



Human Rights & Care Homes

The exercise – or not – of ‘functions of a public nature’ by private bodies

By Naina Patel and Iain Steele

How far does the duty to act compatibly with human rights reach into the private sector, to bodies that are not inherently public but exercise “functions of a public nature”? In *YL v Birmingham City Council, Southern Cross & Others* [2007] UKHL 27, the House of Lords held by a bare majority that a privately-run care home, providing services under contract with a local authority, is not a person exercising “functions of a public nature” and therefore is not bound by section 6 of the Human Rights Act 1998 (“the HRA”).

Birmingham City Council had a statutory duty to arrange care and accommodation for YL, an 84 year old woman suffering from Alzheimer’s disease (section 21, National Assistance Act 1948). She was placed in a home owned and managed by Southern Cross, a private sector care provider, under a tripartite contract. The fees were paid by Birmingham, with a contribution from YL’s family.

Following reports of the family’s anti-social behaviour, Southern Cross gave written notice to terminate YL’s placement in accordance with the contract. YL sought a declaration that termination would breach her rights under Article 8 of the European Convention of Human Rights. The question of whether Southern Cross was exercising a public function under section 6(3)(b) of the HRA was dealt with as a preliminary issue.

Lord Mance, delivering the lead judgment, greatly emphasised the fact that Southern Cross was not exercising any delegated statutory duties or powers. The relevant statutory duty, which remained with Birmingham, was limited to arranging care and accommodation, through the public, private or voluntary sectors. Southern Cross was

simply providing those services on a commercial basis, enabling Birmingham to fulfil that duty. In Lord Mance's view, the actual provision of care and accommodation for those unable to arrange it themselves was not an inherently governmental function; Southern Cross was in the same position as a commercial contractor providing cleaning services to a public body for reward.

In contrast, Lord Bingham (dissenting) viewed the "arrange/provide" distinction as a false one. In his view, what mattered was Parliament's intention that residential care be provided; in which sector that provision took place was unimportant. Indeed, in the absence of alternatives, the state had assumed ultimate responsibility both to fund and provide. Also relevant was the detailed regulatory framework governing residential care and the serious consequences of failing to observe the prescribed standards for the very vulnerable individuals involved.

An explanation for the distance between their Lordships might be found in Lord Neuberger's observation that "*the centrally relevant words, 'functions of a public nature', are so imprecise in their meaning that one searches for a policy as an aid to interpretation*" (at [128]). He went on to elucidate the policy consideration that appears to have won the day: "*It is thought to be desirable, in some circumstances, to encourage core public authorities to contract-out services, and it may well be inimical to that policy if section 6(1) automatically applied to the contractor as it would to the authority. Indeed, unattractive though it may be to some people, one of the purposes of contracting out... may be to avoid some of the legal constraints and disadvantages which apply to local authorities but not to private operators*" (at [152]).

Their Lordships agreed that the interpretation of section 6(3)(b) did not depend upon whether YL's Convention rights enjoyed other common law, statutory or contractual protection. Nevertheless, the majority may have been influenced by the fact that YL could sue Southern Cross for breach of Convention obligations which had been directly incorporated into her contract, and could also bring a claim against Birmingham as a 'public authority' with continuing responsibility to ensure that she was suitably

accommodated and cared for. However, the YL decision seems likely to impact on factual situations where such protection is absent.

Earlier this year, in an attempt to clarify – or change – the law in this area, Andrew Dismore MP, Chair of the Joint Committee on Human Rights, introduced the Human Rights Act 1998 (Meaning of Public Authority) Bill. The Bill stipulates expressly that a function of a public nature includes “a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function”. It remains to be seen whether Parliament will endorse this position.

David Pannick QC and Naina Patel appeared for YL. Beverley Lang QC and Ivan Hare appeared for Southern Cross. Michael Fordham QC and Iain Steele appeared for Liberty, JUSTICE and the British Institute of Human Rights (intervening).