

## CONTRACTING OUT AND ‘FUNCTIONS OF A PUBLIC NATURE’:

### *YL v BIRMINGHAM CITY COUNCIL*

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*This analysis examines the recent House of Lords ruling on the interpretation of ‘functions of a public nature’ under s 6(3)(b) of the Human Rights Act 1998. It criticises the reasoning and result, suggesting that the ruling has failed satisfactorily to settle the law and that the provision of care and accommodation by a private provider pursuant to contract with a local authority acting under s 21 of the National Assistance Act 1948 should be regarded as a function of a public nature. It concludes by assessing the ruling’s impact, briefly commenting on the new Human Rights Act 1998 (Meaning of Public Function) Bill and highlighting remaining issues for future judicial and legislative consideration.*

In providing care and accommodation on behalf of a local authority operating pursuant to s 21 of the National Assistance Act 1948,<sup>1</sup> a private care home is not

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<sup>1</sup> Section 21(1): ‘Subject to and in accordance with the provisions of this Part of this Act, a local authority... shall, make arrangements for providing- (a) residential accommodation for persons who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them...’

exercising ‘functions of a public nature’ under s 6(3)(b) of the Human Rights Act (HRA): *YL v Birmingham City Council*.<sup>2</sup>

It is unlawful for a public authority to act incompatibly with a European Convention (ECHR) right: s 6(1) HRA. ‘Public authority’ includes ‘any person certain of whose functions are functions of a public nature’ (s 6(3)(b)) unless, ‘In relation to a particular act... the nature of the act is private’: s 6(5). Birmingham City Council (BCC) discharged its duty under s 21 of the National Assistance Act 1948 (NAA) to make arrangements for providing residential accommodation to Mrs YL, an 84-year-old Alzheimer’s patient, by contracting with Southern Cross Healthcare (SCH) under s 26 and paying the bulk of the fee.<sup>3</sup> Since the fee for the home chosen by YL exceeded what BCC would usually expect to pay, the remainder was met through contributions by family and, later, South Birmingham NHS Trust. Under a tripartite agreement between YL, SCH and the Council, SCH could give YL four weeks’ notice to terminate but ‘only for a good reason’. This SCH attempted to do, after (disputed) allegations regarding the conduct of YL’s family during visits. YL invoked s 6(3)(b) HRA and the right to respect for the home under Art 8 ECHR in response. By a bare majority, the House of Lords rejected YL’s contention and affirmed the first instance<sup>4</sup> and Court of Appeal<sup>5</sup> decisions that SCH was not exercising ‘functions of a public

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<sup>2</sup> [2007] UKHL 27, [2007] 3 WLR 112.

<sup>3</sup> Section 26 permits s 21 arrangements to be made ‘with a voluntary organisation or with any other person who is not a local authority where- (a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a)...’

<sup>4</sup> [2006] EWHC 2681 (Fam).

<sup>5</sup> [2007] EWCA Civ 27, [2007] 2 WLR 1097.

nature' and not therefore required by s 6(1) to act compatibly with the ECHR when giving YL notice.

For the majority, Lord Mance explained that the HRA's purpose was to furnish complainants whose rights had been breached with a domestic remedy against those bodies engaging the state's responsibility in Strasbourg.<sup>6</sup> Thus, he looked primarily to Strasbourg jurisprudence on the engagement of state responsibility by private bodies performing 'state or governmental functions or powers',<sup>7</sup> and secondarily to domestic definitions of 'governmental functions' for assistance on the definition of 'functions of a public nature'.<sup>8</sup> Lord Neuberger took as his starting point the *private* nature of the function of providing care and accommodation for a fully self-funded resident<sup>9</sup> and reasoned that the same must be true of a resident whose fees were met by a third party, even a local authority such as BCC.<sup>10</sup> He then bolstered his findings with more general points, including the presumption that YL would not be treated by Strasbourg as having Convention rights against SCH.<sup>11</sup> Lord Scott held, without reference to Strasbourg jurisprudence, that the essentially contractual context of SCH's activities rendered the *function* of providing care and accommodation private under s 6(3)(b)<sup>12</sup> and the *act* of serving notice private under s 6(5).<sup>13</sup>

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<sup>6</sup> YL (N2), para 87.

<sup>7</sup> *Ibid.*, para 97 (Lord Mance's phraseology).

<sup>8</sup> *Ibid.*, paras 100-106.

<sup>9</sup> *Ibid.*, paras 133-137.

<sup>10</sup> *Ibid.*, paras 138-142.

<sup>11</sup> *Ibid.*, para 160.

<sup>12</sup> *Ibid.*, paras 26 and 29.

<sup>13</sup> *Ibid.*, para 34.

Lord Bingham and Baroness Hale, dissenting, reached their conclusions without recourse to Strasbourg law on ‘governmental functions’. They believed ‘functions of a public nature’ to focus on the extent to which the state had assumed responsibility for the performance of the relevant task and had recognised its public importance or interest.<sup>14</sup> Here, the public interest in protecting the welfare of ‘the most vulnerable members of the community’ was strong.<sup>15</sup> Additionally, the state’s assumption of responsibility for the care of Mrs YL was established because the framework of the NAA demonstrated Parliament’s desire to see in effect that those to whom s 21 applied were provided for at the state’s expense.<sup>16</sup> To reinforce their view that s 6(3)(b) HRA was intended by Parliament to cover SCH’s activities, the dissentients then drew attention to the particular vulnerability of those in care to behaviour breaching the Convention.<sup>17</sup> Consequently, in the minority’s view, the function of providing care and accommodation on behalf of a local authority operating under s 21 NAA was public.

## ANALYSIS

### *Strasbourg Approach*

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<sup>14</sup> *Ibid.*, paras 6-11 (Lord Bingham) and 65 (Baroness Hale).

<sup>15</sup> *Ibid.*, para 67 (Baroness Hale).

<sup>16</sup> *Ibid.*, paras 18 (Lord Bingham) and 66 (Baroness Hale).

<sup>17</sup> *Ibid.*, paras 19 (Lord Bingham) and 71 (Baroness Hale). For example, Baroness Hale highlighted one care home’s practice of making residents eat their breakfast while sitting on the commode: para 58.

The first criticism of *YL* is, following *Aston Cantlow*,<sup>18</sup> the heavy reliance placed on Strasbourg's view of governmental functions or powers to identify 'functions of a public nature'. After observing that the HRA was intended to provide domestic remedies for victims of rights breaches otherwise actionable in Strasbourg, Lord Mance believed that to make this intention effective, the definition of 'public authority' (including persons performing public functions under s 6(3)(b)) must have been intended to encompass those bodies for whose actions the UK would be answerable in Strasbourg.<sup>19</sup> Next, he identified the two situations in which a private body's interference with a victim's rights could engage the UK's responsibility in Strasbourg, namely if the UK (1) failed to protect the victim's rights when it was under a positive obligation to do so, or (2) delegated state or governmental powers to the private body.<sup>20</sup>

Lord Mance found situation (1) (breach of a positive obligation) of no assistance, which is undoubtedly the correct result: positive obligations should be of no assistance to the question of whether a body is a s 6(3)(b) public authority because, as Quane explains, *any* individual (such as a prisoner killing a cellmate) can potentially behave in a way which engages the state's positive obligations and it is unrealistic to render that individual a public authority.<sup>21</sup> But Lord Mance's reasoning, I respectfully suggest, is fundamentally flawed. By considering whether *SCH* occupied any

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<sup>18</sup> *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

<sup>19</sup> *YL* (N2), para 88.

<sup>20</sup> *Ibid.*, para 92.

<sup>21</sup> H. Quane, 'The Strasbourg jurisprudence and the meaning of a "public authority" under the Human Rights Act' [2006] PL 106, 108.

regulatory or supervisory role indicating a positive obligation upon it to protect Convention rights,<sup>22</sup> he seemed to overlook that situation (1) relates to the *state's* obligations. Had Lord Mance appreciated this, he might have realised, for the reason Quane explains, that the issue of positive obligations could never be relevant to s 6(3)(b) and thus should not have been considered at all. The proper relevance of the state's positive obligations is instead to the court's duty as a public authority under ss 6(1) and 6(3)(a) to act compatibly with the Convention.<sup>23</sup> Whilst s 6(1) is not thought to empower the court to 'legislate' by creating new causes of action (this remains Parliament's domain), it does require the development of existing ones – even where both parties before the court are private bodies – in a Convention-friendly manner.<sup>24</sup> How much development is required will be logically informed by what Strasbourg requires of the state, making its positive obligations pertinent.

Ironically however, it is when one appreciates that positive obligations are of no relevance to s 6(3)(b) that the difficulty of importing Strasbourg jurisprudence into s 6 becomes clearer. Strasbourg can be unclear as to whether a state is responsible under head (1) (positive obligation) or (2) (delegated state powers). *Sychev v Ukraine*,<sup>25</sup> relied on by Lord Mance, demonstrates this. When concluding that the omissions of a judgment-executing Liquidation Commission in that case engaged the Ukraine's

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<sup>22</sup> *YL (N2)*, para 99.

<sup>23</sup> See, for a clear example, the judgment of Dame Elizabeth Butler-Sloss P in *Venables v News Group Newspapers Ltd* [2001] EWHC QB 32, [2001] All ER 908.

<sup>24</sup> M. Hunt, 'The "horizontal effect" of the Human Rights Act' [1998] PL 423. See, recently, G. Phillipson, 'Clarity postponed: horizontal effect after *Campbell*' in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge 2007) 143.

<sup>25</sup> (App no 4773/02), unreported.

responsibility, the European Court of Human Rights mentioned not only the Commission's exercise of 'certain state powers',<sup>26</sup> but also the duty incumbent upon *states* under Art 6(1) ECHR 'to organise their legal systems in such a way that their authorities can meet its requirements'.<sup>27</sup> Additionally, even where Strasbourg is clear on the head of responsibility, it can be unclear on whether it finds head (2) relevant due to the actions of the *state itself* or its *delegated agents* and thus obscures the boundary between what the HRA would regard as s 6(1) and s 6(3)(b) public authorities.<sup>28</sup>

Second, despite Lord Mance seeming unconcerned with the law surrounding Art 34 ECHR which distinguishes between governmental and non-governmental organisations for the purposes of standing,<sup>29</sup> Lord Neuberger presumed,<sup>30</sup> as Quane proposes, Art 34's relevance to ascertaining the divide between 'public authority' (including bodies performing public functions) and 'private' persons under the HRA. Complications arise, however: Quane refers to *Radio France v France*<sup>31</sup> in which Strasbourg drew a distinction similar, according to her, as that drawn between s 6(1) and s 6(3)(b) public authorities in the HRA. But the court then cited a combination of functional and *institutional* factors, even deploying the apparent *lack* of institutional

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<sup>26</sup> *Ibid.*, para 54.

<sup>27</sup> *Ibid.*, para 56. See also *Novoseletskiy v Ukraine* (App no 47148/99) (2006) 43 EHRR 53, para 69.

<sup>28</sup> See *Van der Musselle v Belgium* (App no 8919/80) (1984) 6 EHRR 163, para 29.

<sup>29</sup> 'The [European] Court may receive applications 'from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation...'

<sup>30</sup> *YL (N2)*, paras 159 and 161.

<sup>31</sup> (App no 53984/00), unreported.

links to support its view that Radio France was a non-governmental organisation.<sup>32</sup> Quane believes this to indicate ‘that one should consider a wide range of factors when one is trying to determine the status of a particular body’,<sup>33</sup> but mapping this particular reasoning onto the clearly function-oriented s 6(3)(b) would restore institutional links as the court’s focus and represent an unfortunate retreat to *Poplar*<sup>34</sup> orthodoxy, after Lord Mance was careful to criticise *Poplar*’s focus on institutional rather than functional factors.<sup>35</sup> Furthermore, the European Court can fail altogether to mention the distinction which Quane identified, simply citing a range of institutional and functional factors in support of its decision on a body’s status under Art 34.<sup>36</sup>

### ***Section 21 of the National Assistance Act- An Artificial Interpretation***

Lord Mance and Lord Neuberger relied on a statutory amendment to the NAA, the effect of which was to express a local authority’s s 21 duty as ‘making arrangements to provide’ accommodation rather than the provision itself.<sup>37</sup> According to Lord Mance, this generated a distinction between ‘a local authority with a statutory duty to arrange care and accommodation and a private company providing services’ to fulfil that duty.<sup>38</sup> Since there was nothing ‘inherently governmental’ in the provision of care

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<sup>32</sup> See Quane (N21), 117-120, and also *Holy Monasteries v Greece* (App nos 13092/87 & 13984/88) (1995) 20 EHRR 1, para 49.

<sup>33</sup> Quane (*ibid.*), 120.

<sup>34</sup> *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48.

<sup>35</sup> YL (N2), para 105.

<sup>36</sup> *Holy Monasteries* (N32), para 49.

<sup>37</sup> YL (N2), para 112 (Lord Mance).

<sup>38</sup> *Ibid.*, para 114.



services,<sup>39</sup> SCH's function in providing care and accommodation was of a private nature. Similarly, Lord Neuberger explained that 'the 1948 Act does no more than to *permit* [through ss 21 and 26] a local authority to provide the care and accommodation through its own care homes'.<sup>40</sup> In Lord Bingham's view however, Parliament intended through s 21 that care and accommodation should be provided in one way or another but left the local authority with a choice of how to do so.<sup>41</sup> According to Baroness Hale, when Parliament has assumed responsibility for seeing that both arrangements and provision are made, it would be 'artificial and legalistic to draw a distinction between meeting those needs and the task of assessing and arranging them'.<sup>42</sup> These are more realistic readings of the NAA. Divorcing the duty to *arrange* from the duty to *provide* places the focus of the statutory scheme on the former, ignoring the provisions' real purpose which, surely, is to ensure that vulnerable members of society are cared for.<sup>43</sup>

I suggest therefore that this case is, after all, one of a local authority contracting out its duty to provide accommodation to a private provider. In Craig's words, the function is a public function 'in the classic, social welfare sense' and should be so perceived

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<sup>39</sup> *Ibid.*, para 115.

<sup>40</sup> *Ibid.*, para 147 (emphasis added).

<sup>41</sup> *Ibid.*, para 16.

<sup>42</sup> *Ibid.*, para 66.

<sup>43</sup> The Act's preamble reads 'An Act to terminate the existing poor law and to provide... for the assistance of persons in need by the National Assistance Board and by local authorities...' See further M. Elliott, "'Public" and "private": defining the scope of the Human Rights Act' [2007] CLJ 485, 486.

whether performed by BCC or SCH.<sup>44</sup> Lord Neuberger's assertion that the public function concept relates only to s 6(3)(b) authorities<sup>45</sup> ignores the oft-held judicial and academic assumption that s 6(1) public authorities are functional in nature and can therefore be *identified* by the functions they perform.<sup>46</sup> A full resolution of the nature of s 6(1) public authorities is beyond the scope of this analysis, but even were the correct answer to be that such bodies are defined institutionally by who they are rather than what they do,<sup>47</sup> it would not necessarily follow that the HRA prevented the nature of a s 6(1) authority's functions being used as an interpretative aid to s 6(3)(b).

### IMPACT

It follows from the foregoing that the function of providing care and accommodation should have been classified as public rather than private in nature under s 6(3)(b). The Human Rights Act 1998 (Meaning of Public Authority) Bill was introduced into the House of Commons by Mr Andrew Dismore MP in January 2007 – prior to *YL* reaching the House of Lords – and would have included in the meaning of public function 'a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function'.<sup>48</sup> This would not, of course, have applied to SCH's activities given the majority's views in *YL* that the only

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<sup>44</sup> P. Craig, 'Contracting out, the Human Rights Act and the scope of judicial review' (2002) 118 LQR 551, 557.

<sup>45</sup> *YL* (N2), para 141.

<sup>46</sup> On which assumption see e.g. *Aston Cantlow* (N18), paras 41 (Lord Hope), 85 (Lord Hobhouse) and 144 (Lord Rodger) and J. Landau, 'Functional public authorities after *YL*' [2007] PL 630, 630-631.

<sup>47</sup> D. Oliver, 'The frontiers of the State: public authorities and public functions under the Human Rights Act' [2000] PL 476.

<sup>48</sup> Human Rights Act 1998 (Meaning of Public Authority) HC Bill (2006-2007) [43], cl 1.

*duty* incumbent upon BCC under s 21 NAA was to arrange for, rather than provide, accommodation.

This Bill has now been superseded by the Human Rights Act 1998 (Meaning of Public Function) Bill, also introduced by Mr Dismore, which would classify as public a function ‘which is required or enabled to be performed wholly or partially at public expense’.<sup>49</sup> The new Bill represents an evident attempt to improve upon the old by including in the meaning of ‘functions of a public nature’ the provision of care and accommodation by providers like SCH in circumstances analogous to those in *YL*. However, the Bill in its current form risks doing nothing to alter the result of *YL* itself due to its failure to address – and possible tacit approval of – Lord Scott’s argument that SCH’s purported reliance on its contract with Mrs YL put it beyond the direct reach of the ECHR by rendering the *act* of serving notice of eviction private under s 6(5) HRA.

A key issue requiring consideration by the courts in future will be the extent to which bodies which perform public functions under s 6(3)(b) can also rely on their own Convention rights. Lord Mance assumed that, if the ECHR did apply in *YL*, SCH would in those circumstances have been able to invoke its ‘ordinary private law freedom to carry on operations under agreed contractual terms’ under Art 8(2) ECHR,<sup>50</sup> presumably under Art 8(2)’s head of ‘the protection of the rights and freedoms of others’. Whether SCH could have relied upon a specific Convention right

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<sup>49</sup> Human Rights Act 1998 (Meaning of Public Function) HC Bill (2007-2008) [45], cl 2. This Bill will reach Second Reading in the Commons on 6<sup>th</sup> June 2008.

<sup>50</sup> *YL* (N2), para 116.

such as Art 1 of the First Protocol under this head was therefore unaddressed, and Baroness Hale reserved the question whether rights of ‘others’ meant SCH at all ‘for another day’.<sup>51</sup> The failure to engage with this issue is unfortunate. As emphasised by the Joint Committee’s Ninth Report, it can have potentially far-reaching consequences for charities unable to vindicate their Convention rights<sup>52</sup> which would undoubtedly bear on Parliament’s intention as to s 6(3)(b)’s meaning.

Had SCH been found to be exercising a public function in *YL*, it might have been said that SCH, despite being typically private in nature, should only be able to rely on its own Convention rights when performing *private functions* since it is only there that it can be regarded by the HRA as a private person.<sup>53</sup> A practical problem arises here, however: since this idea requires a body’s ability to enforce Convention rights to change when it shifts from performing a public to a private function, there must be a corresponding change in its status from ‘governmental’ to ‘non-governmental’ organisation under Art 34 and, under the HRA, s 7(7). Distilling from Strasbourg jurisprudence whether and if so, how, such a change occurs is difficult.<sup>54</sup> Quane perhaps overstates the problem: it would be interesting, in an obvious scenario involving a plainly private company with a sole public function, to see how Strasbourg could justify rejecting an Art 34 application if filed by the company in relation to one of its private activities. But greater Strasbourg clarification would be welcome, not least in other, less straightforward, scenarios. To this end, the

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<sup>51</sup> *Ibid.*, para 74.

<sup>52</sup> Joint Committee on Human Rights’ Ninth Report of Session 2006-2007, ‘The Meaning of Public Authority Under the Human Rights Act 1998’, para 98.

<sup>53</sup> See Quane (N21), 109.

<sup>54</sup> *Ibid.*

complication remains. Whereas Quane optimistically encourages Strasbourg to alter its interpretative attitudes towards Art 34 to remedy the complication,<sup>55</sup> I suggest it to represent an additional reason not to attribute such a significant role to Strasbourg jurisprudence when determining ‘functions of a public nature’ under s 6(3)(b).

Unassisted by the ‘public authority’ provisions therefore, those in YL’s position might in future take Hunt’s advice and remain in the home until physically evicted, whereupon they could allege battery and, relying on the HRA’s ‘horizontal effect’, try to persuade the courts to interpret the common law on battery in accordance with their Art 8 rights.<sup>56</sup> Although unnecessarily drastic, *YL* leaves them little choice.

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<sup>55</sup> *Ibid.*, 122.

<sup>56</sup> Hunt (N24), 442.