

Casenotes

Human Rights and the Provision of Residential Care under the National Assistance Act 1948

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YL v Birmingham City Council and Others

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[2007] UKHL 27

Introduction

The 'Welfare State' was established in the 1940s to provide health, housing, education and welfare services 'from the cradle to the grave'² to those in need. One key piece of welfare state legislation was the *National Assistance Act 1948*, which required the provision of a broad swathe of welfare services by local authorities. In particular, section 21(1)(a) of the 1948 Act placed a duty on local authorities to provide residential care for those in need by reason of age or ill health (and later also disability), or for any other reason, if the required care and accommodation was 'not otherwise available to them'. Such accommodation, which was and remains means-tested (section 22), could be provided by the local authority in question or it could draw on the resources of another local authority or a voluntary organisation (sections 21(4) and 26 of the 1948 Act), in which case the local authority with responsibility would pay the provider direct and then recoup any means-tested contribution from the person provided with the accommodation.

The policies implemented in the 1940s enjoyed bipartisan political support (at least in public) until the time of the Conservative administration of the 1980s and early 1990s, at which time there was a significant recasting of the relationship between the public and private sectors, with the introduction of a 'mixed economy of care'. To this end the *National Health Service and Community Care Act 1990* made significant changes to the 1948 Act. Now, the duty of a local authority is to 'make arrangements for providing' care and accommodation rather than having to provide it (although that remains a possibility: section 21(4)), and local authorities could henceforth utilise private providers of care and accommodation (section 26(1A)). In subsequent years the role of the private sector grew exponentially and these days it provides most residential care.³

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² See Sir William Beveridge (1942) *Social Insurance and Allied Services* Cmd 6404.

³ See Bartlett P and R Sandland (2007) *Mental Health Law and Policy* (Oxford: OUP, 3rd edition) 66–67.

In part, the 1990 Act was a pragmatic response to the problem of under-supply of local authority or voluntary sector accommodation, which had led to a situation in which many persons had been accommodated in privately-run care homes with the costs of that accommodation met, at great expense to the public purse, through the benefits system; or as long-term patients in psychiatric hospitals, again at considerable expense. In either case, it was far from clear that the services provided were in the best interests of the client or constituted the best use of public funds⁴.

However, such pragmatic considerations were underpinned by an ideological agenda to 'roll back the frontiers of the state'. At stake was the question of the proper responsibilities of the state for its vulnerable citizens and, as Lord Neuberger noted in *YL v Birmingham City Council*, 'unattractive as it may be to some people, one of the purposes of contracting-out at least certain services previously performed by local authorities may be to avoid some of the legal constraints and disadvantages which apply to local authorities but not to private operators'. [152] This question was given a new impetus when the *Human Rights Act 1998* came into force, because now the 'legal constraints' that might be avoided by contracting out might include the Convention rights brought into UK law by that Act, which are inescapable by a government body, or, in the terminology of section 6(1) of the 1998 Act a 'public authority'.

Whether this was so is not, however, clear on the face of the Act, because although section 6(1) provides that 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right', the scope of the concept of a 'public authority' was left to be defined by the courts. Section 6(3)(b) provides that, in addition to government bodies (often referred to as 'core' public authorities for these purposes) a public authority includes 'any person certain of whose functions are functions of a public nature' although this must be read together with section 6(5), which states that 'In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private'. Those caught by section 6(3)(b) have come to be known as 'hybrid' public authorities, a phrase which attempts to capture the part public, part private, nature of the persons or bodies in question. In the years since 2000, the courts have adjudicated on the meaning and effect of these provisions in the context of the 1948 Act on a number of occasions, the most recent of which is the *YL* case, decided in June 2007, which is the subject of this note.

The Facts

Shortly after New Year, 2006, YL, who was 84 years old and suffered from Alzheimer's disease, moved into a care home run by Southern Cross Ltd ('SC'), her husband (83 years old) and her family being unable to provide her with care at home any longer. Her placement was arranged, and largely funded, by her local authority ('LA'), in the performance of its duties under the Acts of 1990 and 1948. The placement involved various legal agreements. A care home placement agreement, the parties to which were the LA, SC, and YL, detailed the obligation of SC to provide care and accommodation to YL, YL's obligation to pay (a 'top-up fee') to the LA, and the LA's obligation under its contract with SC, and towards YL as required by the 1990 Act. A further agreement involving all three parties detailed the specific terms under which YL was to be accommodated by SC. This provided that SC could give YL four weeks notice to quit the accommodation if, inter alia, in the opinion of SC, YL's continued residence was 'seriously detrimental to the home or the welfare of other residents'.

There was also a service provision contract between the LA and SC, under the terms of which SC agreed

⁴ Griffiths R, (1988) *Community Care: Agenda for Action* (London: HMSO).

to provide care and accommodation for residents placed with them by the LA, with the LA to pay an agreed price per resident (60 of the 72 residents in the accommodation in question and 80% of the 29,000 residents accommodated by SC nationally were placed by local authorities under section 26(1A) of the 1948 Act). Further terms required that SC could give a person placed in its care home notice to quit 'only for a good reason', and that SC and its employees would act at all times in a way compatible with the Convention rights detailed in the *Human Rights Act 1998*.

In June 2006 YL was given notice to quit by SC because it alleged that YL's husband and daughter were a disruptive influence in the home, although this was disputed. The Official Solicitor, on hearing that notice to quit had been given to YL, sought declarations from the High Court in respect of her best interests and the applicability of the 1998 Act to her case (if the Act was held to apply, YL's Article 8 rights would be at issue, along with those of her husband, who visited her every day). This latter question was heard as a preliminary issue. The High Court and subsequently the Court of Appeal held that SC was not performing 'functions of a public nature'. YL appealed to the House of Lords.

The Decision

The House of Lords also held, by a majority of three to two, that SC was not performing functions of a public nature and hence YL had no direct cause of action against SC under the Human Rights Act. The majority comprised Lords Scott, Neuberger and Mance, with Lord Bingham and Baroness Hale in the minority.

The Majority

Each member of the court gave a separate judgment, of varying degrees of length, breadth, and complexity. However, there is a good deal of common ground between the Opinions of the majority. For each of them, the starting point was that the provision of care home accommodation by a private company to a self-funding resident for profit is a private act. [Lord Mance at 115 and Lord Neuberger at 133, Lord Scott at 27]. All three were also concerned that if it was held that SC was performing functions of a public nature, the floodgates might thereby be opened. For Lord Scott, for example, if an outside contractor is engaged by a LA to provide cleaning, catering or other essential services, it would be 'absurd' to view the provision of such services as comprising the performance of 'functions of a public nature' and 'The owner of a private care home taking local authority funded residents is in no different position'. [27] 'Where', his Lordship asked rhetorically, 'does it end?' [30] Much the same view was expressed by Lords Mance [82] and Neuberger. [164] A second obvious problem was that, given that the relationship between self-funding residents and a private provider does not entail the performance of a function or act of a public nature by the latter, then to hold that it did in the case of LA-funded residents would create an anomalous situation whereby those residents, but not self-funders, would be protected a priori by Convention rights. [Lord Mance at 117, 119, Lord Neuberger at 169]

However, the crux of the issue is the meaning of, and approach taken towards, the phrase 'functions of a public nature'. Lord Mance started by accepting the point made by Oliver,⁵ that, in his Lordship's words, 'it is a fallacy to regard *all* functions and activities of a core public authority as inherently public in nature' [110]. This view, which must in general terms be correct, is based on an analysis of the structure of section 6 of the 1998 Act. Section 6(1) applies to all functions and acts of a core public authority, irrespective of whether they could be classified as 'public' or 'private', so that it cannot be assumed, merely on the basis

5 Oliver D, (2004) 'Function of a public nature under the Human Rights Act' *PL*. (Sum) 329–351 at 336.

that a function or act is performed by a core public authority, that it is public. And for Lord Mance 'I do not regard the actual provision, as opposed to the arrangement, of care and accommodation for those unable to arrange it themselves as an inherently governmental function'. [115] This is because 'In contrast with the position relating to the national health service, the default position is one in which the local authority is not involved'. [115] In the same vein, Lord Neuberger expressed his view, that 'the services provided in this case are very much of a personal nature'. [168]

Interestingly, Lord Scott, making up the majority, seems not to have taken the same approach. Although stating that the act of giving YL notice to quit 'affected no one but the parties to the agreement. I do not see how its nature could be thought to be anything other than private', [34] and therefore excluded from section 6(3)(b) by virtue of section 6(5), he also seemed to accept that where accommodation is provided by a LA in-house that 'is unquestionably a function of a public nature'. [20] He reached the same conclusion as Lord Mance, however, because in his view there are 'very clear and fundamental differences' [29] between in-house and contracted out accommodation provision, viz. that the LA acts pursuant to statutory duties imposed by public law whereas a private provider does not. It is submitted that the analysis of Lord Mance is, in principle, to be preferred on this point. It must be correct that not every act or function of a LA is necessarily 'public'. On the other hand, it is debatable whether Lord Mance is correct in this instance. There is a good argument to be made, and which was in fact made by both minority Opinions (see below), that although some functions or acts of an LA are not public, those functions connected to the duties in the 1948 Act are not examples of that.

In either case, this would seemingly be enough to dispose of the appeal, but all members of the majority gave further consideration to the test appropriate for distinguishing public from private functions. This question has been raised in earlier caselaw. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*⁶ D had been given a weekly non-secure tenancy by a LA pending its assessment of whether she was entitled to social housing on a more permanent basis by reason of being homeless, or whether, as intentionally homeless, she did not qualify for such housing. Whilst D's tenancy was still existent, the LA transferred the property in question to the appellant, a housing association which it had created to manage a good proportion of its housing stock. It was later decided that D was not intentionally homeless and the association sought an order for possession.

The pertinent issue was whether the housing association was a public authority for these purposes. Lord Woolf CJ, giving the unanimous judgment of the Court of Appeal, held that it was. Although of the view, not interrupted by any of the later caselaw, that 'The fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function', [67] Lord Woolf reached his conclusion that the housing association was performing a function of a public nature because 'the role of Poplar [the housing association] is so closely assimilated to that of Tower Hamlets [the local authority]' [70] on the particular facts of the case⁷. The problem with this, in terms of statutory interpretation, is that although discussing the nature of the function, the court actually decided the case by reference to altogether different criteria, concerned with the nature of the relationship between the LA and the contractor. The decision was criticised on this basis by Oliver⁸, and in YL, both Baroness Hale [61] and Lord Mance [105] specifically overruled *Donoghue*

6 [2001] EWCA Civ 595, [2002] Q.B. 48.

7 The court emphasised that 'Poplar was created by Tower Hamlets to take a transfer of local authority housing stock; five of its board members are also members of Tower

Hamlets; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acts towards the defendant'. [70]

for precisely this reason. The tests in section 6, in short, are functional not relational: and the nature of the function in question does not change whether performed by the LA or by a private contractor⁹. [Lord Mance at 110]

This was confirmed in the later House of Lords decision in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*¹⁰. The facts of this case need not detain us here, but what is relevant is the approach to determining whether a function is public that was elaborated by Lord Nicholls, which was utilised by both the majority and minority in *YL*. His Lordship held that there could be no simple test for determining whether a person or body is performing functions of a public nature. Instead, he endorsed a factor-based approach, elaborating that

Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service [12, cited by Lord Mance at 91]

However, the presence of one or more of these features is not necessarily decisive. For example, Lord Mance explained, statutory powers may have been bestowed on the person or body in question ‘for private, religious or purely commercial purposes’. [101] Instead, ‘it is necessary to look at the context in which, and basis on which, a contractor acts’ rather than ‘to look at what a contractor ‘does’ [102]. This is potentially confusing, as a little later in his Opinion Lord Mance emphasised that ‘In every case, the ultimate focus must be upon the nature of the functions being undertaken’, [105] but his meaning is fairly clear. It is not that what a contractor does is irrelevant, but rather, that what the contractor does is to be assessed by reference to the context in which those functions or acts are done. He gave the example of a private firm engaged by a LA to enforce road traffic laws on the public highway compared with the same firm being employed by a private person or indeed by a LA to enforce parking restrictions on private land [102]: in the former case the firm will be performing a function of a public nature, in the latter it will not.

Applying Lord Nicholls’ approach led each member of the majority to the conclusion that SC was not performing functions of a public nature. First, SC was not publicly funded. Lord Mance distinguished the situation under which the capital support for a venture undertaken by a non-governmental body is wholly provided by the state, from ‘payment for services under a contractual arrangement with a company aiming to profit commercially’. [105] Lord Neuberger made a similar distinction, [149] as did Lord Scott, holding bluntly that ‘It is a misuse of language and misleading to describe Southern Cross as publicly funded’. [27] Secondly, SC was not exercising any statutory powers in providing *YL* with care and accommodation. [Lord Mance at 84, 104 and 121, Lord Neuberger at 150, 160 and 166, Lord Scott at 28] Thirdly, SC was not in any way standing in the shoes of the LA because the 1948 Act in its present form ‘is deliberately phrased in terms of a duty on the local authority to make arrangements. That duty never passes to the care home, which does no more than provide care and accommodation under contract’ [Lord Mance at 113, see also Lord Neuberger at 147] and therefore the involvement of the LA in arranging and paying for *YL*’s accommodation by SC does not convert SC’s function from private to public. [139] The fourth consideration – whether SC is performing a public service – has already been discussed above. The majority conceptualised SC as engaging in private acts rather than providing a public service. The provision of residential accommodation for the vulnerable, who otherwise would not have that need met,

8 *Op. cit.*, n.5, at 336.

10 [2004] 1 AC 546.

9 Craig P, (2002) ‘Contracting Out, the Human Rights Act and the Scope of Judicial Review’ 118(Oct) *LQR* 551-568 at 556.

is of course, generally speaking, in the public interest, but it does not follow 'as a matter of logic or policy' [135] that the provider is therefore performing a public function. This also explains why the fact that private providers are closely regulated by the *Care Standards Act 2000* does not imply that they are performing a public function. If anything, according to Lord Mance, [116] it implies the contrary.

The Minority

In a relatively short judgment, Lord Bingham applied the *Aston Cantlow* criteria as had the majority, but doing so compelled him to the opposite conclusion. [4–10] For him, for example, the distinction between 'arranging' and 'providing' on which the majority had placed so much emphasis, was 'not...very significant' [16] because for Parliament the important thing is that necessary accommodation and care is provided 'but the means of doing so is treated as, in itself, unimportant'. [16] What matters is that 'By one means or another the function of providing residential care is one which must be performed'. [16] Also significant was the detailed statutory and regulatory control of providers, [17] and the fact that the state would pay if the service user was unable to do so, as 'It is indicative of a function being public that the are public are, if need be, bound to pay for it to be performed'. [18] In his view, a consideration of the context did not point towards the importance of commercial principles, but rather towards the vulnerability of those who have recourse to care home accommodation, and the risks that such vulnerability might leave residents open to abuse. For Lord Bingham 'These risks would have been well understood by Parliament when it passed the 1998 Act... it can scarcely be supposed that residents of privately run care homes, placed in such homes pursuant to sections 21 and 26 of the 1948 Act, would be unprotected'. [19] In particular, section 6(3)(b) was in his view 'clearly drafted' [19] to ensure that the modern policy of contracting out did not alter the broader policy on the provision of residential care which, 'for the past 60 years or so... has been recognised as the ultimate responsibility of the state'. [15]

Baroness Hale also applied the *Aston Cantlow* criteria, and like Lord Bingham, found that they 'tell heavily in favour of section 6(3)(b) applying in this case'. [65] The salient points for the Baroness were that the state has undertaken responsibility for ensuring that the services in the 1948 Act are provided, and in her view that renders it 'artificial and legalistic to draw a distinction between meeting those needs and the task of assessing and arranging them'. [66] The public interest in having these functions carried out, and the fact that they are, where necessary, publicly funded were also telling factors, [67, 68] as was the possibility that any person in receipt of residential care and accommodation by reason of mental disorder (such as Alzheimer's disease) is 'potentially vulnerable to detention under section 5 of the Mental Health Act 1983', [69] and 'The use or potential use of statutory coercive powers is a powerful consideration in favour of this being a public function'. [70] The fact that some people make and fund their own arrangements for care and accommodation does not mean that when others avail themselves of the state's willingness to undertake responsibility the state should be relieved of its obligations, including those voluntarily accepted under the terms of the Convention. In summary, this meant that SC was performing a function of a public nature and its acts in pursuit of this function were also public. [73]

For Baroness Hale this analysis of section 6(3)(b) chimed with its intended purpose. She referred, amongst other things, to the White Paper that preceded the 1998 Act,¹¹ which provided that it was the Government's intention that the Act should apply to 'companies responsible for areas of activity which were previously within the public sector', [54] and to the explanation of the scope of the legislation as it made its way through the legislative process given in Parliament by the then-Home Secretary Jack Straw,

11 Home Office (1997) *Rights Brought Home: the Human Rights Bill* Cm 3782.

who said¹² that the Human Rights Act utilised a definition of a public authority which ‘took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies or charities, have come to exercise *public functions* that were previously exercised by public authorities’ (my emphasis).

Discussion

When the House of Lords decides a case by a majority of one it is as a general rule fair to assume (i) that the case could have gone either way, and (ii) the fact that it went one way and not the other is more a matter of preference and politics than of legal interpretation. Indeed, something very close to this was frankly admitted by Lord Neuberger. [128] And if this is so, then the judicial recourse to statutes, precedent, and principle is to engage more in rhetoric than in logic or objective analysis. This much, I would suggest, is evident from the very different use made by the majority and the minority of the *Aston Cantlow* criteria, which seems to suggest that meaning is imposed on, rather than residing in, section 6 of the 1998 Act, and the difference of approach is explicable in terms of the underlying sympathies of the members of the House.

Lord Bingham, as noted above, situated his judgment in the context of the 60-year history of the welfare state, and Baroness Hale similarly spent quite some time discussing the history of the 1948 Act, the welfare state more generally, and the philosophy behind it. [49–53] Their conclusion on the law was rooted in that welfarist history. The majority, by contrast, had their eyes firmly on the present. Lord Mance, although seeing fit, tellingly, to refer approvingly to the famous historical figure and advocate of the free market, Adam Smith, [105] cut the modern law off from its history (still evident on the face of the legislation: section 21 of the 1948 Act continues to be headed ‘Duty of local authorities to provide accommodation’ for example), holding that ‘it is appropriate to focus on the modern form of the 1948 Act’ [114], and was concerned that to impose ‘public authority’ status on privately run care homes ‘fit[s] in my view uneasily with the ordinary private law freedom to carry on operations under agreed contractual terms’. [116] In other words, his approach is underpinned by an affiliation to free market principles, and rests on his view that ‘I do not regard the actual provision... of care and accommodation... as an inherently governmental function’, [115] a sentence which contains a conclusion which functions also as a point of departure or which, in other words, is entirely circular and self-serving. I do not mean to single out Lord Mance in particular: rather my point is that the same is true of all the Opinions handed down, both by the majority and the minority.

There are some points, however, which are less a matter of opinion than others. For the majority, the outcome was not a defeat for human rights because of the clause in the service provision contract between the LA and SC which obliged SC to act at all times in a way compatible with the human rights of those placed in its care by the LA. Lord Scott, pointing out that ‘No one has suggested that the contractual arrangements [in this case] are not typical’, held that in the light of those terms there is ‘no need to depart from the ordinary meaning of “functions of a public nature” in order to provide extra protection to YL and those like her’ (note the clever sentence construction, with its self-serving use of the word ‘ordinary’) as ‘any breach by Southern Cross of YLs Convention rights would give YL a cause of action for breach of contract under ordinary domestic law’. [32] However, not only are there significant doubts about the degree to which such a term, in the contract between the LA and SC, is enforceable by

¹² *Hansard* (HC) 16 February 1998, column 773.

a third party, here YL, notwithstanding the passage of the *Contracts (Rights of Third Parties) Act 1998*,¹³ but also in contract law the default remedy for breach is damages, which is not obviously the remedy that someone in YL's position would want, and which is remedial rather than preventative, as the *Human Rights Act 1998* is intended to be, and which may on a cost-benefit analysis by a provider be deemed worth paying.

Moreover, it belies the reality of the position of significantly intellectually disabled and vulnerable clients like YL to imagine that the lodging of a claim for breach of contract will easily be within their competence. The contract model assumes an 'equality of arms' (to use the contract lawyer's tellingly militaristic and conflict-model based metaphor) that is, in reality, often likely to be missing. It is true that a resident in privately provided residential accommodation retains his or her human rights as against the LA which owes them the duty to arrange accommodation, but as Lord Neuberger candidly accepted, these 'could be of somewhat less value in practice than if they existed against the proprietor' [149] because, for example, the LA may not be able to prevent actions by the contractor which breach a resident's Article 8 rights in relation to a particular home, and it will be difficult to show that the action of the LA, in placing a service user in a particular private home, was in breach of Article 8¹⁴. To put this differently and perhaps more starkly, the effect of the decision in this case is that not only do those accommodated on a contracted-out basis have no Convention rights directly exercisable against those responsible for their care, but also the efficacy of their still existent Convention rights as against the LA is also thereby decreased. This 'double whammy' might strike some as problematic.

The 'anomaly' point, relied on by the majority, although not without substance, is itself to an extent anomalous. As discussed above, for the majority it would be anomalous if different residents in the same home had different rights according to their status as LA-funded or self-funded. The majority was of course not unaware that its decision created an anomaly of a different kind, between those in LA provided accommodation who have directly enforceable Convention rights against the managers of their day to day care and those in privately provided accommodation who do not, but for Lord Neuberger, to distinguish between residents in the same home would be 'rather more of an anomaly', [169, see also Lord Mance at 119].

There are two points to be made in response. First, if it has become, or becomes, routine for LAs to write an obligation to protect the human rights of LA-funded residents into their contracts with providers, this is likely, as Baroness Hale suggested, to increase the human rights protection of all residents. Lord Mance suggested that the outcome reached by the minority might mean that self-funders are treated less well than those funded by a LA when it comes to making difficult decisions, for example, about which wing of a home to close [117]. But this is (wrongly) to assume that care homes house residents differentially by reference to the source of their funding, which is simply not the case: as Lord Scott noted, the source of a resident's funding 'is of no concern to the care home'. [29] Given this, it is not feasible to have a policy of acting in accordance with the human rights of some but not all residents. It is much easier to construct a policy which applies across the board. This would also neutralise any cost differences as between LA-funded and self-funding residents, as well, of course, as giving due respect to the importance of human rights protection to the vulnerable.

Secondly, it is disputable which is the greater anomaly in terms of the policy of the 1990 Act, to promote

13 Donnelly, C (2005) 'Leonard Cheshire Again and Beyond: Private Contractors, Contract and S. 6(3)(b) of the Human Rights Act' *PL. (Win)* 785–805.

14 *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366; [2002] 2 All E.R. 936 provides an example of exactly this situation.

a 'seamless' community care service. The position adopted by the minority at least has the virtue that the line is drawn between those in receipt of community care provided by the state and those who are not, whereas the line drawn by the majority renders that policy far from seamless by linking the rights of community care service users to the technical status of their accommodation, as LA or privately provided. This might make sense to a lawyer but I for one would not like to have to explain this situation to a community care service user placed by a LA in private accommodation, for whom these technical questions are, as Baroness Hale rightly observed 'artificial and legalistic'. [66]

There were some points on which all members of the House were agreed. Where the performance of a duty owed by a public authority is delegated to a private person or body, the latter will fall within section 6(3)(b). There was also agreement that section 6(3)(b) will also catch a private person or body who is given 'special statutory powers over residents entitling them to restrain them or to discipline them in some way or to confine them to their rooms or to care home premises', [Lord Scott at 28] even if there was no unanimity on what might constitute such coercion (for what it's worth, Baroness Hale's point, that there is real potential for coercion in the, sometimes implicit, threat of being 'sectioned' under section 5 of the *Mental Health Act 1983* is absolutely valid, even if the law cannot see the coercion)¹⁵. Thus, it was common ground that privately run prisons or psychiatric facilities which accept detained patients under the *Mental Health Act 1983*¹⁶ (or as amended by the new *Mental Health Act 2007*, when in force) are public authorities for this reason. It also seems likely that psychiatrists who refuse to accept a detained patient discharged by a tribunal would be held to be performing functions of a public nature on the same basis¹⁷.

Oliver has argued that a test based on the presence of coercive powers is 'the only workable test for "function of a public nature"',¹⁸ and it would appear that this is also the view of the majority in *YL*. This, I would suggest, points to the main objection against the approach of the majority. It is a political not a legal objection, and it is that the majority constructs the state as the locus of coercion but not of care: care, it seems, is a private act, even if performed by a public authority. But is the uncaring state the state we want? I would hope and suggest not.

Is it worth taking this case to Strasbourg? There is in fact a good deal of discussion of Strasbourg caselaw in *YL*, particularly on the part of Lord Mance, and to a lesser extent Lord Neuberger and Baroness Hale, because in *Aston Cantlow* the House had held that the 1998 Act was passed to make available in the UK the same, but no greater, rights than would be available in Strasbourg; and hence it should be possible to determine the intended reach of section 6(3)(b) by looking at the caselaw before the European Court of Human Rights. Not surprisingly, Lord Mance and Lord Neuberger found that that caselaw supported their interpretation of section 6(3)(b) whilst Baroness Hale found that it supported hers. I do not intend to undertake an analysis of their respective positions here, other than to note that students of mental health law are not strangers to the situation in which an applicant succeeds before the European Court having failed before the House of Lords,¹⁹ and that section 2(1)(a) of the 1998 Act requires the domestic courts to 'take into account' the jurisprudence of the Strasbourg court but that does not prevent, as has been accepted as part and parcel of the 1998 Act since its inception, human rights jurisprudence developing more quickly and reaching further in the domestic courts than in Strasbourg.

15 *Op. cit.*, n.3, at 112–114.

16 See *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin); [2002] 1 W.L.R. 2610; [2002] M.H.L.R. 298, approved by Baroness Hale [65] and Lord Mance. [121].

17 This point was left open by the appellate courts in *R. (IH) v SSHD and SSH* [2002] EWCA Civ 646 (CA), [2003] UKHL 59 (HL).

18 *Op. cit.*, n.5, at 337.

19 *HL v UK* (2004) 40 EHRR 761.

Concluding Comments

Some readers may feel that Baroness Hale's reference to the intentions of the Government in passing the 1998 Act should have been treated as decisive: section 6(3)(b) was intended to catch private care homes and so that it is what the courts should hold. However, the majority avoided addressing this point, holding that it had been determined in *Aston Cantlow* that reference to Hansard on this question is not permissible, [89] which gave them the space to arrive at the opposite conclusion. It is unfortunate that such legalistic and technical devices should be deployed in relation to such important matters of social policy. Moreover, it seems arbitrary and anti-democratic that important questions such as this should be left to be decided in an almost random way by the courts. A differently staffed House of Lords may have come down on the side of the minority, and the implications of this case for thousands of care homes and hundreds of thousands of residents in such homes would then have been very different.