

## UK House of Lords Considers Meaning of 'Public Authority' under the *Human Rights Act 1998*

*YL (by her litigation friend the Official Solicitor) v Birmingham City Council & Ors* [2007] UKHL 27 (20 June 2007)

The UK House of Lords has delivered a much anticipated judgment regarding the meaning of 'functions of a public nature' and 'public authority' under the *Human Rights Act 1998* (UK).

### Facts

Section 6(3)(b) of the *Human Rights Act* provides that 'any person certain of whose functions are functions of a public nature' is a 'public authority' and, pursuant to s 6(1), must act compatibly with human rights. Section 6(5) provides that 'a person is not a public authority by virtue only of s 6(3)(b) if the nature of the act is private'.

The issue in this case was whether an aged care home run by Southern Cross Healthcare Ltd ('Southern Cross') was performing functions of a public nature when providing accommodation and care to a resident, YL, pursuant to arrangements with a local council, Birmingham City Council.

YL was an 84 year old woman with Alzheimer's Disease. Her accommodation in the Southern Cross care home was largely funded by Birmingham City Council pursuant to a determination under the *National Assistance Act 1948* that she was eligible for such assistance. The issue as to whether Southern Cross was performing functions of a public nature arose after YL was served with a notice to move, allegedly in violation of her right to privacy and freedom from interference with family and the home pursuant to art 8 of the *European Convention on Human Rights*.

YL contended that Southern Cross was 'performing functions of a public nature' within the meaning of s 6(3)(b) and that it had acted incompatibly with her human rights contrary to s 6(1) of the *Human Rights Act*. The UK Secretary of State and a range of NGOs (including Justice, Liberty, the British Institute of Human Rights and the Disability Rights Commission) intervened broadly in support of this position. Both Birmingham City Council and Southern Cross argued against the characterisation of Southern Cross's operation of the care home as a 'function of a public nature'.

### Majority Decision

The majority, comprising Lord Scott, Lord Mance and Lord Neuberger, held that the provision of care and accommodation by Southern Cross to YL did not amount to a 'function of a public nature' within the meaning of s 6(3)(b) of the *Human Rights Act*.

In reaching this conclusion, the majority considered the following factors, among others:

- Southern Cross is a for-profit, private enterprise which provides a service for a commercial fee. Notwithstanding that this service may be 'socially useful, it is by motivated by 'private and commercial' considerations and operates in a competitive market.

- While the fees for care and accommodation provided to YL were funded, in part, by Birmingham City Council pursuant to the *National Assistance Act 1948*, neither the care home nor any aspect of its operation was publicly funded. YL was charged and paid a standard commercial fee notwithstanding that this fee was paid, in part, by a public authority. The majority considered that it is appropriate to distinguish between (a) a core public authority supporting or subsidising a business generally (eg, by funding or making grants to private care homes) and (b) such an authority funding services provided by the business to a specific individual.
- Southern Cross did not exercise any statutory powers in relation to YL, despite the fact that she was placed in care pursuant to a statutory determination by Birmingham City Council that she was eligible for care and financial aid.
- The relationship between YL and Southern Cross was regulated by private law contract (although notably this agreement expressly incorporated an obligation on the part of Southern Cross to act compatibly with YL's human rights, failure of which to do so would give YL a cause of action for breach of contract).
- The mere fact that there is a 'public interest' in the provision and regulation of aged care services is not a significant factor; there is a public interest in the regulation of many functions (such as providing financial services, running restaurants and manufacturing and handling hazardous materials) but this does not thereby render them 'functions of a public nature'.
- YL continues to maintain rights under the *Human Rights Act* in respect of the care and accommodation provided to her as against Birmingham City Council.
- While it may be desirable that residents in privately owned care homes be afforded human rights as against the proprietors, this is a matter for the legislature to spell out in clear terms.

### **Minority Decision**

The minority, comprising Lord Bingham and Baroness Hale, held that Southern Cross, 'in providing accommodation, health and social care for YL, was performing a function of a public nature', further stating that 'this was a function performed for YL pursuant to statutory arrangements, at public expense and in the public interest'.

In reaching this conclusion, the minority considered the following factors, among others:

- The phrase 'function of a public nature' should be interpreted widely to give effective domestic protection to human rights.
- It is relevant to consider the role and responsibility of the state to the subject matter in question, including the extent to which the state regulates or supervises the function and whether, as a matter of last resort, the state would be willing to pay for or discharge the function. That is, is the function one in relation to which the state has assumed some level of responsibility, at public expense if necessary, and in the public interest? In the present case, the provision of aged care services is subject to detailed statutory and regulatory control. Further, the state is willing to (and does) apply public funds to support those who cannot pay

for themselves rather than to leave them without care or accommodation. More than 80% of residents in Southern Cross care homes were placed and subsidised under the *National Assistance Act*.

- It is relevant to consider the extent of the risk, if any, that improper performance of the function might violate an individual's human rights. Persons in care are – by reason of age, illness, disability and other circumstances – a particularly vulnerable section of the community. There is a significant public interest in the promotion and protection of the human rights of such people.
- Another important factor is whether the function involves or may involve the use of statutory or coercive powers. Thus, for example, it was common ground that both privately run prisons and private psychiatric hospitals exercising powers of detention under the *Mental Health Act 1983* are performing functions of a public nature.
- The primary purpose of the *Human Rights Act* is to 'bring rights home'. As asserted by the Secretary of State (intervening) and two bipartisan reports of the Joint Parliamentary Committee on Human Rights on *The Meaning of Public Authority under the Human Rights Act*, a narrow approach to 'functions of a public nature' is likely to mean that many people, particularly vulnerable people, are deprived of their right to an effective remedy for any violation of their human rights and that the *Human Rights Act* will continue to fall short of its aims of 'bringing rights home' to the UK. It is also notable that, in the course of parliamentary debates on the Act, the Home Secretary and the Lord Chancellor 'made it clear that persons or bodies delivering privatised or contracted-out public services were intended to be brought within the scope of the Act by the "public function" provision'.

### **Implications for the Victorian Charter**

Section 4(1)(c) of the Charter provides that a 'public authority' includes 'an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)'. Section 4(2) of the Charter enumerates a range of non-exhaustive factors that may be taken into account in determining if a function is of a public nature, including whether the function is conferred by or under statute, whether it is connected to or identified with government, whether the function is regulatory in nature, and whether the entity is publicly funded to perform the function. Many of these factors are derived from UK case law which is, in turn, likely to inform their interpretation and application.

In the Centre's view, it is to be hoped that Victorian Courts follow the approach taken by the minority in the present case. Commenting on the decision, the British Institute of Human Rights stated, 'We are stunned by this decision. By exempting private care homes from the *Human Rights Act* when they house people under contract to a local authority, the House of Lords has undermined the fabric of human rights protection in the UK.' As the Joint Committee stated in its 2007 report on the *Meaning of Public Authority under the Human Rights Act* (summarised in Edition 13 of this Bulletin):

In a series of cases our domestic courts have adopted a more restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people...from the human rights protection afforded by the Act. We consider that this is a problem of great importance, which is seriously at odds with the express intention that the Act would help to establish a widespread and deeply rooted culture of human rights in the UK.

...

In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality. The implications of the narrow interpretation...are particularly acute for a range of particularly vulnerable people in society, including elderly people in private care homes, people in housing association accommodation, and children outside the maintained education sector, or in receipt of children's services provided by private or voluntary sector bodies.

It is critical the Victorian Courts heed this warning and ensure that the Victorian Charter is interpreted and applied so as to give real and effective protection to human rights.

The decision is available at <http://www.bailii.org/uk/cases/UKHL/2007/27.html>.

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