



not for profit | public benefit

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an end in sight?

The long awaited results of the Judicial Review brought by the Independent Schools Council (ISC) and the Attorney General's reference into the Charity Commission's guidance on public benefit, which was undertaken in the Upper Tribunal in May, were released on 14 October 2011. The result is a positive for the sector and puts the decisions on providing public benefit firmly back with Governors rather than the Charity Commission.

the history

The Charities Act 2006 became law in November 2006 and resulted in all charities having to demonstrate explicitly that their aims are for the public benefit, rather than that fact being presumed, as was previously the case for charities advancing education.

The Charity Commission issued general guidance on public benefit and supplementary sub-sector guidance for charities for the advancement of education and fee-charging charities. Many felt that the Charity Commission had misinterpreted the law.

The Charity Commission undertook 12 pilot assessments (which included five independent schools) in late 2009 to examine whether the aims of the charities selected were for the public benefit and to assess the extent to which each charity fulfilled that requirement.

Only one independent school, Manchester Grammar School, was deemed to fully pass the public benefit test. Two further schools passed but with good practice recommendations and two failed. The two schools that failed prepared plans to show how they would ensure there is sufficient opportunity to benefit in a material way for those who cannot afford fees, including those in poverty. Both schools included plans to increase the level of means-tested bursaries and after what seemed a more reasonable approach by the Charity Commission, both then passed.

It became very clear that the Charity Commission was focusing on means-tested bursaries and seemed to ignore the many other ways in which the schools ensured access by those who were unable to pay fees.

The ISC felt it had no option but to call for a Judicial Review of the Charity Commission's guidance as it felt that their interpretation of public benefit was 'too narrow and deeply flawed'.

the result

The key issues which emerge from the decision are:

- a school which expressly excludes the poor, other than temporarily, from benefit would not be operating in accordance with its charitable purposes
- charitable fee paying schools must operate for the public benefit. This means that the Governors must ensure that the poor can benefit in a way that is more than "minimal or tokenistic"
- Governors, rather than the Charity Commission, must decide how their school provides for the poor, based on the individual circumstances of their school and acting in the interest of all beneficiaries. This decision should be one that a reasonable Board of Governors would make in the circumstances
- the decision makes it clear that providing means-tested bursaries, although important, is not the only way of meeting the public benefit requirement. It confirmed that schools can provide public benefit through a variety of other methods such as sharing of teachers and facilities with local state schools. It is for the Governors to decide what is appropriate for their school
- sharing of facilities with the broader community is deemed to provide little or no public benefit as the purpose is not educational

The decision also confirmed the following points:

- in the right circumstances, remission of fees for existing students who become unable to pay fees due to a change in circumstance should be seen as for the public benefit and as a benefit provided to the poor
- provision of scholarships and bursaries to those pupils who can pay some, but not all, of the fees can be considered for the public benefit
- the Tribunal accepted that the extent of the activities and facilities provided by a school can depend on historic endowments as well as current fees. However it was their view that where facilities are at the 'luxury' end it will be even more important for the school to demonstrate a real level of public benefit
- the wider benefits provided by fee charging schools, such as relieving the public purse, are not irrelevant but should not be given much weight when considering a school's public benefit, and certainly is not enough alone

The decision also made clear that the Charity Commission cannot remove a school's charitable status if it is deemed not to meet the public benefit requirements.

the future

The Charity Commission now has to rewrite its guidance in line with the judgement; we do not expect this for some time and it appears likely that this revised guidance will be subject to consultation. The ISC plans to issue guidance to assist schools in the intervening period.

We recommend that schools should continue to record the different elements of public benefit that they provide and report on these activities in the Governors' Report. The Governors should also formally consider the way in which their school provides public benefit and whether this in their judgement is sufficient given the circumstances of their individual school. Governors, in making this judgement, should ensure that the poor can benefit in a way which is more than minimal or tokenistic.

conclusion

There will be some who are disappointed that the Judicial Review has not provided clarity and a clear benchmark of what they need to do to meet the public benefit requirements. However, every school is different and what may be appropriate and achievable for one school may be impossible for another. The High Court has appropriately left the decision of what is right for an individual school to those who are best placed to make that judgement – its Governors.

about haysmacintyre

haysmacintyre, Chartered Accountants and tax advisers, comprises 24 partners and 160 staff based in Holborn, London. We provide high quality audit and assurance, business and personal taxation, corporate finance, financial planning and other business support services.

We currently advise over 100 independent schools and key educational sector governing bodies and professional associations. We lead the haysmacintyre annual independent schools' conference, run annual seminars for bursars and governors and have produced the haysmacintyre annual independent schools management survey for over twenty five years.

haysmacintyre is a founding member of MSI Global Alliance (MSI), an international alliance of independent legal and accounting firms, with 250 members in 100 countries.



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