***The Independent Schools Council* v *The Charity Commission* [2011] UKUT 421 (TCC)**

The facts

This case was actually concerned with two different actions.

(1) The Independent Schools Council made an application for judicial review, seeking a declaration that the Charity Commission's guidelines on what an independent (fee-paying) school would have to do to satisfy them that it was operating for the public benefit and could thus retain its charitable status were legally incorrect.

(2) Separately, the Attorney General exercised his powers under the Charities Act 1993 to 'refer' certain questions of charity law to the courts for their determination, to ask the courts a series of questions as to when an independent school would satisfy the requirement that it operate for the public benefit.

Both actions were heard together by the Upper Tribunal of the Tax and Chancery Chamber (or 'UTTCC', for short), which was made up of three judges: Mr Justice Warren, Judge Alison McKenna, Judge Elizabeth Ovey. They gave a joint decision in the case.

The decision

The UTTCC ruled that the Charity Commission's guidelines on how the public benefit requirement applied to independent schools were legally incorrect. In particular, their guidance as to what independent schools had to do for potential students who could not afford the schools fees (referred to in the decision as 'poor') were far too prescriptive.

While an independent school could not say that it was operating for the public benefit if it made no provision, or only a token provision, to help 'poor' children (i.e. students who could not without assistance afford the independent school's fees) become students at the school, it was up to the people running the school to decide how far to go in assisting poor children to become students at the school, given the circumstances of the school:

> it is not possible to be prescriptive about the nature of the benefits which a school must provide to the poor nor the extent of them. It 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. [217]

> There will be no one right answer. There will be one or more minimum benefits below which no reasonable trustee would go but subject to that, the level of provision and the method of its provision is properly a matter for them and not for the Charity Commission or the court. [220]

Let's now look at various aspects of this case in more detail.

Establishing charitable status

The UTTCC took the line (at [44]) that an institution that wants charitable status has to clear two hurdles: (1) it has to show that it is pursuing purposes that are *capable* of benefitting the public (what the UTTCC called 'for the public benefit in the first sense) and (2) it has to show that those purposes do *in fact* benefit the public (what the UTTCC called 'for the public benefit in the second sense').

The UTTCC held that an institution can only be said to be pursuing a charitable purpose within s 2(2) of the Charities Act 2006 if it clears hurdle (1). So an educational institution can only be said to exist 'for the advancement of education' within s 2(2)(b) of the 2006 Act if the education that it provides is *beneficial*, and is thus capable of being for the public benefit if it is provided to a large enough number of people. (While not quoted in the judgment, this is in line with the decision in *Re Pinion* [1965] Ch 85, where exhibiting the contents of the deceased's studio to the public was held not to be for the advancement of education because the contents amounted to worthless junk.)

The UTTCC went on to hold that 'the provision of education to students of school age and according to conventional curricula routinely taught in schools across the land is...capable of being for the public benefit in the first sense of public benefit' ([69]). So an independent school that provides such an education will be able to argue that it exists 'for the advancement of education' within s 2(2)(b) of the 2006 Act and will clear the first hurdle in the way of its obtaining charitable status. But it will still have to show that it does *in fact* operate for the benefit of the public.

The main point at issue in the case was whether an independent school that did not do enough to open its doors to poor children (defined at [40] as children who could not, without assistance from the school, afford the fees to attend the school) could still say that it was *in fact* operating for the benefit of the public.

Access

The UTTCC had to decide two things. (1) Does the requirement that an independent school that has (or wants) charitable status operate for the public benefit mean that the school has to make some provision to allow poor children to attend that school? (2) If the answer to (1) is 'yes', how much will an independent school have to do to assist poor children to attend the school?

The UTTCC ruled (at [213]) that the answer to (1) is 'yes'. As to (2), the UTCC ruled that the school would have to provide *more than* just a token, or *de minimis*, level of support (at [214]-[215]). As to how much support it would have to provide, the correct approach was to ask:

> what a trustee, acting in the interests of the community as a whole, would do in all the circumstance[s] 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. [215 b.]

It is for each school to determine what the answer to this question is. The courts or the Charity Commission will *only* be entitled to intervene to say that an independent school is failing to operate for the public benefit because it does not do enough to open its doors to poor children if 'no reasonable trustee' ([220]) would think that the level of support for poor children being provided by that school is adequate.

So once a school has put in place a more than token or *de minimis* level of support that enables poor children to attend the school, and it is deciding what to do

with its remaining funds, it could well decide to plough those funds into enhancing its educational facilities, or into giving bursaries to students whose families can afford, but with difficulty, the full level of fees (at [214] and [233]). This will be perfectly proper so long as prioritising the use of its resources in this way cannot be said to be wholly unreasonable or 'capricious' (at [218]).

'Gold plating'

The Education Review Group (or 'ERG', for short) – an unincorporated association of individuals involved in the field of education (including a lawyer, Conor Gearty) that helped the Charity Commission draft its guidance on public benefit as it applies to independent schools – asked for, and was granted, permission to make submissions in relation to the application for judicial review of the Charity Commission's guidelines. One of the concerns that the ERG raised was as to whether an independent school could be said to be acting for the public benefit when it uses its money to provide educational resources to its students that go well beyond what might be necessary for the purposes of providing them with a decent education. (For example, building an Olympic-sized swimming pool for its students to use, rather than a smaller swimming pool.) This practice was referred to in the case as 'gold plating'.

This is what the UTTCC had to say about gold plating:

> any school will need to consider whether the provision of some of its facilities can really be justified as either part of or properly ancillary to the advancement of education. This is the "gold-plating" aspect referred to by the ERG. We have to say that some of the activities and facilities revealed in the promotional material produced to us in the case of two schools might well seem astonishing to those who are not familiar with such matters. We recognise that the extent of the activities and facilities provided in any particular school will depend upon the school's historic endowment as well as the fees currently charged. In our view, however, where facilities at what we might call the luxury end of education are in fact provided, it will be even more incumbent on the school to demonstrate a real level of public benefit. This is not to impose different standards on different schools; it is simply that where such luxury provision is made, a stringent examination of how it is provided and how the public benefit is satisfied is appropriate. [219]

What I think this means is two things. (1) The school would have to show that the 'luxury' facilities that it is providing to its students do genuinely have some educational purpose (so while providing rugby pitches to its students would be okay ([202]), providing massages to its rugby players after a game would be out). (2) The school would have to show that there was some rational basis for its decision to plough its resources into educational luxuries instead of doing more to assist poor children to attend the school or providing bursaries for hard-up, but not poor, students attending the school.

Wider public benefits

The ERG made a bold argument that independent schools should not be given charitable status at all because their existence involves a net cost to society as a whole because they '[remove] able pupils from state schools and [present] barriers to social mobility' ([29]). (Note that these are the people the Charity Commission chose to help them draft their guidance on what independent schools had to do to satisfy the charity

law requirement that they operate for the public benefit...) The UTTCC refused to get involved with these arguments on the ground that they raise 'issues which require political resolution. It cannot be right...that the Tribunal should have to grapple with issues of that kind, which are not really capable of judicial, rather than political, resolution' ([109]; see also [96]).

But the flipside of this refusal to engage with the ERG's arguments was that the UTTCC *also* refused to say that an independent school could say that it was operating for the public benefit merely because it was providing an education to children (albeit children drawn exclusively from families who could afford the school's fees). '[T]he value to society of having an educated population' is the reason why educational establishments *may* be entitled to charitable status, but in order to obtain (and retain) charitable status they have to show that 'a sufficient section of the public' *directly* benefits (see [201]) from the services provided by that establishment, and it will not be able to do this if 'it is limited, either constitutionally or in practice, to providing benefits to the rich'. (All quotes in the previous sentence from para [111] of the judgment.)

'Once provision is made for the "poor" which is more than *de minimis* or merely token, we see no reason why an identified wider benefit should not be taken into account in deciding whether, overall, the way in which the school is being operated is for the public benefit' ([230]). The UTTCC was, however, very unclear on what could count as a 'wider benefit': 'the mere fact that education is a good thing...[cannot] be relied on' and the fact that independent schools reduce the 'burden on local authorities' is 'of very little weight and...in any case very speculative'. (All of the quotes in the previous sentence are from para [231] of the judgment.)

One thing the UTTCC did make clear was that 'the public benefit requirement must be satisfied with respect to *each* purpose of an institution claiming to be a charity; the test is not applied to the overall effect of carrying out the institution's purposes' ([192]). So an independent school that was only educating the children of rich families could *not* argue that it was operating for the public benefit because it makes its 'playing fields, sports halls, swimming pools or sports grounds...available to the community as a whole' ([200]). The school has to show that the education it is providing its students is for the public benefit.

So, effectively, wider benefits (or costs) that accrue to the community from the existence of an independent school are to be disregarded in deciding whether an independent school is *in fact* operating for the public benefit. The main focus has to be on the *direct* benefits provided by the school to its students ([201]). If: (1) the school is providing to its students an education that counts as 'educational' (because capable of benefiting its students) for the purposes of charity law; and (2) all of its resources are being used for such 'educational' purposes; and (3) the school has made more than a token or *de minimis* effort to open its doors to poor students who could not otherwise afford the school's fees; and (4) the school is not acting wholly irrationally, or capriciously, in deciding how to use its resources; and (5) the school teaches a sufficiently large number of students that they can be described as being as being 'a section of the public' ([44]), then it should have no problem establishing that it exists for the public benefit.

Specialist schools

The UTTCC showed some sympathy for the idea that it would be easier for an institution to argue that it was *in fact* operating for the public benefit if its purpose was to provide facilities that fulfil needs that the 'the State generally does not meet' ([258]). That was their explanation of the decision in *Joseph Rowntree Memorial Trust Housing Association Ltd* v *Attorney-General* [1983] 1 Ch 159, where a charitable association wanted to build and sell to elderly people self-contained dwellings that were tailor-made to cater for their needs. It was held that such a scheme would be charitable in nature (and thus within the association's purposes) even though it did involve charging (on a non-profit basis) people for taking advantage of this scheme. The UTTCC said:

> There can have been no doubt in *Joseph Rowntree* that the element of public benefit was strongly present...The schemes each provided for a real need which was not adequately met by either local authorities or the private sector. In the context of the provision of that sort of benefit we think that, in principle, it is right to see the particular charging structure as within the scope of a charitable objective. [173]

At [258], the UTTCC considered the position of a fee-charging specialist music school, and what such a school would have to do by way of making its facilities available to poor students to satisfy the requirement of public benefit. In such a case, the UTTCC thought that the school would be able to argue that its mere existence was for the public benefit given that it provided a 'specialist environment' for talented musicians to develop their abilities that the State generally simply does not provide. Given this, the UTTCC thought that the music school would not have to do as much a normal independent school by way of opening its doors to poor students in order to satisfy the public benefit requirement:

> the need for...provision [of specialist training for talented musicians] would lead us to be more ready to think that the minimum provision for the "poor" going beyond *de minimis* or token provision is less than in the case of an ordinary school. [258]

However, it should be noted that such a school would still have to make a more than token or *de minimis* effort to open its doors to poor students, and that a specialist music school would still have to show that any decision it made to focus its spare resources on something other than assisting poor students to attend the school was not wholly irrational.