’s purposes. Where a school does not have a written constitution it may be necessary to look at all the circumstances to determine what the purposes of the school are.

What amounts to public benefit?

The Tribunal identified two different aspects of public benefit:

1. What it called “public benefit in the first sense” was where *the nature of the purpose itself benefits the community*. Common purposes which are for the ‘advancement of education’ are of their nature for the public good. The Tribunal said that educational trusts of an ordinary sort, such as an independent school, are seen as being for the public benefit in the first sense. It will not be difficult for a school of the ordinary sort to show this kind of public benefit.

2. “Public benefit in the second sense” was when those *who benefited from the carrying out of the purpose were numerous and identified in such a manner so as to constitute a “sufficient section of the public”* (our emphasis). This is more difficult to establish. An educational trust of an ordinary sort can fall down by not being for the public benefit in the second sense by not providing a benefit to a sufficient section of the public.

What is a ‘sufficient section of a public’?

It has been shown how the Tribunal affirmed the established principle that for an institution to be for the public benefit it must benefit a ‘sufficient section of the public’. For a fee-charging institution to be charitable it must have purposes which do not ‘exclude the poor’.

The Tribunal affirmed the established principle of charity law that ‘poor’ does not mean destitute. *Re Clarke* [1923] 2 Ch. 407 was relied upon as an authority. Although the definition might differ depending on the head of charity, “[b]roadly speaking, and in the present context, a poor person is a person who cannot reasonably afford to meet a particular need by purchasing at the full cost the price the service which it is the charity’s

purpose to provide". Elsewhere the Tribunal refers to case authority which includes within 'the poor' those of 'some means' although not 'substantial means' and elsewhere those of 'modest means'. It might even include the 'quite well off'. We are far away from the depiction of poverty in William Langland's *Piers Plowman*. But the Tribunal was concerned that this line of thinking is not taken too far. An institution which offers at full price a service which is already provided in the open market and the cost of the service is such that the poor cannot afford to use it, however beneficial to the community the provision of the service may be, is not a charity. An institution with purposes available in practice only to the rich cannot be charitable.

Public benefit applied to the independent school sector

The Tribunal concluded that where the sole object of a hypothetical school is the advancement of the education of children whose families can afford to pay fees of £12,000 p.a. representing the cost of the provision of their education there is not the necessary element of public benefit. Such a hypothetical school would not be charitable. Those able to pay fees of that order could not be considered 'poor'. The effect of such an object would be to exclude 'the poor' completely. In assessing whether a child is 'poor' the Tribunal stated that the relevant unit would include the child's parents. A student who received funding from a grant-making educational charity would still be 'poor' but funding from an employer would be a purely private benefit which would have to be brought into account when deciding whether the student really was 'poor'.

The Tribunal noted that it is extremely unlikely that any school does, as a matter of its constitution, restrict access to those whose families can afford fees.

The relevant test

The Tribunal reaffirmed the established principle that it is up to the charity trustees, not the Charity Commission or the Courts, to make decisions on how to administer the trust. The Tribunal rejected that this involved a test of reasonableness – a test of what an objectively reasonable trustee would do. The Tribunal's key formula was "[a]lthough it is necessary that there must be more than a *de minimis* or token benefit for the poor, once that low threshold is reached, what the trustees decide to do in the running of the school is a matter for them, subject to acting within the range within which trustees can properly act."

The Tribunal did however give some examples of how a school might operate in the public benefit if its purposes allowed the charity trustees to provide one or more of the activities:

- a. provision of scholarships and bursaries (in the case of hypothetical school with an intake of 70 children a year, the award of full scholarships to 10% of them would be enough, but 1% would probably be too few. In a specialist institution which is more expensive to run the trustees may come to a different conclusion);
- b. arrangement under which students from local state schools can attend classes in subjects not otherwise readily available to them;
- c. sharing of teachers or teaching facilities with local state schools;
- d. making available (whether on the internet or otherwise) teaching materials used in the school;
- e. making available to students of local state schools other facilities such as playing fields, sports halls, swimming pools or sports grounds
- f. acting as a co-sponsor to a local Academy by making a substantial financial contribution.

However making school facilities such as playing fields available to the community as a whole is not a benefit relevant to the 'advancement of education'. A school would need to justify this under a separate purpose if it was to do this at all and even were it successful in this it would not satisfy the public benefit requirement which would need to be satisfied in relation to the advancement of education for the school to be a charity. If such a wider service to the community could not be found to fall within one of the school's objects the trustees would be acting outside their powers. A school ought also be careful that the activities in (b) to (f) above are permitted under its constitution.

Schools must not only provide one or more of these benefits but "[i]n all cases, there must be a benefit for the poor which is not *de minimis* or merely token." The school could not provide such a *de minimis* or token benefit "to be able to point at it in order, as it were, to cock a snook at the Charity Commission." It would instead be necessary to look at what the trustees "acting in the interests of the community as a whole, would do in all the circumstance of the particular school under consideration and to ask what provision should be made once the threshold of benefit going beyond the *de minimis* or token level had been met." This process "is one of reaching a conclusion on a general survey of the circumstances and considerations regarded as relevant rather than of making a single conclusive test." Importantly, "[i]t is for the charity trustees of the school concerned to address and assess how their obligations might best be fulfilled in the context of their own particular

circumstances.” The Tribunal did not hold out bursaries as the only way an independent school could show public benefit, but queried whether the indirect or wider benefits of other activities would be enough when taken alone. If bursaries are to count towards the public benefit, they need to be going to 'the poor' (ie the students unable to pay the full fees), and so means-testing might be favoured if exam-based scholarships were going to those students already in a position to afford the fees. Bursaries need not be for the full amount of the fees, but partial bursaries may have less public benefit.

The Tribunal was doubtful whether much weight could be attached to a benefit (such as making teaching materials used in the school) which it thought comparatively easy to provide at little cost and possibly little effort. In so doing the Tribunal seemed to be suggesting that it is important that not only does a charity have to benefit a sufficient section of the public in order to be for the public benefit, but that a charity use a sufficient amount of its resources in that endeavour.

It was rejected however that independent schools as a whole are automatically of public benefit because they take away the strain from the State needing to provide for school places.

The Tribunal recognised that those independent schools with healthy finances or a large endowment were in a different position to those which were financially less secure. It would be necessary for each school to make a decision about what level to set school fees. Class size, qualifications of the teaching staff, and the school's business plan would all be relevant. The geographical location and the levels of deprivation in the local community may also be considered. The Tribunal said that schools need to consider the question of access more generally and how to treat all their potential beneficiaries fairly. Access policies must be fair not capricious.

We underline that a charity is established by what it is set up to do, not by what it actually does. If the trustees fail to provide public benefit in practise they may be in breach of trust, but the Charity Commission has no power to unilaterally remove the charity from the public register without applying to Court.

Gold-plating

The Educational Review Group argued that many independent schools are making provision beyond what is necessary to meet any charitable need and were “gold-plating” education at a cost which made the cost of education unaffordable for the vast majority. The Tribunal

referred to the case of activities and facilities in two schools which “might well seem astonishing to those which are not familiar with such matters.” Although the Tribunal accepted that such activities may be supported from the schools’ historic endowment as well as by fees charged it warned schools providing luxurious benefits that it was even more incumbent on them to demonstrate a real level of public benefit. This was not to impose different standards on different schools, but was simply to say that where such a luxury provision is made “a stringent examination of how it is provided and how the public benefit is satisfied is appropriate.”

Implications for other charities

While the Tribunal’s decision was given in relation to educational charities it recognised that its analysis “may have wider implications” for other charities. What might those wider implications be?

- Charities ought to take note that their charitable status derives from their constitution, not because of anything they may actually do.
- It is up to trustees to make decisions about the administration of their charities, not the Charity Commission. If the trustees get it wrong and act outside their powers or fail to provide a public benefit which is no more than *de minimis* or tokenistic it is open to the Charity Commission to apply to Court for a review of whether the trustees are in breach of trust, not to summarily remove the charity from the public register.
- Although the Tribunal's definition of public benefit was designed for educational charities, if it is the right one, there is no reason why it should not have some application to other charities (with caveats for charities for the relief of poverty and for the advancement of religion). When justifying charitable status, indirect and wider public benefits can be taken into account but only insofar they are relevant to the objects of the charity. More global benefits such as taking the burden off the State to provide for the needy may be too speculative a benefit. Charities must ensure that the poor are not excluded from benefiting, although in the context of fee charging institutions 'the poor' may include those who cannot afford the full market cost of a service.

- When charities provide luxurious facilities they must examine whether they are providing an appropriate level of public benefit.
- The Tribunal reminded us that there is no presumption that an institution with charitable purposes is for the public benefit. It chose to give the example of religious charities. There is “no presumption that Christianity or Islam are for the public benefit and no presumption that the Church of England is for the public benefit.” However if the Tribunal is right that no presumption existed before the 2006 Act, this should not have an effect on the status of longstanding charities.
- Charities should review their objects to see whether they are acting within their powers. Charities may consider taking steps to widen their objects. However in so doing they must be conscious that a wider object may end up making a subsequent merger of charities difficult if those objects are made dissimilar with the objects of charities within the same group. Each purpose must be wholly charitable and show public benefit.

Is the law now settled?

As an aside, the Tribunal made clear that it intended to say nothing about trusts for the relief of poverty since the 2006 Act, because this was subject to separate proceedings before it. These proceedings (which have been set down to be heard on 14 November) arise out of a Reference by the Attorney General to the Tribunal in relation to relief of poverty charities which restrict benefit to a class of persons, such as the employees of an organisation under an employee benevolent fund. The Reference affects the following three main groups:

1. trusts for groups of people who share a relationship in common (eg for poor family members);
2. trusts for employees (or former employees) of a commercial company and their family members;
3. trusts for the members of unincorporated associations and their families.

The proceedings have attracted some considerable interest. Upwards of ten parties, principally large benevolent funds of large commercial companies have been joined. A similar number of 'interveners' will be able to make written representations, including the Police Federation for England and Wales. A large number of Masonic charities, generally

operated by individual lodges, are thought to be affected, including 1,200 which have been identified on the public register.

The proceedings concern the extent to which charities for the relief of poverty must benefit a sufficient section of the public since the 2006 Act. Exceptions to the general rule that the beneficiaries of a charity should not be chosen by purely personal or institutional ties have been made for charities under this head. It may be that the forthcoming proceedings, or those proceedings on appeal, will reopen some of the Tribunal's conclusions on the nature of public benefit.

In the concluding paragraph of their decision the Tribunal notes:

"Our Decision will not, we know, give the parties the clarity for which they were hoping. It will satisfy neither side of the political debate."

It has been show that trustees must do more than provide a token benefit to those in need but all the circumstances of that organisation can be taken into account when prioritising expenditure. The Tribunal rejected the notion that 'one-size fits all' when proving public benefit. In the context of this uncertainty it remains crucial that charity trustees have a clear idea of how they believe their organisation contributes a benefit to society and the strength of conviction to be able to argue that case.

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