Functional Public Authorities under the Human Rights Act

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Introduction

1. The Human Rights Act 1998 (HRA) incorporates European Convention jurisprudence indirectly, making it unlawful for a “public authority” to act in a way which is incompatible with a Convention right (s. 6).

2. The meaning of “public authority” within that context is not exhaustively defined. The Act provides a definition of sorts in s. 6(3), which “includes” a court or tribunal, and also “any person certain of whose functions are functions of a public nature”, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament (other than the House of Lords in its judicial capacity). This group will not be liable for acts of a private nature (s. 6(5)). The latter category has been described as constituting “functional” or “hybrid” public authorities.

3. The width of the category of hybrid public authorities has great significance: the narrower its scope, the fewer bodies on which there will be a legal obligation not to breach Convention rights. The Government made it clear that it favoured a wide definition. For instance, the Lord Chancellor stated that “doctors in general practice would be public authorities in relation to their National Health Service functions, but not in relation to their private patients”.

4. In Poplar Housing and Regeneration Community Association v Donoghue [2001] EWCA Civ 595 [2002] QB 48 the Court of Appeal was faced with the question whether a housing association ranked as a public authority within the HRA on the facts of the case. A tenant appealed against a possession order granted under the Housing Act 1988, s. 21 in favour of her landlord, a housing association. The tenant contended that the hearing should have been adjourned so that she could adduce fresh evidence as to whether Poplar was a public body for the purposes of a declaration of incompatibility, and whether the mandatory nature of s. 21 constituted a breach of her rights under Arts 6 and 8 of the Convention.

5. At first instance the judge found against the tenant, who then appealed. Lord Woolf CJ gave the judgment of the court, holding (at para. 66) that:

“while activities of housing associations need not involve the performance of public functions in this case, in providing accommodation for the defendant and then seeking possession, the role of Poplar is so closely assimilated to that of Tower Hamlets that it was performing public and not private functions.”

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1. The author would like to thank Richard Clayton QC and Steven Kovats for their helpful comments on this article.
6. The court regarded the following factors as being of particular importance (at para. 65):

“(i) While HRA section 6 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 text books since the decision of the Court of Appeal (the judgment of Lloyd LJ) in *R v Panel of Takeovers and Mergers, ex p. Datafin* [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 HRA section 6. 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; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acted towards the defendant.

(vii) The defendant at the time of 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.”

(emphasis added)

7. In *R v Leonard Cheshire Foundation and another ex p. Heather* several long-stay patients in a home, Le Court, run by the Leonard Cheshire Foundation (LCF), applied for judicial review of the latter’s decision to close the home in its existing form and relocate them in another of its homes. One of the arguments deployed by the claimants was that, in so deciding, the trustees of the LCF had breached the claimants’ right to respect for their home under Art. 8 of the Convention.

8. A preliminary issue was ordered as to whether the LCF (the UK’s leading voluntary sector provider of care and support services for the disabled) was a public authority within s. 6. At first instance Stanley Burnton J answered in the negative and dismissed the application.³

9. After the first instance judgment, but before the decision of the Court of Appeal, the courts were asked to determine the legality of the decision of managers of a private

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psychiatric hospital to alter the nature of care provided in one of its wards. A preliminary issue arose as to whether the decision rendered the hospital a functional public authority under s. 6. Keith J held that the decision was an act of a public nature, and (since the issues stood together), was amenable to judicial review, being a decision made in relation to the exercise of a public function. Notably the hospital was under a statutory duty to provide adequate professional staff and adequate treatment facilities.

10. When giving the judgment of the Court of Appeal in Cheshire, Lord Woolf CJ approved the approach in Poplar, but held that the only factor indicating a public character was the fact that the activity of the LCF was regulated, and dismissed the appeal. He stated (at para. 35):

“(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 v HM Treasury, Ex parte Cambridge University [2000] 1 WLR 2514 (ECJ) at p.p. 2523 2534/5, relied on by Mr Henderson, an interesting illustration in relation to European Union legislation in different terms to section 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 [National Assistance Act 1948] 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 Article 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 Article 8, but, if the situation is otherwise, Article 8 cannot change the appropriate classification of the function. On the approach adopted in Donoghue, it can be said that LCF is clearly not performing any public function. Stanley Burnton J’s conclusion as to this was correct.”

11. The court also found persuasive the observation that the local authority remained under an obligation to the claimants both under the relevant statute and under Art. 8 of the Convention despite having contracted out the actual provision of accommodation (at para. 33).

12. It may be questioned, on the particular facts in Cheshire, whether the residents’ rights under the Convention will be adequately protected, since there can be no claim for a legitimate expectation that their human rights will be respected against the provider of accommodation; yet such a claim against the local authority will fail on that ground because it was not it who made the representation.

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5. Under reg. 12(1) of the Nursing Homes and Mental Nursing Homes Regulations 1984 (SI 1984/1528), being the registered person under Part II of the Registered Homes Act 1984.
8. Although the local authority may be liable should the claimants lose their home.
13. Although the test for a functional public authority is to be construed generously, it may come as a surprise that a case like *Cheshire*, involving a function which would so clearly have been performed by the state in the absence of private provision, fell on the private side of the line. This decision has clear implications for commercial entities providing services formerly provided by the state: such bodies will not readily fall within the definition of public authority, and thus be subject to duties under the HRA.

14. Such a position will not be welcomed in all circles. For instance, Moses J had expressed regret, in a pre-HRA case, that authority prevented him from holding a charitable housing association to be a public authority. Murray Hunt has argued in relation to the test for amenability to judicial review that:

“The test for whether a body is ‘public’, and therefore whether administrative law principles presumptively apply to its decision-making, should not depend on the fictional attribution of derivative status to the body’s powers. The relevant factors should include the nature of the interests affected by the body’s decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body’s jurisdiction, and the nature of the context in which the body operates. Parliament’s non-involvement or would-be involvement, or whether the body is woven into a network of regulation with state underpinning, ought not to be relevant to answering these questions. The very existence of institutional power capable of affecting rights and interests should itself be sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court, regardless of its actual or would-be source.”

15. However, there are contrary views. Professor Oliver states:

“It would be very tempting for the courts, committed to maximising the protection of Convention rights, to give a wide meaning to ‘public authority’ but this could deprive a wide range of bodies of the protection of the [Human Rights] Act.”

This is because it would render such bodies outwith Art. 34 of the Convention, which refers to “any person, non-governmental organisation or group of individuals”, and therefore they would not be classified as victims.

16. Stanley Burnton J in *Cheshire*, having approved Professor Oliver’s view, did not share the regret of Moses J, stating (at para. H52):

“The privatisation of formerly governmental activities has been authorised by Parliament. Privatisation means, in general, that functions formerly exercised by public authorities are now carried out by non-public entities, often for profit. It has inevitable consequences for the applicability of judicial review, which the courts are not free to avoid.”

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9. *R v Servite Houses ex p. Goldsmith* (2000) 3 CCLR 325 at 348; although he later declined to state whether the preferable solution was the imposition of public law standards on private bodies whose powers stem from contract, or by greater control over public authorities at the time they first make contractual arrangements (at p. 353).


12. This view appears to be supported by *R (Westminster City Council) v Mayor of London* (unreported) 31 July 2002, in which Maurice Kay J held that the London Borough of Kensington and Chelsea was not a victim under the HRA.
17. The Lord Chief Justice has suggested a novel solution: residents could require local authorities to enter into contracts with service providers to agree to comply with residents’ Convention rights. Assuming that a resident could enforce such contracts despite not being a party, it remains to be seen whether such contracts would be attractive to powerful service providers such as the LCF, which might be in a sufficiently dominant position to refuse; or agree on condition that the contract price rises significantly. In those circumstances local authorities may be less than insistent on the inclusion of such terms.

Conclusion

18. The extent to which private companies performing functions formerly provided by the state are subject to duties under the HRA is difficult to define. One thing, however, is clear: the results will be controversial.

13. In Cheshire, at para. 34.
15. See also Kate Markus, Delivering Rights (Hart Publishing, forthcoming); Monica Carss-Frisk QC, “Public Authorities: The Developing Definition” [2002] EHRLR 319.