AN BINSE ACHOMHAIRC DO CHARTHANAIS
CHARITY APPEALS TRIBUNAL

DETERMINATION OF APPEAL

TRIBUNAL REF NO: CAT2024-003

UNDER SECTION 39 OF THE CHARITIES ACT 2009

Appeal of Midhe Democratic School Company Limited by Guarantee

Appeal against Charites Regulator Decision of 20 June 2024, communicated by letter dated 16 July 2024 refusing the application to be registered in the Register of Charites

Determination of the Tribunal following hearing on 5 December 2024

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THE CHARITY APPEALS TRIBUNAL AND MEMBERSHIP

1. The Charity Appeals Tribunal ("the Tribunal") was established under Section 75 of the Charities Act 2009 ("the Act"). The Tribunal is a statutory body established with effect from 1 August 2016. The function of the Tribunal is to hear and adjudicate on appeals against certain decisions of the Charities Regulator, under Section 45 of the Charities Act 2009.

2. The members of the Tribunal at the time of the hearing of the Appeal were:

    - Patrick O'Connor (Chairperson),
    - Nuala Dockry,
    - Carol Fawsitt,
    - Bill Holohan
    - Karen Horgan.

THE APPELLANT CHARITY

3. The name and address of the Appellant Charity is Midhe Democratic School Company Limited by Guarantee, with its registered office at Gneeve, Edgeworthstown, Co. Longford.

THE RESPONDENT AUTHORITY

4. The Respondent Authority ("the Regulator") is the Charities Regulatory Authority established under section 13 of the Act.

BACKGROUND TO THE APPEAL

5. Prior to the establishment of the Act and in particular it's Part 3 (section 39) which came into operation on 16 October 2014, there was no requirement for any charitable organisation operating in the State to register with any government authority. Those who had, as of this October 2014 date, an entitlement to an exemption under section 207 or section 208 of the Taxes Consolidation Act 1997 and held a CHY number provided by the Revenue Commissioners, were deemed to be automatically registered in the Register of Charities ("the Register") established under section 39 of the Act. Such bodies were not obliged to apply for registration under the Authority's registration process.

6. The Appellant was incorporated on 24 November 2022 and did not have exemption from the Revenue Commissioners.

THE APPLICATION

7. The Applicant submitted an application for registration under section 39 of the Charities Act 2009, on 6 June 2023 (Submission number SR 90086). In the application form, the Applicant stated, in respect of its main object that:

"The Main Object for which Midhe Democratic School (MDS) is established is:

i. To provide democratic education in the Midlands of Ireland through an environment where young people can determine their own education at their own pace using democratic processes, values and membership; and

ii. To contribute by every means at its disposal to the advancement of this Education; and

iii. To advance and develop the wider community concept of the school to

benefit the students, their families and the surrounding community; and

iv. *To facilitate the coming together of the students, their families and the surrounding community to share values, experiences and skills; and*

v. *To provide all of this to members on a cost-sharing basis.*

8. In terms of the charitable purpose of the Applicant, the Applicant indicated that it was (under section 3 (1) (b) of the Act):

"The advancement of education: Primary or secondary education (school without a roll number).

9. In terms of who would benefit, this was identified by the Applicant as a defined section of the community consisting of:

"a defined section of the community"
"a group defined by their age".

10. In terms of a summary of activity/planned activities, it was stated by the Applicant that:

- Activity 1 – *"we will operate a democratic school that will provide a self-directed education for students aged 5-18 years old".*
- Activity 2 – *"to run seasonal camps for students and prospective students between the ages of 5 - 18 years old".*

11. In terms of planned Objectives, the following was stated by the Applicant:

- Objective 1 – *"To create a safe inclusive learning culture where young people are free to follow their natural curiosity and creativity to develop their capacity as independent self-directed learners".*
- Objective 2 – *"we will establish a community of self-governance and justice where everyone's voice is heard and equally valued, while connected to their community, through restorative practice".*
- Objective 3 – *"to promote self-directed learning and enable students to choose what they will learn, how and when that will occur and with whom they wish to learn, whether independently, as part of a group or from a mentor.*
- Objective 4 – *"to promote community. to this end the students and the staff members together take responsibility for all aspects of the school through school meetings and collective decision-making processes".*
- Objective 5 – *"to promote inclusivity and actively work to make sure all individuals feel safe, respected and valued for who they are and what they bring to the school".*

12. In its Constitution, the main Object of the Applicant was stated as follows:

The main object for which Midhe Democratic School (MDS) is established is

i. To provide democratic education in the Midlands of Ireland through an environment where young people can determine their own education at their own pace using democratic processes, values and membership; and

ii. To contribute by every means at its disposal to the advancement of this Education; and

iii. To advance and develop the wider community concept of the school to benefit the students, their families and the surrounding community; and

iv. *To facilitate the coming together of the students, their families and the surrounding community to share values, experiences and skills; and*

v. *To provide all of this to members on a cost sharing basis.*

13. Subsidiary Objects in the Constitution were as follows:

"As objects incidental and ancillary to the attainment of the Main Object, the Company shall have the following subsidiary objects:

i. *To establish and maintain a living democratic culture where members pursue learning and personal development in the way that best meets their individual needs while participating in a community of self-governance and justice where each member's voice is equally valued and heard;*

ii. *To maintain a safe environment and flexible structure;*

iii. *To encourage the students intrinsic and intuitive ability to direct their own learning;*

iv. *To provide the students with the means to access the necessary resources to meet their self-expressed needs and personal and academic goals;*

v. *To provide an environment which deems all pursuits equal;*

vi. *To facilitate integration with the wider community through co-operation in teaching, learning, modelling and other experiences as may be requested by the students;*

vii. *To maintain the sustainability and viability of the school in the community by operating subsidiary businesses;*

viii. *To ensure equality of access to people on all income streams through targeted fundraising activities and a contributory social fund specifically to provide financial assistance for tuition fees;*

ix. *Provided that the company shall not support with its funds any object nor endeavour to impose on or procure to be observed by its members*

or others any regulation or restriction which, if an object of the company, would make it a trade union.

COMMUNICATIONS WITH THE REGULATOR

14. By email from the Applicant to the Regulator on 19 June 2023, the Applicant noted the recently submitted application for charity status and requested clarification on fundraising.

15. By email from the Regulator to the Applicant on 3 August 2023, Ms. Sarah J. Hanna, Registration Manager, advised the Applicant of delays in the process and outlined that the application had completed Step 1 – Initial Review and was awaiting assignment to a case officer for Step 2 of the process.

16. By email from the Regulator to the Applicant on 2 February 2024, Mr. Daniel Hutton, the Case Officer in the Registration and Reporting Team referenced the recent telephone conversation with the Applicant during which various amendments to the application form and some of the documents submitted, was discussed.

17. The Regulator outlined the requirements of the Charities Act 2009 (the Act) that an organisation must meet to be considered a charity, and advised the Applicant that there were a number of issues to be addressed before the application could be processed.

18. The Regulator outlined that one of the requirements of the Act is that the charitable purpose(s) being promoted by an organisation considered to be a charity, must be of public benefit.

19. The Regulator outlined the definition of public benefit in Section 3 of the Charities Act 2009, and requested clarification on the following:

a. *Confirmation of who are or will be staff of the school, how will they be/were hired, and details of each role.*
b. *Confirmation of whether it was the Applicant's intention to employ trustees or members of the organisation as staff.*
c. *Confirmation if the trustee's children will be attending the school.*

20. The Regulator noted that the Applicant's selected charitable purpose was the advancement of education. The Regulator outlined aspects of the Applicant's Business Plan and advised that *"it is not clear how you will advance your chosen charitable purpose of advancing education".*

21. The Regulator requested information on how the Applicant would advance its chosen charitable purpose of advancing education, and requested that the Applicant give consideration to the following:
    a. *How self-directed learning be delivered and by who?*
    b. *How you will enable, guide and support all learning styles?*
    c. *What is the role of staff and what are the educational background of the staff /volunteers?*
    d. *What educational outcomes will be achieved, and how will this be assessed?*

22. The Regulator advised that only information relevant to determining whether the application meets the charity test was requested.

23. By email from the Applicant to the Regulator (Mr. Daniel Hutton, Case Officer in the Registration and Reporting Team) on 18 February 2024, the Applicant addressed the questions raised by the Regulator in the email of 2 February 2024.

24. Potential Private Benefit - the Applicant provided clarification as to public benefit and dealt with the questions raised regarding the roles and responsibilities of staff of the school, and the skills and experience required, particularly in democratic education principles, and giving freely of their time. The Applicant

clarified inter alia that "*staff may or may not have specific educational qualifications but rather demonstrate a desire to work with young people, be passionate about self-directed learning and be committed to the democratic system".*

25. The Applicant clarified that the two trustees would work in a voluntary capacity and advised that they are both listed as trustees of the charity and Board of Directors.

26. The Applicant confirmed that six of the trustees would be sending their children to the school.

27. In relation to the query regarding demonstration of the Advancement of Education, the Applicant outlined the following:

> *"Midhe Democratic School aims to promote its charitable purpose of advancing education by creating an environment that will support and facilitate self- directed learning. To do this we will provide a broad range of activities aimed at promoting learning, knowledge acquisition, and personal development. Self-directed learning will be delivered by our staff members and volunteers whereby they will enable the students to take initiative and responsibility for their own learning, identifying their learning needs, setting goals, and selecting and implementing strategies to achieve those goals. The role of staff as mentors is integral in the advancement of education. While traditionally, education has been more teacher-centred, focusing on imparting knowledge and skills from educators to students, self-directed education will enable students to participate in society from an early age and also adapt easily as adults to an ever-changing world".*

28. The Applicant then outlined how self-directed learning will be incorporated into their school setting to enhance educational opportunities and promote a lifelong passion for learning under the following headings:

- Facilitation and Guidance
- Personalised Learning Plans
- Project-Based Learning
- Technology Integration
- Reflection and Feedback
- Flexibility and Choice
- Cultivating Growth Mindset
- Differentiated Instruction
- Universal Design for Learning
- Varied Instructional Strategies
- Individualised Learning Plans
- Flexible Grouping
- Scaffolded Instruction
- Multisensory Approaches
- Assistive Technology and Supports
- Culturally Responsive Teaching

The Applicant affirmed that the role of staff is to act as facilitators, resource providers, assessment guides, collaborators, and advocates for equity and inclusion.

29. The Applicant also provided information on the pay structures for fees as follows:

> *"Midhe Democratic School also aims to further our charitable purpose of advancing education by offering two pay structures for fees. One for families with a gross income of more than €26,000 and one for those whose gross household income is less than €26,000. We will provide places to students regardless of their socio-economic background through this tiered fee structure. As our school grows, we intend to create a Bursary Scheme to further enable access to this alternative style of education.*
>
> *Midhe Democratic School will also take in interns studying in the field of education, both in Ireland and worldwide, who wish to further understand self-directed and democratic education. We hope this will*

highlight that alternative forms of educations are available and can be pursued".

30. The Applicant forwarded this response of 18 February 2-25 to the Regulator stating that they would '*welcome any further queries that may be necessary*'

NOTICE OF INTENTION TO RECOMMEND REFUSAL

31. By letter dated 20 March 2024, by way of Notice of Intention to Recommend Refusal, Ms. Meagan Gill, Head of Registration of the Regulator, informed the Applicant that it was the view of the Registration Unit that the application for registration should be refused, and attached the Notice of Intention to Recommend Refusal of the application under section 39 of the Act. The Notice set out the reasons for this proposed course of action. The Regulator also informed the Applicant that this Notice was based on the information provided to date by the Applicant and was not an invitation for the Applicant to provide further or different information and supplemental documentation could not be accepted.

32. The Applicant replied to the Regulator regarding the Notice of Intention to Recommend Refusal, by way of email on 5 April 2024, and requested advice as to whether a new application can be made to register as a charity, after a period of time has passed.

33. The Applicant also asked the Regulator to *"set out what is involved in taking an appeal to the tribunal, and what the relevant time frame may be".*

34. The Regulator replied to the Applicant by way of email on 9 April 2024, outlining the following:

    a. *"In relation to appealing to the Tribunal, please note that we are not at stage of the process.*

b. *If an organisation does not meet the legal requirements of the Act to be considered a charity, we will inform the applicant of this decision in writing in a letter called a Notice of Intention to Recommend Refusal of the Application (the Notice). This letter was issued to you on the 20 March 2024. This letter explained why the Registration Unit intends to recommend that the application is refused.*

c. *Before a final decision is made, the applicant has a right of reply to the Notice. This means you have the opportunity to correct any error of law or any misrepresentation of facts that may be contained in the Notice. Therefore, you may make a submission at this stage regarding the Notice.*

d. *Any reply received from an applicant about any error of law, or any misrepresentation of facts will be considered before the board of the Charities Regulator makes a final decision on the application.*

e. *An applicant cannot make any changes to an application or withdraw it at this stage. This is in the interest of fairness to all applicants. We have to allocate our resources fairly and evenly. By the time an application reaches this stage, the applicant will have been given sufficient opportunities and information to understand the requirements of the Act.*

f. *If an application is refused, the applicant can appeal the decision to the Charity Appeals Tribunal, an independent body established by the Act. Information on the appeals process can be found in in the following link: https://www.gov.ie/en/organisation-information/672545-charity-appeals-tribunal/".*

35. The Applicant replied to the Regulator's Notice of Intention to Recommend Refusal of the Application on the 19 April 2024 and addressed the various issues raised.

36. The Applicant noted that:

> *"the Registration Unit appears to be of the view that our school fees place a limitation on those who can benefit, and they do not promote a charitable purpose for public benefit".*

37. The Applicant noted that they had taken great effort to compare and consider the different ways in which their schools could operate and be sustainable in the future.

38. The Applicant outlined that they had also given careful consideration to how other schools that were also registered charities, operate. The Applicant submitted that the charging of fees was standard operating procedure for all schools that were considered private schools and provided an example of St. Columba's College, registered charity number 20005306, whereby the current fees were in excess of €10,000 per year.

39. The Applicant submitted that 'charging a fee' was standard practice across all fee-paying schools which were also registered charities in Ireland, and that it was not possible to operate without sharing the operations costs across members. The Applicant outlined that for this reason, they found the Regulator's point in this regard to be inconsistent with the Regulator's current practices.

40. In relation to a Bursary Scheme, the Applicant outlined the intention to "*build that fund once we are open and gaining an income".*

41. The Applicant outlined that:

> *"at the time of submitting our application in May 2023, a bursary scheme was being devised by our committed team of volunteers. The Bursary*

Scheme Policy document has now been drafted, and we would be happy to submit same. However, we note that we have not been invited to provide further information or supplemental documentation".

42. In relation to the requirement to meet the Public Benefit Test, the Applicant referred again to the example of St. Columba's College and outlined that:

"their bursary fund is limited to those who are boarding pupils and not day pupils. This limits all families who cannot afford to pay €10,000 per year to access their charitable service. This is one example of many".

43. The Applicant outlined that *"fundraising in a transparent way will happen once the school has members"* and that *"we prioritise fundraising efforts to secure the necessary fees for sustaining their presence within our educational community".*

44. The Applicant also referred to West Cork Sudbury School, charity number 20206027, and noted that West Cork Sudbury School *"explained that fundraising monies or monies in the account would be dedicated to supporting a current student who could no longer afford to pay fees".*

45. In relation to private benefit, the Applicant addressed the concerns raised by the Regulator that two trustees as staff members could give rise to a potential benefit to those trustees.

46. The Applicant outlined that:

"it was agreed in the early stages of the development of Midhe Democratic School that, any staff member recruited as staff for the day to day running of the school, who is also a trustee, will stand down from their trustee role, prior to the opening of the school. It is anticipated that the school will not open before September 2025. Prior to this date an open call for volunteer staff roles will be made public. Any trustees intending to apply for these roles will recuse themselves from writing of the job specifications and will

step down prior to applying for the roles. They will go through the same recruitment process as all other applicants".

47. The Applicant also outlined the requirements of all trustees to adhere to internal financial control activities, and how *"the trustees understand their obligations in protecting the organisation's interests".*

48. The Applicant further submitted that:

> *"it will be necessary for those trustees to remain on the board until such time as the school opens, at which point their roles as trustees will have been fulfilled and appointed to subsequent trustees".*

DECISION TO REFUSE

49. By letter dated 16 July 2024, the Regulator communicated to the Applicant that on the 20 of June 2024 the Board of the Charities Regulatory Authority refused the application to be registered on the Register of Charitable Organisations and appended its Decision to Refuse.

50. At paragraph 3 of the Decision to Refuse, the Board noted that is of the view that:

> *"the Midhe Democratic School CLG (the "Applicant") does not advance a charitable purpose for the public benefit as the fees charged by the Applicant places a limitation on those who can benefit.*
>
> *In addition, the Board is of the view that a potential private benefit accrues which is not reasonable in all of the circumstances, ancillary to and necessary for the furtherance of the public benefit. Finally, some of the Applicant's property is payable to its members and so does not apply all of its property in furtherance of its charitable purpose".*

51. The Regulator outlined the Provisions of the Charities Act 2009 in relation to Public Benefit Assessment (Sections 3(2), 3(3)) and also outlined the definition of Section 3(7) of the Act in relation to the importance of considering when assessing public benefit whether there are any restrictions placed upon who may avail of the benefit provided.

52. In relation to the potential limitation on who can benefit, the Regulator outlined the necessity to determine the amount of any charge payable for any service provided and whether it is likely to limit the number or persons or class of persons who may benefit. The Regulator outlined the Applicant's fee structure as detailed in the Applicant's Business Plan.

53. The Regulator also outlined that *"the Applicant provides some information on a potential bursary"* and noted that the Applicant's submission goes on to state that *"in relation to a bursary scheme the intention is to build a bursary fund once the school is fully opened and gaining an income".*

54. The Regulator noted that:

> *"the Board has examined the application, supporting documents and submission and is of the view that there is no immediate plan to award a bursary, and a bursary will only be available if the Applicant can afford to pay a bursary".*

55. The Regulator noted that:

> *"the fee being charged is not an insignificant one being €4,000 per school year, and for households with an income of less than €26,000 per year the fee will represent a minimum of 10% of those household's income".*

56. The Regulator noted that:

"the Board is of the view that the school is available only for people who can afford to pay and that the level of the fee charged will limit the public access to the Applicant's services and accordingly, is of the view that the Applicant has not demonstrated that it meets the public benefit element as required by section 3(2) of the Act".

57. The Regulator noted that in relation to the issue of Private Benefit:

"*the Applicant is a company limited by guarantee and has seven subscribers (otherwise known as members). The seven members are also directors of the company, which means should the application for registration to the Register be successful the seven members will also be trustees".*

58. The Regulator further noted that the Applicant stated that two of its members / trustees will be staff at the school and:

"this gives rise to a potential private benefit to those members / trustees who are employed by the Applicant".

59. The Regulator noted that:

"*for any private benefit to be permissible it must be reasonable in all of the circumstances and is ancillary to and necessary for the furtherance of the public benefit*".

60. In paragraph 20 the Regulator outlined that:

"the Registration Unit is not satisfied that the Applicant has demonstrated that the employment of trustees / members as staff is reasonable in all of the circumstances, and is ancillary to, and necessary, for the furtherance of the public benefit".

61. The Regulator noted that the Applicant's submission stated that the any trustee who was recruited as a staff member would recuse themselves from writing of the job descriptions and stand down before applying for employment with the Applicant.

62. The Regulator further noted that:

> "*this does not however address the issue that the trustees who resign will still be members. It is important to note that the definition of a charitable organisation in section 2(1) of the Act requires a charitable organisation to apply all of its property in furtherance of its charitable purpose and "none of the property of which is payable to the members of the body other than in accordance with section 89. Section 89 of the Act has not been commenced. From the information provided by the Applicant, it appears that the Applicant has employed two of its members. This will result in property of the organisation being paid to its members, which is contrary to the definition of charitable organisation as defined in section 2(1) of the Act".*

63. For these reasons, the Decision noted, at paragraph 22, that the Board was not satisfied that the Applicant was a charitable organisation within the meaning of the Act, and the Decision notified the Applicant that pursuant to section 39 (8), the Board was refusing the Application for the reasons outlined.

APPEAL

64. The Applicant duly entered an appeal dated 6 August 2024 against the Decision of the Authority.

THE APPEAL HEARING

65. The appeal hearing took place at the premises of the Residential Tenancies Board at O'Connell Bridge House, Dublin 2, on 5 December 2024.

REPRESENTATION AT THE HEARING

66. The following parties appeared at the hearing.

On behalf of Appellant:

- Ms. Jenny Shortt
- Ms. Caroline Lewis
- Ms. Kate Egan
- Ms. Amanda Leahy Clarke

On behalf of Respondent:

- Mr. Mark Tottenham BL (Counsel for the Charities Regulator)
- Mr. Alan Fitzgerald (Legal Advisor, Charities Regulator)

Tribunal Members:

- Mr. Patrick O'Connor, Chair
- Ms. Nuala Dockry BL
- Ms. Carol Fawsitt
- Ms. Karen Horgan
- Mr. Bill Holohan SC

THE HEARING

67. Mr. Patrick O'Connor, Tribunal Chair ("the Chair"), welcomed those in attendance and asked the members of the Tribunal to introduce themselves. They did so.

68. The Chair then requested Ms. Jenny Shortt to identify those in attendance on behalf of the Appellant and she did so.

69. Mr. Tottenham introduced himself and Mr. Fitzgerald from the Regulator.

70. The Chair outlined part 5 of the Charities Act 2009, which, effectively, established the Charity Appeals Tribunal, the statutory instrument relating to the rules governing the actual establishment of the Tribunal and its process and management.

71. The Chair listed the core documents relating to the Appeal and referred to the ancillary documents.

72. The Chair asked if there were any preliminary applications that either party wished to make to the Tribunal in relation to any documents or otherwise that they wished to submit.

73. Ms. Jenny Shortt on behalf of the Appellant, requested the Tribunal's permission to submit further evidence relating to policies and documents that had been drafted since the Application was submitted to the Regulator in June 2023.

74. Mr. Tottenham objected to this on behalf of the Regulator, noting that this is an appeal from a decision of the Regulator, and the Regulator had to make a decision on the basis of certain materials that were available to her. Mr. Tottenham submitted that this was, effectively, a review of that decision but, it should be based on the materials that were before the Regulator at the time.

75. The Chair asked Ms. Shortt, on a preliminary basis, why these documents were not presented to the Regulator with the application and Ms. Shortt replied that this information was not requested by the Regulator at any stage.

76. Mr. Tottenham noted that there was an initial indication of a decision to refuse which resulted in a response that could then have, at least in theory, resulted in the inclusion of further materials and they were not submitted at that stage.

77. Ms. Shortt replied that the Notice of Intention of Refusal stated that no additional information can be provided.

78. The Chair outlined his decision to adjourn the Hearing at that point in order for the Tribunal to consider the admissibility of the material.

79. When the Tribunal reconvened, the Chair outlined that the Tribunal was of the view that the additional material in question could not be introduced at that stage. He explained that the Tribunal did not consider the substance of the material as it felt constrained in the process to considering only what was before the Regulator when the decision was made.

80. The Chair noted two aspects of the matter that the Tribunal wished to draw attention to on a primary basis.

81. One was that no additional material was submitted by the Appellant in relation to the decision of, or at least the letter of the Regulator to them on the 20 March 2024 in relation to the recommendation that they were going to make to the Board.

82. And secondly, in fairness to the Appellant, it was going to be extremely difficult to make any submission because in the third last paragraph of the letter, at page 6, it stated clearly "*please note that this is notice is based on the information provided to date by the Applicant and is not an invitation for an Applicant to provide further or different information and supplemental documentation cannot be accepted".* The Chair observed that, in effect, this was shutting the door in relation to any further submissions being made at that stage.

83. The Chair invited Ms. Shortt to present the Appellant's case.

84. Ms. Shortt outlined that the Appellant respectfully disagreed with the decisions reached by the Regulator regarding the potential limitation on who can benefit, the private benefit arising and disagreed that the company's property was being used in furtherance of the charitable purpose.

85. In relation to the public benefit assessment, Ms. Shortt noted that the Regulator reached a decision that there was a potential limitation on who can benefit, and they referred specifically to the company's fee structure and also reached the view that there was no immediate intention to award a bursary.

86. Ms. Shortt submitted that was not the case and referred to the company Constitution, specifically the subsidiary objects 4.8 where it states that:

> *"We will ensure equality of access to people on all income streams through targeted fundraising activities and a contributory social fund specifically to provide financial assistance for tuition fees".*

87. Ms. Shortt noted that at the outset, the aim had been to make the school available to as many students as possible, and she submitted that the two-tiered fee structure did, in fact, remove those limitations on attending the school.

88. Ms. Shortt also noted that the school had a number of enrolment forms filled out where parents had indicated on the form that they wished to avail of the reduced fees rate, which, she noted, accounted for 21% of the 38 enrolment forms received to date. In addition, a parent specifically stated that had it not been for the school's reduced fees rate, she would not have been able to consider the school.

89. Ms Short submitted that the Appellant's two-tiered fee structure was an attempt to remove limitations on those attending the school, and that it was in fact a bursary policy to those who could not afford to pay the full fees. She further submitted that the Regulator questioned the bursary issue. She noted that at that stage of the process the Appellant was precluded from adding any further information and had it been brought to their attention during the assessment stage, they could have provided the further information.

90. Ms. Shortt also noted that the Appellant attempted in their response to the Regulator's Notice of Intention to Recommend Refusal to highlight how other

schools that are registered as charities used fee structures to ensure that the school was open to everybody.

91. In relation to private benefit, Ms. Shortt noted that the Regulator reached a decision that the employment of two trustees as staff gave rise to a private benefit to those trustees.

92. Ms. Shortt submitted that there was a twofold explanation as to how this was not the case. Firstly, the two trustees in question had agreed to work unpaid at the school for the period of two years once it opened, which was evidenced in company documents.

93. Ms. Shortt further outlined that in the application to the Regulator, under "*Staffing and Volunteers*," when asked if the school intended to have employees in the next three years, the answer provided was no and when asked how many volunteers the school intended to have in the next three years, the answer was one to nine. Also in the application form, the Appellant was asked to provide financial projections and the figures provided for expenditure on salaries and wages was zero for the first two years.

94. Ms. Shortt submitted that it was hard to see how two trustees volunteering their time were gaining private benefit and that should the Tribunal agree with the Regulator that there was still a private benefit there by two trustees working at the school, that the employment of the trustees as staff would have been reasonable in all circumstances and being ancillary to and necessary for the furtherance of the public benefit.

95. Ms. Shortt further submitted that it was wholly in the best interest of the school to have two founding trustees as staff members, and further to that, the two trustees in question had agreed with the Board that when the school opened, they would step down from their role as trustees. She maintained that there was no private benefit here.

96. Ms. Shortt also submitted that the Regulator did not engage with the Appellant around this issue, in that there was the Regulator's submission, and the Appellant responded to it, and but there were no further questions and no further submissions. The Appellant assumed that they would have the opportunity to work with the Regulator, and to be guided by the Regulator. Ms. Shortt cited the Determination of Charity Appeals Tribunal Reference CAT2304 relating to Cuman Barra na Gaeilge where in one of the letters from the Regulator it was stated that "*we are able and willing at all stages of the process to offer direction",* and Ms. Shortt submitted that the Appellant did not get that guidance and direction.

97. Mr. Holohan asked Ms. Shortt about the salary levels of the two trustees when they became paid staff and how it would compare to industry standards.

98. Ms. Shortt responded that the two trustees would be working as unpaid staff members in the first instance, and when funds were available, the intention was to start at minimum wage with a 19-hour contract.

99. Mr. Holohan observed that had the Regulator requested this information i.e., the issue of whether the individuals being remunerated would be remunerated on par with industry standards or whether they would be remunerated more handsomely might have been a material issue.

100. Mr. Holohan observed that in relation to the issue of the public benefit element regarding the fees, the Regulator appeared to have made a principled decision that at a figure of the fees that would be charged this would exclude a segment of the population. Mr. Holohan observed that regardless of whether that figure was €50.00, €500.00 or €5,000.00 or €50,000.00, it was still going to exclude somebody.

101. Ms. Leahy Clarke responded that the Appellant had the intention to create a scholarship fund, but as a business it was harder to get funding than as a charity. Ms. Leahy Clarke outlined various measures the Appellant had taken to engage

with school completion programmes to discuss scholarship funds and see if they would have any candidates for their educational model.

102. Ms. Fawsitt asked the Appellant if the intention was to apply for charitable status when the company was formed.

103. Ms. Shortt said that it had always been the intention, and that the Constitution used was from the Regulator's website.

104. Ms. Fawsitt outlined her concerns regarding the interchangeability of the terms members (Directors) and employees and servants. Ms. Fawsitt sought clarification in relation to object (v) in the Appellant's Constitution "*to provide all of this to members on a cost-sharing basis*". Ms. Fawsitt asked who were the members referred to here.

105. Ms. Shortt responded that the members in question were the students and their families.

106. Ms. Fawsitt then referred to clause 6.2 of the Constitution which states:

> *"no Director shall be appointed to any office of the company paid by salary or fees or receive any remuneration or other benefit in money or money's worth from the company. However, nothing shall prevent any payment in good faith by the company of (a) a reasonable and proper remuneration to any member or servant of the company, not being a director, for any services rendered to the company".*

Ms. Fawsitt observed that the Director was clearly differentiated in this clause. Ms. Fawsitt observed that the concern was the confusion that could arise from a payment to a member.

107. Ms. Shortt responded that it was a drafting error and that the wording could be amended and changed.

108. Ms. Fawsitt raised a query in relation to staff stipends in the Appellant's Business Plan.

109. Ms. Fawsitt then asked about the other three democratic schools that the Appellant referenced in the company's Business Plan, and specifically when the three schools referred to (Wicklow, Cork and Sligo) had acquired charitable status.

110. Mr. Tottenham responded on behalf of the Regulator and confirmed that the schools were registered between 2018 and 2020.

111. Ms. Fawsitt asked what differentiated the Appellant's school from these other three schools.

112. Ms. Shortt noted that these three schools were doing the same things as the Appellant's school, and in the same manner and that the Appellant had availed of help from them in relation to their application for charitable status.

113. The Chair pointed to an issue in the Appellant's Business Plan whereby Profit and Loss are referred to, rather than the correct terminology for a non-profit making organisation which would be Surplus and Deficit. The Chair noted that it was not relevant, but it was important.

114. The Chair asked the Appellant if they had anything further to add and asked Tribunal members if they have any further questions.

115. Mr. Tottenham requested a short adjournment, to receive instruction from the Regulator, and this was granted.

RESPONSE FROM THE REGULATOR

116. Following the adjournment, the Chair invited Mr. Tottenham on behalf of the Regulator to respond.

117. Mr. Tottenham stated that the Regulator had no issue with the bona fides of the staff of the Appellant or of the competence of the staff or the vision, and furthermore no issue was being taken with the concept of democratic education as being within the advancement of education.

118. Mr. Tottenham noted that the Regulator was solely concerned in making her decision with the issue as to whether this charity on its own application complied with the terms of the Act, and the two issues that were raised were:

i. First of all, the issue of public benefit which was under section 3.2 of the Act which says: *"A purpose shall not be a charitable purpose unless it is of public benefit."*
ii. The second issue is the specific issue of property which was payable to the members of the body and that is in the definition of a charitable organisation which says that none of the property is payable to the members of the body other than in accordance with section 89. Mr. Tottenham noted that this had already been observed by Ms. Fawsitt, and section 89 has not yet been commenced.

119. Mr. Tottenham referred to the Constitution of the organisation, and the main object of the organisation:

> *"the main object for which Midhe Democratic School, MDS, is established is to provide democratic education in the Midlands of Ireland to an environment that young people can determine their own education at their own pace using democratic processes, values, and memberships. To contribute by any means at its disposal to the advancement of this*

education, and to advance and develop wider community concept at the school to benefit students, their families, and the surrounding community, and to facilitate the coming together of the students, their families, and the surrounding communities to share values, experiences and skills".

120. Mr. Tottenham further observed that in section (v) of the objects it says*: "To provide all this to members on a cost-sharing basis."* Mr. Tottenham observed that on its face this is an organisation that was effectively paying, providing for certain services to its members, not the technical meaning of members, rather members as suggested by Ms. Shortt and it was on a cost-sharing basis with a fee structure involved. The first subsidiary object was:

"To establish and maintain living democratic culture where members pursue learning and personal development in a way that best meets their individual needs while participating in community and self-governance and justice."

121. Mr. Tottenham observed that it was very much the members that are referenced in this section (the families and their children) and noted that the organisation's Business Plan then went on to effectively replicate these objects and used exactly the same language in the objectives. He noted that in the application for registration the same language was then used, and that the Appellant had used the main objects and used the same phrase to provide all this to members on a cost-sharing basis.

122. Mr. Tottenham submitted that in his opinion there was no real issue then with the wording of the application for registration and turned the attention of the Tribunal to the Beneficiary Selection Policy. He noted that although it used the term Beneficiary Selection Policy, it looked on its face as if it was an Admissions Policy similar to that used by a number of schools, and it was striking that it had very few limitations on the applications. He outlined that there was no sibling

rule or geographic limitation, it was very much open and the only restrictions apart from the fees was the statement:

> *"The official enrolment is subject to (a) the school, community, and family's belief that the students can thrive at Midhe Democratic School, and (b) whether the student chooses to join the school."*

123. Mr. Tottenham observed that that required, effectively, both the school, community, and the family to believe that the student would thrive, and it was reasonable to assume that anybody that applied to the school did at least by virtue of their application in the belief that their child could or might thrive and it was the school itself that was making the final determination as to whether a child would thrive. Mr. Tottenham noted that he is not suggesting that there's anything wrong with that on its face as an Admissions Policy but there was no particular charitable intent involved in the sense that it was not saying any particular type of student was more likely to thrive. It was very much a discretionary policy on the part of the school.

124. Mr. Holohan requested clarification on Mr. Tottenham's point.

125. Mr. Tottenham submitted that for example, if the organisation said this particular environment was suitable for people, say, who had a particular neuro-diverse condition or something along those lines, that might point more towards it being of charitable intent rather than being a school for people who had children in the school and who were able to pay the fees. There was a certain discretion on the part of the school as to who was likely to thrive and there were no determinations set out. He observed that the question was, was there charitable intent and a public benefit.

126. Mr. Tottenham submitted that there was no charitable intent demonstrated by the Admissions Policy, and so while it uses the phrase, Beneficiary Selection Policy, it was not beneficiary in any respect other than the fact that a family had applied to the school for their child to go to that particular school.

127. Ms. Fawsitt observed that the Beneficiary Selection Policy was with the Regulator and the Regulator never raised any question about it, which Mr. Tottenham accepted.

128. Mr. Tottenham responded that the Regulator has said that the public benefit element had not been demonstrated, and that if taken together with the membership fees, it did not demonstrate a public benefit.

129. Ms. Fawsitt asked if this was a requirement for a Beneficiary Selection Policy.

130. Mr. Tottenham responded that it was a requirement for a charity to have a public benefit, and within the parameters of the Act, no public benefit, on its face, it was demonstrated by the Beneficiary Selection policy.

131. Mr. Tottenham then went on to address the membership fees and outlined the Appellant's fee structure, noting that the fee structure was for families with an income of over €26,000 per year. For the first child, the fees would be €4,000 per year, for the second child it was €2,500 per year and for the third child it was €1,500 per year. There was a lower fee structure for families with an income of under €26,000 per year. The first child was €2,500 per year. The second child was €1,500 per year and the third child was €1,000 per year.

132. Mr. Tottenham observed that this was a matter that the Regulator had to determine whether this established a benefit to the public and the determination the Regulator reached was that this did not establish a benefit to the public because the fee level for families with under €26,000 a year was not sufficiently low for it to be described as charitable.

133. Mr. Holohan queried at what level would the fees be considered charitable.

134. Mr. Tottenham responded that the Regulator was dealing with the matter as it appeared in the application submitted. The determination was that this fee structure was not of a charitable nature, that although it was a lower fee

structure, it still came within the determination of the members coming together and providing the service on a fee sharing basis and that it was not in the nature of an organisation that was raising money to provide education for another person who needed it.

135. The Chair asked Mr. Tottenham if the Regulator has, or had in this case, an objection to the payment of fees by members, and if it was question of the fees or the level of fees.

136. Mr. Tottenham responded that it was his understanding that it was the level of fees in the sense that there was a very nominal amount that was paid by people from a lower income level, families with a lower income level, and that was more likely to tend to suggest that it was of a charitable nature. He observed that in circumstances where it was not insubstantial amounts of money, €2,500.00 per year per child, was considered not to be of a charitable level.

137. The Chair asked if that set up the Regulator then as the determinant factor as to what are reasonable fees or charitable fees or other fees.

138. Mr. Tottenham responded that on the application submitted, the Regulator took the view that this level would not be considered charitable or of public benefit.

139. The Chair observed that there was also evidence of bursaries and possible scholarships and asked if that was taken into account in determining whether or not the fees that were proposed to be charged were, in the views of the Regulator, excessive.

140. Mr. Tottenham responded that the Regulator's view was that the information in relation to bursaries was insufficiently set out to be able to determine them as part of a charitable intention, and the primary purpose of a charity had to be a charity, that it was not one where on the side they are also providing bursaries. The primary purpose needed to be charitable.

141. The Chair asked that if the Regulator had an issue with that, why did the Regulator not go back and ask for clarification in relation to (a) the fees, (b) the bursary and (c) the actual scholarships.

142. Mr. Tottenham responded that the Regulator, as had already been pointed out, had taken the view that the determination should be made based on the material that was supplied and that by writing back and asking for subsidiary information would be effectively directing the individual organisation as to what information should be provided. Mr. Tottenham outlined that that was why in the original reply it was suggested that they should be addressing the material that was before the Regulator rather than to an invitation to provide a lot more information.

143. The Chair observed that the Regulator is a public entity and has an obligation to the public, and it is not a determinant factor in relation to everything. It should get all of the information that is reasonable and appropriate to make a decision.

144. The Chair further observed that in other cases before the Tribunal, the Regulator did engage with the Applicant. He observed that in this case it seemed that the door was firmly shut once the decision had been flagged to the Applicant that they were going to refuse the application. The Chair pointed to reference to the third paragraph in the letter from Meagan Gill (Head of Registration) to the Applicant.

145. The Chair asked Mr. Tottenham if he was saying that under no circumstances should the Regulator engage with an Applicant for charitable status to determine what are the issues that she would like to have addressed or clarification in relation to those?

146. Mr. Tottenham responded that there was an initial engagement before the Notification of the Intention to Refuse, so there was an opportunity at that stage to provide further information.

147. Ms. Fawsitt observed that right at the very beginning, the first engagement by the Regulator with the Appellant was on the 2 February 2024 and the response by the then Applicant of 18 February referred to the bursary. After the Notice of Intention to Recommend Refusal on 20 March 2024, the Applicant confirmed that the bursary had been drafted, so this was not something that had been lately manufactured.

148. After the notice on 20 March 2024, the Appellant confirms that the bursary scheme has been drafted, so this is not something that has been lately manufactured. This has been in existence in the plan right from the beginning, from the first engagement by the Regulator with the Applicant.

149. Ms. Fawsitt further observed that the Case Worker involved, who represented the Regulator, did not raise any question about the bursary and then, suddenly, the notice referred to it and the Appellant confirmed it has been drafted but there was no request for further information. Ms. Fawsitt asked that surely before the matter went to the Board, the bursary scheme was sought because it was very clear that the Board made its decision based on the information that had been amassed by the Regulator and by its staff in the process. Ms. Fawsitt referenced again the first engagement by the Regulator and the Applicant's response of 18 February 2024 and noted there was no follow-up, and then the Appellant was told they cannot submit any more documentation once the Notice of Intention to Refuse was issued. Ms. Fawsitt stated that that did not strike her as being fair.

150. Mr. Holohan raised a further issue - insofar as the Regulator appeared to have made a decision on the basis of certain criteria, for example, that the figure of fees was regarded as excessive, one of the basic principles was the right to be heard. Mr. Holohan observed that if the Regulator was going to make a decision on the basis of criteria which had not been addressed and they had not been afforded an opportunity to be heard, and Mr. Holohan observed that this was

inherently unfair.

151. Mr. Tottenham noted that he would need to seek instruction from Mr. Fitzgerald on both matters raised.

152. Ms. Shortt observed that she could not find anywhere on the application form to upload a bursary policy, and that it was not asked for and it was a lengthy application form.

153. Ms. Horgan observed that in relation to the Regulator's determination regarding the level of fees and how that would fit a charitable purpose or not, there were examples of other charities who did charge service users fees. She pointed to an example of homeless hostels, which operated as charities and they charged their service users rent of for example, up to €100.00 per week, and if the service users did not pay that charge, they were precluded from that using service. Ms. Horgan observed that €100.00 a week amounted to a lot more than the fees in question.

154. Ms. Horgan queried the Regulator's determination as to what level of fees fitted a charitable purpose or not, and how that could be differentiated from an organisation providing homeless services or intellectual disability services, and how the level of acceptable fees had been determined.

155. The Chair advised Mr. Tottenham that might be something else on which he might wish to take instruction.

156. Ms. Horgan asked about the fee structures of the other democratic schools who had been registered (Sligo, Cork and Galway) and how the fee structure differed from the Appellant's.

157. Ms. Shortt responded that Sligo operates on the same basis as the Appellant, as in, set fees. Wicklow and Cork are working on a sliding scale - Wicklow is €8,000 for the first child, and €13,000 for three children. Cork also starts at €8,000 and then they have a lower cut-off of €5,000 for the second child.

158. Ms. Fawsitt queried when charitable status was accorded to the three, it being a matter of public record.

159. Mr. Tottenham responded that one had been registered in 2018 and the other two in 2020.

160. The Chair indicated that the Tribunal would rise in order to allow Mr. Tottenham to seek instruction from Mr. Fitzgerald.

161. Following the resumption of the hearing, Mr. Tottenham reiterated that in relation to the issue of bursaries, the decision of the Regulator was that the information on bursaries at the time of the application was vague and aspirational, that it was not sufficiently specific for the Regulator to make a determination as to whether there was a sufficient provision made for those on and above limited means. And that in relation to the level of the fees charged, Section 3.7 of the Charities Act 2009, states:

> *"In determining whether a gift is of public benefit or not, account shall be taken of any limitation imposed by the donor of the gift on the class of person who may benefit from the gift and whether or not such limitation is justified and reasonable having regard to the nature of the purpose of the gift and the amount of any charge payable for any service provided and of the purpose for which the gift is given and whether it is likely to limit the number of persons or classes of person who will benefit from the gift".*

162. Mr. Tottenham observed that the Regulator took the view in this case that the level of fees, even on the reduced scale, was likely to limit the number of persons or classes of persons who would benefit from the gift. He further observed that in relation to the issue of the bursaries, at the time of the application, the Regulator took the view that these were vague and aspirational, and they were not sufficiently determined to overcome the limitation posed by the level of fees.

163. The Chair observed that there was no effort made by the Regulator to go back and clarify that.

164. Mr. Tottenham responded that attempts were made originally to raise various issues, but maybe that issue might have been addressed more directly.

165. The Chair drew Mr. Tottenham's attention to Section 3.1 (b) of the Charities Act 2009, in relation to the Appellant's object of the advancement of education. Mr. Tottenham noted that the Regulator has no issue in relation to this section.

166. The Chair then asked Mr. Tottenham if Section 3, subparagraph 3 (a) and (b), in relation to the determination of public benefit, is relevant also, and Mr. Tottenham replied that it was.

167. Ms. Shortt observed that the Bursary Policy was just not addressed, and that it was not that it could have been clearer, it was not addressed.

168. Mr. Tottenham noted that in relation to one of the other questions that was raised, that the three other democratic schools were registered in 2018 and 2020, postdating the Act. The scale of fees was available on their website. Mr. Tottenham noted that he was limited as to the comment that he can make in relation to their applications because the applications themselves were not public documents and that he was not aware what the scale of fees was when the applications were made. However, the Regulator determined in relation to this particular application that the scale of fees was likely to limit the public benefit, as set out in Section 3.7 of the Act.

169. Mr. Tottenham referred to the letter from the Applicant to the Regulator of 18 February 2024 which states:

> *"Midhe Democratic School has a charitable purpose of advancing education by offering two pay structures for fees. One for families with a gross income of more than €26,000 and one for those whose gross*

household income is less than €26,000. We will provide places to students regardless of their socioeconomic background through this tiered fee structure".

170. Mr. Tottenham observed that the above section from the letter did not form the basis for the Regulator's determination, but to suggest that the school would be able to accommodate students if all of them came in at the lower structure and it was just something that might have been elaborated on. He noted that this was a matter that was not flagged in the response.

171. Mr. Tottenham observed that the section of the Act that has already been referred to, Section 3.2, says that: "*A purpose shall not be charitable unless it is of public benefit".* He observed that in section 4, it says:

"In a case where it confers a benefit on a person other than in his or her capacity as member of the public or section of the public, any such benefit is reasonable in all of the circumstances and is ancillary to and necessary for the furtherance of public benefit".

172. Mr. Tottenham addressed the issue of the trustees becoming employees of the school and observed that this may be an issue of the language that is used in the Act and the language that is used in the applications because it is really simply a technical issue. Under section 2, which is a definition of the Section of the act, it says that a charitable organisation means: "*the trustees of a charitable trust or a body corporate or an incorporated body of persons",* and this refers to a company limited by guarantee. He noted that it says, first of all, that it promotes a charitable purpose only. Secondly, that under its Constitution it is required to apply all of its property both real and personal in furtherance to that purpose, except for monies expended, first of all, in the operation and the maintenance of the body, including the monies paid in remuneration and superannuation of the members of the staff of the body.

173. Mr. Tottenham observed that it then it went on at subsection 3 (b) to say:

"None of the property of which is payable to the members of the body, other than in accordance with section 89".

174. Mr. Tottenham then drew the Tribunal's attention to the decision of the Regulator and observed that it might have been worded more clearly. It says:

"The applicant states that two of its members or trustees will be staff at the school and that this gives rise to a potential private benefit to those members or trustees".

175. Mr. Tottenham observed that what had been said by the Applicant was that the two trustees will step down as trustees of the body or as directors. They had not said that they would step down as members and this may simply be a question of terminology, but the two people involved were subscribers to the company in its Constitution. And so, by virtue of being subscribers, they were members of the company. And so, there was a straightforward prohibition in the Act on them receiving a portion of the property of the company, whether or not they were Directors or trustees, and so that was the basis upon which the Regulator made that particular decision.

176. Mr. Tottenham observed that again, arguably, there might have been a misunderstanding of terminology here, but there would have needed to be a very express determination that they would step down as members as well as trustees. The trustees had not stepped down by the time of the application or had not said that there was any particular date upon which they would step down and this might be considered to be insufficiently clear to bring them outside of section 2.

177. Mr. Tottenham observed that this was the basis of the Regulator's decision in that regard and just because Ms. Shortt did address, in some detail, the vision and the intention, none of that applied to the Regulator in her particular determination. He noted that it was specifically the issue of them being members

of the organisation; nothing more and nothing less and that there is no question of their bona fides at all in relation to that.

178. Mr. Holohan observed that again, that could have been clarified had there been engagement.

179. Mr. Tottenham noted that the issue was raised, however, it may not have been raised in such a way that the terminology was sufficiently clear.

180. Mr. Tottenham noted that he had provided a number of authorities which are not necessary to open in detail as the Tribunal was probably reasonably familiar with them.

181. Mr. Tottenham referred to the case of Catholic Care (Diocese of Leeds) and The Charity Commission for England and Wales and The Equality and Human Rights Commission, [2010] EWHC 520 (Ch), which he noted, was a case on very different facts where a particular charity was involved in adoption, and was trying, because it came from a Catholic ethos, to take the adoption principles outside of same sex couples. They tried to take advantage of a section of the UK Charities Law which allowed them to rely on their own instruments, and they tried to amend their instrument, and the Charity Commission did not allow them to do so.

182. Mr. Tottenham referred to paragraph 62, where it stated that there were four features of charity law which were relevant for present purposes. The first was that:

> *"a charitable institution or instrument, such as a trust, is defined as such by reference not to its beneficiaries but by reference to its purpose. Thus, whereas an ordinary trust is valid only if it exists to the benefit of the class of beneficiaries, a charitable trust is, by definition, a purpose trust".*

183. Mr. Tottenham then referred to paragraph 64, which says:

"The second relevant aspect is the requirement of exclusivity. An institution or instrument is not charitable unless its purposes are exclusively charitable."

184. Paragraph 65 says:

"The third and most important feature of charity law is that a purpose is not charitable unless it is for the public benefit. Charitable trusts are public not private trusts. Indeed, public trusts and charitable trusts may be considered in general synonymous expressions."

185. Mr. Tottenham observed that it then makes reference to the public benefit test in the UK legislation, which at section 3.1 says:

"A purpose falling within section 2.2 must be for the public benefit if it is to be a charitable purpose".

186. In paragraph 67 it states:

"For present purposes, the important point which emerges from section 3 is that although general charity law, which is by no means entirely statutory, is the primary source of the understanding of the meaning of public benefit, it is no longer to be presumed that any particular type of purpose is for the public benefit. Section 3, therefore, expressly contemplates that purposes commonly regarded as charitable, such as the advancement of a religious education, the relief of sickness or poverty or the care of children in need may not be for the public benefit, for example, if they are sought to be achieved in a particular manner. It, therefore, admits of the possibility that the question whether a particular purpose which is within section 2.2 is charitable may require a weighing of the public benefits and dis-benefits associated with its implementation."

187. Paragraph 69 says:

> *"The final aspect of charity law relevant for present purposes is the regulatory role of the Charity Commission itself."*

188. Mr. Tottenham observed that in relation to paragraph 67, determining whether a charitable purpose *"is charitable may require a weighing of the public benefits and dis-benefits associated with its implementation."*

189. Mr. Tottenham submitted that this was what the Regulator had done in this particular case. The Regulator had looked at the scale of fees involved and had taken the view that this did not comply with the requirements of public benefit, and it excluded a sufficiently large proportion of the population.

190. The Chair noted that that was an interesting weighing of the public benefit and asked Mr. Tottenham to expand on it, and again raised the question of on what basis and what principles was the Regulator guided by in relation to a weighing of the public benefit and, also, what was the quantum thereof.

191. Mr. Tottenham observed that in relation to the Regulator's decision, the decision simply stated that the Applicant's charging of fees to children to attend the school, fell to be considered whether the fee was likely to limit the number of persons or class of persons who would attend. When considering the charge payable, he could not take discounts, bursaries, the number of individuals who could benefit for free or other financial aid as may be provided, and the view was taken that there was insufficient information in relation to bursaries.

192. Mr. Tottenham referred to paragraph 17 of the Regulator's decision*:*

> *"The Board is of the view that the school is available only for people who can afford to pay and that the level of the fee charged will limit the public*

access to the Applicant's services and, accordingly, is of the view that the Applicant has not demonstrated that it meets the public benefit element as required by section 3.2 of the Act."

193. Mr. Tottenham further observed that it was not on the face of the determination, and asked, taking into account the scale of fees involved, a person who was on a family income of €26,000 a year, if they had three children, was it realistic that they would be in a position to pay the fees for all three people? The view that the Regulator had taken was that that will limit public access, that it really was not sufficient to encompass anybody who was likely to be able to attend the school.

194. Mr. Holohan referred to the definition in section 3(3)(a) of the Charities Act 2009:

"a gift shall not be a public benefit unless it intends to benefit the public or a section of the public."

195. Mr. Holohan observed that even those who are able to afford it, are still *"a section of the public".*

196. Mr. Tottenham agreed that they were a section of the public, but that it was the fact that it was the limiting of numbers of people who were classed as people who could benefit from the gift.

197. Mr. Tottenham further observed that there was no question that the general public included people who had means as well as people who did not have means. It was the access of people to the particular service that underlay the decision.

198. Mr. Holohan queried that if the Act permits a gift to be restricted to a section of the public, then where was the justification for the Regulator saying because your fee level will restrict access, therefore, it was no longer charitable.

199. Mr. Tottenham responded that a section of the public would have to be a defined

section of the public on the face of the application and to suggest that any charity was there specifically to provide a service to people of means would fly in the face of charities regulation. He further noted that Section 7 (a) (b) of the Act dealt with that because it needs to be something where provision was available to people who did not have the means.

200. Mr. Holohan observed that the Regulator has relied on the fee level, which logically may exclude certain people who may not be in a position to afford it. That does not deal with the bursaries or scholarships or otherwise.

201. Mr. Holohan noted that he is trying to establish where is the authority for the Regulator to say because a certain section of the public may not be able to afford this, outside of the purse strings or scholarships that then takes it outside the realms of a charitable gift.

202. Mr. Tottenham responded that even if it did not completely exclude, it certainly abided by section 7(b) of the Act. He contended that if you were to take the phrase, a section of the public, you would have to take a section of the public that was not defined by the fact that they were able to afford fees. It would need to be, for example, children with special needs or people who have a particular requirement, for example there were schools that are set up for people with particular types of disability. The section of the public could not simply be delimited by the ability to pay fees.

203. Mr. Holohan noted that that was the basis of the decision by the Regulator.

204. Mr. Tottenham responded that the basis of the decision of the Regulator was the contrary that the restriction to the ability to pay fees was sufficient to exclude the number of people who could benefit from the gift.

205. Mr. Holohan observed that ignored the question of bursary or scholarship which was addressed by the Applicant, and which was not then the subject of engagement by the Regulator with the Applicant.

206. Mr. Tottenham replied that the Board was able to take a view of the nature of the engagement, but in a decision of the Board it was stated that there was insufficient information to make a decision on the basis of the bursaries.

207. Mr. Tottenham in closing, reiterated the fact that no issue was being taken with the nature of the democratic education. He outlined that had not been made an issue by the Regulator and neither had any bona fides or competence on the part of the employees or the trustees. The issue was, first of all, the fact that the level of fees was likely to exclude certain members of the public and, secondly, the very technical issue of the likely employment of members of the organisation even if they stepped down from their positions as trustees.

208. The Chair thanked Mr. Tottenham and Mr. Fitzgerald for the trouble they went to preparing a booklet of authorities. He re-iterated that most of the cases have been before the Tribunal already, but asked in the context of this particular case, if there were any of the seven cases in the booklet, other than the one mentioned, to which Mr. Tottenham wished to make particular reference.

209. Mr. Tottenham replied that the nature of the Charities Law is that the principles are fairly well set out and if an issue needed to be raised in relation to any of those, he would have opened the relevant case. He noted that the Catholic Care case was the only one that he was particularly concerned to open.

210. The Chair asked the Appellant if there was anything they wished to refer to or to add.

211. Ms. Shortt re-iterated that in relation to the errors in the Constitution, there was ambiguity around who the members were, be it the members of the school or the members of the company, and that was a drafting error that could be amended.

212. Ms. Shortt commented that in relation to the Beneficiary Selection policy, there

was reference to it being a school for neuro-diverse children versus a school for children that can afford to pay. Ms. Shortt outlined that in terms of a child starting at a school, there was a lengthy admission process in that there was an interview with the parents and there was an interview with the child. Then the child would get a four-week trial period at the school. They would not be paying fees at that point because the school would not be for people who can afford to go to it. She noted that there are many children with trauma from average school who needed a place to be and a place to be themselves. Ms. Shortt submitted that that was opening it to the public even more and not just limiting it to the people who can afford to pay.

213. Ms. Shortt asked that in relation to the issues with the Beneficiary Selection Policy, why the Regulator did not raise these issues in that policy. Ms. Shortt observed that with reference stepping down as trustees and as members of the company this could be very easily rectified. She further observed that in terms of not having a date to step down, the school was not open yet and they had a provisional opening date which was likely to be delayed, and when an opening date was confirmed, they can confirm the date that the two trustees would step down from the Board.

214. Ms. Egan added that she could not understand how fees can be acceptable in certain circumstances and not theirs, particularly when they were comparable circumstances.

215. Ms. Lewis outlined how she was one of the full-time members that will be giving their time voluntarily at the school, and explained why she was willing to do this, and outlined the benefits of the school for the next generation. She outlined that they were looking for charity status because they saw the benefit to the whole of society, and this was in the interest of the public.

216. Ms. Fawsitt commended the purpose and vision of the school and noted that there was a growing need for alternatives, referring to how Educate Together started and was now mainstream.

217. Ms. Fawsitt also noted the poor engagement by the Regulator and how it was unfortunate because the Appellant was told that they could not supply any more information when the Notice of Intention to Recommend Refusal was served, and there had only been one engagement before that.

218. The Chair asked the Appellant if the school would open if they did not get charitable status.

219. Ms. Shortt responded in the affirmative and outlined that they needed to ask people to invest and in order to ask people to invest they needed to offer them the benefits that came with being a charity.

220. Ms. Egan added that they feel that their work was charitable, and this was advancing education within Ireland, and it should have charity status because that was a status within Ireland that brings a level of response or a level of connection, but it also created an accessibility as well for people.

221. The Chair noted that this was a Tribunal of law, and that there were clear benefits of the school. However, the Tribunal had to make a decision as to whether or not the Appellant came within the provisions of the Charities Act, and whatever the decision arrived at was not to be regarded in any way as a recognition or non-recognition of very good work.

DETERMINATION

222. The Charities Regulatory Authority in Ireland is responsible for overseeing the operation of charities to ensure compliance with the Charities Act 2009. Its regulatory functions include maintaining the Register of Charities, promoting transparency, and ensuring that charities are operating in the public interest.

223. Key responsibilities of the Regulator include promoting the effective use of the property of charitable trusts or charitable organisations and promoting understanding of the requirement that charitable purposes confer a public

benefit and ensuring the accountability of charitable organisations to donors and beneficiaries of charitable gifts, and the public.

224. The Regulator has the authority to investigate complaints, conduct audits, and take enforcement actions if a charity misuses funds or fails to comply with regulatory standards. The goal is to promote accountability and public trust in the charitable sector.

225. Under section 14 (1) (c) of the Act the Charities Regulatory Authority is required to ensure probity, require accountability, set and monitor standards for promoting "*the effective use of the property of charitable trusts or charitable organisations".*

226. Section 14 provides:

> *"14. — (1) The general functions of the Authority shall be to—*
>
> *(a) increase public trust and confidence in the management and administration of charitable trusts and charitable organisations,*
>
> *(b) promote compliance by charity trustees with their duties in the control and management of charitable trusts and charitable organisations,*
>
> *(c) promote the effective use of the property of charitable trusts or charitable organisations,*
>
> *(d) ensure the accountability of charitable organisations to donors and beneficiaries of charitable gifts, and the public,*
>
> *(e) promote understanding of the requirement that charitable purposes confer a public benefit,*

(f) establish and maintain a register of charitable organisations,

(g) ensure and monitor compliance by charitable organisations with this Act,

(h) carry out investigations in accordance with this Act,

(i) encourage and facilitate the better administration and management of charitable organisations by the provision of information or advice, including in particular by way of issuing (or, as it considers appropriate, approving) guidelines, codes of conduct, and model constitutional documents,

(j) carry on such activities or publish such information (including statistical information) concerning charitable organisations and charitable trusts as it considers appropriate,

(k) provide information (including statistical information) or advice, or make proposals, to the Minister on matters relating to the functions of the Authority.

227. Section 3(3)(a) of the Charities Act 2009 states that:

"A gift shall not be a public benefit unless it intends to benefit the public or a section of the public."

228. Section 3(7) of the Charities Act 2009 states that:

“In determining whether a gift is of public benefit or not, account shall be taken of—
(a) any limitation imposed by the donor of the gift on the class of persons who may benefit from the gift and whether or not such limitation is

justified and reasonable, having regard to the nature of the purpose of the gift, and

(b) the amount of any charge payable for any service provided in furtherance of the purpose for which the gift is given and whether it is likely to limit the number of persons or classes of person who will benefit from the gift".

229. In the course of the Hearing before the Tribunal, Mr. Tottenham cited the case of Catholic Care (Diocese of Leeds) and The Charity Commission for England and Wales and The Equality and Human Rights Commission, [2012] UKUT 395 (TCC) and submitted on behalf of the Regulator, that determining whether a charitable purpose is charitable *"may require a weighing of the public benefits and dis-benefits associated with its implementation."*

230. Mr. Tottenham submitted that in this case before the Tribunal, the Regulator had looked at the scale of fees involved and had taken the view that this did not comply with the requirements of public benefit and that it excluded a sufficiently large proportion of the population.

231. The Tribunal noted the submissions made on behalf of the Regulator in relation to the basis and the principles by which the Regulator was guided in relation to a weighing of the public benefit and its role in determining suitable fee levels and structures.

232. The Tribunal found that there were inconsistencies in relation to the Regulator's approach to determining an appropriate level of fees in order for organisations to be classified as fulfilling a charitable purpose within the definition of the Charities Act 2009.

233. Mr. Tottenham referred to the Regulator's decision:

"the Board is of the view that the school is available only for people who can afford to pay and that the level of the fee charged will limit the public access to the Applicant's services and, accordingly, is of the view that the Applicant has not demonstrated that it meets the public benefit element as required by section 3.2 of the Act."

234. The Tribunal was of the view that even those who were in a position to pay, were still a "*section of the public*" under the definition in section 3(3)(a) of the Charities Act 2009.

235. The Tribunal was also of the view, that there were many examples of charities benefitting sections of the public (including schools, homelessness organisations and other service providers) that operated on a service charge or fee-paying basis.

236. The Tribunal was of the view that the Appellant signalled a clear intent to establish a Bursary Scheme, and this would ensure that members of the public would not be excluded by virtue of their means to pay.

237. In the course of the Hearing before the Tribunal, Mr. Tottenham submitted that when considering the charge payable, the view was taken that there was insufficient information in relation to bursaries. He further submitted that there was no charitable intent evidenced by the Beneficiary Selection Policy and that when taken together with the membership fees, it did not demonstrate a public benefit.

238. The Tribunal was of the view that the Appellant, as part the application process, signalled a clear intent to establish a bursary scheme, and had the Regulator engaged with the Appellant (then Applicant) in relation to this issue, that the Regulator would have been furnished with additional information in this regard. The Appellant was clear that it would be in a position to establish a bursary scheme when it had sufficient income in place to do so.

239. The Appellant's Constitution (subsidiary objects 4.8) stated that:

"We will ensure equality of access to people on all income streams through targeted fundraising activities and a contributory social fund specifically to provide financial assistance for tuition fees".

240. The Tribunal considered that the public benefit element had been demonstrated in the Appellant's Beneficiary Selection Policy, and it was clear that equality of access to people on all income streams was a fundamental aspect of it.

241. The Tribunal was satisfied that the Regulator did not engage meaningfully with the Appellant in relation to issues regarding the Appellant's Beneficiary Selection Process and its Bursary Plans and did not raise any questions with the Appellant (then Applicant) as part of the application process.

242. In addition, the Tribunal believed, that taking into account the principles of natural justice, it was inherently unfair that the Regulator would make a decision on the basis of criteria that it had not addressed with the Appellant, in relation to the Beneficiary Selection Policy, as part of the application process.

243. The Tribunal also considered the issue of Private Benefit. In the Regulator's Decision to Refuse letter dated 16 July 2024, which had appended its Decision to Refuse, the Regulator noted that in relation to the issue of Private Benefit, that:

"*the Applicant is a company limited by guarantee and has seven subscribers (otherwise known as members). The seven members are also directors of the company, which means should the application for registration to the Register be successful the seven members will also be trustees".*

244. The Regulator further noted that the Applicant stated that two of its members / trustees would be staff at the school and *"this gives rise to a potential private benefit to those members / trustees who are employed by the Applicant".*

245. The Regulator noted that *"for any private benefit to be permissible it must be reasonable in all of the circumstances and is ancillary to and necessary for the furtherance of the public benefit".*

246. In paragraph 20 of the Decision to Refuse, the Regulator outlined that:

> *"the Registration Unit is not satisfied that the Applicant has demonstrated that the employment of trustees / members as staff is reasonable in all of the circumstances, and is ancillary to, and necessary, for the furtherance of the public benefit".*

247. In this Decision to Refuse, the Regulator raised, for the first time in its dealings with the then Applicant, the issue that:

> "*the trustees who resign will still be members*. *It is important to note that the definition of a charitable organisation in section 2(1) of the Act requires a charitable organisation to apply all of its property in furtherance of its charitable purpose and none of the property of which is payable to the members of the body other than in accordance with section 89. Section 89 of the Act has not been commenced. From the information provided by the Applicant, it appears that the Applicant has employed two of its members. This will result in property of the organisation being paid to its members, which is contrary to the definition of charitable organisation as defined in section 2(1) of the Act".*

248. For these reasons, the Decision noted, at paragraph 22, that:

> "*the Board was not satisfied that the Applicant was a charitable organisation within the meaning of the Act, and the Decision notified the Applicant that pursuant to section 39 (8), the Board was refusing the Application for the reasons outlined".*

249. The Tribunal was satisfied that had the Regulator engaged with the Appellant during the application process in relation to this, it would have identified what the Appellant conceded was a simple drafting error in the organisation's Constitution in relation to its members. Confusion arose unnecessarily in relation to payment to a member in the circumstances where members are referred to as students and their families.

250. The Appellant was clear in its company documents submitted to the Regulator as part of the application process that the two trustees in question would resign from the Board in advance of taking up any paid positions and that they would work in a voluntary capacity at the school for two years once it opened. If the Regulator had engaged with the Appellant as part of the application process in relation to this, it would have been simple to rectify the drafting error in the Constitution and clarify that the trustees would also resign as members of the Board when resigning as Directors and trustees. The Tribunal noted Mr. Tottenham's acknowledgement that this matter was not raised in a sufficiently clear manner by the Regulator.

251. The Tribunal considered that the private benefit ensuing as a result of the employment of two trustees as staff (when they had resigned from the Board) would have been reasonable in such circumstances, being ancillary to and necessary for the furtherance of the public benefit.

252. Had the Regulator engaged with the Appellant, it would have been aware of the Appellant's intention to employ the two trustees (when they had resigned as trustees) on the minimum wage after the two-year voluntary period had passed when they were to become paid staff, and it would have been clear that they were not going to be paid above the industry standard.

253. The Tribunal formed the view that there was an obligation on a public entity, such as the Regulator, to help and assist the public in relation to what they wished to do, particularly when it came to the registration of a charity.

254. While the Tribunal appreciated that the Regulator had a website and there were also very helpful booklets that had been prepared and individual staff members had, from time to time, been of assistance, the Tribunal was satisfied in this particular case there was a lack of meaningful engagement that could perhaps have avoided or obviated the need for an appeal and a hearing.

255. Taking into account the submissions made, and bearing in mind that the Tribunal was a tribunal of law and had to determine matters in accordance with the legal principles, and taking into account the evidence heard and, the submissions that were made very ably by both sides, the Tribunal was satisfied that the Appellant had demonstrated its right to become and be registered as a charity.

256. For the foregoing reasons, the Tribunal was of the view that the Appeal of the Applicant be upheld, and the Decision of the Regulator be reversed.

257. This decision becomes effective from the date of the determination.

258. The Chair commended all of the parties to this Appeal for the manner in which they dealt with it in an open and fair and reasonable manner. The Chair also thanked the Secretariat and the stenographer.

Dated this 18th February 2025

Patrick O'Connor

Chairperson,

Charity Appeals Tribunal.