



Meaning of 'Public Authority' under the Human Rights Act

Joint Committee on Human Rights

December 2006

For further information contact

Eric Metcalfe, Director of Human Rights Policy

email: emetcalfe@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. We welcome the Committee's continuing inquiry into the meaning of 'public authority' under section 6 of the Human Rights Act 1998. JUSTICE submitted evidence to the Committee's previous inquiry on this issue in May 2003. We also intervened in the *Leonard Cheshire* case in 2002 to argue for a broad definition. We continue to believe that the current definition given to 'public authority' by the courts is too narrow.
3. Although we welcome the government's own intervention in the *R (Johnson and others) v London Borough of Havering* in support of a broader definition, we also consider:
 - the Lord Chancellor's view that a broader meaning of public authority may drive private providers out of the market to be ill-advised; and
 - the ODPM's guidance to public authorities on contracting for services in light of the HRA to be inadequate.

Narrowness of the existing definition

4. In our 2003 submission to the Committee, we set out our reasons why the *Leonard Cheshire* decision was wrongly decided. We restate those grounds in summary form here. In our view, the Court's approach was flawed for three reasons: (i) it failed to have regard to the nature of the statutory duty; (ii) it failed to consider whether the Claimants themselves had any choice but to accept the regime of private care; and (iii) it gave insufficient weight to the question of public authorities evading public liability under the HRA by contracting out the discharge of its statutory duties to private bodies.

The nature of the statutory duty

5. In our view, the nature and purpose of the statutory duty to be important to the question of whether a private body is performing a 'public function' within the meaning of section 6(3)(b) HRA. The fact that the duty being discharged is one referable to the rights of particular individuals - especially their unqualified rights - makes it more likely that the actions of the private body in discharge of that duty will attract public liability. Similarly, the fact that a private body's activities are subject to regulation, the purpose of which *inter alia* is to ensure respect for individual rights, is another useful indicator that a private body discharging a statutory duty

that engages such rights is performing a 'public function'. As we noted in our submission to the Court in *Leonard Cheshire*, the important feature is the manner in which a private body acting in performance of a statutory duty is in a position to exercise 'real power' in respect of the individuals concerned:¹

the key factor in determining whether or not a public function is involved in an area where the activity in question may be being undertaken in a different context for purely commercial reasons (e.g. in most circumstances private medical provision) is whether or not the body is in fact acting so as to assist in the discharge of the state's role and duties (e.g. the provision of a free NHS service) *with the result that* the body in question is exercising real *power* over third parties.

The unavailability of the private regime

6. Another serious flaw in the existing definition of 'public authority' is the failure of the courts to have due regard to the relative unavailability of private regimes in particular cases. In *Leonard Cheshire*, for example, it was far from clear that the claimants had any realistic alternative to being placed in a private home by their local authority – e.g. whether the claimants had the option of living in a residential care home run by their local authority.
7. In our view, the mere absence of compulsion is not sufficient to *remove* the public character from the discharge of a public duty by a private body. The very fact that someone's support has fallen to a local authority under section 21(1) NAA, for example, tends to show that they lack the private means to make appropriate contractual arrangements. Instead, the availability (or non-availability) of any private regime discharging public duties seems to us a key feature in determining whether it attracts public liability. While it is plausible to distinguish for HRA purposes between public and private regimes where those subject are genuinely free to choose, it is much less so where the individual has no practical option but to accept private provision, e.g. the supply of accommodation to an asylum seeker or a recipient of income support. If 'public authority' is to be interpreted generously, as the Court held in *Donoghue*, then JUSTICE submits the question of whether a given private regime was avoidable in practical terms must be closely considered by the courts in each case.

The possibility for evasion of public liability by public authorities

¹ Para 9. C.f. also 583 HL Official Report (5th Series) col 808, in debates over the then-Human Rights Bill where the Lord Chancellor justified the proposed general definition of 'public authority' in the following terms 'because we want to provide *as much protection as possible* for the rights of the individual against the misuse of power by the State' [emphasis added].

8. Thirdly, the current approach of the courts to the definition of 'public authority' fails to give sufficient weight to the possibility of public authorities evading their liability under the Human Rights Act 1998 by contracting out the discharge of its statutory duties to private bodies.
9. As we noted in our submission in *Leonard Cheshire*, the European Court of Human Rights has clearly established that contracting states cannot absolve their responsibility to respect Convention rights by delegating their obligations to private bodies or individuals.² This principle is analogous, too, to the special extension of public liability under Community law to otherwise private acts in order to prevent a state taking advantage of its own failure to implement a directive.³ And it is consistent with the Canadian approach to the extension of public liability to private bodies for 'governmental' activities under section 32 of the Charter of Rights and Freedoms 1982.⁴ As La Forest J noted in *McKinney v. University of Guelph* (whether a university in its capacity as a private employer could be liable as a 'government actor' under section 32 of the Canadian Charter): 'It would be strange if the legislature and the government could evade their Charter responsibility by appointing a person to carry out the purposes of the statute'.⁵

The public interest in outsourcing v the public interest in protecting rights

10. We note that the Lord Chancellor recently expressed concern that widening the meaning of public authority might drive private providers of services such as residential care out of the market for such services and so be counter-productive.
11. In our 2003 submission, we similarly noted that one of the considerations in the mind of the Court in *Leonard Cheshire* appeared to be a concern that attaching public duties to private bodies might inhibit the marketplace for community care services (and harm the apparent public interest in local authorities being able to reduce their costs by farming out services):⁶

A public body in order to perform its public duties can use the services of a private body. Section 6 should not be applied so that if a private body provides such services, the nature of the functions are inevitably public. If this were to be the position, then when a small hotel provides bed and breakfast accommodation as a temporary

² See *Van der Musselle v. Belgium* (1983) 6 EHRR 163, esp. paras. 28-30; *Cosado Coca v Spain* (1994) 18 EHRR 1, para 39. Accordingly, the state is also responsible for the actions of any such delegate and must provide an effective remedy against their actions: *Costello-Roberts v UK* (1993) 19 EHRR 112, esp. paras 29 to 32 and 37 to 40.

³ See *Marshall v Southampton and SouthWest Area Health Authority* (ECJ, case 152/84) para 49.

⁴ Note that the reference to 'government' in section 32 of the 1982 Charter is narrower than that of section 6 HRA. See JUSTICE submission, paras 16-18 and the judgment of La Forest J in *Eldridge v AG for British Columbia* [1997] 3 SCR 624.

⁵ [1990] 3 SCR 229.

⁶ *Donoghue*, para 58

measure, the small hotel would be performing public functions and required to comply with the HRA. This is not what the HRA intended.

12. However, we consider that the importance of ensuring respect for human rights in the provision of public services outweighs the potential difficulties such an extension may involve. If the purpose of the Act is to give further effect to rights and freedoms guaranteed under the ECHR, it seems difficult to see how human rights can be promoted by restricting - as the Court did in *Leonard Cheshire* - the number and quality of the bodies that are publicly responsible.
13. We also note the criticism of a broad definition of 'public authority' offered by Professor Oliver and relied upon at first instance by Stanley Burnton J in *Leonard Cheshire*, such that, were public liability to be extended to private bodies discharging public functions, then such bodies would themselves be deprived of the protection of the HRA.⁷ In our view, this criticism seems wholly misplaced. First, hybrid bodies would have the benefit of the saving provisions in Articles 8-11, as the Court itself accepted in *Leonard Cheshire*.⁸ Secondly, where a private body is in the position of discharging public duties to individuals, the notion of 'deprivation of protection' must be considered in the round. In such a context, we doubt whether the human rights of a private body engaged in a commercial enterprise could ever be afforded greater weight than those of the individuals who have no choice but to be subject to its activities.
14. While the extension of public liability to private bodies discharging public functions may in some cases reduce the benefits of outsourcing for public authorities, we consider that the extension of respect for rights to be a more important end. We also suspect that the burden of public liability would, in most cases, not be as onerous as is sometimes claimed. Similarly, the competitive nature of the market for public sector contracts suggests that those private bodies unwilling to shoulder the burden of public liability will be replaced by those that are. If the economic arguments against extending public liability are to be taken seriously, then it is important that those in favour should also be considered.

ODPM guidance on contracting out

15. We note that the Court in *Leonard Cheshire* placed weight on the possibility of public authorities using contractual means to safeguard the Convention rights of those subject to private care:⁹

⁷ Judgment of Stanley Burnton J, para 11; citing Oliver [2000] *Public Law* 476: 'It would be very tempting for the courts, committed to maximising the protection of Convention rights, to give a wide meaning to 'public authority' but this could deprive a wide range of bodies of the protection of the [HRA].'

⁸ Para 28.

⁹ Para 34.

If the arrangements which the local authorities made with [the Respondent charity] had been made after the HRA came into force, then it would arguably be possible for a resident to require the local authority to enter into a contract with its provider which fully protected the residents' Article 8 rights and if this was done, this would provide additional protection. Local authorities who rely on section 26 should bear this in mind. Then not only could the local authority rely on the contract, but possibly the resident could do so also as a person for whose benefit the contract was made.

16. However, it seems difficult to see how private contractors would be less reluctant to take on contractual obligations than public obligations. Certainly it is questionable whether, in *Leonard Cheshire*, the private charity would have been willing to agree terms allowing patients to challenge its commercial decisions (e.g. closing a care home) on human rights grounds.
17. To this end, we note the November 2005 ODPM guidance to local authorities on contracting for services in light of the Human Rights Act. In fact, when looked at closely, the guidance seems to us to provide little practical guidance to public bodies other than eschewing 'conceptual' provisions in favour of those which specify particular steps, procedures to be taken by private providers, and the possible use of output measurements. In and of themselves, recommendations of signing off procedures and checklists seem sensible instances of good practice. However, this emphasis on greater specificity seems only to beg our earlier question: if private providers fear public liability, why is it reasonable to believe that they will be more prepared to assume the same obligations (e.g. towards individual recipients of community care) by way of private agreement? As we also noted in our 2003 evidence, it seems deeply unsatisfactory to leave the task of negotiating the protection of Convention rights to the same public bodies who are themselves concerned to obtain the benefits of outsourcing.
18. Thus, while we welcome the ODPM's attempts to secure best practice in agreements between public authorities and private providers, we do not believe such provisions are enough to close the current 'protection gap' brought about by the narrow meaning given to 'public authority' by the Court of Appeal.

ERIC METCALFE
Director of Human Rights Policy
JUSTICE
15 December 2006