

LIBERTY

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Evidence to the Joint Committee on Human Rights:

Meaning of Public Authority under the Human Rights Act

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Introduction

1. The Human Rights Act 1998 (the “**HRA**” or the “**Act**”) only requires public authorities to act compatibly with the rights and freedoms that the Act protects.¹ The Act places no direct obligation on private bodies or individuals to comply with basic human rights standards. Public authorities are defined in the Act as including core public authorities, like local councils – these bodies are required to comply with human rights standards in everything they do. Private bodies that perform “functions of a public nature” should, in the performance of those functions, also be treated as public authorities for the purposes of the Act (“**Functional Public Authorities**”). The question of which bodies fall within the definition of public authority is of great significance. The answer to this question determines how effectively the basic rights and freedoms in the European Convention on Human Rights (the “**ECHR**” or “**Convention**”) are secured in the United Kingdom and the extent to which UK law provides an effective remedy where an individual’s rights and freedoms are violated.²

2. In 2004, the Joint Committee on Human Rights published an important report on the meaning of “public authority” under the HRA (the “**2004 Report**”).³ It concluded that the development of case-law on the definition of Functional Public Authority had led to real gaps and inadequacies in human rights protection in the UK which ministerial statements during the passage of the Human Rights Bill indicate were not intended by Parliament. These gaps in human rights protection have arisen because some courts have sought to identify Functional Public Authorities by looking at the character of the institutional arrangements of the body, i.e. the extent to which the body is controlled or funded by a core public body, rather than the character of the function that it is performing.⁴ This has, for example, meant that the rights of an elderly person are unlikely to be protected by the Act when a local council pays for care to be provided in a private care home. By contrast, the same person’s rights would be protected if the care were provided by the local authority in a care home it runs itself.

¹ Section 6

² This could, thereby, effect the extent to which the UK could be said to comply with the obligation under Articles 1 and 13 of the Convention

³ Seventh Report of Session 2003-04, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 39/HC 382

⁴ *Callin and Others v. Leonard Cheshire Foundation*, [2002] EWCA Civ 366

3. Liberty shares the view expressed in the 2004 Report, by Lord Bingham in the House of Lords and by Ministers during the progress of the Human Rights Bill that “[i]t is the function that the person is performing that is determinative of the question whether it is, for the purposes of the case, a [functional] public authority.”⁵ Accordingly, in the hypothetical case described above, we consider that the elderly person’s rights should be protected by the Act regardless of the nature of the body that delivers the care. At the outset we acknowledge that it will not always be easy to identify when a function is “of a public nature”. This will need to be determined on a case by case basis by the courts. The appropriate question for the courts to ask is, however, whether the function in question is one for which the state has taken responsibility in the public interest.

4. The Committee considered various ways of remedying the problem with the way some courts have approached the identification of Functional Public Authorities. The Committee did not consider it appropriate to amend the terms of the HRA and Liberty also opposed this suggestion. The approach we preferred was to allow the courts an opportunity to move towards a broad functional interpretation of the meaning of “public authority” under the Act, with Government interventions in appropriate cases. It is now two years since the Committee’s last report and, sadly, the difficulties remain. Liberty is therefore delighted that the Committee has decided to look at this issue again and to reconsider what, if anything, should be done to address it.

Current Context

5. Since 2004 there have been a number of developments which make the resolution of this problem all the more important. We briefly consider these below.

⁵ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*, [2003] UKHL 37

Universal Protection and Defence of the HRA

6. Universality is the most powerful defence against attacks on the Act launched by some sectors of the media and some politicians; the best response to ill-informed and misleading claims that the HRA is no more than a charter for terrorists and criminals. This means that the Act must be shown not only to protect individuals whose rights are traditionally and rightly argued over by lawyers and considered by the courts. The Act must also provide visible and accessible protection for children, disabled people and older people at the most vulnerable times in their lives. It must provide redress where rights have been violated and an unequivocal direction to those who design and deliver important public services that people must be treated with freedom, respect, equality and dignity. As long as protection for a person's rights and freedoms depends on arbitrary and irrelevant questions about the type of body that provides a public service, rather than the nature of the service provided, the claim that rights are universal is undermined. We fear that the current approach of some courts to the definition of Functional Public Authority weakens the case for the HRA.

Sub-contracting of Law and Order Functions

7. As the Committee explained in its 2004 Report private bodies now provide many public functions.⁶ The tendency of government to contract-out public services has continued at a significant pace in the last two years. This has been particularly visible in the context of law and order / anti-social behaviour functions. The Police and Justice Act 2006, for example, created a power for local authorities to contract-out their powers to enter into parenting contracts and to apply for parenting orders.⁷ A similar provision already exists in relation to applications for ASBOs⁸ and it is proposed to give local authorities the power to contract-out their ASBO powers to organisations managing their housing stock including small tenant-run organisations.⁹ The Act also gave the

⁶ Paras 50 ff

⁷ Section 25

⁸ Section 1F Crime and Disorder Act 1998

⁹ ODP, "Enabling local authorities to contract their anti-social behaviour functions to organisations managing their housing stock". Liberty's response to that consultation is available at: <http://www.liberty-human-rights.org.uk/resources/policy-papers/main.shtml>

Home Secretary the power to specify an unrestricted range of bodies on whom the police can confer the power to issue on-the-spot fines.¹⁰

8. The exercise of such powers could clearly engage a wide range of rights and freedoms, such as the right to freedom of expression (Article 10), freedom of association (Article 11) and private and family life (Article 8). When local authorities or the police exercise these powers they are required to comply with these basic human rights standards as they are clearly public authorities for the purposes of the HRA. Law and order is a classic public function, a matter for which it is generally accepted that the state has taken responsibility in the public interest. This is expressly accepted in the Prime Minister's rhetoric on the criminal justice system being a public service in need of reform.¹¹ One would therefore expect that private bodies would, in the performance of those functions, be required to respect basic rights and freedoms. During debates on the Police and Justice Bill Lord Bassam of Brighton expressly stated that this was the Government's intention.¹² Sadly, the approach taken by some courts to the identification of Functional Public Authorities would mean that many of the private bodies on whom these functions are conferred would not be treated as public authorities for the purposes of the HRA when performing them. Accordingly, those whose rights have been violated would be denied a remedy purely because the law and order function has been contracted out.

A Change of Tack by Government

9. In its recent report *The Human Rights Act: the DCA and Home Office Reviews*, the JCHR expressed its disappointment at an apparent change of approach by the Government on this question.¹³ The generally welcome DCA review into the implementation of the HRA stated that a wider re-interpretation of public authority could "increase burdens on private landlords, divert resources from this sector and deter property owners from entering the market to provide temporary and longer term

¹⁰ Section 16

¹¹ i.e. "And here is where the fourth strand of work is relevant. Whenever I talk of public service reform, then, not unnaturally, people think of the NHS and education. But many of the same principles apply to the CJS. It is a public service, or at least should be. Its role is to protect the public by dispensing justice." (Speech, "Our Nation's Future - Criminal Justice System", 23 June 2006).

¹² HL Deb, 6 July 2006, col 440

¹³ Thirty-second Report, HL 278/HC 1716, para 90

accommodation to those owed a duty by the local authority under housing legislation”.¹⁴ In evidence to the Committee, the Lord Chancellor added that the risk of such an impact should be considered before any change is made to the definition of public authority in the Act.

10. We agree that the wider impact would need to be considered before any change is made to the current definition of public authority in the HRA. For example, if the Convention rights were to become directly enforceable against private individuals in the performance of private functions this would significantly change the scheme of human rights protection in the Act. There is, however, a significant difference between this kind of change and ensuring that Parliament’s intention, as currently expressed in section 6 of the Act, is reflected in judicial decisions. Section 6 already states that any body which performs a public function should, in the performance of that function, comply with human rights standards.¹⁵ While the question of whether or not a function is of a public nature will often be a difficult one, the Act states that the focus should be on the nature of the function rather than the nature of the institution performing it. It would not be appropriate to condition Government action in support of such a position on the basis of the potential burdens on those performing public functions. The appropriate time for such considerations was when the Human Rights Bill was drafted and the HRA passed not several years later. The costs of compliance with basic rights standards should not be a defence to unlawful human rights violations by private bodies performing public functions.

The Havering Case

11. The Government recently intervened in the case of *R (on the application of Johnson and others) v London Borough of Havering*, which concerned the transfer of local authority care homes to the private sector. The key question that the Court considered was whether the residents of the care homes would cease to have protection of the HRA as a result of the transfer or whether they would continue to have the protection of the HRA. The Government argued that the residents’ rights would continue to be protected because the care home would be performing a public function

¹⁴ DCA, *Review of the Implementation of the Human Rights Act*, July 2006

¹⁵ Section 6

when caring for the residents and providing accommodation and would, therefore, be a Functional Public Authority. A secondary argument, considered below, was that the residents would continue to be protected as they would have the same claims against the local authority under the HRA, even after the transfer to the private sector.

12. In evidence to the Committee the Lord Chancellor commented that the Government's intervention in *Havering* had failed.¹⁶ The High Court decided that it was bound to follow the Court of Appeal's approach in *Poplar Housing and Regeneration Community Association v. Donoghue*¹⁷ and *Callin and Others v. Leonard Cheshire Foundation*.¹⁸ Accordingly, it decided that the private care home would not be required to act compatibly with the Convention rights in the HRA. The High Court refused permission to "leapfrog" to the House of Lords and permission to appeal to the Court of Appeal was initially refused. We are, however, delighted that, in the last two weeks, an appeal of the *Havering* case to the Court of Appeal has been allowed. We understand that the case will be heard early next year and that both the Government and the Disability Rights Commission are likely to intervene. As we discuss below, we consider the best way of remedying the problems to be a change of approach by the judiciary to the identification of Functional Public Authorities.

How to Remedy the Problem?

13. In its call for evidence the JCHR specifically sought views on possible ways of remedying the problematic approach taken by some courts to the identification of Functional Public Authorities. In particular it asked whether primary legislation may be needed including amendments to the HRA itself.

¹⁶ JCHR, Thirty-Second Report, *The Human Rights Act: the DCA and Home Office Reviews*, oral evidence

¹⁷ [2001] ECWA Civ 595

¹⁸ [2002] EWCA Civ 366

A Change of Judicial Approach

14. In our evidence to the Committee in 2003 we stated that it would be “premature to consider taking any steps to further refine the definition of a public function under the Human Rights Act”. Three years later the problematic Court of Appeal precedents have still not been overruled. Despite this considerable delay we still believe that the best way to deal with this issue would be a change of judicial approach which the courts themselves initiate. Despite the delay we do not consider such an approach to be unrealistic. Since we submitted our evidence to the JCHR the House of Lords has considered this question and explained that, in deciding whether a body is a functional public authority, “it is the function that the person is performing that is determinative of the question whether it is, for the purposes of the case, a [functional] public authority”.¹⁹ Sadly, the House of Lords did not overrule the earlier Court of Appeal judgments which had focused on the nature of the body in question rather than the nature of the function being performed.²⁰ Nevertheless, this statement of the proper approach to the identification of Functional Public Authorities by the House of Lords’ provides a powerful authority in support of a change of judicial approach in an appropriate case. As noted above, the Court of Appeal has recently agreed to hear the appeal from the High Court’s decision in *Havering*. We hope that this case will provide an opportunity for the Court of Appeal to change its approach to this important issue.

Amending the HRA

15. We do not believe that amending the HRA would be the best way of dealing with this issue. For the reasons set out in the 2004 Report and in our evidence to that inquiry we would not support amendments to the HRA which would specify a list of public functions or of public authorities. Ultimately the question of whether a body is a Functional Public Authority will have to be determined by the courts on a case-by-case basis. The only thing that section 6 of the Act should provide is an indication of the appropriate questions for the courts to ask. In our view section 6 of the Act already states clearly that the appropriate focus for the courts should be the nature of the

¹⁹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*, [2003] UKHL 37

²⁰ Cf *Hampshire Farmers Market, ex parte Beer*, [2003] EWCA Civ 1056

function in question rather than the nature of the body performing it.²¹ We do not consider it necessary to design another way of expressing this idea. Given the profound constitutional importance of the Act amendments to it should only be considered where this is absolutely necessary for a pressing reason of constitutional importance. In addition we fear that in the current political climate if any Bill were introduced to amend the HRA this would be likely to lead to a reduction in the level of human rights protection that is currently afforded by the Act.

Other Forms of Legislative Intervention

16. Despite our preference for a change of judicial approach we do understand the JCHR's view that: "failure of that strategy to date and the growing urgency of the problem mean that it is now time to give serious consideration to whether or not to introduce legislation to reverse the effect of the *Leonard Cheshire* decision and to seek to give proper effect to Parliament's intention at the time of the passage of the HRA."²² While waiting for the courts to change their approach, people's rights are not being protected by the Act in the way that Parliament intended.

17. For this reason Liberty has proposed a number of legislative interventions which would clarify that bodies performing specific functions are, in the performance of those functions, public authorities for the purpose of the HRA. As discussed above the Police and Justice Act 2006 enabled local authorities to contract out the power to enter into parenting contracts and to apply for parenting orders. We proposed amendments to the Bill which would have clarified that private bodies are, when performing these functions, public authorities for the purposes of the HRA (the text of the amendment is below).²³

²¹ Section 6(3)(b)

²² JCHR, Thirty-Second Report, *The Human Rights Act: the DCA and Home Office Reviews*, para 92

²³ In its scrutiny of the Bill, the Joint Committee on Human Rights also expressed the view that "it would be desirable if the Bill were to provide that the person to whom the functions are contracted out is to be treated as a public authority for the purposes of the HRA 1998 in the discharge of those functions" (JCHR, *Legislative Scrutiny: Tenth Progress Report*, HL Paper 186, para 1.30)

“28B Treatment of organisations performing parenting contract and parenting order functions as public authorities

(1) Any person with whom arrangements are made under or by virtue of section 28A for the performance of the functions under section 25A or 26A shall, in the discharge of those functions, be treated as a public authority for the purposes of the Human Rights Act 1998 (c.42).

(2) For the avoidance of doubt it is hereby declared that nothing in this section affects the meaning of “public authority” in section 6 of the Human Rights Act 1998 (c.42) or the determination of whether functions, other than those referred to in subsection (1) above, are functions of a public nature for the purposes of section 6.”

18. The Government did not disagree with the principle underlying the amendment but nevertheless opposed it.²⁴ Lord Bassam explained the Government’s view that a change in the courts’ interpretation of “public authority” would “present the best possibility of resolving the lack of clarity of the case law in this subject.”²⁵ He commented that this would have a wider and more consistent impact on this area of law than the *ad hoc* statutory clarification that certain functions are to be treated as “public” for the purposes of the Human Rights Act. As we explain above, this would also be Liberty’s preferred means of addressing this problem. We do not, however, believe that the possibility of a future change of approach by the judiciary should prevent Parliament clarifying its intention in the meantime when new legislative powers to contract out public functions are proposed.

19. Lord Bassam also expressed concerns about the fact that “[i]f we put such provisions in this Bill, it would cast doubt on previous legislation in which we have intended the same but have not stated it explicitly.”²⁶ We understand this concern. We would not want to include a provision in a Bill which would have the undesired impact of suggesting that other public functions conferred on private bodies pursuant to other legislation should not be treated as public functions for the purposes of the HRA. For this reason we added a second part to the amendment which clarified that this is not the effect of the statutory provision. We believe that, with this addition, the amendment

²⁴ HL Deb, 6 July 2006, col 440

²⁵ Ibid

²⁶ Ibid

would enable Parliament to clarify the position with respect to a particular power to contract out while avoiding wider undesired consequences.

20. A similar amendment to address the specific circumstances in *Leonard Cheshire* could also be included in an appropriate Bill. Such an amendment might read:

“After subsection 26(7) of the National Assistance Act 1948 there is inserted –

(8) Any person with whom arrangements are made under or by virtue of this section for the provision of accommodation, nursing and/or personal care, shall, in the performance of those functions, be treated as a public authority for the purposes of the Human Rights Act 1998 (c.42).

For the avoidance of doubt it is hereby declared that nothing in this subsection affects the meaning of “public authority” in section 6 of the Human Rights Act 1998 (c.42) or the determination of whether functions, other than those referred to in this subsection, are functions of a public nature for the purposes of section 6.”

By means of such a provision Parliament could expressly address the problematic Court of Appeal precedent. Such an amendment would ensure that, in future cases, lower courts would not be required to apply the decision reached by the Court of Appeal *Leonard Cheshire* in a new case concerning the same functions (as happened in *Haverling* at first instance).

Direct Enforcement against a Core Public Authority

21. As discussed above the High Court in *Haverling* did not consider that private care homes could be Functional Public Authorities. Nevertheless, the Court considered that the Local Authority’s transfer of the care home to the private sector would not result in “significant diminution” of the residents’ rights. The Judge reached this decision because he believed that the local authority would continue to be responsible for any rights violations by the private care home:

“after any such transfer, the claimants will still continue to enjoy the very same Convention rights as against the Council as they do at present. The Council, as a core public authority, has an obligation to act compatibly with the Claimant’s convention rights ... A transfer of the homes to the private sector does not absolve the Council of its duty ... Thus, if a transfer does take place, the

Council will continue to be obliged to take appropriate steps (for example) to safeguard the lives of the claimants, to protect them from inhuman or degrading treatment and to safeguard their private and family life, home and correspondence. The real and effective protection of the claimant's rights will continue to be ensured by the Council and, if necessary, by the Courts.”²⁷

Similar views were expressed by the Court of Appeal in *Leonard Cheshire*.²⁸ If this were correct the importance of the courts' approach to the definition of Functional Public Authority would be seriously diminished. It might not be necessary to raise a human rights claim directly against the private body as the same claim would exist against the local authority.

22. There are, however, a number of practical and legal reasons why this approach is unsatisfactory and does not replace the need for a different judicial approach to be taken to the identification of Functional Public Authorities:

- The wording of section 6 and Ministerial statements as the Bill passed through Parliament demonstrate that Parliament intended that private bodies performing public functions should be directly accountable under the Act where, in the performance of those functions, they act in a way that is incompatible with Convention rights.
- Mr Justice Forbes states that “the real and effective protection of the claimant's rights will continue to be ensured by the Council”. The legal basis for this statement is unclear. There is no legal requirement in the HRA for even core public bodies like local authorities to provide “real and effective protection” of rights and freedoms.²⁹ The obligation to take positive action to protect rights only exists in the context of a few of the human rights protected by the Act and even then the extent of these positive obligations to take action is limited. In the case of other rights, like the right to marry in Article 12, there is no positive obligation at all; the only obligation is not to do anything which interferes in the enjoyment of those rights.

²⁷ para 44

²⁸ para 34

²⁹ Articles 1 and 13 of the Convention, which require active protection of human rights, are not themselves contained in the HRA – they are not Convention rights.

- A direct obligation on a private body providing public services would create a clearer incentive and direction for the body not to breach an individual's rights in the first place.
- In many cases a claim against a core public authority for rights violations by a private body could not provide an effective remedy. Imagine for example that a private care home were to be closed without any prior consultation or consideration being given to the residents' rights under Article 8. An action against the care home could result in an injunction to delay the closure of the care home or an order requiring prior consultation. It is difficult to think of a remedy against the local authority which would be as effective in protecting the residents' right to respect for their existing home, damages or the provision of alternative accommodation would not achieve this.
- The approach suggested by Mr Justice Forbes could also be considered to lead to unfairness for the local authority. Why, for example, should the local authority be held responsible for unforeseeable rights violations by a private body over which it has no control?

Protection by Contract

23. As the 2004 Report explained, another indirect means of protecting human rights is by contract. A requirement for a private service provider to act compatibly with Convention rights would have to be included in either (A) the contract under to which the core public authority's public functions are contracted out to the private body; or (B) the contract between the private body and the recipient of the service. The recipient of the service could then seek to enforce a breach of their rights and freedoms as a breach of contract.

24. Liberty does not consider such an approach to be a satisfactory alternative to the judiciary identifying Functional Public Authorities by focusing on the nature of the function that a body is performing. The difficulties with this approach include:

- It does not deal with those individuals who were never in the care of a core public body where, for example, the public function is conferred directly on the private

body rather than sub-contracted. Neither would this provide a remedy where public functions were contracted out before the HRA came into force.

- As we explained in our response to the JCHR's 2004 inquiry on this issue this would create a two-tier system of enforcing rights. For example, actions against a local authority under the HRA would be in the administrative court with judges and advocates with greater human rights experience.
- There is no legal requirement for the core public body to ensure such contract terms are in place and no obligation for the private body to accept such terms.³⁰ It may also be difficult for a public body to find a sufficient pool of private sector service-providers that are willing to accept such terms at an acceptable contract price. It is also unrealistic to expect the recipient of a service to insist that these terms are included in the contracts between them and the private service provider.
- A culture of respect for human rights would be better ensured by an awareness that Functional Public Authorities are subject to a direct legislative obligation to act compatibly with human rights.

25. Nevertheless, despite these inherent problems, contract terms could provide some degree of human rights protection pending a change of approach to the identification of Functional Public Authorities by the judiciary. We therefore welcome the fact that in response to the 2004 Report the Government has published guidance on contracting for services in the light of the Human Rights Act 1998.³¹ A number of general questions do, however, need to be answered before any reliable assessment of the effectiveness of this guidance in practice can be made, including: do core public bodies know that the guidance exists and have they used it?; is there any evidence about the extent to which terms are included in contracts for the provision of public functions by private sector providers?; and have standard contract terms been drawn-up in the context of specific types of contract?

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³⁰ But see the reasoning in *Havering* above

³¹ <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/contrguide.pdf>