

**YL (by her litigation friend the Official Solicitor) v  
Birmingham City Council and others**

**Interveners: Secretary of State for Constitutional Affairs;  
JUSTICE, Liberty and The British Institute of Human Rights;  
Help the Aged and the National Council on Ageing;  
Disability Rights Commission.**

House of Lords [2007] UKHL 27

**Human Rights Act 1998: Meaning of “Public Authority”**

**A response by JUSTICE, Liberty, The British Institute  
of Human Rights, Help the Aged, Age Concern and the  
Disability Rights Commission.**

**Contact:**

**Martin Crick, Legal Officer, DRC**

**[martin.crick@drc-gb.org](mailto:martin.crick@drc-gb.org)**

**Sonya Sceats, Policy and Research Officer, BIHR**

**[ssceats@bihr.org.uk](mailto:ssceats@bihr.org.uk)**

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The House of Lords handed down its judgment on 20<sup>th</sup> June 2007 in the case of *YL v Birmingham City Council and others* which explored the definition of “public authority” under section 6 of the Human Rights Act 1998 (“HRA”). JUSTICE, Liberty, The British Institute of Human Rights, Help the Aged, Age Concern England (The National Council on Ageing), and the Disability Rights Commission all intervened in the case.

By a majority of 3 to 2, the Law Lords held that that a private care home providing accommodation to elderly residents under contract with a local authority was not itself exercising “functions of a public nature” for the purposes of the Human Rights Act 1998. Consequently, the care home was not bound under section 6(1) of the HRA to act in accordance with rights protected by the European Convention on Human Rights.

The decision has implications for thousands of families across the UK. Nine out of ten care homes are privately run and local authorities are increasingly arranging for private companies to provide care and accommodation which the local authority has a statutory duty to provide. The impact is of particular significance given that residents in care homes are amongst those most vulnerable to human rights abuses.

## **Facts**

YL is an 84 year old woman with Alzheimer's disease. In January 2006, she became a resident of a nursing home under the terms of an agreement signed on YL's behalf by her daughter. The home is privately owned, although YL's care and accommodation was arranged and largely funded by the local authority in accordance with its statutory duties to arrange accommodation under sections 21 to 26 of the National Assistance Act 1948.

In June 2006, the company wrote to YL's daughter giving 28 days notice that the agreement would be terminated. This was prompted by concerns - which are disputed - about the conduct of some of YL's family during visits. There was evidence that YL would deteriorate clinically if she was transferred to an unfamiliar care setting. YL argued that the notice given by the care home was incompatible with her right to respect for her home under Article 8 of the European Convention on Human Rights and was therefore unlawful under section 6(1) of the Human Rights Act 1998.

## The Law

Section 6 of the Human Rights Act 1998 provides that:

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) ....
- (3) In this section “public authority” includes
  - (a) .....
  - (b) any person certain of whose functions are functions of a public nature.

The courts have considered the definition of ‘functions of a public nature’ and the interpretation and application of section 6(3)(b).

## The Issue

This appeal considered the preliminary issue of whether a care home, when providing accommodation and care to a resident pursuant to arrangements made with a local authority under the National Assistance Act 1948, is performing “functions of a public nature” for the purposes of section 6(3)(b) of the Human Rights Act 1998. If so, the care home would, in that respect, be a “public authority” obliged to act compatibly with Convention rights under section 6(1) of the HRA and residents would be able to enforce their human rights directly against the private care home.

## Lower courts

Both the High Court and the Court of Appeal followed the much criticised Court of Appeal authority *R (on the application of Heather and others) v Leonard Cheshire Foundation* [2002] EWCA Civ 366 in deciding that the private care home was not performing “functions of a public nature” under section 6(3)(b) of the Human Rights Act. This meant that YL was unable to enforce her human rights directly against the private care home.

## Leonard Cheshire

The claimants in the *Leonard Cheshire* case were long term residents of a care home run by a charity (“LCF”). They had all been placed in the care home by local authorities exercising their statutory duties under the National Assistance Act 1948. The court

rejected the argument that the provision of residential care by a private or voluntary sector provider in these circumstances was a “function of a public nature”. This meant that a decision by LCF to close the home and transfer the residents could be taken without any consideration of the impact on their human rights.

## **The House of Lords**

By a narrow majority of 3 to 2, the House of Lords dismissed YL’s appeal. It held that the provision of care and accommodation by the privately owned care home in the circumstances described above does not constitute a “function of a public nature” for the purposes of section 6(3)(b) of the HRA. However, Lord Neuberger, one of the majority judges, admitted that there was “a sharp difference of opinion in the House.”

The majority of the Law Lords took a narrow black letter law approach, relying heavily on private law principles and contractual remedies. By contrast, Baroness Hale and Lord Bingham, who issued strong dissenting judgments, took a purposive approach which is more in keeping with both the jurisprudence of the European Court of Human Rights and the interpretative principles of the HRA itself (section 3(1) imposes a statutory duty on the courts to read and give effect to all legislation in a way which is compatible with Convention rights).

### **The Minority**

Baroness Hale and Lord Bingham both focused heavily in their judgments on the various factors which ought to be considered in the round when assessing whether a function is of a public nature. Baroness Hale said that relevant factors include whether the state has assumed responsibility for seeing that the task is performed, the public interest in having that task undertaken, public funding and the connection between the service and the core values underlying the Convention rights. She also made the important point that the use or potential use of statutory coercive powers is “a powerful consideration in favour of this being a public function”, noting that “provisions to safeguard incapacitated people who are deprived of their liberty will be inserted into the Mental Capacity Act 2005 by the Mental Health Bill currently going through Parliament. These will apply to residents in care homes as well as in hospital.”

It was her view that in this case, the factors that she identified, when taken together, “lead inexorably to the conclusion that the company, in providing accommodation, health and social care [for YL], was performing a function of a public nature. This was a function performed [for YL] pursuant to statutory arrangements, at public expense and in the public interest. *I have no doubt that Parliament intended that it be covered by section 6(3)(b)*” (emphasis added)<sup>1</sup>.

Lord Bingham agreed with Baroness Hale. “The performance by private body A by arrangement with public body B, and perhaps at the expense of B, of what would undoubtedly be a public function if carried out by B is, in my opinion, precisely the case which section 6(3)(b) was intended to embrace. *It is, in my opinion, this case*” (emphasis added).

### **The Majority**

Lord Scott, however, decided that the private care home was simply providing a service for which it charges a commercial fee and that the manager’s duties to its residents are governed by private law (rather than imposed by public law). In his view, it was “a feature or consequence” of the regulatory framework relating to care homes that there is, in this case, an express term in the agreement between the Council and the care home obliging the care home to observe the Convention rights of residents, including YL. This term is incorporated into the agreement between the care home and YL so any breach by the care home of YL’s Convention rights would, Lord Scott reasoned, give her a cause of action for breach of contract under ordinary domestic law. Lord Scott rejected the suggestion that there was a need for the extra protection that potential liability of the care home under the HRA would provide. Lord Mance and Lord Neuberger also dismissed the appeal.

Another of the factors that swayed the majority was the argument made for Birmingham City Council that, under the National Assistance Act 1948, the local authority has a duty to arrange accommodation, but only a power - rather than a duty - to provide it<sup>2</sup>. There was also a clear concern, driven by public policy considerations, that the boundaries of the HRA would be drawn too wide as a result of allowing the appeal, and in particular, that this might undermine the contracting out of services.

## Comment

Hundreds of thousands of older people and disabled people are placed by their local authorities in private and voluntary sector care homes and they all stand to lose from this decision. Our highest domestic court has now confirmed that residents and their families are unable to use the Human Rights Act to challenge these care homes directly when basic human rights are denied.

The decision was premised, in part, on an assumption that there is a clear-cut distinction in practice between patients who are admitted to mental health institutions under section and care home residents who are assumed, in the absence of statutory coercive powers, to exercise freedom of choice. Unfortunately the reality of the experience of most care home residents is very different. Approximately 62% are cognitively impaired<sup>3</sup> and have little or no choice as to where they live.

The majority decision also took no account of the fact that very many care home residents are receiving nursing care funded by the NHS on one of three bands. In that sense, the care home is standing in the shoes of the NHS as well as the local authority.

Whilst the decision of the House of Lords does not affect the responsibility of local authorities to protect the human rights of those they place in residential care, this will be of little comfort to those, like YL, who are placed by authorities in care homes run by the private or voluntary sector. Residents and their families should be able to challenge human rights abuses 'at source'. This decision means that instead, complaints must be taken all the way to the local authority. This will almost certainly be a disincentive for those already frightened by the prospect of 'speaking out' against poor treatment. In practical terms, an individual's rights in these circumstances will be of lesser value than if they existed against the care home itself. In some cases - notably in home closure situations - a remedy against the local authority will be worthless.

In addition, any contractual term imposed on the care home to observe residents' Convention rights is not an adequate substitute for potential liability of the care home under the HRA. Where behaviour is incompatible with a Convention right, such treatment needs to be seen in those terms and not merely as a matter of private law. A finding that the HRA has been breached would send

a strong signal to all care homes that such behaviour is a violation of fundamental human rights and cannot be tolerated in a democratic society. Crucially, it would also help to encourage the development of a positive culture in which respect for fundamental rights is placed at the heart of care home service provision. A court action in contract law would not have the same impact. In any event, despite guidelines on procurement, there is no guarantee that contractual terms relating to HRA compliance will be in place in every case where a breach may occur, nor that any existing contract terms will be enforceable by the care home resident as a matter of contract law.

The issue explored in YL is a pressing concern and there are real consequences “on the ground”. Those in care homes are often amongst those most vulnerable to human rights abuses and therefore they have an especially acute need for the protection provided by the HRA. Indeed, our organisations continue to hear about horrible human rights abuses occurring in care home settings<sup>4</sup>. Examples include persistent rough handling, unjustified evictions, residents being left for hours in soiled sheets, older couples being split up from one another and residents being routinely overmedicated to keep them docile. Convention rights of particular importance and relevance are the right to life (under Article 2), the right to be protected from inhuman or degrading treatment (under Article 3), the right to liberty (under Article 5) and the right to respect for private and family life (under Article 8).

The importance of the problem regarding the meaning of public authority is highlighted by the fact that so many organisations decided to intervene in the YL case. JUSTICE, Liberty and BIHR jointly intervened, as did Help the Aged and Age Concern England (National Council on Ageing). The Disability Rights Commission and the Secretary of State for Constitutional Affairs also made separate intervention submissions. All of the interveners argued that the Human Rights Act should directly bind private and voluntary care homes providing residential care under contract to a local authority to people such as YL.

Interestingly, the care home in this case has now decided not to terminate the contract relating to YL’s care and is discussing arrangements for visits by her family. Somewhat ironically, the commencement of legal proceedings on behalf of YL was an

impetus for the parties to sit down and find a solution in a manner consistent with a human rights approach.

### Next Steps

In the final paragraph of his judgment, Lord Neuberger observed that “it may well be thought to be desirable that residents in privately owned care homes should be given Convention rights against the proprietors. ....If the legislature considers such a course appropriate, then it would be right to spell it out in terms...”

Without doubt, the decision by the House of Lords in YL increases pressure on the Government to plug the ‘legal loophole’ that means that people in private and voluntary sector care homes - effectively, the vast majority of care home residents in Britain - continue to be denied effective human rights protections.

JUSTICE, Liberty, BIHR, Help the Aged, Age Concern and the DRC are committed to working with partners to help find a solution.

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**JUSTICE is an all-party, law reform and human rights organisation working to improve the legal system and the quality of justice in particular by: promoting human rights, improving the legal system and access to justice, improving criminal justice, raising standards of EU justice and home affairs.**

**Liberty, also known as the National Council for Civil Liberties, is a cross party, non-party membership organisation at the heart of the movement for fundamental rights and freedoms in England and Wales. It promotes the values of individual human dignity, equal treatment and fairness as the foundations of a democratic society. Liberty seeks to protect civil liberties and promote human rights for everyone.**

**The British Institute of Human Rights (BIHR) is a human rights organisation that is committed to challenging inequality and injustice in everyday life here in the UK. It aims to achieve this by *bringing human rights to life* – supporting people to use human rights principles and standards to improve their own lives and as a tool for organisations to develop more effective public policy and practice.**

**Help the Aged is an international charity fighting to free disadvantaged older people from poverty, isolation and neglect. Help the Aged campaigns for change in government policy, undertakes research into the needs of older people and provides local services in communities across the UK and overseas.**

**Age Concern England (ACE), the National Council on Ageing, is a national voluntary organisation aiming to improve the opportunities and quality of life of people over 50. It works through campaigning, public policy development, research, information provision, publishing, training, grant-making and international and European work. ACE is part of Age Concern, the UK's largest federation of organisations working with and for older people.**

**The Disability Rights Commission (DRC) is an independent body established by Act of Parliament to stop discrimination and promote equality of opportunity for disabled people. The DRC's vision is a society where all disabled people can participate fully as equal citizens.**

**Martin Crick, Legal Officer, Disability Rights Commission  
Sonya Sceats, Policy and Research Officer, BIHR  
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<sup>1</sup> In her judgment Baroness Hale referred to two BIHR reports: Something for Everyone (2002) and The Human Rights Act – Changing Lives (2007). Both of these reports are available at [www.bihar.org](http://www.bihar.org) or by contacting [info@bihr.org.uk](mailto:info@bihr.org.uk).

<sup>2</sup> Note also that the Human Rights Act 1998 (Meaning of Public Authority) Bill - which is Andrew Dismore MP's Private Members Bill to clarify the meaning of public authority in section 6 of the HRA introduced to Parliament in May 2007 - reads: "Meaning of public authority. For the purposes of section 6(3)(b) of the Human Rights Act 1998 (c. 42), 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." There may be some doubt as to whether the Bill would fill the gap it purports to.

<sup>3</sup> Research findings from the Continuing Care Conference 2006.

<sup>4</sup> Only last week Help the Aged learned of a case in which a woman in her late 80s has effectively been imprisoned in her small bedroom in a private care home. The "justification" for this is that she has a recurring infection which the home claims might spread if she leaves her room and spends any time with other residents. Both a doctor and a specialist nurse have advised that there is no such risk as the infection is not air borne. Despite medical evidence that isolation is unnecessary and useless, the home has refused to reconsider its decision. The resident, who is reliant on others for her basic care needs following a stroke, is mentally alert and enjoys the company of others. She is extremely distressed and her mental well-being has been adversely affected by her imprisonment.