Summary of Decision by Upper Tribunal (Tax and Chancery Chamber) in
(a) judicial review proceedings brought by the Independent Schools Council and
(b) an Attorney General's Reference
regarding the public benefit test for charitable independent schools following the Charities Act 2006

Decision published: 14 October 2011

The Proceedings

1. This decision concerns two separate but closely related sets of proceedings raising issues about the effect of the public benefit requirement contained in the Charities Act 2006 ("the 2006 Act") on independent schools which charge fees.
2. The first set of proceedings ("the JR Application") is an application for judicial review, seeking an order quashing parts of the Charity Commission's guidance "Charities and Public Benefit – the Charity Commission's General Guidance on Public Benefit" issued in January 2008, and "Public Benefit and Fee-Charging" and "The Advancement of Education for the Public Benefit", both issued in December 2008 (together "the Guidance"). The JR Application was commenced by the Independent Schools Council ("the ISC") in the Administrative Court and transferred to the Tax and Chancery Chamber of the Upper Tribunal.
3. The second set of proceedings ("the Reference") concerns a process by which the Attorney General may "refer" certain questions of charity law to the Tribunal for a determination. This was the first such reference under the new procedure, introduced by the 2006 Act. The Reference consists of a series of specific questions about the operation of charity law in relation to a hypothetical independent school. The questions are reproduced at Annexe A to the decision.
4. The JR Application and the Reference were dealt with in the course of a single hearing in May this year. The proceedings were heard by the President of the Upper Tribunal (Tax and Chancery Chamber), Mr Justice Warren, who sat with two Upper Tribunal Judges, Judge Alison McKenna and Judge Elizabeth Ovey.

The Charity Commission's Guidance

5. The Charity Commission's Guidance (the subject of the JR Application) focuses on two stated principles of public benefit, with a number of sub-principles. These are:

"Principle 1: There must be an identifiable benefit or benefits

1a It must be clear what those benefits are
1b The benefits must be related to the aims
1c Benefits must be balanced against any detriment or harm

Principle 2: Benefit must be to the public or a section of the public

2a The beneficiaries must be appropriate to the aims

2b Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted

- *by geographical or other restrictions; or*
- *by ability to pay any fees charged*

2c People in poverty must not be excluded from the opportunity to benefit"

The issues before the Tribunal related primarily to principles 2b and 2c.

The Tribunal's Conclusions

14. The legal concept of charity has developed over several centuries and is not static. The decided cases applied differing public benefit requirements as between different types of charitable purposes, so that the Tribunal's decision in this case was applicable to educational charities only.
15. The case law has developed two identifiable strands to what is meant by public benefit. The first is that any charitable purpose must be of benefit to the community. The advancement of education has long been recognised as beneficial by the Courts. There was no dispute in this case that education in the sense of the delivery of a standard curriculum to school-age children was for the benefit of the community.
16. The second strand of "public benefit" which is discernible from the case law is that those who benefit from the carrying out of the charitable purpose must be sufficiently numerous and identified in such a manner as to constitute a "section of the public."
17. The Tribunal concluded (at paragraph 53) that the concept of "public benefit" which applied immediately before the enactment of the 2006 Act incorporated both strands of public benefit and that an educational charitable purpose therefore had to satisfy both aspects both before and after the 2006 Act.
18. The Tribunal then considered what presumptions (if any) were made under pre-existing law about purposes being for the public benefit.
19. In relation to the first sense of public benefit, the Tribunal concluded that the courts had in the cases before them formed their own view on the basis of the evidence and made a decision on it. This involved the consideration of evidence in some of the cases but not in others where this issue was not in dispute. This process did not involve the application of a presumption as that term is usually understood (paragraphs 67 - 68). In any case where detriment to society was alleged and this allegation was supported by evidence, the Tribunal would have to balance the alleged benefits against the alleged detriment in order to decide whether public benefit in the first sense was made out. The Educational Review Group ("the ERG") an intervener in this case, had argued that the independent schools sector produced dis-benefits to society, in particular through impairing diversity and social mobility. The Tribunal concluded that the material presented

to it by the ERG was not sufficient to establish its case in this regard (paragraph 108). It noted that the ERG had raised "*issues which should be of concern to all members of society [but which] require political resolution*".

20. The courts had not, prior to the 2006 Act, applied a presumption in relation to the second sense of public benefit – the "sufficient section" test (paragraph 71) and that this was a matter for the decision of the Court or Tribunal in each case. In considering the decided cases in relation to the second sense of public benefit (including those concerned with charities which charge for their services) the Tribunal concluded (at paragraph 178) that a charity which (either constitutionally or as a matter of practice) excluded the "poor" from benefiting from its charitable activities would not satisfy the public benefit requirement in its second sense as it would not be providing for a sufficient section of the community. The meaning of "rich" and "poor" in this context is not straightforward (see paragraphs 40 and 179 to 185).

21. The Tribunal considered the extent to which the material provisions of the 2006 Act had changed the pre-existing law (other than by stating that it is not be presumed that any purpose was for the public benefit). In the issue before the Tribunal in this case (whether those able to afford to send their children to charitable independent schools are a sufficient section of the public) the Tribunal concluded that section 3(2) had not changed the pre-existing law because there had never in fact been a presumption in relation to this aspect of public benefit (paragraph 83).

23. The Tribunal concluded (at paragraph 214) that a charitable independent school would be failing to act for the public benefit if it failed to provide some benefits for its potential beneficiaries other than its fee-paying students (unless this was a merely temporary state of affairs). However, it also decided that each case depends upon its own facts and (provided the *de minimis* threshold is crossed) it is a matter for the trustees of a charitable independent school (rather than the Charity Commission or the Tribunal) to decide how trustees' obligations might best be fulfilled in the light of their circumstances. Benefits for potential beneficiaries who are not or will not become fee-paying students may be provided in a variety of ways (see paragraph 196), including, for example, the remission of all or partial fees to "poor" students and the sharing of educational facilities with the maintained sector.

Relief Granted

24. The Tribunal concluded at paragraph 236 that certain parts of the Charity Commission's Guidance were erroneous and, whilst sympathising with the Commission in its difficult task, invited the parties to agree the wording of a formal Order granting appropriate relief to the ISC on the JR Application. If no agreement is reached the Tribunal will invite further submissions before making an Order.

25. The Tribunal answers the Attorney General's questions about the hypothetical school at paragraphs 237 – 258.

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