Charity – application for judicial review of Guidance issued by Charity Commission – application granted in principle at previous hearing – terms of relief to be given

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TCC-JR/03/2010

BETWEEN

THE INDEPENDENT SCHOOLS COUNCIL

Claimant

and

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Defendant

and

THE NATIONAL COUNCIL FOR VOLUNTARY ORGANISATIONS

First Intervener

and

CONOR GEARTY, AURIOL STEVENS, ANNE MOUNTFIELD, HENRIETTA DOMBEY, RON GLATTER, MARGARET LLOYD, CLIO WHITTAKER and JULIA ECCLESHARE ON BEHALF OF THE EDUCATION REFORM GROUP.

Second Interveners

THE TRIBUNAL: **The Chamber President, the Hon Mr Justice Warren**

Judge Alison McKenna

Judge Elizabeth Ovey

Heard in public on 22 November 2011

Robert Pearce QC, instructed by the Legal Department for the Charity Commission

Nigel Giffin QC and Matthew Smith of counsel, instructed by Farrer & Co for the Independent Schools Council

Introduction

1. In this decision we deal with the relief to be granted following on from our previous Decision dated 13 October 2011 ("the Decision"), the definitions in which are adopted in this further Decision. In paragraph 236 of the Decision, we said that it would not be right simply to leave matters to the Charity Commission to correct without granting any relief at all. Our hopes that the parties would be able to agree a form of order have been disappointed.

2. Although we had also expressed the hope that any areas of disagreement could be dealt with by us on paper, we have in fact heard further oral argument from the ISC, again represented by Mr Giffin QC and Mr Smith, and the Charity Commission, again represented by Mr Pearce QC. The Attorney General and the interveners did not appear at this hearing. The lines of dispute are essentially these: the ISC's position is that we should quash large parts of the Guidance in order to remove those parts which we found to be wrong in law or obscure. In contrast, the Charity Commission's position is that we should grant only declaratory relief, thus leaving the Guidance in place but with the effect of the Decision somehow being incorporated into it. If we are against the Commission on that, its fall-back position is that a more limited quashing order should be made than that sought by the ISC.

The principles

3. In addressing the rival contentions, it is necessary to focus in the first place on principles 2b and 2c of the guidance contained in *Public Benefit.* In paragraph 235 of the Decision, we said that principle 2b was wrong. We reached that conclusion because principle 2b was to be read with, *inter alia,* section F10. In the context of fee-charging (the second bullet point) it was, we considered, directed principally, if not exclusively, at activities rather than purposes. In relation to activities, it was wrong because of the errors and obscurities identified in relation to section F10 and *Fee Charging* in paragraphs 228 to 234 of the Decision and because of the use of the words "unreasonably restricted" in the opening words. We did not, either at the main hearing or on the further hearing, hear any argument about principle 2b insofar as it concerned the first bullet point, namely geographical or other restrictions, nor about sections F4 to F9. We did not, and do not now, say anything about whether principle 2b as explained for the purposes of those restrictions is right or wrong. In particular,

we do not decide whether or not principle 2b would be a correct statement of general principle in relation to the geographical and other restrictions considered in sections F4 to F9 if the reference to section F3 and the whole of the second bullet point were deleted.

4. We also said that principle 2c was wrong, "at least as explained in the Guidance". We reached that conclusion because of the errors which we perceived in section F11 which (i) appeared to us to be unclear whether it was dealing with purposes or activities in judging whether those in poverty are excluded from benefit and (ii) did not fairly reflect the concept of poverty in charity law. However, if principle 2c is read in isolation as a general statement of principle shorn of the reference to section F11, it is correct provided that it is properly to be seen as directed at purposes rather than activities.

5. If we were to quash section F10 (and relevant parts of section F3 referred to in the opening words of principle 2b), but not principle 2b itself, it might be said that principle 2b should then be interpreted in a different way and as directed at purposes rather than activities. It is said by Mr Pearce that principle 2b, viewed in that way and at a high level of abstraction simply as a general principle, is correct. We will come to that in a moment.

6. But before we do, we must point out that Mr Pearce's argument has to rely on the proposition that the quashing of section F10 would result in a change, in relation to fee charging, in the meaning of the existing wording of principle 2b by turning an activity focused principle into a purpose focused principle. We consider that to be a very unsatisfactory argument and one which, if correct, could lead to confusion. It would be far preferable if such a general principle were expressed clearly by reference to purposes and not to activities. As section F1 itself states, the principles there set out "are important factors to consider when deciding whether an organisation's aims meet ... the public benefit requirement" and should be framed accordingly.

7. A similar point might be made in relation to principle 2c, that is to say that the quashing of section F11 would result in a change in the meaning of the existing wording of principle 2c. We do not think that that is correct. Whereas principle 2b read with section F10 is to be seen as clearly directed at activities rather than

purposes, we do not consider principle 2c read with section F11 can be seen in the same way. In our view, principle 2c includes purposes within its ambit and whether it includes activities is at best unclear. We consider that quashing section F11 would leave principle 2c to continue to have effect in relation to purposes and would make it even more doubtful that the principle is concerned with activities at all. (It would, of course, be open to the Charity Commission to produce further guidance for charity trustees, reflecting the Decision, on how to administer a charity so that operationally it provides the public benefit which constitutionally its purposes are directed to providing.)

8. We come, then, to the question whether principle 2b (without reference to section F10 or the relevant parts of section F3) is correct as a general proposition insofar as fee charging is concerned, assuming that it can be viewed as directed at purposes and not activities. This is to read the relevant part of principle 2b as a free-standing statement that, constitutionally, the opportunity to benefit must not be unreasonably restricted by ability to pay any fees charged. In our view, the case law analysed in the Decision, and specifically *Re Resch*, does not support such a proposition. As we said in paragraphs 164 and 165 of the Decision, there is no reference to reasonableness in *Resch*. Nor was our attention drawn to any other authorities stating a reasonableness requirement in relation to limiting the class of potential beneficiaries by reference to ability to pay fees. We consider that the validity of a constitutional provision restricting opportunity to benefit by reference to an ability to pay fees is not to be judged by the reasonableness of the restriction.

9. It is to be recalled that it is ultimately a matter for the tribunal and the court to decide whether the class of potential beneficiaries identified in an institution's objects is a sufficient section of the public. This requires an overall assessment and is not, on the authorities, a test of reasonableness, although reasonableness may come into the picture. For instance, a wholly capricious restriction – nothing to do with an ability to pay - unrelated to the objects of the charity might not be valid even if the restricted class was numerically very large. A wholly capricious restriction may be unreasonable on any view, but that is not to say that the restriction is invalid because it is unreasonable: rather, it is invalid because it is capricious. To give another example, a restriction imposed by a settlor for understandable personal reasons but

wholly unrelated to the objects of the charity may be invalid. In the public benefit context, it can be said, therefore, to be not "reasonable", which is a convenient way of encapsulating the ideas that what is a sufficient section of the public varies with the nature of the trust and that the class of potential beneficiaries and the particular nature of the trust are interdependent. Thus Mr Giffin in his original skeleton argument accepted that "any restriction on who can benefit must be reasonable, having regard to the objects of the charity" citing *Inland Revenue Commissioners* v. *Baddeley* [1955] A.C. 572. But that is very different from a restriction relating to an ability to pay in cases where fees are inevitable if the school is to function at all and is not, we think the sort of reasonableness to which principle 2b, in relation to fee charging, is referring.

10. We are, in any case, bound to say that we see this particular debate as rather academic. It is, we think, not likely that institutions, particularly schools, will be found where the class of potential beneficiaries is limited as a matter of its constitution in any way by reference to an ability to pay fees. If there are difficulties, they are more likely to arise in relation to activities than at a constitutional level. And that leads to the final point on this aspect of the case. The question of the correctness or otherwise of principle 2b standing alone – that is to say with section F10 and the relevant parts of section F3 having been quashed – only arises if that stand-alone version is properly to be read as being focused on purposes rather than activities. We very much doubt that principle 2b in that amended form (with both bullet points but omitting reference to section F10) should be read in that way. It is at least strongly arguable that principle 2b would, so far as concerns fee charging, remain applicable to activities even if it also applied to purposes.

The form of relief

11. So far as the form of relief is concerned, Mr Giffin submitted that in judicial review proceedings the starting point is that a claimant who has succeeded in demonstrating illegality is entitled to relief unless there is some principled basis for withholding relief, and similarly if an unlawful action or decision has been taken or promulgated it should be quashed unless there is some principled reason for declining to do so. He supported this proposition by reference in his skeleton argument to a number of authorities. Mr Pearce did not take issue with Mr Giffin as to the principles to be drawn from the authorities, but relied on the particular circumstances of this case.

12. The present case is of course, as Mr Giffin recognised, not a case in which illegality has been shown or in which the Charity Commission has taken an unlawful action or promulgated an unlawful decision. What has happened is that in discharge of its statutory obligation under s.4 of the Charities Act 2006 it has issued guidance based on a very detailed analysis of the complex and difficult case law relating to public benefit and following thorough consultation. We have decided that limited parts of the Guidance are wrong or obscure. The Charity Commission has power to revise the Guidance and has already, we are told, constituted a working party to do so. At present, however, the Guidance remains unrevised (although the Charity Commission has taken steps to draw attention to the Decision) and charity trustees are obliged to take account of it by s.4(6) of the 2006 Act, which provides:

> "(6) The charity trustees of a charity must have regard to any such guidance when exercising any powers or duties to which the guidance is relevant."

Further, under the Charities (Accounts and Reports) Regulations 2008, S.I. 2008 No. 629, the annual report of charity trustees must contain a statement

> "as to whether they have complied with the duty in section 4 of the 2006 Act to have due regard to guidance published by the Commission".

13. It does not appear to us that any of the authorities referred to by Mr Giffin precisely covers this case. In particular, although Mr Giffin drew attention to *R.* v. *Secretary of State for the Environment ex parte Lancashire County Council* [1999] 4 All E.R. as an example of a case in which statutory guidance which third parties are obliged to take into account was quashed, in that case the passage in the guidance which was quashed was a sentence which was held to be ultra vires because it had the effect of requiring the Local Government Commission to take account of a further criterion in addition to the statutory criteria and it undermined the statutory criteria themselves: see page 177c of the judgment. Nevertheless, we think that there is a close practical similarity between guidance which imposes an obligation on a third party to have regard to a criterion which has been unlawfully added and guidance which imposes an obligation on a third party to have regard to material which is legally wrong or obscure. We regard the existence of s.4(6) as a significant factor in support of Mr. Giffin's

contentions. We therefore approach this issue on the basis that such material in the Guidance should be quashed unless there are good reasons for not doing so.

14. Mr Pearce's contention is that the appropriate relief is to make declarations (i) reflecting the terms of paragraphs 226*ff* of the Decision (ii) drawing the distinction between the constitutional and operational functions of principles 2b and 2c and (iii) declaring them to be wrong in their operational function only. He accepts that there should be an order that, in summary, the Charity Commission do as soon as reasonably practicable revise the Guidance. Trustees would then perform their s.4(6) duty having regard also to the terms of the declarations granted.

15. In support of his contention, Mr Pearce made the following points:

    a. The ISC had brought proceedings as a result of its concerns about the outcome of the programme of public benefit assessments, as applied to independent schools. There was no intention to carry out further such assessments (the implications of which had in any event been misunderstood) and the Charity Commission itself was certainly not going to act inconsistently with the Decision. The ISC therefore need have no further concerns on that score.

    b. Charity trustees generally have become very familiar with the Guidance and would be better served by having regard to the known Guidance subject to the qualifications produced by the Decision than by having substantial passages of the Guidance quashed. The Decision itself has been widely publicised by the Charity Commission and there is no risk of trustees being misled.

    c. On a true reading of the Decision, the Guidance is not seriously deficient. It would be easy for trustees to read the Guidance with the mental qualifications resulting from the Decision.

    d. Any quashing order would need to range considerably more widely than a declaration, since on any view it would have to extend to sections F10 and F11 and the whole of *Fee Charging*. That would involve quashing material which might be largely right and which is helpful to trustees.

e. A quashing order would not assist the Charity Commission's public benefit objective (i.e., to promote awareness and understanding of the operation of the public benefit requirement: see s.1B(3)2. of the Charities Act 1993), because experience shows that such an order would attract ill-informed headlines and give rise to general misunderstanding, not necessarily limited to the effect of the Decision.

f. The Charity Commission has already made clear its intention to revise the Guidance, as contemplated by the 2006 Act. It is clear that subsequent legal developments may be one of a number of causes for revision.

16. We have considered the points made by Mr Pearce carefully. However, two points weigh particularly heavily with us. The first is the statutory obligation imposed by s.4(6), as to which we prefer Mr Giffin's arguments. In the absence of any formal revision of the Guidance, trustees must have regard to it as it stands and must make a statement in their annual report about whether they have done so. We accept that the course proposed by Mr Pearce is not impossible, but we do not think it is satisfactory, given that an alternative exists, that trustees should first be required to have regard to guidance which is flawed and then be required to work out for themselves what qualification to the Guidance is to be made in the light of the Decision. Nor is it satisfactory that they should be required to state in their annual report that they have had regard to guidance which is flawed. If the statement remains unqualified, it will appear that they have had regard to guidance which is wrong, but to frame a suitable qualification might not be straightforward, particularly for smaller charities. The fundamental difficulty is that the fact that we have found the Guidance to be wrong in some respects does not displace the s.4(6) duty to have regard to that part of the Guidance while it retains its status. We therefore conclude that the proper order is an order quashing certain parts of the Guidance.

17. The second point is that declaratory relief would be very difficult to formulate if it is to have the clarity which is required. We cannot make declarations which simply put into an order some of the things which we have said in the Decision. Since the thrust of Mr Pearce's argument is that the Guidance as modified by the declarations will be enough for trustees to rely on, our declarations would have to have at least the clarity and certainty which are to be expected of accurate revised guidance. The Decision

indicates the parameters within which revised guidance must be formulate but it does not give the detail necessary to tell trustees what they need to do to be able to ignore one sentence or another of guidance which has not been quashed.

18. Accordingly, we consider that a quashing order is the appropriate form of relief.

The extent of the order

19. We turn, then, to consider the extent of the quashing order. It is agreed between the parties that if an order is made, it should extend to:

    a. the whole of *Fee Charging*.

    b. the cross-reference to *Fee Charging* on page 19 of *The Advancement of Education for the Public Benefit.*

    c. sections F10 and F11 of *Public Benefit*.

    d. (as we understand the position adopted by Mr Giffin at the hearing) the eighth and ninth bullet points in section H4, which sets out criteria for assessing public benefit.

20. There is a dispute as to the extent of any order relating to:

    a. sections C3 and F1 of *Public Benefit*, which set out the principles of public benefit, including principle 2b and principle 2c.

    b. section F3.

21. The dispute in relation to sections C3 and F1 reflects the constitutional point we have considered earlier. As we have said, we regard principle 2c as correct, when shorn of its cross-reference to section F11 and the further explanation in *Fee Charging*. We do not consider that the doubt referred to in paragraph 7 above should persuade us to make a quashing order when otherwise we would not. Principle 2c should not be quashed save that the reference to section F11 should be quashed.

22. We are not able to take the same view of principle 2b, for the reasons already given. However, there is good reason for minimising the extent of any quashing order, so that the effect on material which has not been challenged and which will be familiar

and helpful to trustees is as small as possible. The appropriate order is, in our view, to quash the second bullet point only.

23. For similar reasons, we see no need to quash more of section F3 than the cross-reference to section F10 on page 19 and the fourth bullet point in the second box on that page. Taking that course in relation to section F3 eliminates any need to quash the reference to section F3 in principle 2b. It has to be accepted that this does create a small measure of ambiguity. Section F3, read on its own, appears to apply perfectly generally. However, it is concerned with principle 2b which is restricted in its operation (after deletion of the second bullet point) to the restrictions (geographical and other) referred to in sections F4-10. This might not be clear to the layman reading the Guidance; it is a point which should be taken account of in any revised guidance.

24. For completeness, we make clear that we are leaving the remainder of principle 2b unaffected because, in the form in which it will remain, it has nothing at all to say about fee charging, let alone fee charging by private schools. We have heard no argument specifically directed at the first bullet point or sections F4-9. It might be thought that our reasoning in relation to reasonableness as a test in restricting opportunity to benefit applies across the board; but there may be contrary arguments (for instance, based on *Baddeley*). It would inappropriate for us to quash guidance which has not been challenged unless we were sure it was wrong, which we are not.

Next steps

25. Subject to the point raised in the next paragraph, we propose to make a direction quashing the following parts of the Guidance:

    a. All of the parts referred to in paragraph 19 above.

    b. In sections C3 and F1 (i) the second bullet point in principle 2b (including the reference to section F10) and (ii) the references to section F11 in principle 2c.

    c. The reference in section F3 to section F10 on page 19.

    d. The fourth bullet point in the second box on that page 19.

26. The Charity Commission has expressed the concern identified at paragraph 15e. above. Although attaching little weight to that concern, we think that the Commission should be given the opportunity of withdrawing those parts of the Guidance which we would otherwise quash. We would have thought that the Commission's power to revise the Guidance would enable them to withdraw the offending parts, but even if that is wrong, new guidance could quickly be issued with the offending parts removed pending a full review. We therefore direct that the Commission may give an undertaking to withdraw the relevant parts of the Guidance, such undertaking to be received by the Tribunal within 7 days from the date of the release of this Decision. The undertaking should be to effect such withdrawal within 21 days from the date of the release of this Decision. Failing the giving of such undertaking or actual withdrawal of the relevant parts of the guidance in accordance with it, we will make a quashing order. The Commission may apply for an extension of time if it can show good reason why one should be granted. The ISC, which has not been notified of this proposal, may apply to us to revoke this direction and to make the quashing order. Such an application should be filed within 7 days from the date of the release of this Decision.

27. Finally, Mr Pearce has applied for an extension of time for the parties to apply for permission to appeal both in relation to the Reference and the JR Application. The extension sought is until the expiration of 21 days after the date on which we give this Decision. The application appears to us entirely reasonable and we grant the extension sought.

Signed: Dated: 2 December 2011

Mr Justice Warren

Judge Alison McKenna

Judge Elizabeth Ovey

RELEASE DATE: 2 December 2011