OPENING PANDORA'S BOX: THE UPPER TRIBUNAL'S DECISION ON PUBLIC BENEFIT AND INDEPENDENT SCHOOLS

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Background

The charitable status of the independent fee-paying schools has for decades been the subject of political controversy. In both its 1974 General Election manifestos, the Labour Party promised to withdraw the charitable status and tax advantages of such schools, but the Labour Government that came into office in that year did not do so. The promise was repeated in its manifesto of 1983, but the Party lost the ensuing General Election. The approach of New Labour, in government between 1997 and 2010, was different: taking its lead from a report of the National Council for Voluntary Organisations,[2] a report of the Cabinet Office[3] in 2002 stated that, under its proposals, 'to maintain their charitable status, independent schools which charge high fees have to make significant provision for those who cannot pay full fees and the majority probably do so already.'[4] In Scotland, the legislation clearly requires charities to provide public benefit in carrying out their activities,[5] but the draft Charities Bill 2004, intended for England and Wales, was far less clear. The meaning of 'public benefit' was expressly left unchanged, but the draft Bill stated

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2 NCVO, *For the public benefit? A consultation document on charity law reform* (2001).

3 Cabinet Office, Strategy Unit, 'Private Action, Public Benefit', 2002.

4 Ibid., para 4.26 (p 41).

5 Charities and Trustee Investment (Scotland) Act 2005, ss 7 and 8.

that there was no presumption that any particular description of charitable purposes was for the public benefit. The draft Charities Bill was considered by a Committee of both Houses, which received evidence that the clauses on public benefit would be ineffective.[6] The Joint Committee was concerned that, if this were so, it would leave the draft Bill 'in the ludicrous position of promising to bite on the public benefit bullet without having any teeth to do so.'[7] It said: 'This is deeply unsatisfactory. For a matter of such public importance and interest to produce such total confusion at the heart of the draft Bill is nothing short of farcical.'[8] However, the Committee had been placated by an agreement (given the name of 'concordat') subsequently reached between the Home Office and the Charity Commission setting out basic principles on how the latter would determine public benefit.[9] The concordat assumed that the Bill would reverse a previous presumption of public benefit for established categories of charitable purposes, and, agreed that, for fee-charging charities, the Commission would apply the broad principles indicated in *Re Resch's Will Trusts*.[10] As a result of the Joint Committee's recommendations, a clause was inserted into the Bill (which became section 4 of the Charities Act 2006[11]) requiring the Charity Commission to produce guidance on public benefit. Instead of clear legislation, therefore, it was left to the executive to reach a political compromise.

One view is that the government deliberately chose the public-benefit fudge so that it could ensure passage of the Bill (most of which was relatively uncontroversial) without running into serious political opposition, so leaving to the Charity Commission the tricky task of carrying out the government's intention. Another is that the government wanted 'the appearance of change without the substance' and

6 *The Draft Charities Bill*, Joint Committee Report (2004), vol III, HL Paper 167-III, HC 660-III; Charity Commission, Ev 192, para 19; Hubert Picarda QC, Ev 625, para 9; Peter Luxton Ev 591.

7 *The Draft Charities Bill*, Joint Committee Report (2004), vol I, HL Paper 167-I, HC 660-1 (para 76, p 22).

8 Ibid.

9 Ibid., p 24, which contains the relevant extract of a letter to the Committee from the Home Office and the Charity Commission.

10 [1969] 1 AC 514 (PC).

11 Now Charities Act 2011, s 17; although the Charities Act 2006 and much of the earlier legislation has been consolidated into the Charities Act 2011, references in this article (unless otherwise indicated) are to the sections in the Charities Act 2006 because it was that Act with which the Upper Tribunal was dealing in the *ISC* case, and it may facilitate the reader's reference to that case when reading this article.

wanted 'to satisfy critics of the status quo without arousing the middle classes. In short, they want the credit without any opprobrium.'[12]

The Act did not indicate how detailed and expansive the Commission's guidance needed to be, so arguably a single page might have sufficed. Nevertheless, shortly before the relevant sections of the Charities Act 2006 relating to the meaning of charity and public benefit came into force on 1 April 2008, the Commission had produced many pages of general guidance on public benefit,[13] together with a separate legal analysis document,[14] and it later produced further subject-specific guidance and also guidance for fee-paying charities. It was clear that, although the legislation did not single out independent schools, the Charity Commission, like the government then in power, saw such schools (as well as some religious bodies) as their main targets. In its guidance on public benefit, the Commission sought to give effect to what the government had intended, despite warnings that the statute had not succeeded in carrying such intention into law.[15]

The Commission's guidance, which relied on the so-called 'reversal' of public benefit by section 3(2),[16] required all charities to show both that their purposes were for the public benefit, and that in their activities they were producing sufficient public benefit. Its guidance indicated that high charges might restrict the opportunity to benefit to an insufficient section of the public.[17] It also stated that 'People in poverty must not be excluded from the opportunity to benefit',[18] and it mentioned how this requirement might be met, including by the provision of bursaries or assisted places.[19]

Having produced its guidance, the Commission then set about applying it to particular charities by way of public-benefit assessments. Its first round of such assessments included five independent schools, and in its report of 2009 it concluded that two such schools were not 'operating for the public benefit',

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12 Lord Phillips of Sudbury, House of Lords Debates, Charities Bill 2005, Second Reading, Hansard, 20 June 2005, col 907.

13 *Charities and Public Benefit: The Charity Commission's general guidance on public* benefit (2008).

14 *Analysis of the Law underpinning Charities and Public Benefit* (2008).

15 See Luxton, *Making Law? Parliament v The Charity Commission*, Politeia (2009).

16 Now Charities Act 2011, s 4(2).

17 *Charities and Public Benefit: The Charity Commission's general guidance on public* benefit (2008), F10 (p 22).

18 Ibid., Principle C2 (p 26).

19 Ibid., p 25.

essentially because they each provided insufficient funding for bursaries.[20] At the time it was assessed, one of the schools was awarding one bursary, and was planning to award two bursaries from 2011, each worth up to 90% of fees; the Commission thought that this was insufficient, not merely because the value of such bursaries was less than 1% of the school's income, but because even such substantial fee-reduction might (in the Commission's view) exclude those who could not afford the remaining 10%.[21] The other school failed on the same grounds: although its fees were pitched to cover operating costs, it awarded no means-tested bursaries.[22] The Commission did not attempt to remove such schools from the register of charities, but gave them time to change their policies so as to comply with the Commission's view of public benefit. There was however a veiled threat that failure to comply might lead to removal. The assessment reports led to two experienced Chancery silks' writing that the Commission's assessments had no legal basis.[23]

The present action arose because the Independent Schools Council (ISC), which represents about half of the independent schools in England and Wales, most of which are charities, was concerned about the impact of the Commission's guidance on such charitable schools, particularly the Commission's apparent concentration on the importance of bursaries. The ISC did not dispute that the charitable schools it represented needed to show public benefit; its main concern was that the Charity Commission was unwilling to take sufficient account of the various ways, besides bursaries, in which such schools were providing 'public benefit.'

The only way open to the ISC to challenge the guidance was by application for judicial review. The Administrative Court gave its permission for the claim to be brought, but gave a direction[24] for its transfer to the Upper Tribunal (Tax and Chancery) (hereafter the Upper Tribunal). Shortly after the ISC application, the Attorney-General made a reference under the Charities Act 2006 to the First-Tier

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20 Charity Commission, *Public Benefit Assessment Report* on St Anselm's School Trust Ltd and on Highfield Priory School Ltd (both July 2009).

21 Charity Commission, *Public Benefit Assessment Report* on St Anselm's School Trust Ltd (July 2009); there was the possibility of full bursaries, but this was apparently not made clear to those who might benefit from them: ibid., p 9.

22 Charity Commission, *Public Benefit Assessment Report* on Highfield Priory School Ltd (July 2009).

23 Leolin Price QC, letter to *The Times* 16 July 2009; Stanley Brodie QC, letter to *The Times* 21 July 2009 ('There is no authority for the public-benefit test as enunciated by the Commission'; … 'the Commission has become politicized [and] has been turned into an arm of government.'). See also more generally, Stanley Brodie QC, 'The Charity Commission – Politicised and Politicising' [2010] *Economic Affairs* (Oct) 9.

24 *R (ISC) v Charity Commission* [2010] EWHC 2604 (Admin) (Sales J).

Tribunal (Charities) (hereafter the Charity Tribunal) with a number of questions relating to fee-paying schools. The Charity Tribunal passed the reference to the Upper Tribunal, which heard both sets of proceedings together in May 2011. Two parties were permitted to be joined as interveners: the National Council for Voluntary Organisations and the Education Review Group, both of which were essentially opposed to the arguments of the ISC; the Attorney-General was (at least seemingly) neutral.

As the issues raised in the proceedings were broad, it is understandable that the Upper Tribunal (hereafter 'the Tribunal') took five months to publish its judgment. The Tribunal subjected the issues to a full and detailed analysis in a long and complicated judgment: with 260 paragraphs filling 109 pages, it is more like a thesis, although it makes no reference to any relevant commentaries.[25] Furthermore, in a few places the meaning is obscured by tortuous sentence construction.[26] The Hodgson Review has recently pleaded for the Tribunal to 'reconsider the structure, length and language of some of its judgments'[27] – a comment surely directed particularly (and justifiably) at this one. Ultimately, however, the issue is whether the judgment is sound in law.

Public benefit before the Charities Act 2006

In that part of its judgment in which it considered public benefit before the Charities Act 2006, the Tribunal usefully distinguished between public benefit in the first sense of the nature of the purpose itself, and in the second sense of the section of the public who may benefit.[28] Such a distinction has not previously been explicitly drawn in the case law, although (which is not mentioned in the judgment) it has been previously pointed out in commentaries on public benefit.[29] The Tribunal accepted that public benefit was 'from early times inherent in the

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25 E.g. Hubert Picarda QC, *The Law and Practice Relating to Charities* , 4th ed., Bloomsbury Professional Ltd (2010), chapter 2, where public benefit under the Charities Act 2006 is subjected to a detailed analysis.

26 E.g. the multiple negatives in the opening of *Independent Schools Council v Charity Commission* (hereafter *ISC v CC*) [2012] 2 WLR 100; [2012] PTSR 99 (sub nom *R (ISC) v Charity Commission*); [2011] UKUT 421 (TCC), para 144 (p 60): 'We have explained in paragraph 118 above, why, in our view, the *Lonsdale* case is not to be read as deciding that the express exclusion of the poor from a school does not mean that the school cannot be a charity.'

27 Lord Hodgson, *Trusted and Independent: Giving charity back to charities, Review of the Charities Act 2006*, (July 2012): para 7.28.

28 *ISC v CC* para 44 (pp 19-20).

29 E.g. Luxton, *Making Law? Parliament v The Charity Commission*, Politeia (2009).

concept of charity and thus of what fell within the Statute [of Elizabeth].'[30] It considered however that, in more recent times, public benefit ceased to be viewed in this way, 'so that it is now articulated as a separately identified requirement of public benefit.'[31] It said that:[32]

> [e]ven a trust for the advancement of education in the form of a school would not have been charitable *regardless of the form of education* offered simply because it provided for a sufficient section of the community. In the well-known example, a trust to train pickpockets would not be charitable; and that, we think, would be *because such a trust would not be for the advancement of education* within the scope or spirit of the Preamble.

Few would doubt that such a trust would not qualify for charitable status, yet the Tribunal's explanation at this crucial point is ambiguous. The first part of the quotation would suggest that the reason a trust to train pickpockets[33] is not charitable is that, although it is for the advancement of education, it lacks public benefit in the first sense. The second part indicates that the reason is that such a purpose does not rank as the advancement of education. The Tribunal concluded:[34]

> We ... do not consider that a trust for the advancement of education is necessarily for the public benefit simply because it is such a trust, even if it is directed to a sufficiently wide section of the community. The terms of a particular trust have to be considered on a case-by-case basis ...

As this conclusion, on which the remainder of the Tribunal's judgment rests, would mean that English law, in the years since *Pemsel*'s case,[35] had ceased to regard an established category of charity as inherently for the public benefit – which, by the Tribunal's own admission had pertained for centuries – one might reasonably expect the Tribunal to provide clear and unequivocal support for it in the case law. It is therefore necessary to examine the decisions on which its view was based. What should be borne in mind, however, is that it does not appear that counsel for the ISC had argued that the advancement of education is by its nature

30 *ISC v CC* para 42 (p 18).

31 Ibid.

32 Ibid., para 48b (p 22) (italics supplied).

33 A school for pickpockets was an example provided by Harman LJ in *Re Pinion* [1965] Ch 85, 105.

34 *ISC v CC* para 52 (p 24).

35 *Comrs for Special Purposes of the Income Tax v Pemsel* [1891] AC 531.

for the public benefit in the first sense, although the Tribunal indicated that it was aware of this view 'in some quarters'.[36]

The Tribunal sought to rely on a number of well-known speeches made by Lord Simonds in some of the most important decisions of the House of Lords in the middle of the last century. It quoted[37] a long extract from Lord Simonds' opinion in *Oppenheim v Tobacco Securities Trust Co Ltd*,[38] which included his statement that '[i]n the case of trusts for educational purposes the condition of public benefit must be satisfied'.[39] The decision concerned whether a trust to provide education limited to the children of employees of a group of companies was charitable. The House of Lords held that it was not, since the specified class to benefit was not a sufficient section of the community for the law of charities. Read in context, therefore, Lord Simonds' words dealt with public benefit in the second sense, and so provide no assistance to the Tribunal. The House of Lords did not in that case deal with whether public benefit was satisfied in the first sense: there was no need for this, as the object of the company in that case merely referred to the provision of education. The decision is therefore at least consistent with the view that the advancement of education is by its nature inherently for the public benefit. The Tribunal, however, explained that public benefit in this first sense had been merely accepted by the House of Lords without question.[40]

The Tribunal then turned to Lord Simonds' speech in *Gilmour v Coats*,[41] and stated that his Lordship indicated at least two limitations on public benefit in the first sense: first, that a gift had (to use the language of Russell J in *Re Hummeltenberg*[42]) to be 'operative for the public benefit'; and, secondly, that a gift would lack public benefit if it were made on (the unlikely) condition that the beneficiaries should communicate to no-one the fruits of their study and leave no record of them.[43] The relevance of the second limitation may be dismissed at once: it provides no support for the Tribunal since it clearly relates to public benefit only in the second sense. If there is support for the Tribunal's conclusion, it must therefore be sought in the first limitation.

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36 *ISC v CC* para 24 (p 10); see particularly the trenchant observations of Jeffrey Hackney, 'Charities and public benefit' (2008) 124 LQR 347.

37 *ISC v CC* para 43 (p 19).

38 [1951] AC 297, 305.

39 Ibid., 305.

40 *ISC v CC* para 43 (p 18).

41 [1949] AC 426, 449-50.

42 [1923] 1 Ch 237.

43 *ISC v CC* para 49 (pp 22-23).

Lord Simonds specified the two limitations while commenting on an argument raised for the first time before their Lordships' House: namely, 'that the element of public benefit is supplied by the fact that qualification for admission to membership of the community is not limited to any group of persons but is open to any woman in the wide world who has the necessary vocation.'[44] Having rejected this argument, Lord Simonds added:[45]

> Finally I would say this. I have assumed for the purpose of testing this argument that it is a valid contention that a gift for the advancement of education is necessarily charitable if it is not confined within too narrow limits. But that assumption is itself difficult to justify. It may well be that the generality of the proposition is subject to at least two limitations. The first of them is implicit in the decision of Russell J. in *In re Hummeltenberg:* the second is one that is not likely in the nature of things to occur…'

and his Lordship then sets out his second limitation. The context shows that both limitations were intended to refer to public benefit in the second sense. Lord Simonds' mention of *Re Hummeltenberg* was not specifically directed to that part of Russell J's judgment that states that a gift must be 'operative for the public benefit': Lord Simonds does not himself use these words in *Gilmour v Coats*, and his speech does not support the Tribunal's view that a gift can be for the advancement of education and yet not for the public benefit in the first sense. Indeed, his speech casts no doubt upon the public benefit inherent in the advancement of education; he was instead indicating that a particular 'gift' for the advancement of education might not be charitable if it does not benefit a sufficient section of the community. It was the absence of public benefit in this second sense (the lack of any dissemination of the benefits to the public outside the convent) that proved fatal to the charitable status of the gift in *Gilmour v Coats*.[46] Crucial to that decision was the House of Lords' rejection of the argument that the purpose of the gift was for the public benefit merely because the Catholic Church believed that it was. Their Lordships rejected as incapable of judicial proof the Church's

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44 [1949] AC 426, 448.

45 Ibid., 449-450 (the footnote reference to *Re Hummeltenberg* is omitted).

46 See also Browne-Wilkinson J in *Re Hetherington* [1990] Ch 1, at 12. As the courts are not equipped to assess the merits of a religion, they have eschewed any attempt to determine whether the nature of a particular religion is for the public benefit, and treat as charitable (and so for the public benefit in the first sense) any body whose objects meet the definitional criteria for the advancement of religion, except in the extreme case where 'the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and … are subversive of all morality': *Thornton v Howe* (1862) 31 Beav 14, 20; *Re Watson* [1973] 1 WLR 1427. Even the exception for such an extreme case might be characterised as part of the definitional criteria rather than as an aspect of public benefit. See also Anne Sanders, 'The Mystery of Public Benefit', (2007) 10 CL&PR (issue 2) 33, 37.

claim that the public were benefited through intercessory prayer and edification. It is therefore clear that Lord Simonds' reference to *Re Hummeltenberg*[47] was intended to draw attention to the passage in that judgment in which Russell J rejected the argument that only the donor could determine if the gift were for the public benefit. In *Re Hummeltenberg*, Russell J observed:[48]

> If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a mild example.

The reasoning of Russell J suggests that he too treated public benefit in the first sense as inherent in the advancement of education. Hence, the proposed college for spiritualist mediums in *Re Hummeltenberg* failed as a charity because it did not possess the requisite public benefit to rank as the advancement of education in the first place. As Russell J said:[49]

> no matter under which of the four classes a gift may *prima facie* fall, it is still, in my opinion, necessary (in order to establish that it is charitable in the legal sense) to show that the gift will or may be operative for the public benefit…

The important words here are 'prima facie': counsel in a case might argue that a particular purpose is for the advancement of education, but if the purpose lacks public benefit, it will be held that it is not. Again, the decision provides no support for the Tribunal.

What the Tribunal does not give, and this is an important omission, is a sensible practical illustration of a purpose that would clearly rank as 'the advancement of education' and yet which would not be for the public benefit in the first sense. It no doubt gave the example of the school for pickpockets because this was suggested by Harman LJ in *Re Pinion*,[50] but it would seem rather to be a purpose that would patently not rank as education in the law of charity. In any event, the example is too trivial and unrealistic to sustain the Tribunal's analysis.

If the Tribunal were correct, it would mean that a trust simply 'for the advancement of education' would not necessarily be entitled to charitable status,

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47 [1923] Ch 237.

48 Ibid., 242.

49 Ibid., 240-241 (italics supplied).

50 [1965] Ch 85, 105.

since it would have to be shown additionally that the purpose was for the public benefit. The Charity Commission had been adopting the policy of asking for evidence of public benefit before the Tribunal decision, and has since been criticised for it by the Hodgson Review.[51] This approach could lead to the failure of a testamentary trust 'for the advancement of education' if there is no evidence of what the testator had in mind. Even on the Tribunal's view of the law (which, as has been discussed, treats public benefit as a free-standing requirement), it would be appropriate to adopt a benignant construction to validate the gift for charity, by assuming (in the absence of evidence to the contrary) that the testator intended the purpose to be limited to the advancement of education so far as it was for the public benefit.[52] The Commission's approach arrogates to itself the power to determine what organisations should be charities, even if their purposes fall within the established categories. As the Commission reaches a result through a process of weighing various alleged benefits and detriments both individually and against each other, there is much uncertainty and inevitably a degree of subjectivity.[53] Whilst such process is necessary when it is sought to establish a new category of charity, it should be irrelevant if the purpose falls within one of the established categories. By effectively approving of the Commission's approach in relation to the advancement of education, the Tribunal has placed a dangerously wide power in the hands of the executive, and has probably emboldened the Commission in its similar approach to assessing public benefit in the advancement of religion.[54]

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51 Lord Hodgson, *Trusted and Independent: Giving charity back to charities, Review of the Charities Act 2006*, (July 2012): para 4.15.2: 'The Commission's argument is not universally accepted. It seems strange that a list of "charitable purposes" may include purposes which are not, in fact, charitable, and in practice this approach can give rise to anomalies: an organisation with the express object of "relieving poverty" may be regarded by the Commission as having charitable purposes within the meaning of the Charities Act 2011, but an organisation with the express object of "advancing amateur sport" may not. It is difficult to see how the Charity Commission's position helps organisations with legitimately charitable aims which are seeking to draft their formal legal objects in a way which is acceptable to the Commission.'

52 Cf. *Re Hetherington* [1990] Ch 1, 12H-13A; such an assumption has nothing to do with any presumption of public benefit. The possibility of a benignant construction is referred to by the Tribunal: *ISC v CC* para 116 (pp 48-49).

53 E.g. its decision to register the Druid Network (21 September 2010), but not the Gnostic Centre (16 December 2009): see Luxton and Evans, [2011] Conv 144.

54 See 'Exclusive brethren group appeals against Charity Commission's refusal to grant charitable status', Third Sector Online (25 July 2012); Grimston and Hellen, 'Churches battle 'anti-Christian' charity chiefs', The Sunday Times, p 15 (29 July 2012).

A presumption of public benefit?

In order to determine if the Charities Act 2006, section 3(2),[55] had reversed any presumption of public benefit, the Upper Tribunal needed to consider both whether there had previously been any such presumption and what the effect (if any) of that sub-section was on the previous law. With respect to the Tribunal, its reasoning in this part of its judgment is in some places both convoluted and obscure.[56] This can be partly explained by the Tribunal's having decided earlier in its judgment that the established heads of charity (including, of course, the advancement of education) are not themselves necessarily for the public benefit in the first sense. Had it accepted that they are, its discussion of any presumption of public benefit in the first sense would have been restricted to purposes that were attempted to be brought within the fourth head of *Pemsel* (now the residual category (m) of the Act), leaving it to consider any such presumption further only in respect of public benefit in the second sense. As it is, the earlier holding infects and wrongly complicates the Tribunal's analysis.

The Tribunal drew attention to the passage in Lord Wright's speech in *National Anti-Vivisection Society v IRC*[57] where his Lordship said that '[t]he test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be prima facie assumed unless the contrary appears.' It identified that Lord Wright was concerned with public benefit in the first sense. It also referred to Lord Simonds' speech in the same case, where he said that 'when a purpose appears broadly to fall within one of the familiar categories of charity, the court will assume it to be for the benefit of the community and, therefore, charitable, unless the contrary is shown …'[58] The Tribunal said that these appear to be the first judicial statements that might be construed as referring to a 'presumption' of public benefit.[59] It concluded, however, that neither Lord Wright nor Lord Simonds was speaking of any presumption of public benefit; instead, the Tribunal considered that it could be seen from the latter's speech that: [60]

> the Court will form its own view on the evidence before it whether the trust is for the public benefit and will do so, not by way of assumption, but by way of decision. It will no doubt take account of other decided cases;

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55 Now Charities Act 2011, s 4(2).

56 *ISC v CC* especially paras 83-85 (pp 34-36).

57 [1948] AC 31, 42.

58 Ibid., 65.

59 *ISC v CC* para 62 (p 27).

60 Ibid., para 68 (p 30).

> and it will take judicial notice of facts where appropriate. This is far from a "presumption" in the usual sense.

The Upper Tribunal's conclusion that there was no presumption of public benefit in the first sense before the Charities Act 2006 is soundly based. When it turned to the impact of the Charities Act 2006, however, its analysis was unnecessarily complicated by its having held that established categories of charities are not necessarily for the public benefit in the first sense. Although its conclusion that there was no presumption of public benefit before the Charities Act 2006 made it strictly unnecessary, in its view, to determine the impact of section 3(2) of that Act,[61] it nevertheless went on to say something about it.[62] The Tribunal's discussion of the meaning of the sub-section[63] comprises perhaps the most impenetrable part of its entire judgment. It considered that the sub-section does 'not focus on, or at least not only on, the Particular Purpose'[64] (which is what the Tribunal called the purpose or purposes of the institution[65]). It explained that 'if that had been the intention, it would more naturally have been provided that it was not to be presumed "that that purpose is for the public benefit."'[66] It also considered that the sub-section did not 'focus on, or at least only on,' [67] the categories set out in section 2(2).[68] Instead, it said that section 3(2):[69]

> is designed to prevent any presumption which would result in any particular purpose (such as the Particular Purpose we have referred to) being recognised as charitable without it needing to be established that the Particular Purpose, in the context of the particular institution concerned, is for the public benefit.

The Tribunal explained this in the context of the advancement of religion: not only is there no presumption that religion generally is for the public benefit (as one of the purposes set out in section 3(2)), but also that there is no presumption 'at any more specific level' that, for instance, Christianity or Islam, or the Church of

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61 Ibid, para 83 (p 34).

62 Ibid., para 84 (p 35).

63 Ibid., paras 84-85 (pp 35-36).

64 Ibid., para 84e (p 35).

65 Ibid., para 82a (p 34).

66 Ibid., para 84e (p 35).

67 Ibid., para 84f (p 35).

68 Now Charities Act 2011, s 3(1).

69 *ISC v CC* para 84g (p 36).

England, is for the public benefit.[70] To use the advancement of religion as an illustration is perhaps unfortunate, and unnecessarily gives hostages to fortune, considering that the case before Tribunal was concerned solely with the advancement of education and that the Tribunal had stated earlier in its judgment that its comments on the public benefit was 'confined to the context of educational charities'.[71] Nevertheless, the Tribunal concluded that there is similarly no presumption that any particular type of education is for the public benefit.[72]

Although the Tribunal determined that there had not previously existed any presumption of public benefit, so that the Charities Act 2006, section 3(2),[73] had no 'reversing' effect, the Charity Commission appears to be sticking doggedly to its previously stated view[74] that there had been such a presumption and that it had been reversed.[75]

Alleged dis-benefits?

As the Tribunal rejected the view that the 'descriptions of purposes' in section 2(2)[76] are necessarily for the public benefit as a matter of law, even an institution whose purpose is the advancement of education must be able to show that such purpose provides public benefit in the first sense. The Tribunal regarded the mainstream education that the schools represented by the ISC provided as being clearly for the public benefit in this sense.

It then went on, however, to consider whether the public benefit (in the first sense) of the provision of private education was outweighed by any alleged dis-benefits arising from the payment of fees. It referred to the evidence of the Education Review Group (ERG), which comprised, to use the Tribunal's words, an 'attack on the whole system of private education and its allegedly socially divisive effects

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70 Ibid., para 84g (p 36).

71 Ibid., para 15 (p 8).

72 Ibid., para 85 (p 36).

73 Now Charities Act 2011, s 4(2).

74 Charity Commission, 'Analysis of the law underpinning Charities and Public Benefit', (January 2008), Introduction, para 3 (p 3).

75 See 'Exclusive brethren group appeals against Charity Commission's refusal to grant charitable status', Third Sector Online (25 July 2012), where it is reported that a Commission spokeswoman said 'The 2006 [A]ct removed the presumption of public benefit from certain classes of charity including religious charities.'

76 Now Charities Act 2011, s 3(1).

and detrimental consequences for social mobility.'[77] The Tribunal correctly determined that it was not for the Tribunal or for the courts to carry out what would be 'an essentially political exercise'.[78] It said that it would be reluctant to carry out any such balancing exercise, and that the only case that indicated that this should be conducted was *National Anti-Vivisection Society v IRC*.[79] In that case, the House of Lords weighed up the tangible medical benefit to mankind of vivisection against the intangible moral benefit of anti-vivisection, and determined that the promotion of anti-vivisection was not a charitable purpose within the fourth head of *Pemsel*.[80]

There are two criticisms of this aspect of the Tribunal decision. First, the Tribunal declined to limit the scope of the approach of the House of Lords in the *National Anti-Vivisection Society* decision to cases that fall outside the established categories of charity. The Tribunal said:[81]

> We can see no difference, analytically, between one of the first three heads and a later head of charity which has been established by case-law. Thus trusts for the advancement of animal welfare had been established as a head of charity prior to *National Anti-Vivisection Society*. But this did not mean that all trusts for the advancement of animal welfare were necessarily charitable as that case shows. Similarly, education was a recognised head of charity but that did not prevent Russell J from reaching the conclusion he did in *Hummeltenberg*.

With respect, this analysis is unsound. It has already been argued that *Re Hummeltenberg*[82] does not support the Tribunal's conclusion. Whilst it is correct that the welfare of animals is, and was at the time of the *National Anti-Vivisection Society* case, an established category of charity,[83] it was not an object of that Society. Indeed, none of the Society's express objects was charitable. One of these was the repeal of a statute,[84] which is a political purpose and non-charitable. The House of Lords also treated as one of the Society's objects the promotion of

77 *ISC v CC* para 96 (p 40).

78 Ibid., para 96 (p 40).

79 [1948] AC 31.

80 [1891] AC 531.

81 *ISC v CC* para 104 (p 44).

82 [1923] Ch 237.

83 Charities Act 2011, s 3(1)(k) ('the advancement of animal welfare'), formerly Charities Act 2006, s 2(2)(k), which recognised the line of cases on animal welfare, including *Re Wedgwood* [1915] 1 Ch 113.

84 Cruelty to Animals Act 1876.

anti-vivisection. As the first-instance decision in *Re Foveaux*[85] was not binding on it, the House was able to determine *de novo* whether the purpose of promoting anti-vivisection should be admitted into the fourth head, and in doing so it was of course necessary to establish that such a purpose was for the public benefit. Having weighed the alleged benefits and detriments of anti-vivisection to mankind, the House of Lords held that such purpose was not for the public benefit. In no circumstance can the decision in the *National Anti-Vivisection* case be characterised as one in which the House of Lords held that the objects of the Society were exclusively for an established charitable purpose (the welfare of animals) but denied it charitable status because of lack of public benefit. By allowing arguments about benefits and dis-benefits to be brought even where the purpose before the court is within one of the established heads of charity, the Tribunal has misguidedly widened the scope (and therefore effectively the meaning) of public benefit in the law of charities.

The other criticism of this aspect of the decision is that, whilst the Tribunal rejected the arguments of the ERG, it did not entirely close the door on the admissibility in future cases of evidence of the sort that the ERG had produced. The Tribunal rejected the ERG's arguments, not merely because its research was not sufficiently detailed, but because they pertained to the independent-school sector as a whole. Nevertheless, the Tribunal stated:[86]

> The material indicates the battle-lines which would be drawn if an actual challenge were made to the charitable status of a particular institution. There will be disputes not only about the factual conclusions to be drawn from research, but also about the implications for policy which can be properly drawn from those conclusions. Different, and to some extent contradictory, conclusions will no doubt be drawn and implications made. Some will argue that social mobility is impaired; others will argue that the independent sector promotes it.

Whilst the Tribunal had apparently accepted that evidence of this sort is in its nature political, these comments provides succour for those who wish to promote a political view, encouraging them to make another application with more detailed and persuasive evidence. This ultimately springs from the Tribunal's holding that the advancement of education is not by its nature for the public benefit. If, as this article has argued, the Tribunal was wrong on that point, no question of public benefit would have arisen. Even if the Tribunal's view were correct, so that public benefit needs to be assessed, it should not have been a matter of the lack of cogency of the evidence presented by the ERG but rather that any evidence of that

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85 [1895] 2 Ch 501.

86 *ISC v CC* para 108 (pp 45-46).

sort, regardless of how broad-ranging and detailed it might be, is in its nature political. Whilst such evidence might contribute to the political debate, it should not influence the court in a case involving an established charitable purpose. The Tribunal's comments are bound to encourage, under the guise of 'public benefit', and even in relation to the established categories of charitable purposes, further attempts to smuggle into the law of charities the litigants' own political views. This is a further undesirable consequence of the Tribunal's preparedness to give greater scope to public benefit than had been recognised in any of the earlier cases.

No exclusion of the poor

The Upper Tribunal addressed one of the questions (A2) raised in the Attorney-General's reference, namely whether charity law operates:

> so as to cause an institution established for the sole purpose of the advancement of the education of children whose families can afford to pay fees representing the cost of the provision of their education not to be established for a charitable purpose.

Underlying the Charity Commission's argument was that a trust cannot be a charity if it excludes the poor. This argument was based on *Jones v Williams*,[87] decided in 1767, where Lord Camden defined a charitable gift as 'a gift to a general public use, which extends to the poor as well as the rich', and on a number of later cases in which this definition had been quoted and approved.[88] In addressing this issue, the Tribunal reviewed at length a range of cases that involved the payment of fees. It found a number of nineteenth-century cases that had been cited to it on the advancement of education of little assistance in determining if fee-charging had any effect on charitable status.[89] More relevant was *ex parte University College of North Wales,*[90] where Cozens-Hardy MR said:[91] 'I entirely decline to limit the doctrine that a trust for the advancement of education is not charitable unless there be the element of poverty in it also.' The Upper Tribunal interpreted these words as 'doing no more than refuting the

87 (1767) Amb 651, 652.

88 E.g. *Re Macduff* [1896] 2 Ch 451, *Re Resch* [1969] 1 AC 514. For criticisms of the Charity Commission's reliance on these cases to support its analysis, see Mary Synge, 'Poverty: an essential element in charity after all?' [2011] CLJ 648.

89 *A-G v Clarendon* (1810) 17 Ves 491; *A-G v Lonsdale* (1827) 1 Sim 105; *A-G v Stamford* (1843) 1 Ph 737; *A-G v Devon* (1846) 15 Sim 193; *A-G v Bishop of Worcester* (1851) 9 Hare 328.

90 *R v Comrs for Special Purposes of the Income Tax, ex p University College of North Wales* (1909) 5 TC 408.

91 Ibid., 414.

Attorney-General's argument that it was necessary for all beneficiaries to be poor'.[92] The Upper Tribunal explained Danckwerts J's observations in *The Abbey Malvern Wells Ltd*[93] in a similar way.[94]

The Tribunal also examined cases that did not involve the advancement of education. It dealt at length with *Re Resch's Will Trusts*,[95] which, it said, was 'at the heart of the Charity Commission's Guidance'. The Tribunal concluded that it was not easy to derive clear principles from that decision;[96] but, taken together with a number of earlier cases,[97] it established 'the proposition that a trust which excludes the poor from benefit cannot be a charity.'[98] The Tribunal admitted that there was no case which decides that point, but considered it 'right as a matter of principle, given the underlying concept of charity from early times.'[99] It also said that it accorded 'with many expressions of views to that effect in the cases which we have reviewed, dating back to *Jones v Williams* and including in particular *Macduff*, *Taylor v Taylor* and *Re Resch*.'[100] For this reason, the Tribunal concluded that the hypothetical school addressed in Question A2 'does not have purposes which provide that element of public benefit necessary to qualify as a charity.'[101]

The remaining issue was who qualifies as 'poor'. The Tribunal's analysis of the *Joseph Rowntree* case[102] was that 'even persons who might be seen as quite well-off … can be seen as "poor" in the context of the test of exclusion of the poor in a

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92 *ISC v CC* para 131 (p 55).

93 *The Abbey Malvern Wells Ltd v Ministry of Housing and Local Government* [1951] 1 Ch 728.

94 *ISC v CC* para 144 (p 60).

95 [1969] 1 AC 514.

96 *ISC v CC* para 162 (p 71). This is an understatement; Lord Phillips of Sudbury has aptly described *Re Resch* [1969] 1 AC 514 as 'wonderfully obscure': Hansard, HL Deb, 2nd Reading Charities Bill 2011, col 642, 5 May 2011. Furthermore, as a decision of the Privy Council, it is not binding on domestic courts. Yet, despite what the Tribunal states, it does nevertheless rely on *Re Resch* later in its judgment as authority for a number of controversial points: para 178 (p 77); para 205 (p 86); para 233 (pp 99-100).

97 I.e. *Jones v Williams* (1767) Amb 651, *Re Macduff* [1896] 2 Ch 451, and *Taylor v Taylor* (1910) 10 CLR 218.

98 *ISC v CC* para 178 (p 77).

99 Ibid., para 178 (p 77).

100 Ibid., para 178 (p 77).

101 Ibid., para 177 (p 77).

102 *Joseph Rowntree Memorial Trust Housing Association Ltd v A-G* [1983] 1 Ch 159.

trust which is not for the relief of poverty; and it follows that an institution may be a charity even though it charges, without any element of subsidy at all, for its services where the cost is nevertheless within the ability of the not very well off to meet.'[103] It thought that persons who can afford fees of £12,000 per annum are not poor;[104] whereas it considered that it is 'at least arguable' that a partial bursary leaving fees to be paid of £3,250 per annum, whilst no doubt excluding the poorest, could still be afforded by persons who were 'poor'.[105] It said that a school could not claim that a pupil attending was 'poor' if the fees were paid by an employer;[106] presumably the Tribunal had in mind here fees paid by the employer of the pupil's parent or other relative. On the other hand, it thought that a school could claim that a pupil was poor if the fees were paid by a grant-making educational charity and the child was from a family that was 'poor by any standard'.[107] The Tribunal said that other cases of third-party assistance would have to be dealt with as they arise.[108]

Several general observations can be made on this part of the Tribunal's judgment.

First, none of the decisions on which the Tribunal relied to support the proposition that there must be no exclusion of the poor involved the advancement of education. *Jones v Williams*[109] was about the supply of water to Chepstow, *Re Macduff*[110] involved a legacy for purposes that were 'charitable or philanthropic or [blank]', and *Re Resch* was concerned with the care of the sick. Although one of the legacies in *Taylor v Taylor*[111] was for scientific research, the discussion of the aforesaid proposition by the High Court of Australia related to another legacy: one to endow homes for the care and treatment of mentally afflicted persons. As Lord Simonds cautioned in *Gilmour v Coats*,[112] it may be unwise to reason by analogy from one category of charity to another as the element of public benefit in each may vary.

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103 *ISC v CC* para 179 (p 77).

104 Ibid., para 180 (p 78) (the comment was made in reference to the hypothetical school in Question A2).

105 Ibid., para 255 (p 107), in response to Question 9B in the A-G's reference.

106 Ibid., para 183 (p 78).

107 Ibid., para 184 (pp 78-79).

108 Ibid., para 185 (p 79).

109 (1767) Amb 651.

110 [1896] 2 Ch 451.

111 (1910) 10 CLR 218 (High Court of Australia).

112 [1949] AC 426, 449.

Secondly, in every case that mentioned the proposition, it would appear that the courts were referring to an express exclusion of the poor, which means an exclusion that is contained in the trust or other governing instrument.[113] At first sight, *Re Resch* might appear to be at odds with this, since Lord Wilberforce considered whether the private hospital was operating a charging system that effectively excluded the poor. Its activities were relevant, however, because the hospital had no governing instrument, so it was necessary (as the Tribunal pointed out[114]) to determine the institution's purposes from how it in fact carried on its activities. In its discussion of the proposition that there must be no exclusion of the poor, the Tribunal came close to accepting that it meant an express exclusion in the governing instrument. It commented that:[115]

> when the judges speak of excluding the poor, the principal (*if not exclusive*) focus is on exclusion as a matter of the constitution of the institution or trust concerned, and *possibly*, as a matter of the policies adopted by the institution or trust.

A trust whose purpose expressly excludes the poor[116] would be unusual; and this explains why, despite the courts' occasionally mentioning the proposition, there is not a single reported case in which a trust or other institution has been held not charitable on this ground.

Thirdly, it is to be noted that, apart from *Re Resch*, none of the cases that considered this proposition did so by reference to the charging of fees, which indicates that the prohibition is of an express exclusion of person by virtue of their being poor. Thus a trust to provide a rest home for millionaires[117] would not be charitable because the poor would by definition be excluded. It can be inferred that there would be no infringement of the proposition merely by charging fees, since, although that might have the effect of reducing the availability of the facilities to the poor, the poor might still use them if the fees are paid by a third party, perhaps a benefactor or a charity. Indeed, large numbers of charities exist to provide financial assistance for education or training of poor persons who meet

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113 In *Taylor v Taylor* (1910) 10 CLR 218, Griffith CJ, having referred to the proposition as expressed by Lindley LJ in *Re Macduff* [1896] 2 Ch 451, said: 'The testator has, however, certainly not expressly excluded the poor from the benefit of this trust'.

114 *ISC v CC* para 158 (p 67).

115 Ibid., para 162 (p 71) (italics supplied).

116 Though a trust can be charitable for the relief of poverty even though it excludes the very poorest, so long as it relieves persons of modest means: *Re De Carteret* [1933] 1 Ch 103.

117 Harman J's example in *Re White's Will Trusts* [1951] 1 All ER 528, 529.

their criteria, such as being resident in a specific town or county or being children of persons of a particular trade or calling.[118]

Fourthly, although the Tribunal rejected the argument that the proposition means that the relief of poverty must be a purpose of all charitable trusts and bodies, the effect of holding that the poor cannot be excluded can be characterised in this way. Before the nineteenth century, the founding of 'free schools' could be treated as a means of relieving the poverty of those attending them, in contradistinction to the 'schools of learning'[119] also mentioned in the Preamble, which appeared to indicate the advancement of education as a distinct purpose. *Pemsel*'s case recognised that the relief of poverty was merely one charitable purpose of many, but there continued to be skirmishes in the courts, in the years after Lord Macnaghten's categorisation, about the significance (if any) of the relief of poverty in cases outside the first head.[120] This debate can be seen as having a political significance, as is evident from the rare instance of both the Attorney-General[121] and the Solicitor-General[122] arguing in person in a charity case in *ex parte University College of North Wales*.[123] In this light, the Tribunal may have been too ready to interpret narrowly Cozens-Hardy MR's reasons for rejecting the argument that the Law Officers of the Crown had put forward in that case.

Fifthly, as the Tribunal was dealing with fee-paying schools, it did not address what differences there might be for universities. Although it made sense, as the Tribunal held, to determine whether a pupil at a school was 'poor' by considering whether the pupil was from a poor family,[124] it would arguably be inappropriate to take family wealth into account where a student has attained eighteen, so the position of university students who are above the age of majority remains to be resolved. Similarly, it is unclear whether postgraduate students on professional courses, such as the Legal Practice Course or the Bar Professional Training Course, can still rank as 'poor' if their fees are paid by the firms or chambers with

118 Besides 'the relief of ... poor people', the Preamble to the Statute of Elizabeth 1601 also lists as charitable 'the education and preferment of orphans' and 'the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed'.

119 *A-G v Lonsdale* (1827) 1 Sim 105. See also the Court of Appeal in the post-*Pemsel* case of *Smith v Kerr* [1902] 1 Ch 774, 778 (Collins MR), 781 (Romer LJ), holding Clifford's Inn to be a 'school of learning' within the Preamble and so charitable (affirming [1900] 2 Ch 511 (Cozens-Hardy J)).

120 Notably in *Re Macduff* [1896] 2 Ch 451.

121 Sir WS Robson KC, MP.

122 Sir ST Evans KC, MP.

123 (1909) 5 TC 408.

124 *ISC v CC* para 181 (p 78), also referring to *IRC v Educational Grants* [1967] 1 Ch 993.

which they have secured training contracts or pupillages, or by an Inn of Court. If (as would seem to accord with the tenor of the Tribunal's judgment) an assessment of whether the institution is excluding the poor is to be performed, not on each individual degree or diploma course separately, but globally across all the university's courses, both undergraduate and postgraduate taken together, the issue is not in practice likely to arise. The Tribunal's decision nevertheless means that, in principle at least, the Charity Commission's role in assessing public benefit in universities in Wales (these being no longer exempt charities) duplicates to this extent a similar (albeit more limited) function performed by the Office for Fair Access.[125]

Sixthly, it later becomes apparent from the Tribunal's judgment that the principle that the poor must not be excluded applies in every case, regardless of how much 'public benefit' a school may provide in other ways.[126]

'Operating for the public benefit'

The Charity Commission had argued that a charity that does not operate for the public benefit ceases to be a charity, which would mean that the trustees, by misapplying the charity's funds, could cause it to cease to be a charity. The Tribunal rightly rejected this argument, as confusing purposes and activities. It correctly stated that section 2(2) of the Charities Act 2006[127] listed 'descriptions of purposes, not categories of activities.'[128] It also made it clear that an application of a charity's income by the trustees for non-charitable purposes would not affect the institution's status as a charity, but would be a matter of breach of trust. The Tribunal nevertheless did not consider it sufficient that an institution's purposes be for the public benefit; it indicated that the trustees of a charity would be in breach of trust if the charity does not operate 'for the public benefit.'[129] Having rejected the Commission's activities-based analysis, how did the Tribunal reach this conclusion?

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125 The potential for duplication in English universities (which remain exempt) is between OFFA and HEFCE as principal regulator. These bodies already collaborate, and are being encouraged to develop a shared strategy: see letters of 22 May 2012 to HEFCE and OFFA from Vince Cable, Secretary of State for Business, Innovation and Skills, and David Willetts, Minister for Universities and Science.

126 *ISC v CC* para 222 (p 95).

127 Now Charities Act 2011, s 3(1).

128 *ISC v CC* para 188 (p 80).

129 Ibid., paras 194-195 (pp 82-83).

The first hint in the Tribunal's judgment that a charity must carry out its purposes 'for the public benefit' is in its analysis of *IRC v Educational Grants Association Ltd*.[130] The Tribunal said that the decision indicated that the charity 'had to operate, and expend its income only, for the public benefit.'[131] In the Court of Appeal, however, only Lord Denning MR used the language of 'public benefit'. The issue was whether the charitable company, which had been established and funded by Metal Box Ltd for the advancement of education, had applied its income to 'charitable purposes only'.[132] It was held that the application of at least 75% of the income each year to children of employees of Metal Box Ltd was not such an application, so tax relief was not obtainable on that part of the income so expended. If the objects of the charitable company had expressly limited the application of the income to 'Metal Box children', it would not have been a charity, since the class to benefit, being defined by reference to a personal nexus (in that case, contract), would not have been a sufficient section of the community: it would have been a private class.[133] This prohibition does not, however, preclude a fee-charging school from being a charity, since the selection is not made from amongst a private class but from a wider range of applicants. It is only after such selection that a contract is entered into between the school and (usually) the parent. The pupils at the school are therefore a sufficient section of the community.[134] Only if (as is highly unlikely) a charitable fee-paying school were to have a policy of excluding persons on the grounds of poverty, regardless of whether they could raise the fees from a charity or benefactor or not, would there be a parallel with the 'Metal Box' case. In such circumstances, a *de facto* policy of the trustees of excluding 'poor persons' would be equivalent to the *de facto* policy of the directors in *Educational Grants* of selecting 'Metal Box children'.

The Tribunal placed much reliance on Russell J's statement in *Re Hummeltenberg*,[135] which it claimed had the support of Lord Simonds in *Gilmour v Coats*,[136] that it must be shown in all classes of charity 'that the gift will or may be operative for the public benefit'. However, as previously explained, it would seem that Lord Simonds' reference to *Re Hummeltenberg* was directed at an entirely different passage in Russell J's judgment. Furthermore, Russell J was considering whether the purpose before him was charitable; he cannot be taken to

130 [1967] 1 Ch 993.

131 *ISC v CC* para 154a (p 64).

132 Income Tax Act 1952, s 447(1)(b).

133 *Oppenheim v Tobacco Securities Trust* [1951] AC 297.

134 Cf. *Joseph Rowntree Memorial Trust Housing Association Ltd v A-G* [1983] Ch 159.

135 [1923] 1 Ch 237, 240-241.

136 [1949] AC 426, 450.

have meant that a charity must, in carrying out its activities, produce public benefit. His judgment is perfectly consistent with the view that, in its activities, a charity is required only to carry out its purposes.

Apart from its reference to these authorities, there is nothing in the Tribunal's judgment to indicate how the Tribunal managed to slide from treating 'public benefit' as an aspect of a charitable purpose, to treating it additionally as a necessary product of a charity's activities.[137]

The Tribunal may have been influenced by the way in which the Attorney-General worded the questions in his reference. It might be assumed that the reference was made because the Attorney-General considered that the matter needed broader consideration by the Tribunal than was afforded by the ISC application. However, apart from Question A2, all the questions ask, *inter alia*, if, in the different circumstances specified, an institution would or would not be 'operating ... for the public benefit'. These questions assume that a charity is indeed legally obliged to 'operate for the public benefit.' Perhaps the concern of the Tribunal to answer these questions explains why it did not pause to consider whether they might be based on a false premise. It might even be suspected that, whilst in the proceedings the Attorney-General's stance was ostensibly neutral, the questions had been deliberately phrased to encourage the Tribunal to accept without demur the assumption on which they were founded. If this was his objective, the Attorney-General succeeded in achieving it. The Attorney-General, as a (Conservative) member of the Coalition government, might have good reason to wish for a decision holding that charities must 'operate' for the public benefit: after all, one of the policies of the Coalition (as it was of the preceding Labour administration) is to encourage the founding of academies.[138] What a coincidence, then, that one of the Attorney-General's questions included asking whether the hypothetical school would be 'operating for the public benefit' if it acted 'as co-sponsor to a local academy by contributing £1 million over five years to an

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137 See *ISC v CC*: the slide starts from para 194 (p 82): 'As to duties, a charity had to operate, even before the 2006 Act, in accordance with its objects and subject to the constraints of charity law: it thus had to operate in a way which was for the public benefit.' No authority is cited there for this proposition.

138 See Miranda Green, *Charitable status: Public benefit row nears resolution*: FT.com (10 September 2010): 'the coalition has kept up the pressure on partnerships between the sectors by accelerating Labour's drive to create academies. This increases the opportunities for private schools to demonstrate public benefit. Independent schools are encouraged, however, that either through the ISC's judicial review process or through the Charity Tribunal's ruling, legal clarity will deprive politicians on both sides of a convenient tool for putting pressure on private schools.' It is indeed unclear whether the reference had been prepared for the current A-G, Dominic Grieve QC, or whether he merely adopted a reference that had already been prepared for his Labour predecessor in that office, Baroness Scotland QC.

endowment fund.'[139] This smacks of an unsubtle attempt to nudge the Tribunal into distorting the legal concept of 'public benefit' in order to facilitate the carrying out of government policy. The Tribunal could, and should, have avoided becoming unwittingly ensnared in such political matters by adhering to the established principles of charity law that 'public benefit' has nothing to do with the way a charity operates. The Tribunal should have pointed out that Questions A1 and B were based on a misunderstanding of charity law, and so have answered them accordingly.

As it was, having already sold the pass, the Tribunal spent much of the rest of its judgment considering what a school needed to do to provide public benefit, and in dealing with the Attorney-General's questions on whether a fee-paying school would be 'operating for the public benefit' if it engaged in various activities, from making its examination papers available to the public on-line, to co-funding an academy. The Tribunal decided that a 'fact-sensitive assessment' should be applied.[140] If certainty is looked for, the Tribunal's approach make dismal reading:[141]

> Each case must depend on its own facts. It is an approach which is not, we readily acknowledge, without difficulty of application and, of its nature, it makes it very difficult to lay down guidelines. … [I]t is necessary to look at the facts of each case and to treat the matter as one of degree: the process is one of reaching a conclusion on a general survey of the circumstances and considerations regarded as relevant rather than of making a single conclusive test.

The Tribunal nevertheless attempted to indicate how much public benefit would be provided by different levels of bursaries, and how many would need to be awarded. It said that the benefits had to be related to the purposes, so that if a school were to open its sports facilities to the community as a whole (assuming it were empowered to do so) any public benefit from such wider access would not be a public benefit that related to the advancement of education.[142] The Tribunal could not answer precisely how the different sorts of benefits were to be weighed, although it said that 'the primary focus must be on the direct benefits which it provides.'[143] It said that the benefits to the poor had to be more than token or *de minimis*, but they had also to be appropriate to the school, and that what was

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139 Question B2.5(a).

140 *ISC v CC* paras 215-216 (pp 91-92).

141 Ibid., para 216 (p 92).

142 Ibid., paras 200 and 203 (pp 85 and 87).

143 Ibid., para 201 (p 86).

appropriate was to be determined, not by the court or the Charity Commission, but by the trustees.[144] It thought that a school that provided full bursaries to only 1% of its pupils would not be doing enough to ensure that it was not excluding the poor, whereas it thought that provision for 10% would probably be enough; but it declined to indicate where the line should be drawn.[145] The Tribunal said that where the facilities were 'at the luxury end of education' (which the ERG had called 'gold-plating') 'it will be even more incumbent on the school to demonstrate a real level of public benefit.'[146] The Tribunal also made it clear that, regardless of other types of benefit being provided, the school had, in all cases, to ensure there was appropriate benefit for the poor.[147] Subject to this, whether a school was 'operating for the public benefit' was to be considered 'overall'.[148]

Later in its judgment, the Tribunal came closest to appreciating the hopelessness of the task that it had set trustees:[149]

> There is no clear line which identifies what it is that trustees have to do. We have explained the principles as best we can and must leave to others the difficult task of applying them.

Although the Tribunal treated the need to provide appropriate public benefit as a matter for the trustees, it remains to be seen whether this will itself prove sufficient to deter the Commission from continuing its involvement in assessing public benefit through an examination of charities' statements of 'public benefit' activities contained in their annual reports.[150] As a charity that does not (according to the Tribunal) 'operate for the public benefit' would be in breach of trust, it would still be open to the Commission to take action against the trustees, though admittedly the variety of means by which the Tribunal indicates that public benefit can be provided will make it harder for the Commission to make out a case of breach of trust. More likely to cause the Commission to withdraw from too great extensive a scrutiny of the way that independent schools carry out their activities are: first, the huge cuts in the Commission's budget, which are forcing it to concentrate on areas of greatest concern, including criminal activity and fraud; and, secondly, any changes in the Commission's policy that might result from the appointment, in the late summer of 2012, of a new Chair of its Board.

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144 Ibid., para 220 (pp 92-93).

145 Ibid., para 253 (p 106).

146 Ibid., para 219 (p 93).

147 Ibid., para 222 (p 95).

148 Ibid., para 217 (pp 92-93).

149 Ibid., para 224 (p 95).

150 Charities (Accounts and Reports) Regulations 2008 (which continue to apply after Charities Act 2011).

Charity Commission's guidance quashed

The Tribunal held that certain parts of the Charity Commission's guidance were wrong, but initially left to the parties to attempt to reach agreement on how it should be revised. No agreement could, however, be reached, and in a later hearing, the Tribunal acceded to the ISC's request and quashed specific parts of it.[151] The Commission accordingly withdrew those parts of its guidance and launched a consultation in June 2012 on new draft public benefit guidance.

Neither party appealed from the main judgment. The ISC was no doubt satisfied with the fact that the Tribunal had rejected the Charity Commission's emphasis on bursaries as the key test for public benefit, and with the Tribunal's view that modest fees of £3,250 could arguably be charged without excluding the poor. It would also have been pleased that the Tribunal had treated the provision of public benefit in a charity's activities as a matter essentially for the trustees rather than the Commission. On the other hand, the Charity Commission would have derived satisfaction from other parts of the Tribunal's judgment: its holding that the advancement of education (and hence potentially the advancement of religion) is not necessarily for the public benefit, that a charity must 'operate' for the public benefit, that the principle that a charity must not exclude the poor applies to fee-paying schools, and that proportionately more benefits must be provided where there is 'gold-plating'.

Conclusion

The Upper Tribunal judgment is both detailed and wide-ranging, but its legal basis is not always solid. The main objection to the judgment is that, by widening the scope of 'public benefit' in charity law, it has opened Pandora's box: it has allowed subjectivity and uncertainty into areas that should be objective and certain; it has put unacceptably broad powers in the hands of the executive; and it has given the green light to potentially time-consuming and expensive litigation, including politically-based challenges to the charitable status of many existing charities and disputes over whether a charity is 'operating for the public benefit'. The Tribunal's judgment is the most striking instance of judicial creativity in the history of the law of charities; and that such a judgment should have been handed down, not by the Supreme Court, nor even by the Court of Appeal, but by a tribunal is remarkable. Until the issues raised in this case are considered by our highest domestic court, they cannot be regarded as settled.

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151 *ISC v CC* (2 December 2011).

What the decision does at least reveal is that the attempt to tighten up public benefit in the Charities Act 2006 proved to be – as some commentators had warned even before its enactment – misdirected, misconceived, and ineffective. Indeed, in the autumn of 2010, even before the decision in the *ISC* case, the Charity Commission, without any publicity[152] or public-benefit assessments, registered both Eton College[153] and Winchester College[154] as charities. The endowments that such institutions possess enable them easily to satisfy the Commission's interpretation of the public-benefit requirement, in contrast to the smaller independent schools that are much more dependent on fees. The Labour Opposition seems to accept that, on public benefit, its attempt to legislate has failed, and has indicated that there might be a need to look at primary legislation, with a threat that, under a new Labour government, independent schools might lose their charitable status if they do not fulfil 'charitable objectives'.[155] In the meantime, the review undertaken by the Conservative peer, Lord Hodgson, has recommended that, in order to ensure flexibility, no statutory definition of public benefit should be introduced.[156] The Public Administration Select Committee will be conducting a scrutiny from the autumn of 2012 into the impact and implementation of the Charities Act 2006, including a consideration of whether it achieved its intended effects on public benefit.[157] It would not be surprising if such scrutiny revealed that, regardless of political views, hardly anybody is wholly satisfied with the judgment of the Upper Tribunal in the *ISC* case.

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152 In contrast to its registration of some other previously exempt charities, such as universities in Wales, each of which was the subject of several paragraphs on the Commission's website. It can be inferred that the Commission found it too embarrassing to draw attention to its registration of the two public schools.

153 Registered 18 November 2010.

154 Registered 12 November 2010.

155 See interview with Stephen Twigg, Shadow Education Secretary, guardian.co.uk (19 July 2012): 'I don't think a school should have charitable status that isn't fulfilling charitable objectives.'

156 Lord Hodgson, *Trusted and Independent: Giving charity back to charities, Review of the Charities Act 2006*, (July 2012): para 4.13 (p 29).

157 See Public Administration Select Committee: Regulation of the Charitable Sector and the Charities Act 2006: Issues and Questions Paper (2012).