PUBLIC SCHOOLS FOR PUBLIC BENEFIT?

THE Charities Act 2006 (and the consolidating Charities Act 2011) left intact the principle that a valid charitable purpose must be not only charitable in nature but also "for the public benefit" (s. 2(1)(b) of both Acts). Under section 3(2) of the 2006 Act (see now 2011 Act, s. 4(2)), which aimed to bring about a change in the law, "it is not to be presumed that a purpose of a particular description is for the public benefit". A controversial question arising out of the 2006 reforms was how a fee-charging school might be expected to demonstrate that it is carrying out its educational purpose in a publically beneficial manner.

In *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC), [2012] 2 W.L.R. 100 the Council, an umbrella organisation for around 980 charitable independent schools, asked the Tax and Chancery Chamber of the Upper Tribunal to quash parts of the Commission's guidance on the public benefit requirement (*Charities and Public Benefit: The Charity Commission's General Guidance on Public Benefit*; *Public Benefit and Fee-Charging; The Advancement of Education for the Public Benefit* (all 2008)). That guidance, *inter alia*, provided that a valid public benefit must not be unreasonably restricted by ability to pay fees and that those in poverty must not be excluded from the opportunity to benefit from a charity's purpose. The Council regarded the guidance as erroneous and over-prescriptive, usurping trustees' discretion, and expressed concern at its uncertainty. The Attorney-General referred several questions to the Tribunal in the same hearing, and there were two interveners.

Many of the propositions discernable from the Tribunal's lengthy judgment, which it attempted to confine to the education version of the public benefit test, will be subject to significant future debate. It identified two aspects of "public benefit". The first aspect dictates that the nature of the charitable purpose itself must be beneficial to the community; the second requires that those who benefit from the purpose must be sufficiently numerous to constitute "a section of the public" ([44]). This case concerned the second aspect, in relation to which "[t]here was, under the pre-existing law, no presumption at all" ([83]). The Tribunal decided that section 3(2) of the 2006 Act (as it then was) addressed the first aspect only and was therefore irrelevant. The Tribunal also held that neither a court nor the Commission could decide the political question of whether the public benefit in the first sense provided by independent schools was outweighed by the "dis-benefits" arising from the charging of fees and the impact of independent schools on the public as a whole. It would be difficult to demonstrate that an otherwise charitable purpose was rendered non-charitable because of its wider consequences for society.

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The pertinent question, which the Tribunal saw as unaffected by the 2006 Act or any directly binding authority, was whether those able to pay school fees factually constituted a sufficient section of the public. The Tribunal distinguished between the purposes and the activities of a school. It decided "as a matter of principle" that a trust whose purposes exclude the poor cannot be charitable ([178]). This means that a school with the sole purpose of educating children whose families could afford to pay (substantial) fees representing the cost is not charitable. Conversely, a new school "which, as a matter of its constitution, can admit students whatever their ability to pay, but as a matter of fact (whether because of a policy of accepting only fee paying students or because of some financial imperative) does not do so" ([187]) would "generally speaking" be exclusively charitable ([189]).

When considering whether the activities of an existing charitable school are consistent with the public benefit requirement, the focus would be primarily on the direct benefits, such as scholarships, provided to students. While the sharing of broadly educational facilities with state schools could contribute to the satisfaction of the public benefit requirement, the Tribunal doubted that making such facilities available to the community as a whole would be sufficiently direct to do so unless that somehow implemented an educational object. The Tribunal was also sceptical about the argument that independent schools provide a benefit by removing students from the state sector.

In evaluating whether a school was doing enough to comply with its public benefit-related duties, the Tribunal held that the correct approach was to examine what a trustee would do in the circumstances of the particular school in question, and ask what should be done above a necessary *de minimis* or more-than-token threshold for the poor, although it did not obviously settle on a definitive meaning of "poor". The Tribunal deliberately tried (but ultimately failed) to avoid the word "reasonable" in describing the relevant standard, robbing it of much content. Fundamentally it was for the "trustees of the school concerned to address and assess how their obligations might best be fulfilled in the context of their own particular circumstances" ([217]). Trustees could properly exclude vast numbers of potential beneficiaries, provided they did so in a manner that was "rational and justifiable in the promotion of the public interest" and without acting capriciously ([218]). The Tribunal also emphasised the need to ensure that facilities were at least ancillary to the advancement of education.

Turning to the guidance itself, the Tribunal reluctantly concluded that the Commission had sought to impose the very "reasonableness" standard that the Tribunal had rejected. *Inter alia*, the guidance confused aims with activities, wrongly implied that there was a necessary obligation to give the poor the opportunity to benefit other than by

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going beyond the *de minimis* threshold and was sometimes obscure. The Tribunal therefore held that several passages of the guidance required correction (ultimately permitting an undertaking from the Commission to amend it), although the Tribunal was unable to provide the clarity requested by the Council's second submission.

The conclusion thus appears to empower trustees at the expense of the Charity Commission, but the level of uncertainty is considerable even if the Tribunal's answers to the Attorney-General's hypothetical questions provide some assistance. It is telling that the Tribunal was subsequently forced to revisit the necessary alterations to the guidance (unreported judgment, 2 December 2011) and its decision is unlikely to represent the last word on the charitable status of independent schools.

BRIAN SLOAN

REMOULDING THE SCOPE OF APPLICATION OF ANTI-DISCRIMINATION LAW

IN *Jivraj v Hashwani* [2011] UKSC 40, [2011] 1 W.L.R. 1872 the Supreme Court, in reversing the decision of the Court of Appeal, found that an arbitration clause contained in a commercial agreement between two Ismaili businessmen, which provided that any irremediable dispute arising between its parties would have to be resolved by arbitrators drawn exclusively from the Ismaili community, was not incompatible with the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660).

Lord Clarke, with whom the other Justices agreed, delivered the leading judgment which dealt with three extremely important interpretative questions pertaining to the Regulations, and to the Equality Act 2010 which revoked and restated the Regulations while at the same time introducing a single, harmonised and EU-compliant framework for UK equality law. These three questions pertain to (i) the personal scope of application of UK equal-treatment legislation as contained in reg. 2(3) of the Regulations and, now, in section 83(2) of the Equality Act 2010; (ii) the personal and material scope of application of Article 3(1) of EU Directive 2000/78; and (iii) the justifiable exceptions to discriminatory conduct by reason of a genuine occupational requirement as permitted by regulations 7(1) and 7(3) of the Regulations, now replaced by the similarly worded provisions contained in Schedule 9 of the Equality Act. This note is predominantly concerned with points (i) and (ii).

On point (i), the Supreme Court disagreed with the Court of Appeal decision that an arbitrator could be seen as an "employee" working "under a contract of service" (at [21]–[23]). In addition, it affirmed that

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