

PUBLIC AUTHORITIES AND THE HUMAN RIGHTS ACT

Introduction

1. The purpose of this talk is:
 - (i) to provide a brief description of the case-law on the concepts of “core” and “hybrid” public authorities as it has developed since the HRA came into force and
 - (ii) to describe something of the academic criticism of that case-law that has been put forward by, for example, the Joint Committee on Human Rights (“The Meaning of Public Authority under the Human Rights Act”, Seventh Report of Session 2003 – 04), and Dawn Oliver [2004] PL Summer p329.

The Act

2. The material parts of s6 read as follows:-

“(1) It is unlawful for a public authority to act in a way which is incompatible with a convention right.

(3) In this section, ‘public authority’ includes –

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either house of Parliament or person exercising functions in connection with proceedings in Parliament.

(4) In this subsection Parliament does not include the House of Lords in its judicial capacity

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (b) if the nature of the act is private.”

The decision in Aston Cantlow [2004] 1 AC 546

2. The leading case on the approach to the concept of public authority in s6 is now the decision of the House of Lords in *Aston Cantlow*, although this is considerably more illuminating on the approach to “core” public authorities rather than to “hybrid” or “functional” authorities.
3. A central part of the reasoning on this issue is to be found in the speech of Lord Hope at paragraphs 44 to 47, where he seeks to supply the “one vital step” that was missing from the Court of Appeal’s analysis. It was the relationship between Art 13 of the ECHR; the concept of victim to be found in art 34 and s7, and the consequent balance the act sought to strike between public authorities on the one hand and private individuals on the other.
4. Paragraph 47 reads:-

“The test as to whether a person or a body is or is not a “core” public authority for the purposes of s6(1) is not capable of being defined precisely. But it can at least be said that a distinction should be drawn between those persons who, in Convention terms, are governmental organisations on the one hand and those who are non-governmental organisations on the other. A person who would be regarded as a non-governmental organisation within the meaning of Article 34 ought not to be regarded as a “core” public authority for the purposes of section 6. That would deprive it of the rights enjoyed by victims of acts which are incompatible with Convention rights that are made unlawful by section 6(1).”

5. The case is less helpful on the approach to hybrid authorities. However, Lord Nicholls did observe, at paragraph 11, that:

“A hybrid authority is not a public authority in respect of an act of a private nature. Here again, as with s 6(1) this feature casts some light on the approach to be adopted when interpreting s6(3)(b). Giving a generously wide scope to the expression “public function” ...will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.”

6. Lord Hope said that the concept of a functional public authority had “a much wider reach, and is sensitive to the facts of each case”.

7. As we shall see, the Joint Committee regarded both Lord Nicholls and Lord Hope as adopting a wider approach to the concept of public functions than in the cases considered immediately below. However those cases were not referred to at all in *Aston Cantlow*, and, as has been subsequently observed, were not overruled. The Court of Appeal in *Hampshire County Council v Graham Beer t/a Hammer Trout Farm* held that they were still good law. [2003] EWCA Civ 1056 at paragraph 25, 47.

Poplar Housing Association v Donaghue [2002] QB 48.

8. The issue in this case (pre *Qazi*) was whether a housing association was a public authority performing public functions for the purposes of s6. The issue arose in the context of possession proceedings. The general approach of the Court, which held that it was, can be seen from paragraph 65 of the judgement of the Court given by Lord Woolf:

“In coming to our conclusion as to whether Poplar is a public authority within the Human Rights Act 1998 meaning of that term, we regard it of particular importance in this case that:

- (i) While section 6 of the Human Rights Act 1998 requires a generous interpretation of who is a public authority, it is clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review. The emphasis on public functions reflects the approach adopted in judicial review by the courts and textbooks since the decision of the Court of Appeal

- (the judgment of Lloyd LJ) in *R v Panel on Takeovers and Mergers, Ex p Datafin plc* [1987] QB 815.
- (ii) Tower Hamlets, in transferring its housing stock to Poplar, does not transfer its primary public duties to Poplar. Poplar is no more than the means by which it seeks to perform those duties.
 - (iii) The act of providing accommodation to rent is not, without more, a public function for the purposes of section 6 of the Human Rights Act 1998. Furthermore, that is true irrespective of the section of society for whom the accommodation is provided.
 - (iv) The fact that a body is a charity or is conducted not for profit means that it is likely to be motivated in performing its activities by what it perceives to be the public interest. However, this does not point to the body being a public authority. In addition, even if such a body performs functions, that would be considered to be of a public nature if performed by a public body, nevertheless such acts may remain of a private nature for the purposes of sections 6(3)(b) and 6(5).
 - (v) What can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorised private.
 - (vi) The closeness of the relationship which exists between Tower Hamlets and Poplar. Poplar was created by Tower Hamlets to take a transfer of local authority housing stock; five of its board members are also members of Tower Hamlets; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acts towards the defendant.
 - (vii) The defendant, at the time of the transfer, was a sitting tenant of Poplar and it was intended that she

would be treated no better and no worse than if she remained a tenant of Tower Hamlets. While she remained a tenant, Poplar therefore stood in relation to her in very much the position previously occupied by Tower Hamlets.”

9. It will be seen that this analysis, leading to the conclusion that this particular RSL was indeed exercising functions of a public character, was heavily dependent on the relationship with Tower Hamlets. The approach has been criticized as being an analysis by institutional relationship, not function. A different conclusion was reached in the next case to reach the Court of Appeal.

R(Heather) v Leonard Cheshire Foundation [2002] 2 All ER 936

10. This case concerned a decision by LCF to close a home in which the claimant had lived for many years under arrangements made by a local authority under the NAA 1948. The Court proceeded on the basis that the fact that the accommodation was being provided by LCF under arrangements under s26 NAA 1948 did not render the provision of the accommodation as a public function. The relationship with the claimant was a private relationship. Lord Woolf said (paragraph 35):-

“35. The matters already referred to, can however, be put aside. In our judgment the role that LCF was performing manifestly did not involve the performance of public functions. The fact that LCF is a large and flourishing organisation does not change the nature of its activities from private to public. (i) It is not in issue that it is possible for LCF to perform some public functions and some private functions. In this case it is contended that this was what has been happening in regard to those residents who are privately funded and those residents who are publicly funded. But in this case except for the resources needed to fund the residents of

the different occupants of Le Court, there is no material distinction between the nature of the services LCF has provided for residents funded by a local authority and those provided to residents funded privately. While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private. Here we found the case of *R (on the application of the University of Cambridge) v HM Treasury* Case C-380/98 [2000] All ER (EC) 920 at 930, 940-942, sub nom *R v HM Treasury, ex p University of Cambridge* [2000] 1 WLR 2514 at 2523, 2534-2535, relied on by Mr Henderson, an interesting illustration in relation to European Union legislation in different terms to s.6. (ii) There is no other evidence of there being a public flavour to the functions of LCF or LCF itself. LCF is not standing in the shoes of the local authorities. Section 26 of the 1948 Act provides statutory authority for the actions of the local authorities but it provides LCF with no powers. LCF is not exercising statutory powers in performing functions for the appellants. (iii) In truth, all that Mr Gordon can rely upon is the fact that if LCF is not performing a public function the appellants would not be able to rely upon art 8 as against LCF. However, this is a circular argument. If LCF was performing a public function, that would mean that the appellants could rely in relation to that function on art 8, but, if the situation is otherwise, art 8 cannot change the appropriate classification of the function. On the approach adopted in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 4 All ER 604, [2002] QB 48, it can be said that LCF is clearly not performing any public function. Stanley Burnton J's conclusion as to this was correct."

11. In *R(A) v Partnerships in Care Limited* [2002] 1 WLR 2610 Keith J distinguished *Leonard Cheshire* (then at first instance) in a case where a private home was subject to the specific duties of reg 12(1) of the Nursing Homes and Mental Nursing Homes Regulations 1984.

R v Servite Homes and Wandsworth Borough Council ex parte Goldsmith and Chatting 2001 33 HLR 369

12. This was an application for judicial review raising issues of whether Servite Homes, an RSL, was amenable to judicial review before the commencement of the HRA. The context was similar to Coghlan, ie it was a homes closure case. The accommodation was provided by Servite pursuant to arrangements made under the NAA 1948. Moses J held that Servite were not amenable to judicial review. Specifically:

- (i) s26 of the NAA 1948 merely permits a local authority to discharge their public law function by entering into private law arrangements with a private body; it does not impose on that body any public law functions; the relationship between the private body and the authority is purely commercial and the source of the private body's power is entirely regulated by contract; no private body owes its existence to s26 nor does it derive its power to enter into contractual relationships from that section; accordingly the respondent RSL's decision was not susceptible to judicial review.
- (ii) Once an authority have made arrangements for the provision of accommodation by a private body under s26, they have discharged their obligation under s21; they do not continue to discharge that duty through the person with whom they have made that arrangement; accordingly, in providing the accommodation the RSL was not acting as the authority's agent.
- (iii) An authority are not in breach of any public law obligation when a private body with whom they contract under NAA 1948 to provide accommodation terminates the provision of the accommodation; once the private body has terminated the accommodation, the authority are powerless to force the continued provision of it; an authority's public law obligations are limited to the need to reassess the applicant's need for residential accommodation.

13. Moses J in reaching these conclusions rejected arguments that Servite were subject to judicial review because of the alleged statutory underpinning of

their functions – (cf the Assisted Places case considered by Dyson J in *R v Cobham Hall School, ex parte S* [1998] ELR 389) or in the alternative, even without statutory underpinning they were exercising public functions – because the provider of “health and community care services to those in need is the very essence of government”. It appears from the judgment that he had some sympathy with this last submission. He considered Lord Steyn’s paper “*The Constitutionalisation of Public Law*” (May 1999) and its approval of Murray Hunt’s approach in “*The Province of Administrative Law*”. He said that the approach “presents enormous attraction” but was contrary to established authority such as *Datafin* and *Aga Khan*, which stood as “authorities for the proposition that the courts cannot impose public law standards upon a body the source of whose power is purely contractual and absent sufficient statutory penetration”.

The Joint Committee Report

14. The Joint Committee were critical of the approach taken in the *Leonard Cheshire* case. They considered that the possible lack of protection for eg residents in homes where accommodation was provided under arrangements with the local authority opened up a:

“serious gap ... in the protection which the Human Rights act was intended to offer, and a more vigorous approach to re-establishing the proper ambit of the Act needs to be pursued.”

15. The basic criticism emerges from the following passage:-

“The tests being applied.....are, in human rights terms, highly problematic. Their application results in many instances where an organisation stands “in the shoes of the State” and yet does not have responsibilities under the HRA. It means that the protection of human rights is not dependant on the type of power being exercised, nor on its power to interfere with human rights, but on the relatively arbitrary (in human rights terms) criterion of the body’s administrative links with institutions of the state. The ECHR provides no basis for such a limitation, which calls into question the capacity of the HRA to bring rights home to the full extent envisaged by those who designed, debated and agreed the Act.”

16. They suggested an approach to interpretation, summarised in paragraphs 25 to 28 of their conclusions and recommendations. They made the following points:-
- In their view, the case-law had taken a wrong turning in focusing on statutory authority and institutional proximity to the State rather than analysis of function.
 - For a body to discharge a public function, it does not need to do so under direct statutory authority. A state programme or policy, with a basis in statute or otherwise, may delegate its powers or duties through contractual arrangements without changing the nature of those powers or duties.
 - Institutional links with a public body are not necessary to identifying a public function.
 - The attribution of public authority responsibilities to private sector bodies is justified on the basis that the private body operating to discharge a government programme is likely to exercise a degree of power and control over the realisation of the individual's convention rights.

The Response

17. Dawn Oliver's starting point in the article in [2004] PL Summer is in some ways very similar to the criticism of the case-law made by the Joint Committee (and indeed other commentators). It is that the case-law wrongly concentrates on the relationship, or institutional links, with the body concerned and the State. However, a major difference of approach rapidly becomes apparent. Her starting point is a recognition that the issue with authorities other than "standard" public authorities, s6(3)(b) of the HRA does not describe the body, but rather identifies functions having a particular characteristic – "*functions of a public nature*". She says that paraphrases – "public functions"; "private functions" are inherently dangerous.

"In common parlance "public functions" is often loosely used to refer to all or any functions (or acts, activities or purposes) in fact performed by a public body, "public" being a transferred epithet. "Functions of a public nature", by contrast, clearly refers to the intrinsic quality of the act, activity or function rather than who performs it. It is true that it is not easy to decide what makes

a function “of a public – or private – nature but the criterion cannot be that a function is normally performed by a public body, or has been performed by a public body in the past”.

18. So, goes the thesis, whereas a standard authority is obliged to comply with Convention standards in carrying out all its functions, whether they are functions of a public nature or not, other bodies are only so required when the functions they are carrying out are of a public nature. Moreover, and critically for the thesis, the simple fact that a given activity is carried out in order to discharge a statutory duty does not mean that it is a “function of a public nature”.

“...Lord Woolf stated that if the authority itself provided the accommodation it is performing a public function. On this approach the question whether an activity is a public function depends upon who performs it. As Craig comments this cannot be right. Either a function is of a public nature or it is not. I think these are both examples of confusing use of transferred epithets and of assumptions that all the activities of standard public authorities are functions of a public nature which...is not the case. The use of a paraphrase “public function” for the statutory phrase “functions of a public nature” gives the legislation a changed meaning. The local authority in such a case is performing a public *duty*, and it is doing something itself, which in common parlance might be called a public function, but it is not performing a function of a public nature.”

19. The thesis goes on to claim that this approach avoids the difficulty of apparent horizontal direct effect if the private sector nursing home is to be treated as discharging functions of a public nature because some – how many? – of its residents have been placed under s26; and that it is compatible with a deliberate feature of the HRA, namely that all the functions of a “standard” public authority are covered by the duties in the Act, but only those “of a public nature” where the authority is non-standard.

20. Does it work?

Richard Drabble QC

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