



Public Benefit:

What now for independent schools?

Jo Coleman considers the impact of the recent Tribunal ruling on public benefit for independent schools.

Everyone's a Winner?

The Upper Tribunal (Tax and Chancery Chambers) delivered its judgment on 14 October 2011 on the Independent Schools Council's application for judicial review of the Charity Commission's public benefit guidance as it relates to fee-charging charities and considered its response to the Attorney General's reference.

In the few days following the judgment both sides claimed victory. The ISC announced that the Tribunal:

'Overruled the Charity Commission's approach to public benefit and discredited controversial parts of the statutory guidance as 'obscure or wrong'.

The Charity Commission welcomed the ruling and said it was:

Pleased that in its judgment the Tribunal agrees with our interpretation of the law on key issues'.

The reality was in fact more nuanced and is aptly summarised by the Tribunal who concluded:

'Our decision will not, we know, give the parties the clarity for which they were hoping.'

The Law on Public Benefit

The Tribunal considered detailed case law which has developed over centuries. It made clear that public benefit requirements apply differently to different types of charitable purposes and that its decision is applicable to educational charities only, though it acknowledged that it would have an impact for other fee-charging charities.

The Tribunal confirmed the two aspects of public benefit:

i. the nature of the purpose itself must be a benefit to the community: though the Tribunal concluded that there had never been any presumption (pre 2006) that educational purposes were for the public benefit, it had no difficulty in finding that the provision by independent schools of education to students of school age according to conventional curricula was a benefit to the community.

ii. those who may benefit from the carrying out of the purpose must be sufficiently numerous to constitute what is described as a 'section of the public':

the Tribunal confirmed that a trust which excludes the poor from benefit cannot be a charity. Whilst accepting that poor does not have to mean 'destitute' the Tribunal was clear that people who were able to pay the fees charged by independent schools are not 'poor' in this context, no matter how many sacrifices they may make in order to fund the fees. A School which was established for the purposes of educating only those who could pay full fees would not be charitable.

What can be taken into account in providing public benefit?

The Tribunal then considered the ways in which a school could provide benefits – whether direct, indirect or wider benefits. It confirmed that the following could all be counted:

The provision of scholarships and bursaries (including hardship funds);

Inclusion of students from local state schools in classes and activities;

Sharing of teachers and teaching facilities with local schools;

Making available (eg via the internet) other teaching resources to schools;

Making other facilities available e.g. playing fields, sports halls, swimming pools to local state schools;

But, it discounted any benefit arising from the provision of school facilities to the local community as a whole (including adults), as this was not directed at furthering a school's educational purposes.

The Decision confirmed that bursaries are not the only way in which a school will be able to demonstrate that it is meeting the public benefit test. Yet before Governors scrap their planned bursary provision and seek to rely on indirect benefits they should heed the Tribunal's findings that "When it comes to considering whether a school which is a charity is operating for the public benefit in accordance with its charitable purposes, the primary focus

must be on the direct benefits which it provides. Scholarships or other forms of direct assistance are therefore important." Account can be taken of the other types of listed benefits but the Tribunal noted 'it must be very doubtful whether much weight can be attached to a benefit which must be comparatively easy to provide at little cost and the effect of which seems... uncertain.'

So, when is the public benefit requirement satisfied?

The Tribunal has made it clear that some benefit must be provided for the poor. Those benefits must be more than de minimis or a token benefit. Once this 'low' threshold is reached it will be a question for each school to apply a more fact sensitive assessment i.e. 'What provision should be made in the circumstances of the particular school?'

There will be no one right answer. The Tribunal found that it is not possible to be prescriptive, the Governors have to assess how their obligations might best be fulfilled in the context of their own particular circumstances (i.e. its financial circumstances, the size of an endowment, the way the school prioritises expenditure and the facilities which it provides). This is not a licence to do nothing. Governors must take a proper decision on what is appropriate in the circumstances of their charity. Once the de minimis level is reached however, the level of provision is a matter for the Governors and not for the Charity Commission or the Courts.

The Tribunal made a point of referring to 'gold-plating' of provision at the premium end of the market and made it clear that schools providing facilities at the luxury end, will need to examine stringently how they satisfy the public benefit requirement.

What next?

The Tribunal has yet to establish what relief will be given to the ISC and whether the offending parts of the Commission Guidance will be quashed. In the meantime, the Commission has already begun work

to amend its Guidance. We can expect the revised Guidance to become less prescriptive, which will not provide the clarity that some Governors had been seeking. There will be no black letter test to be applied.

Governors will of course need to consider the new Guidance when it is published (it is still a statutory requirement to have regard to it) but will have to make their own decision as to the level of provision that is appropriate.

Finally, whilst Governors are making their difficult assessments of the benefits to be provided to the poor, they can take some comfort from the fact that the Tribunal has confirmed that a school will not lose its charitable status if it fails to meet its obligation to provide a public benefit. What happens to a charity that is not meeting the public benefit requirement? The Commission previously suggested that it would be struck off the Register as it failed to be a charity. The Tribunal, however, thought the approach would be that the Commission would remove the trustees.

ISC's verdict:

Matthew Burgess, ISC's General Counsel, said:

"The ruling takes public benefit decisions away from the Commission and hands them back to school governors, and for that reason we warmly welcome it.

"The ruling liberates schools to innovate and be creative in their charitable provision. The Commission's former approach, now discredited by the Tribunal, had the effect of reducing the public benefit of independent schools to a crude calculation of fees and bursaries. "Each school is in the best position to determine what it can do to fulfil its charitable objectives in the public benefit, and the ruling emphasises the independence and autonomy of each school to take the best decisions it can, free from the threat of intervention by the Commission."