

Where now for “public authorities”?

A Comment on *YL v Birmingham City Council*

Introduction

The Human Rights Act 1998 (HRA) is one of the most significant pieces of legislation in the last decade and surely needs no further introduction. However, it has never been far from controversy and it may be helpful to set the recent judicial and academic debate about public authorities in context. Section 6(1) states that “[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right”, therefore the concept of a “public authority” is crucial to the reach and effectiveness of the Act. “Public authority” has never been adequately defined, but the HRA effectively recognises that there are two different types of public authority – core public authorities and hybrid public authorities, although this terminology is not used in the Act. A core public authority, such as a local authority or the police, must not act in a way which is incompatible with a Convention right, unless one of the section 6(2) exemptions applies¹. A hybrid public authority is one which carries out some “functions of a public nature” (s.6(3)(b)), but is exempted for particular acts if they are private (s.6(5)). The meanings given to “functions of a public nature”, and to a lesser extent section 6(5)’s “private acts”, are key to determining the scope of the HRA. These questions have come before the courts in several notable cases, such as *Poplar Housing v Donoghue*², *Heather v Leonard Cheshire Foundation*³, *Hampshire v Beer*⁴ and *Aston Cantlow*⁵ and again this summer in *YL v Birmingham*⁶. The 3:2 majority decision in *YL* is a clear blow to advocates of an expansionist approach to the HRA or one based on increasing its effectiveness rather than limiting its scope. The House of Lords held that a care home, operated by Southern Cross, providing care and accommodation to the elderly, which had been arranged by the local authority under the National Assistance Act 1948, was not carrying out functions of a public nature. While this has obvious implications for anyone in the same position as Ms YL⁷, the effects will also be wider than this. While there is still no single definitive test of what makes a function public in nature the judgment must inevitably restrict the number of functions that can be considered to be so.

¹ These are where “as the result of one or more provisions of primary legislation, the authority could not have acted differently” (s.6(2)(a)) and “in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect or to enforce those provisions” (s.6(2)(b))

² *Donoghue v Poplar Housing & Regeneration Community Association Ltd & Anor* [2001] EWCA Civ 595

³ *R. v Leonard Cheshire Foundation (a charity) & Anor* [2002] EWCA Civ 366

⁴ *Hampshire County Council v Graham Beer (t/a Hammer Trout Farm)* [2003] EWCA Civ 1056

⁵ *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank & Anor* [2003] UKHL 37

⁶ *YL v Birmingham City Council & Ors* [2007] UKHL 27

⁷ According to one estimate this could be as many as 300,000 care home residents, ‘Law Lords reject care home plea’, <http://news.bbc.co.uk/1/hi/uk/6220716.stm>

Whether this is correct can be examined from two perspectives, both of which are contentious, but one is probably clearer than the other.

Public Policy

Firstly, is this right as a matter of public policy? In other words, regardless of the legal correctness of the decision, is this the way things should be? The better view, as a matter of principle, is surely that Southern Cross is carrying out functions of a public nature and section 6(3)(b) therefore applies, although the section 6(5) exemption may still be relevant in certain circumstances. This conclusion is the only one that gives full effect to the HRA and is based on the simple premise that the provision of care and accommodation to the elderly, whether fully or partly funded by a local authority, is a public function. This is the view laid out in the speeches of Lord Bingham at para 19 and Baroness Hale at 61-72. Therefore, even though Southern Cross is operating as a profit making enterprise, residents placed in one of its homes by a local authority are entitled to the protection of the HRA. It has been suggested that protection for residents like Ms YL is best entrusted to a contractual approach, but this does not give an adequate level of protection for some of the most vulnerable members of society⁸. As a matter of policy this expansionist approach to “public functions” is that preferred by the Joint Committee on Human Rights⁹ and seemingly the Department for Constitutional Affairs. It also reflects Parliament’s intentions in passing the Act in 1998.

Law

Even if we accept that in a perfect world the public good and public policy are best served by Southern Cross being viewed as carrying out functions of a public nature, the second question to be asked of the YL judgment is whether it is correct as a matter of law. As the HRA did not define “functions of a public nature” the courts are effectively being asked to decide what can be considered to be public on a function by function basis, as recognised by Lord Nicholls at para 12 of *Aston Cantlow* and Lord Bingham at para 5 of YL. Lord Neuberger acknowledges at para 128 that the test applied in any individual case will be constructed to justify a policy based decision. The majority have clearly reached a view on the policy issues that runs counter to the argument outlined above. Be that as it may, have they reached the correct legal decision within the loose framework that the legislation and previous decisions have defined? On the face of it their Lordships appear to acknowledge the criticisms of earlier decisions which concentrated too much on the nature of the institution in question. Instead they appear to analyse the function concerned. However, on closer inspection the majority appear to have been too influenced by the nature of Southern Cross as an institution, reflecting their opinions on the policy forces behind this issue. So in all three opinions of the majority it is possible to detect a thread running through them which is concerned with

⁸ See Paul Craig, ‘Contracting Out, the Human Rights Act and the Scope of Judicial Review’, *Law Quarterly Review*, 2002 and Catherine M Donnelly, ‘Leonard Cheshire Again and Beyond: Private Contractors, Contract and S.6(3)(B) of the Human Rights Act’, *Public Law*, 2005

⁹ Joint Committee on Human Rights, ‘The Meaning of Public Authority under the Human Rights Act, Seventh Report of Session 2003-04’, paras 138 & 141

Southern Cross as an institution, and a profit-making institution at that. This is most noticeable in Lord Scott's speech at para 26 and Lord Mance's at para 117, but it runs deeper in the majority's thinking than simply those two paragraphs. That is why Lord Neuberger can list seven factors that suggest Southern Cross was performing a public function (para 154) and still discount them all. While he rightly states that none of these factors are on their own sufficient (at least with the HRA as it currently is), he is, with respect, not giving them sufficient weight when considered together. This is how this judgment has effectively raised the bar for other functions. Despite this it is difficult to say, when no prior definition exists, that they have got this completely wrong. As a matter of law it seems that this function could have quite easily been public or private (or perhaps a third category - non-public) and it all comes down to the circularities inherent in a policy-driven definition which is supposed to prove that policy.

It is tempting to draw the conclusion that the majority have accepted that both interpretations may be valid, but they prefer a restrictive interpretation over an expansive interpretation for policy reasons and have been able to reject an expansive interpretation due to the lack of explicit detail in the legislation. It is interesting to note that Lord Bingham praises the draftsman's wisdom at para 5, while Lord Neuberger criticises the drafting at para 130. The majority's stance on this is not a wholly unreasonable one to take. Prior to the HRA Ms YL would clearly have had no domestic action against either Southern Cross or Birmingham in defence of her Convention rights. The HRA would clearly give her rights against Birmingham if they were accommodating her, but as the position is not clear with regards to Southern Cross then perhaps the pre-HRA position can be viewed as unaltered. This presupposes that care and accommodation for the elderly is not a public function.

The Way Forward

The problem still remains though - how can this be phrased in the HRA or what else can be changed? This of course is only relevant if the proposition that YL runs counter to the prevailing policy is correct. Andrew Dinsmore has put forward a Private Members' Bill, the Human Rights Act 1998 (Meaning of Public Authority) Bill which would be a useful clarification to support the underlying policy, but it would not have helped Ms YL in this case. The minimum requirement on Birmingham CC under the 1948 Act is simply to arrange her accommodation. The arrangement has not been contracted out, so unless there is to be an incredibly semantic debate about whether "provision" necessarily includes "arrangement" this would not assist the situation, at least in terms of care homes. Some situations were hinted at in passing in YL which this Bill would affect, so it still has its merits. Beyond that, the Joint Committee on Human Rights has looked into this twice before, in the 7th report of 2003/04 and the 9th report of 2006/07. They considered four possible ways forward:

- Amending legislation
- A contractual approach
- Guidance
- Judicial interpretation

Their preferred solution in 2004 was to allow the interpretation of section 6 to develop in the courts, but that die has been well and truly cast now. This possibility was recognised at para 116 of the 2007 report, which concluded that new legislation would be necessary. If there is a strong feeling that this particular case is wrong then a simple amendment to the National Assistance Act, such as "acts carried out in accordance with these sections shall be considered to be functions of a public nature for the purposes of the Human Rights Act", would remedy the present situation. This then causes a knock-on problem in that roughly similar acts which do not have any such statement about them may well be considered not to be public functions precisely because they will be seen to have been excluded and then the problematic situation arises of having to list every single public function or authority, which is awkward for a concept which Lord Mance rightly regards as not being immutable. This approach has been ruled out by the Joint Committee in terms of listing all public authorities, but they have given some limited support to the possibility of amending specific Acts to state that a particular function is public. A workable compromise might be a combination of a broader definitional clarification, such as Andrew Dinsmore's bill, coupled with specific amendments in individual cases such as the arrangement of care and accommodation under the National Assistance Act. This may then provide appropriate guidance and framework for the courts to re-examine the concepts and ensure that the original intention of Parliament in 1998 is not frustrated.

Unfortunately the current political situation is unlikely to make such legislation feasible. Continued attacks from various quarters on the HRA mean that it would be a brave government that tried to extend the reach of the Act. The *YL* decision is therefore unfortunate as it could be several years before this unnecessary restriction on the HRA is removed.