Briefing on the Attorney General's Reference on benevolent funds

Anne-Marie Piper and Lizzie Jones | March 2012

The Upper Tribunal's determination on the Attorney General's Reference on benevolent funds and certain other poverty charities was issued on 20 February 2012.

Benevolent funds around the country will be relieved that the Upper Tribunal has determined that their charitable status remains unaffected by the Charities Act 2006 ("the 2006 Act") and that an appeal of the Reference is unlikely.

As was widely expected, the Upper Tribunal ruled that charities relieving poverty among a group of beneficiaries defined by a common nexus in the form of a family relationship, common employer or membership of an unincorporated association remain charitable: the 2006 Act did not alter their status.

The background

The Reference asked a number of questions as to whether charities that relieved (or prevented) poverty among a group of persons defined by a common nexus remained charitable following the implementation of the 2006 Act. The Charities Act 2006 introduced a new statutory definition of charities, which required all charitable purposes to be for the public benefit (where public benefit was defined by reference to the pre-existing law).

The Attorney General was prompted to make the Reference by the Charity Commission raising concerns as to the status of poverty charities where beneficiaries were connected by a common nexus. The Attorney General's position was that such charities remained charitable after the implementation of the 2006 Act.

Approximately 1500 charities on the Register of Charities were identified by the Charity Commission as potentially affected. These charities included a number of very large benevolent funds, notably those connected to the large high street banks.

The Reference was limited to those charities where beneficiaries had a common nexus and it did not consider the position of charities to assist members of a profession, as this is a wider class of person not defined by reference to a single employer. Nor were charities supporting members of the armed forces or members of the emergency services within the ambit of the Reference.

The issue

The Attorney General asked the Tribunal to determine whether the case law that upheld the status of charities relieving poverty among a group of beneficiaries with a common nexus was reversed by the 2006 Act. The Attorney General also asked the Tribunal to determine the position for charities preventing poverty, following the inclusion in the 2006 Act of references to both relieving and preventing poverty, potentially drawing a distinction between the two.

At the heart of the issue are two different interpretations of judicial comments made in the leading cases as to exactly why these organisations are charitable, when an educational or religious charity that restricted its beneficiaries in this way would not be.

The two interpretations are:

1. that the leading cases are an anomaly to the general rule that a charity must provide public benefit, and are charitable because of the extremely long-standing case law in this area that a court has never seen fit to overrule; or alternatively...
(2) the public benefit requirement differs between charitable purposes, and the requirement for charities relieving poverty is not the same as the public benefit requirement for (say) a charity advancing education.

Given that the 2006 Act expressly requires a purpose to be for the public benefit if it is to be charitable, an interpretation that held that poverty cases were anomalous in that no public benefit was required would lead to a conclusion that poverty trusts were rendered non-charitable by the introduction of the 2006 Act.

The parties to the reference

There were eleven parties (including the Attorney General and the Charity Commission) and eighteen interveners to the Reference.

All the parties supported the view that there had been no change to the law following the implementation of the 2006 Act except the Charity Commission, which took a neutral stance. However, to assist the Tribunal, the Charity Commission advanced submissions to support the case that the 2006 Act changed the law.

The determination

The Tribunal followed its decision in the Independent Schools Council case and confirmed that different charitable purposes have different tests of public benefit.

The Upper Tribunal rejected submissions that all charities must satisfy the public benefit test in both its first sense (i.e. that the purpose is a good thing) and its second sense (i.e. that the benefit is provided to a sufficient section of the public).

The Upper Tribunal found that charities relieving poverty did not necessarily have to satisfy the public benefit test in both its first sense and its second sense. The decision clarified that poverty charities were capable of providing public benefit even where there was no public benefit in its second sense.

The Upper Tribunal found that for charities relieving poverty among a small class the presence of public benefit in its first sense was sufficient on its own and there was no requirement for public benefit in its second sense to be provided by charities relieving poverty.

In reaching this conclusion the Upper Tribunal agreed with the observations of Mr Taube QC (representing the Masonic charities) that a charitable trust “does not have individual or private beneficiaries . . . accordingly, in principle, it cannot be right to focus exclusively on the question whether the ‘beneficiaries’ of a trust can or cannot be regarded as a section of the community when deciding whether or not the public benefit requirement for a charity is satisfied”.

The Upper Tribunal also drew on conclusions reached in *Re Hummeltenberg* [1923] 1 Ch. 237, where a school for mediums was found not to be for the public benefit because public benefit in its first sense was not provided. This demonstrated the importance of public benefit in its first sense as being a distinct part of public benefit divisible from the requirement to provide public benefit in its second sense.

The Upper Tribunal considered the position of charities preventing (rather than relieving) poverty, and whether the public benefit requirement for these charities was the same as for charities relieving poverty. Although noting that the cases on relieving poverty were in many instances exceptions to the general rule and not to be extended, the Upper Tribunal approved of judicial comment in *Re Scarisbrick* [1951] Ch 622 that where there is an anomaly it needs to be "logical and coherent".

The Upper Tribunal found that the same test of public benefit applied to charities preventing poverty as it did to charities relieving poverty. In reaching this conclusion the Upper Tribunal referred to the drafting of the Charities Act 2006, which listed "the prevention or relief of poverty" as a single description of a charitable purpose. The Upper Tribunal qualified this with a comment that where a charity prevented poverty in a manner that did not "correspond in a relevant way to a trust for a relief of poverty" then such a charity may be required to satisfy the public benefit requirement in both its first and second sense. It was acknowledged that in many cases preventing poverty is intrinsically linked to relieving poverty, but it was noted that there were examples (such as a charity to prevent poverty by teaching people how to manage their money) where a charity to prevent poverty had little in common with a charity to relieve poverty.
As the Charity Commission took a neutral stance on the questions set out in the Reference and the other ten parties took the view there had been no change to the law, it seems unlikely there will be an appeal to the determination.

**The Upper Tribunal's approach on public benefit**

With the publication of the second determination of the Upper Tribunal on public benefit, it is now possible to offer some tentative conclusions on the Upper Tribunal's general approach in this area.

First, the Upper Tribunal has been keen to emphasise the difference in the public benefit requirement between different charitable purposes and that its decisions are confined to charities advancing purposes that are the subject matter of the decision.

Secondly, while recognising that charity law does develop over time, the Upper Tribunal has been careful to follow case law and has shown an aversion to take any dramatic steps away from the law on public benefit as it stood prior to 2006.

The Upper Tribunal has also highlighted the difficulty of the task the Charity Commission has been set in producing guidance on public benefit, given that it has found the case law does not provide a comprehensive statement defining the public benefit requirement but rather sets out a series of examples of where the requirement has been satisfied.

It is also worth noting that, for references to the Tribunal on the operation of charity law (as opposed to a reference on the application of charity law to a particular scenario), it is clear that factual evidence is of extremely limited use given the hypothetical nature of the questions posed. Although this seems an obvious statement, in the Attorney General's Reference on poverty charities there was a considerable amount of evidence relating to the parties and interveners submitted to the Upper Tribunal that played no part in determining the Reference. The Upper Tribunal's assurances that this evidence was extremely helpful are difficult to square with the fact that the substantive part of the decision makes no reference to any evidence provided by a party or intervener on its own activities. A similar point could be made in relation to the recent Independent Schools Council case.

It will be interesting to see whether either the Attorney General or the Charity Commission choose to make further references to the Tribunal in the near future, or whether there will now be a pause while the review of the 2006 Act is undertaken by Lord Hodgson and the Charity Commission rewrites parts of its public benefit guidance following the independent schools' case and this determination.

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