HOUSE OF LORDS SESSION 2006–07

[2007] UKHL 27

on appeal from: [2007] EWCA Civ 27

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

YL (by her litigation friend the Official Solicitor) (FC) (Appellant)

v.

Birmingham City Council and others (Respondents)

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

Appellants:	*1st Respondent*:	*2nd Respondent:*	*3rd and 4th Respondents:*
David Pannick QC Ian Wise Naina Patel (Instructed by Irwin Mitchell)	Andrew Arden QC David Carter (Instructed by Birmingham City Council Legal Department)	Beverley Lang QC Ivan Hare (Instructed by Lester Aldridge)	Helen Mountfield (Instructed by Bailey Wright & Co)

Interveners

Secretary of State for Constitutional Affairs	*Justice, Liberty and BIHR*	*Help the Aged and the National Council on Ageing*	*Disability Rights Commission*
Philip Sales QC Cecilia Ivimy (Instructed by Treasury Solicitor)	Michael Fordham QC Jessica Simor Iain Steele (Instructed by Liberty)	Rabinder Singh QC David Wolfe Samantha Knights (Instructed by Help the Aged and the National Council on Ageing)	Robin Allen QC David Wolfe (Instructed by Disability Rights Commission)

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ON
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LORD BINGHAM OF CORNHILL

My Lords,

1. The issue in this appeal is whether a care home (such as that run by Southern Cross Healthcare Ltd), when providing accommodation and care to a resident (such as Mrs YL, the appellant), pursuant to arrangements made with a local authority (such as Birmingham City Council) under sections 21 and 26 of 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 and is thus in that respect a "public authority" obliged to act compatibly with Convention rights under section 6(1) of that Act.

2. For reasons more fully given by my noble and learned friend Baroness Hale of Richmond, with whose opinion I wholly agree, I would answer that question in the affirmative. Despite the contrary opinions of my noble and learned friends, and of the Court of Appeal in *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936, I venture to think that the answer to the question is clear. For that reason, and because the issue is an important one, I give my reasons for reaching the conclusion I do. In doing so, I shall take as read, and will not repeat, Baroness Hale's survey of the facts, the legislation, the history and the authorities.

3. Public authorities in the United Kingdom must not act incompatibly with a Convention right of anyone in the country. That is the effect of sections 6(1) and 1(1) of the Human Rights Act 1998. The same prohibition applies to any body which is not a public authority but certain of whose functions are of a public nature, save in respect of a

particular act if the nature of that act is private. That is the effect of section 6(1) of the Act, read with sections 6(3)(b) and 6(5). Thus the question to be resolved is whether Southern Cross, as the owners and managers of the registered care home in which Mrs YL is resident, is in material respects exercising functions of a public nature not involving acts of a private nature.

4. Section 6 is a provision in a domestic statute, to be construed as such. Its meaning is not to be found in the Convention. The provision is found in a measure intended to give effective domestic protection to Convention rights as defined in and scheduled to the Act. It is accordingly appropriate to give a generously wide scope to the expression "public function" in section 6(3)(b), as Lord Nicholls of Birkenhead observed in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, para 11.

5. As Lord Nicholls also observed in the same case, at para 12, there is no single test of universal application to determine whether a function is of a public nature. A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case. Tempting as it is to try and formulate a general test applicable to all cases which may arise, I think there are serious dangers in doing so. The draftsman was wise to express himself as he did, and leave it to the courts to decide on the facts of particular cases where the dividing line should be drawn. There are, however, some factors which are likely to be relevant, as Lord Nicholls recognised in paragraph 12 of his opinion in *Aston Cantlow.*

6. It will be relevant first of all to examine with some care the nature of the function in question. It is the nature of the function – public or private? – which is decisive under the section.

7. It is also relevant to consider the role and responsibility of the state in relation to the subject matter in question. In some fields the involvement of the state is long-standing and governmental in a strict sense: one might instance defence or the running of prisons. In other fields, such as sport or the arts, the involvement of the state is more recent and more remote. It is relevant to consider the nature and extent of the public interest in the function in question.

8. It will be relevant to consider the nature and extent of any statutory power or duty in relation to the function in question. This will throw light on the nature and extent of the state's concern and of the responsibility (if any) undertaken. Conversely, the absence of any statutory intervention will tend to indicate parliamentary recognition that the function in question is private and so an inappropriate subject for public regulation.

9. Also relevant will be the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question, and imposes criminal penalties on those who fall below publicly promulgated standards in performing it. This is an indicator of the state's concern that the function should be performed to an acceptable standard. It also indicates the state's recognition of the importance of the function, and of the harm which may be done if the function is improperly performed.

10. It will be relevant to consider whether the function in question is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay. The greater the state's involvement in making payment for the function in question, the greater (other things being equal) is its assumption of responsibility.

11. It will be relevant to consider the extent of the risk, if any, that improper performance of the function might violate an individual's Convention right. In some fields, such as sport, the risk of infringing a Convention right might appear to be small; in relation to certain of the arts, the potential impact of article 10, for instance, could obviously be greater.

12. Certain factors are in my opinion likely to be wholly or largely irrelevant to the decision whether a function is of a public nature. Thus it will not ordinarily matter whether the body in question is amenable to judicial review. Section 6(3)(b) extends the definition of public authority to cover bodies which are not public authorities but certain of whose functions are of a public nature, and it is therefore likely to include bodies which are not amenable to judicial review. In considering whether private body A is carrying out a function of a public nature, it is not likely to be relevant that public body B is potentially liable for breach of an individual's Convention right. The effect of the Act may be that both A and B are liable. It will in my

opinion be irrelevant whether an act complained of as a breach of a Convention right is likely to be criminal or tortious: the most gross breaches of the Convention – the improper taking of life, inhumane treatment, unjustified deprivation of liberty – will ordinarily be both criminal and tortious.

13. It is necessary to stress that no summary of factors likely to be relevant or irrelevant can be comprehensive or exhaustive. The present question may arise in widely varying contexts and on widely varying facts. Other factors may then call for consideration.

14. The nature of the function with which this case is concerned is not in doubt. It is not the mere provision of residential accommodation but the provision of residential accommodation plus care and attention for those who, by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.

15. Historically, the attitude of the state towards the poor, the elderly and the incapable has not been uniformly benign. But for the past 60 years or so it has been recognised as the ultimate responsibility of the state to ensure that those described in the last paragraph are accommodated and looked after through the agency of the state and at its expense if no other source of accommodation and care and no other source of funding is available. This is not a point which admits of much elaboration. That the British state has accepted a social welfare responsibility in this regard in the last resort can hardly be a matter of debate.

16. Sections 21 and 26 of the National Assistance Act 1948 confer statutory powers and impose a statutory duty. The duty is imposed on the relevant local authority. It may be discharged by arranging for the provision of residential care in a home run by itself, or by another local authority, or by a voluntary organisation (such as the Leonard Cheshire Foundation) or by a private provider such as Southern Cross. These are alternative means by which the responsibility of the state may be discharged. Counsel for the Birmingham City Council laid great emphasis on the fact that its duty under the Act is to arrange and not to provide. This is correct, but not in my view significant. The intention of Parliament is that residential care should be provided, but the means of doing so is treated as, in itself, unimportant. By one means or another the function of providing residential care is one which must be

performed. For this reason also the detailed contractual arrangements between Birmingham, Southern Cross and Mrs YL and her daughter are a matter of little or no moment.

17. The provision of residential care is the subject of very detailed control by statute, regulation and official guidance, and criminal sanctions apply to many breaches of the prescribed standards. Little is left to chance, or the judgment of the particular provider.

18. Some of those for whom residential care is provided pursuant to sections 21 and 26 of the 1948 Act pay the full cost of the service they receive. A majority are subsidised to a greater or lesser extent out of public funds. No difference of legal principle depends on the group to which a particular resident, if accommodated and cared for pursuant to sections 21 and 26, belongs. The significant thing is that the state is willing to apply public funds to support those falling within sections 21 and 26 if, and to the extent that, they cannot pay for themselves, rather than leave them unaccommodated and uncared for. Those who need residential care but are able (through themselves or their families or other agents) to arrange it and pay for it fall into a different category, altogether outside sections 21 and 26. It is indicative of a function being public that the public are, if need be, bound to pay for it to be performed.

19. Those who qualify for residential care under sections 21 and 26 are, beyond argument, a very vulnerable section of the community. With children, mental patients and prisoners they are among the most vulnerable. Despite the intensive regulation to which care homes are subject, it is not unknown that senile and helpless residents of such homes are subjected to treatment which may threaten their survival, may amount to inhumane treatment, may deprive them unjustifiably of their liberty and may seriously and unnecessarily infringe their personal autonomy and family relationships. These risks would have been well understood by Parliament when it passed the 1998 Act. If, as may be confidently asserted, Parliament intended the Act to offer substantial protection of the important values expressed in the articles of the Convention given domestic effect by the 1998 Act, it can scarcely have 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.

20. When the 1998 Act was passed, it was very well known that a number of functions formerly carried out by public authorities were now carried out by private bodies. Section 6(3)(b) of the 1998 Act was clearly drafted with this well-known fact in mind. 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.

LORD SCOTT OF FOSCOTE

My Lords,

21. The opinions on this appeal prepared by my noble and learned friends Baroness Hale of Richmond, Lord Mance and Lord Neuberger of Abbotsbury, which I have had the advantage of reading in draft, have described the facts that have given rise to this appeal and have lucidly explained the fairly complex statutory background applicable to the management of privately owned care homes and to the use of them made by local authorities pursuant to their statutory duties and responsibilities under the National Assistance Act 1948. I gratefully adopt, and hope not to repeat unnecessarily, my noble and learned friends' exposition.

22. The issue which your Lordships must decide, as expressed in paragraph 18 of the order of Ryder J of 12 September 2006, is whether the second Respondent, Southern Cross Healthcare Ltd ("Southern Cross"), "in providing care and accommodation for YL [the appellant] is exercising a public function for the purposes of section 6(3)(b) of the Human Rights Act 1998". Bennett J held, on 5 October 2006, that it was not. The Court of Appeal, on 30 January 2007, agreed: [2007] 2 WLR 1097. But these decisions are challenged before the House by YL, supported by the Secretary of State for Constitutional Affairs and by Justice, Liberty, the British Institute of Human Rights, Help the Aged and Age Concern England, each an independent body. It is convenient to refer, briefly, to the statutory and factual background to the formulation of this preliminary issue.

23. The Human Rights Act 1998 incorporated into our domestic law the rights referred to in a number of specified articles of the European

Convention on Human Rights. Section 6(1) of the Act said that "it [was] unlawful for a public authority to act in a way which [was] incompatible with …" any of these rights. The section did not contain any comprehensive definition of "public authority" but subsection (3)(b) said that a "public authority" included "any person certain of whose functions are functions of a public nature". However subsection (5) said 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."

The effect of all this is that an act (or an omission) of a private person or company that is incompatible with a Convention right is not unlawful under the 1998 Act (it may, of course, be unlawful under ordinary domestic law) unless the person or company has at least some "functions of a public nature"; but even if that condition is satisfied the private person or company will not have any liability under the 1998 Act if the nature of the act complained of was private.

24. YL became a resident in one of Southern Cross' care homes on 3 January 2006. She became a resident under the terms of an agreement with Southern Cross signed on 20 February 2006. The agreement was signed on YL's behalf by her daughter. By a letter of 21 June 2006 Southern Cross gave the daughter 28 days' notice to terminate YL's right to remain in the care home. The agreement allowed Southern Cross to give four weeks' notice of termination but a contractual undertaking had been given by Southern Cross to Birmingham City Council ("the council") that notice of termination would be given "only for a good reason". There are unresolved issues as to whether Southern Cross did have "a good reason". YL contends that the notice given by Southern Cross was incompatible with her right under article 8 of the Convention to respect for her home and was unlawful under section 6(1) of the 1998 Act. Hence the preliminary issue directed by Ryder J to be tried.

25. The reason why I have referred to this statutory and factual background is that there are, in my opinion, two issues for your Lordships to consider; first, whether, for subsection (3)(b) purposes Southern Cross has functions of a "public nature", and, second, whether Southern Cross' act in serving notice to terminate its agreement with YL

was an act the nature of which, for subsection (5) purposes, was "private".

26. My Lords, on both the issues to which I have referred I have reached the same conclusion for much the same reasons as my noble and learned friends Lord Mance and Lord Neuberger. To express in summary terms my reason for so concluding, Southern Cross is a company carrying on a socially useful business for profit. It is neither a charity nor a philanthropist. It enters into private law contracts with the residents in its care homes and with the local authorities with whom it does business. It receives no public funding, enjoys no special statutory powers, and is at liberty to accept or reject residents as it chooses (subject, of course, to anti-discrimination legislation which affects everyone who offers a service to the public) and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors.

27. A number of the features which have been relied on by YL and the intervenors seems to me to carry little weight. It is said, correctly, that most of the residents in the Southern Cross care homes, including YL, are placed there by local authorities pursuant to their statutory duty under section 21 of the 1948 Act and that their fees are, either wholly or partly, paid by the local authorities or, where special nursing is required, by health authorities. But the fees charged by Southern Cross and paid by local or health authorities are charged and paid for a service. There is no element whatever of subsidy from public funds. It is a misuse of language and misleading to describe Southern Cross as publicly funded. If an outside private contractor is engaged on ordinary commercial terms to provide the cleaning services, or the catering and cooking services, or any other essential services at a local authority owned care home, it seems to me absurd to suggest that the private contractor, in earning its commercial fee for its business services, is publicly funded or is carrying on a function of a public nature. It is simply carrying on its private business with a customer who happens to be a public authority. The owner of a private care home taking local authority funded residents is in no different position. It is simply providing a service or services for which it charges a commercial fee.

28. The position might be different if the managers of privately owned care homes enjoyed 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 the care home premises. The managers do, of course, have private law duties of care to all their

residents and these duties of care may sometimes require, for the protection of a resident, or of fellow residents, from harm, the exercise of a degree of control over the resident that might in other circumstances be tortious. When the Mental Capacity Act 2005 comes into force acts of that sort, in relation to persons who lack mental capacity, may attract a statutory defence to any civil action (see sections 5 and 6 of the Act). This, however, really does no more than place common law defences of self-defence or necessity on a statutory basis and does not, in my opinion, advance any argument about the "public nature" of the function being carried on by care homes.

29. An argument heavily relied on in support of the appeal has been a comparison of the management by a local authority care home with the management of a privately owned care home. There is no relevant difference, it is pointed out, between the activities of a local authority in managing its own care homes and those of the managers of privately owned care homes. The function of the local authority is unquestionably a function of a public nature, so how, at least in relation to residents the charges for whom are being paid by the local authority, can the nature of the function of the managers of a privately owned care home be held to be different? So the argument goes. There are, in my opinion, very clear and fundamental differences. The local authority's activities are carried out pursuant to statutory duties and responsibilities imposed by public law. The costs of doing so are met by public funds, subject to the possibility of a means tested recovery from the resident. In the case of a privately owned care home the manager's duties to its residents are, whether contractual or tortious, duties governed by private law. In relation to those residents who are publicly funded, the local and health authorities become liable to pay charges agreed under private law contracts and for the recovery of which the care home has private law remedies. The recovery by the local authority of a means tested contribution from the resident is a matter of public law but is no concern of the care home.

30. As it seems to me, the argument based on the alleged similarity of the nature of the function carried on by a local authority in running its own care home and that of a private person running a privately owned care home proves too much. If every contracting out by a local authority of a function that the local authority could, in exercise of a statutory power or the discharge of a statutory duty, have carried out itself, turns the contractor into a hybrid public authority for section 6(3)(b) purposes, where does this end? Is a contractor engaged by a local authority to provide lifeguard personnel at the municipal swimming pool a section 6(3)(b) public authority? If so, would a local

authority employee engaged by the local authority as a lifeguard at the pool become a public authority? Could it be argued that his or her function was a function of a public nature? If Southern Cross is a section 6(3)(b) public authority, why does it not follow that each manager of each Southern Cross care home, and even each nurse or care worker at each care home would, by reason of his or her function at the care home, be a section 6(3)(b) public authority?

31. These examples illustrate, I think, that it cannot be enough simply to compare the nature of the activities being carried out at privately owned care homes with those carried out at local authority owned care homes. It is necessary to look also at the reason why the person in question, whether an individual or corporate, is carrying out those activities. A local authority is doing so pursuant to public law obligations. A private person, including local authority employees, is doing so pursuant to private law contractual obligations. The nature of the function of privately owned care homes, such as those owned by Southern Cross, no different for section 6 purposes from that of ordinary privately owned schools or privately owned hospitals (nb some schools and hospitals may have special statutory powers over some pupils and patients eg reformatories in the olden days and mental hospitals these days), seems to me essentially different from that of local authority care homes.

32. It has been suggested that vulnerable elderly residents in care homes are in need of the extra protection that potential liability of private care home managers under section 6 of the 1998 Act would provide, and that section 6(3)(b) should be given a wide and generous construction accordingly. There is nothing, in my opinion, in this suggestion. It is common ground that it is a responsibility of government and, through government, of local authorities to establish a regulatory framework to provide legal remedies to those in care homes whose rights under the Convention might be breached by those in charge of them (see the cases cited by Lord Mance in paragraphs 93 and 94 of his opinion). This regulatory framework is in place. A feature, or consequence, of it is that an obligation by Southern Cross to observe the Convention rights of residents is an express term of the agreement between the council and Southern Cross and is incorporated into the agreement between Southern Cross and YL. Any breach by Southern Cross of YL's Convention rights would give YL a cause of action for breach of contract under ordinary domestic law. No one has suggested that the contractual arrangements between the council and Southern Cross and between Southern Cross and YL are not typical. There is, in my opinion, 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. I would add that the ability of an inmate in a care home to challenge on article 8 grounds the efficacy of a notice to quit that was otherwise contractually effective would be subject to the same considerations that were explored and ruled upon by this House in *Kay v Lambeth London Borough Council* [2006] 2 AC 465.

33. For the reasons I have given I am unable to conclude that Southern Cross, in managing its care homes, is carrying on a function of a "public nature" for section 6(3)(b) purposes, whether the contractual charges are payable in respect of residents who are privately funded or are met out of public funds.

34. As to the act of Southern Cross that gave rise to this litigation, namely, the service of a notice terminating the agreement under which YL was contractually entitled to remain in the care home, the notice was served in purported reliance on a contractual provision in a private law agreement. It 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. In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank* [2004] 1 AC 546 (referred to by Lord Mance in paragraph 87 of his opinion) the act, or acts, of the Parochial Church Council held by the House to be private in nature were the steps taken to recover from private individuals the cost of repair to the chancel of the parish church. Lord Nicholls of Birkenhead accepted that to some extent the state of repair of the church building affected rights of the public but said that a contract by the PCC with a builder could hardly be regarded as a public act (para 16). Lord Hope of Craighead, explaining why the nature of the acts of the PCC were private, said that the liability of the defendants, lay rectors, to repair the chancel arose as a matter of private law (para 63) He went on, at para 64:

> "The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt"

Lord Hope's emphasis was on the private law nature of the obligations sought to be enforced by the PCC. So here, the notice served by Southern Cross, whether rightly or wrongly served, falls, in my opinion, to be tested by reference to YL's rights and Southern Cross' obligations under the agreement between them; by reference, that is to say, to

private law. It was, in my opinion, an act the nature of which, for section 6(5) purposes, was private.

35. For these reasons, supplemental to those of my noble and learned friends Lord Mance and Lord Neuberger, with which I am in full agreement, I would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

36. Many services which used to be provided by agencies of the state are now provided, not by employees of central or local government, but by voluntary organisations or private enterprise under contract with central or local government. The issue before us is of great importance, both to the many hundreds of thousands of clients of those services and to the organisations and businesses which provide them. To what extent, if at all, are they covered by the Human Rights Act 1998 ('the 1998 Act')?

37. Under section 6(1) of the Act, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. 'Public authority' is nowhere exhaustively defined, but by section 6(3)(b) it includes 'any person certain of whose functions are functions of a public nature'. However, in relation to any particular act, section 6(5) provides that 'a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private'. The broad shape of the section is clear. 'Core' public authorities, which are wholly 'public' in their nature, have to act compatibly with the Convention in everything they do. Other bodies, only certain of whose functions are 'of a public nature' have to act compatibly with the Convention, unless the nature of the particular act complained of is private. The law is easy to state but difficult to apply in individual cases such as this.

The facts

38. The appellant is an 84 year old woman with Alzheimer's disease. She and her family have lived in the area governed by Birmingham City

Council ('the council') for many years. Since January 2006 she has been living in a nursing home owned and run by the second respondent ('the company'), a limited company which provides approximately 29,000 care home beds in the United Kingdom. Of these approximately 80% are funded by local authorities. When these proceedings began, 60 of the 72 residents in the appellant's home, including the appellant, were funded by local authorities and 12 paid privately.

39. The company has a contract with the council ('the service provision contract'). Under this, the company undertakes to provide accommodation for the residents placed with them by the council in accordance with the terms of the agreement and of the council's care plan for each individual resident. In return, the council agrees to pay the 'SSD price' for each 'SSD resident' (SSD stands for Social Services Department). In addition to residential care, the company also undertakes to provide the appropriate level of nursing care assessed to be needed for each resident, and the local NHS Primary Care Trust agrees to pay for this.

40. Among the many detailed provisions about the standards of service to be provided are two of particular relevance to this case. Under clause 24.7.2, the service provider may only give notice of termination of a placement 'for a good reason'. And under clause 55.1:

> 'The Service Provider shall and shall ensure that its employees agents and officers shall at all times act in a way which is compatible with the Convention Rights within the meaning of section 1 of the Human Rights Act 1998.'

41. The recitals to the agreement refer to the statutory duty of the council 'to make arrangements for providing residential accommodation for persons in need of care and attention which is not otherwise available to them pursuant to section 21 of the National Assistance Act 1948' (clause 4.1) and to the duty of the Primary Care Trust 'to assess and provide for the Registered Nursing Care needs of the SSD residents who are resident at the care home, pursuant to the directions and guidance' of the Secretary of State (clause 4.3). I shall return to the statutory framework in due course.

42. For each SSD resident there is also a care home placement agreement, made between the council, the company and the resident (or someone acting on her behalf). This is expressly subject to and includes the specification and conditions of the current service provision contract between the council and the company. The company agrees to provide a service to the resident in accordance with that contract and with the individual resident's care plan. The resident agrees to pay direct to the council (unless directed otherwise) whatever sums the council has determined should be paid by the resident. The council undertakes to meet its obligations under the service provision contract, which expressly include arranging assessments and formal reviews of the resident's needs.

43. Coupled with the placement agreement there may also be a third party funding agreement. Under this a third party (usually a relative) agrees to pay a weekly 'top up' amount 'because the home chosen has a fee which is greater than the council would usually expect to pay'. In this case, the appellant's daughter agreed to pay an extra £35 per week, on top of the SSD price. The NHS contribution to the costs of nursing care was assessed at £129 per week.

44. In addition to the placement agreement, there is an agreement between the company, the council, the resident and the resident's receiver detailing, among other things, the specific accommodation and services to be provided and the payment arrangements. This agreement is to continue in force until terminated by the death of the resident or by four weeks' notice in writing (clause 7.1). The company undertakes that it will 'normally' only give notice if the fees are not promptly paid, the home is no longer able to meet the resident's needs, or the company 'considers the circumstances or behaviour of the resident to be seriously detrimental to the home or the welfare of other residents' (clause 7.2).

45. On 21 June 2006, the company wrote to the appellant's daughter stating that 'in light of the continuing and irreconcilable breakdown in relationship between yourself and the home management and staff I am writing to formally give 28 days written notice regarding your mother'. This was prompted by concerns, which are disputed, about the appellant's husband's behaviour towards the appellant and her daughter's behaviour towards staff. When it became apparent that the company intended to serve a formal notice to quit, the Official Solicitor launched proceedings on the appellant's behalf under the jurisdiction of the Family Division of the High Court to make declarations as to the best interests of people who are unable to take decisions for themselves.

46. Among the declarations sought was a declaration that the company, in providing accommodation and care for the appellant, was exercising public functions for the purpose of section 6 of the 1998 Act. Ryder J ordered that this be tried as a preliminary issue. Both the High Court [2006] EWHC 2681 (Fam) and the Court of Appeal [2007] EWCA Civ 26; [2007] 2 WLR 1097 decided this issue against the appellant, following the previous decision of the Court of Appeal in *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366; [2002] 2 All ER 936. Recognising the importance of the point, which has attracted considerable academic comment, the Court of Appeal gave leave to appeal to this House.

47. Happily, following the first hearing in the Family Division, the council agreed to fund supervised contact between the appellant, her daughter and husband. The company has since withdrawn the request to remove the appellant from the home. The parties are now in discussions about arrangements for unsupervised visits. This is welcome, because a consultant in the psychiatry of old age has reported that the appellant would certainly deteriorate clinically if she had to transfer to an unfamiliar care setting. It is also likely that any new care setting would be further away from her family home, making visiting more difficult for her 83 year old husband, who visits her every day. He therefore has an independent interest in his own human rights in these proceedings.

48. It is to be hoped, therefore, that the future of this appellant is now more secure. The issue remains of great importance for the many thousands of other 'SSD residents' who are looked after in care homes run by private companies or voluntary organisations.

The statutory framework

49. The National Assistance Act 1948 was part of the package of measures which created the modern welfare state. It stood alongside the Children Act 1948, which is the origin of our modern child care services, the National Insurance Act 1946, which laid the foundations of the modern social security system, and the National Health Service Act 1946, which created the National Health Service. The Education Act 1944 had already led the way in the fight against what Sir William Beveridge had called the 'five giants on the road of reconstruction' – Want, Disease, Ignorance, Squalor and Idleness (*Social Insurance and Allied Services, Report by Sir William Beveridge* (1942) (Cmd 6404). The education and health services were universal, in the sense that they

were available to all, and originally without any charge, irrespective of ability to pay. But people who could afford to do so remained, and still remain, free to make their own arrangements if they wish. The social services were more limited, in that it was expected that families would continue to look after their children and their elderly or disabled relatives. But the social services were there to provide a safety net for those whose families could not look after them and from the start people were expected to pay what they could afford for the accommodation with which they or their children were provided. Once again, of course, there was nothing to prevent those with the means to do so from making their own arrangements.

50. Section 21(1)(a) of the National Assistance Act 1948 originally required each local authority to provide 'residential accommodation for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them' . Accommodation could be provided either in homes owned and run by the authority, or by another local authority (section 21(4)), or by a voluntary organisation (section 26), but not by private persons. Residents were required to pay for their local authority accommodation according to their ability to pay (section 22). Where accommodation was arranged with a voluntary organisation, the local authority was liable to pay for it and could then recoup a means-tested contribution from the resident (section 26(2) and (3)). Schemes were later replaced with ministerial approval and directions (Local Government Act 1972, section 195(3)) and the relevant words of section 21(1) amended to read '. . . a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing . . . .' (1972 Act, section 195(6), Schedule 23, para 2(1)). Ministerial directions required that provision be made for people ordinarily resident in the area (DHSS Local Authority Circular 13/74).

51. But supply was never able to match demand. Many older people were accommodated in private residential homes but paid for by the state, through the means tested benefits system rather than by local authorities. This was widely regarded as inefficient and expensive, because there was no professional assessment of whether the resident really needed this expensive form of care, rather than to be helped to remain in her own home, nor was there any systematic control of the cost (see Audit Commission, *Making a Reality of Community Care*, (1986) Griffiths, *Community Care: Agenda for Action: A Report to The Secretary of State for Social Services,* (1988). The result was Part III of the National Health Service and Community Care Act 1990. Under this, each local authority must prepare and publish a strategic plan for the

provision of community care services in their area (section 46). They were instructed to develop a 'mixed economy of care' making use of voluntary, not for profit and private providers whenever this was most cost-effective. They were to move away from the role of exclusive service provider and into the role of service arranger and procurer (Department of Health and others, *Caring for People: Community Care in the Next Decade and Beyond* (1989) (Cm 849). To this end, section 26 of the 1948 Act was amended to allow them to place residents with private providers as well as with voluntary organisations. The charging arrangements remained broadly the same, primary liability remaining with the local authority.

52. At the same time, local authorities were placed under a duty to carry out an assessment of the need for community care services of any person who might be in need of them (1990 Act, section 47(1)(a)) and then to decide whether those needs called for the provision by them of any such services (section 47(1)(b). 'Community care services' include arranging or providing accommodation under section 21(1) of the 1948 Act (section 46(3)). If the person may also need health care under the National Health Service Act 1977, the local authority must invite the relevant health body to assist in the assessment. A large slice of the social security budget was transferred to local authorities to enable them to meet these new responsibilities.

53. The appellant's case was a good example of how the system is supposed to work. She was first assessed as needing residential care in January 2005, but the family decided to continue looking after her at home with the help of social services. But eventually her health deteriorated to the extent that they could no longer do so. The local authority arranged the placement with the care home provider and undertook to meet the charges under the tripartite contractual arrangements described above. The local authority has a continuing duty of assessment and remains responsible for the resident's welfare. The local NHS Primary Care Trust assessed her health care needs, and found them to be in the high band, entitling her to a weekly contribution towards the nursing component in her care. This is paid direct to the nursing home and will reduce the amount which the local authority would otherwise have to pay. The NHS contribution would also go to reduce the fees payable by a purely private resident for whom otherwise the contractual arrangements are quite different.

The Human Rights Act 1998

54. The purpose of the 1998 Act, as has so often been said, was to ensure that people whose rights under the European Convention on Human Rights had been violated would have an effective domestic remedy in the courts of this country, as required by article 13 of the Convention, and would not have to seek redress in the European Court of Human Rights in Strasbourg. In the Labour party's consultation paper, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law* (December 1996), by Jack Straw and Paul Boateng, it was said that:

> "We take the view that the central purpose of the ECHR is to protect the individual against the misuse of power by the state. The Convention imposes obligations on states, not individuals, and it cannot be relied upon to bring a case against private persons.
>
> For this reason we consider that it should apply only to public authorities – government departments, executive agencies, quangos, local authorities and other public services. An appropriate definition would be included in the new legislation and this might be framed in terms of bodies performing a public function. We would welcome views on this."

The Government's white paper, *Rights brought home: the Human Rights Bill* (1997) (Cm 3782), explained the resulting clause in the Bill thus:

> "The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies); local government; the police; immigration officers; prisons; courts and tribunals themselves; and, to the extent that they are exercising public functions, companies responsible for areas of activity which were previously within the public sector, such as privatised utilities." (para 2.2)

It is also worthwhile quoting the explanation given by the then Home Secretary, Mr Jack Straw, at the second reading of the Bill in the House of Commons (Hansard (HC Debates) 16 February 1998, col 773):

> "Under the Convention, the Government are answerable in Strasbourg for any acts or omissions of the state about which an individual has a complaint under the Convention. The Government have a direct responsibility for core bodies, such as central Government and the police, but they also have a responsibility for other public authorities, in so far as the actions of such authorities impinge upon private individuals.
>
> The Bill had to have a definition of a public authority that went at least as wide and 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."

55. Two points emerge clearly from these extracts. One is that it was envisaged that purely private bodies which were providing services which had previously been provided by the state would be covered. The second is that the Government were anxious that any acts for which the United Kingdom might later be held responsible in Strasbourg would be covered by the domestic remedies. Hence the definition would go 'at least as wide' as that.

56. Strasbourg case law shows that there are several bases upon which a state may have to take responsibility for the acts of a private body. The state may have delegated or relied upon the private body to fulfil its own obligations under the Convention: as in *Van der Mussele v Belgium* (1983) 6 EHRR 163, in which the provision of legal aid was delegated to the Belgian bar which required young advocates to provide their services pro bono; or, perhaps, in *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112 where the fact that education is itself a convention right was influential in engaging the state's responsibility for corporal punishment in private schools. The state may have delegated some other function which is clearly a function of the state to a private body: as in *Wós v Poland* (Application No 22860/02) (unreported) 1 March 2005, where the Polish Government delegated to a private body the task of allocating compensation received from the German Government after World War II. The state may itself have assisted in the violation of convention rights by a private body: as in *Storck v Germany*

(2005) 43 EHRR 96, where the police had assisted in the illegal detention of a young woman in a private psychiatric hospital by taking her back when she ran away.

57. Above all, the state has positive obligations under many articles of the Convention to take steps to prevent violations of an individual's human rights. These include taking general steps, such as enacting laws to punish and deter such violations: as in *X and Y v The Netherlands* (1985) 8 EHRR 235, where Dutch law did not afford an effective remedy to a mentally disabled girl who had been raped by a relative of the directress of the care home where she lived. They also include making effective use of the steps which the law provides: as in *Z v United Kingdom* (2001) 34 EHRR 97, in which a local social services authority did not use its powers to protect children whom they knew to be at risk of serious abuse and neglect.

58. Positive obligations arise under each of the articles most likely to be invoked by residents in care homes. Article 3 may afford them protection against inhuman and degrading treatment. Article 8 may afford protection against intrusions into their privacy, restrictions on their contacts with family and the outside world, and arbitrary removal from their home. Article 5 may afford protection against deprivation of liberty. Regrettably, examples abound in the literature (I hasten to add, none of it with reference to the company involved in this case) of care homes where acts which might well amount to breaches of articles 3 or 8 are commonplace but might not amount to the criminal offence of ill-treatment or neglect. The following example is taken from Jenny Watson, *Something for Everyone: The impact of the Human Rights Act and the need for a Human Rights Commission* (2002) (British Institute of Human Rights):

> "An agency worker told us about going into a residential care home for older people at breakfast time. She was instructed to get the residents up and onto their commode. She was then told to feed them breakfast. When she started to get the residents off their commodes first she was stopped. The routine of the home was that residents ate their breakfast while sitting on the commode and the ordinary men and women who worked there had come to accept this as normal."

59. Happily, there is now evidence in the literature that invoking human rights values in support of residents has produced change. The following example comes from Sonya Sceats, *The Human Rights Act – Changing Lives* (2007) (British Institute of Human Rights):

> "A learning disabled man in a care home became very anxious about bathing after slipping in the bath and injuring himself. Afterwards, in order to reassure him and build his confidence once again, a carer, usually female, would sit in the room with him as he bathed. His female carers felt uncomfortable with the arrangement. . . A discussion of the human rights principle of dignity had served as a 'trigger' for [one carer] and together with co-workers she was able to develop solutions that would both protect the man's dignity, whilst also providing him with the support he needed."

60. There is, of course, a difference between the negative obligation of the state to refrain from violating an individual's rights and the positive obligation of the state to protect an individual from the violations of others. But the case of *Storck v Germany* (2005) 43 EHRR 96 is a good example of the willingness of the Strasbourg court to find several reasons for holding a state responsible for violations caused by private bodies. The most effective way for the United Kingdom to fulfil its positive obligation to protect individuals against violations of their rights is to give them a remedy against the violator.

Functions of a public nature

61. This is a domestic law concept which has no parallel in the Convention jurisprudence although the extracts quoted above give some indication of why it is in the Act. It is common ground that it is the nature of the function being performed, rather than the nature of the body performing it, which matters under section 6(3)(b).The case of *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 relied too heavily upon the historical links between the local authority and the registered social landlord, rather than upon the nature of the function itself which was the provision of social housing.

62. The contrast is drawn in the Act between 'public' functions and 'private' acts. This cannot refer to whether or not the acts are performed in public or in private. There are many acts performed in public (such as singing in the street) which have nothing to do with public functions. And there are many acts performed in private which are nevertheless in the exercise of public functions (such as the care of prisoners or compulsory psychiatric patients). The contrast is between what is 'public' in the sense of being done for or by or on behalf of the people as a whole and what is 'private' in the sense of being done for one's own purposes.

63. Hence it is common ground that 'functions of a public nature' include the exercise of the regulatory or coercive powers of the state. Thus, were a public authority to have power to delegate the task of regulating care homes to a private body, that regulation would be a function of a public nature. Again, it is common ground that privately run prisons perform functions of a public nature. In a similar category are private psychiatric hospitals when exercising their powers of compulsory detention under the Mental Health Act 1983: see *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610, 2619. This is so, even though the power to detain rests with the hospital managers rather than with a state body by whom it has been delegated.

64. The respondents argue that the concept should go no further than this. The appellants, with the support of all the interveners including the Secretary of State for Constitutional Affairs, would go further. As Lord Nicholls of Birkenhead pointed out in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 555, para 10, 'the phrase used in the Act is public function, not governmental function'. He went on, in paras 11 and 12:

> ". . . Giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.
>
> What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these function are discharged today. 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."

65. Those factors tell heavily in favour of section 6(3)(b) applying to this case. While there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest.

66. One important factor is whether the state has assumed responsibility for seeing that this task is performed. In this case, there can be no doubt that the state has undertaken the responsibility of securing that the assessed community care needs of the people to whom section 21(1)(a) of the National Assistance Act 1948 applies are met. In the modern 'mixed economy of care', those needs may be met in a number of ways. But it is artificial and legalistic to draw a distinction between meeting those needs and the task of assessing and arranging them, when the state has assumed responsibility for seeing that both are done.

67. Another important factor is the public interest in having that task undertaken. In a state which cares about the welfare of the most vulnerable members of the community, there is a strong public interest in having people who are unable to look after themselves, whether because of old age, infirmity, mental or physical disability or youth, looked after properly. They must be provided with the specialist care, including the health care, that they need even if they are unable to arrange or pay for it themselves. No-one can doubt that providing health care can be a public function, even though it can also be provided purely privately. This home was providing health care by arrangement with the National Health Service as well as social care by arrangement with the local social services authority. It cannot be doubted that the provision of health care was a public function.

68. Another important factor is public funding. Not everything for which the state pays is a public function. The supply of goods and ancillary services such as laundry to a care home may well not be a public function. But providing a service to individual members of the public at public expense is different. These are people for whom the public have assumed responsibility. There may be other residents in the

home for whom the public have not assumed responsibility. They may not have a remedy against the home under the Human Rights Act, although there may well be circumstances in which they would. But they will undoubtedly benefit from the human rights values which must already infuse the home's practices as a result of clause 55.1 of the service provision contract.

69. Another factor is whether the function involves or may involve the use of statutory coercive powers. All in-patients receiving treatment for psychiatric disorder are potentially vulnerable to detention under section 5 of the Mental Health Act 1983. This means that their capacity for self-determination is diminished and their vulnerability to human rights abuses increased even before any compulsory powers are invoked. Currently, the Mental Capacity Act 2005 provides for the restraint of a person who lacks the capacity to decide for herself, but only in that person's best interests and if certain conditions are fulfilled: see sections 5(1), 6(1) to (4). It does not provide for the deprivation of liberty within the meaning of article 5(1) of the Convention, whether or not the defendant is a public authority: see section 6(5).

70. However, the unregulated deprivation of liberty which is frequently practised upon people who lack the capacity to decide for themselves under the common law doctrine of necessity has been held to contravene article 5 of the Convention: see *HL v United Kingdom* (2004) 40 EHRR 761. Given the approach of the Strasbourg court in *Storck v Germany* (2005) 43 EHRR 96, it is perhaps unlikely that the United Kingdom would be absolved from responsibility for deprivations of liberty taking place in private care homes. Hence 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. The use or potential use of statutory coercive powers is a powerful consideration in favour of this being a public function.

71. Finally, then, there is the close connection between this service and the core values underlying the Convention rights and the undoubted risk that rights will be violated unless adequate steps are taken to protect them.

72. The fact that other people are free to make their own private arrangements does not prevent a function which is in fact performed for

this person pursuant to statutory arrangements and at public expense from being a function of a public nature. People are free to provide their own transport rather than to use the publicly provided facilities. People are free to arrange their own health care rather than to use the National Health Service. Nor does the fact that people pay for or towards the service they receive necessarily prevent its provision being a function of a public nature. National Health Service dentistry is no less a function of a public nature because those patients who can afford to do so pay for it. I accept that not every function which is performed by a 'core' public authority is necessarily a 'function of a public nature'; but the fact that a function is or has been performed by a core public authority for the benefit of the public must, as Lord Nicholls pointed out in *Aston Cantlow* [2004] 1 AC 546, be a relevant consideration.

Conclusion

73. Taken together, these factors lead inexorably to the conclusion that the company, in providing accommodation, health and social care for the appellant, was performing a function of a public nature. This was a function performed for the appellant 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). The Court of Appeal was wrong to reach a different conclusion on indistinguishable facts in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936. Furthermore, an act in relation to the person for whom the public function is being put forward cannot be a "private" act for the purpose of section 6(5) (although other acts, such as ordering supplies, may be). The company is therefore potentially liable to the appellant (as well as to the council) for any breaches of her Convention rights.

74. We have not been concerned with whether her rights have been or might be breached in this case. It is common ground that the company may seek to justify any invasions of her qualified rights. Whether 'the rights … of others' for this purpose includes the rights of the company itself is a question for another day. But it is also common ground that the company, being a 'non-governmental organisation' for the purpose of article 34 of the Convention, may complain of violations of its own Convention rights, as pointed out by Lord Nicholls in *Aston Cantlow* [2004] 1 AC 546, para 11. Any court would have to strike a fair balance between the competing rights.

75. For these reasons, in amplification of those given by my noble and learned friend, Lord Bingham of Cornhill, with which I agree, I would allow this appeal and make the declaration sought.

LORD MANCE

My Lords,

Introduction

76. Does a privately owned, profit-earning care home providing care and accommodation for a publicly funded resident have "functions of a public nature", and is it therefore a public authority, under section 6(3)(b) of the Human Rights Act 1998? The second respondent, Southern Cross Healthcare Ltd ("Southern Cross") is such a care home. It has some 29,000 beds in the United Kingdom. About 80% of its residents benefit by full or partial local authority funding. The appellant, YL, is 84 years old and suffers from Alzheimer's Disease. She has lived in a Southern Cross care home since 3 January 2006. Her residence is largely funded by the first respondent, Birmingham City Council ("the council"). It is covered by a "three way" placement agreement signed on 20 February 2006 by Southern Cross as "the provider [homeowner]", the council and the third respondent, OL (YL's daughter), acting on behalf of YL, as well as by a third party funding agreement between the council and OL. Under these agreements Southern Cross receives a basic fee from the Council and a top-up fee from OL. A further tri-partite agreement dated 10 March 2006 records that Southern Cross's fee was £478 per week including the top up fee of £35 per week, and that each party [ie the council and YL/OL] "will only be liable for their own agreed proportion".

77. The council in arranging the placement acted pursuant to its duty under section 21 the National Assistance Act 1948. Because Southern Cross's fee for residence in the care home chosen by or on behalf of YL was greater than the council would usually expect to pay, the council was only obliged to agree to the placement upon a third party (YL or, in this case, OL) agreeing to meet the top up fee: section 54 of the Health and Social Care Act 2001 and regulation 4 the National Assistance (Residential Accommodation) (Additional Payments and Assessment of Resources) (Amendment) (England) Regulations 2001 (SI 2001/3441).

In May 2006 the local primary care trust, South Birmingham NHS, authorised additional higher band nursing care, pursuant to its responsibility under section 3 of the National Health Service Act 1977, and section 49 of the Health and Social Care Act 2001, and an additional weekly figure (around £130) became payable on that account by South Birmingham NHS to Southern Cross. Although in the case of YL Southern Cross thus received fees under three heads from three sources, in the case of other residents and/or care homes fees for care and accommodation could be covered by a simple arrangement between the local authority and the care home. There were also resident in YL's and other care homes a number of "self-funders", that is residents who or whose relatives had arranged their own placement and met their fees themselves.

78. The issue of principle which the House must address is general and continuing, although the particular difficulties which led to this litigation have happily resolved themselves. They arose from allegations (strongly disputed) about the conduct of OL and YL's husband, VL, during visits, followed by a notice given by the care home to OL to have YL moved. In response YL invoked section 6(3)(b) of the Human Rights Act and article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms against Southern Cross as well as the council. The potential relevance of the issue is not confined to article 8. If, under section 6(3)(b) of the Act, the Convention applies against Southern Cross, then in other circumstances (not suggested as applicable in this case) other articles of the Convention – such as some or all of articles 3 to 5 and 9 to 11 – might apply. Further, if the Convention applies, then relatives such as YL's husband, VL, might in some circumstances be able directly to invoke the Convention (eg under article 8 in respect of the right to visit). However, the domestic case law in this field to date suggests that the main impact of the Convention, if applicable, would be in the area of closure of care homes or termination of residence for other reasons.

79. Whether the Convention applies under section 6(3)(b) does not depend upon whether other common law, statutory or contractual protection anyway exists. But on each side reference has been made to the extensive regulation of care homes, generally under statute and contractually in the case of this particular care home. Under the Care Standards Act 2000 and the Care Homes Regulations 2001 (SI 2001/3965), any care home must establish its fitness and obtain registration from the Commission for Social Care Inspection ("CSCI"). Its operations must comply with substantial and detailed regulations, backed by a procedure for complaints to the CSCI and in many cases by

criminal sanctions. Under section 23 of the 2000 Act, the Secretary of State for Health is empowered to prepare and publish statements of national minimum standards. These are to be taken into account by the CSCI in relation to registration and in any proceedings for an offence under the regulations. The third edition of such national minimum standards *Care Homes for Older People* published in February 2003 extends to over 91 pages. Standard 13 requires service users to be able to have visitors of their choice in private at any reasonable time.

80. As to contract, the tripartite placement agreement incorporated (cf the opening paragraph of its Introduction and clauses 1 and 2(5)) a set of general contractual conditions agreed between the council and Southern Cross. These restricted Southern Cross's right to give notice of termination to circumstances where it had "good reason" (clause 24.7.2). Southern Cross also undertook that its service to residents would comply with the national minimum standards published under section 23 (clause 6.2.1), and that its employees, agents and officers would "at all times act in a way which is compatible with the Convention rights within the meaning of section 1 of the Human Rights Act 1998" (clause 55.1). That general tort and criminal law would also cover abuse of residents is evident. But, as stated, the issue for decision by the House does not depend upon the existence of protections other than the Convention.

Section 6(1)

81. Section 6(1) of the Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(3) includes in the concept of a public authority "(a) a court or tribunal and (b) any person certain of whose functions are functions of a public nature". But section 6(5) provides 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". Thus, the section identifies two types of public authority – "core" public authorities who are to be so regarded in relation to all their functions and "hybrid" persons with functions both of a public and of a private nature who are only to be so regarded when the nature of their particular act under consideration is public rather than private.

The parties' submissions

82. The interpretation and application of section 6(3)(b) have been left by Parliament to the courts. A range of approaches to section 6(3)(b) was advocated before the House. Mr Andrew Arden QC for the council and Miss Beverly Lang QC for Southern Cross distinguish the council's public law functions in placing and funding YL in the care home from Southern Cross's private law activities under contract in running the care home. In contrast, Mr David Pannick QC for YL and Miss Helen Mountfield for OL and VL describe Southern Cross as performing functions of the State, in the form here of the council. Thus, in reply, Mr Pannick suggested that Parliament was in section 6(3)(b):

> "primarily concerned about functions which the State has decided should be performed in the public interest, with the State accepting responsibility (by legislation or some other public instrument such as a Direction) for ensuring that the function is performed, whatever the legal status of the person who performs the function, especially if the function is performed at public expense (even if subject to a means test), and especially if the function is linked to Convention rights for which the State is answerable".

Mr Pannick invited the House to confine its attention to care homes. But some consideration of wider implications is necessary. On Mr Pannick's formulation, any contractor agreeing with a governmental authority to supply goods or services, the supply of which fulfils a responsibility incumbent on that authority in the public interest, will itself in that regard be a public authority. Mr Pannick suggested that section 6(3)(b) would exclude "incidental" services undertaken by private contractors such as window cleaning, but it is not easy to see on what principle, at least if the cleaning was of premises let by the council to its tenants rather than of the council's offices.

83. Mr Philip Sales QC for the Secretary of State for Constitutional Affairs as intervener was, in contrast, concerned to look more widely. He advances a nuanced, "factor-based" test, with limitation of the application of section 6(3)(b) avowedly in mind. He submits that contracting out by a governmental authority of services involved in a particular function of that authority does not of itself make the contractor a public authority. Other factors have to be examined. In his submission Southern Cross was and is a public authority within section 6(3)(b) because its services discharge the local authority's duty, are publicly funded, are subject to detailed and intensive regulation and are not services which the beneficiaries of the services could provide for

themselves, and there is an immediate and direct link between the services and Convention rights, such that State responsibility might be engaged by the manner of their performance.

84. In oral submissions Mr Sales added that, had Southern Cross had coercive powers (eg to detain), that would have been another pointer. In written submissions after the hearing, Mr Sales suggests that this last factor applies to this case in the light of section 22(5)(b) of the Care Standards Act 2000 and regulation 13(7)(8) Care Homes Regulations, and will be reinforced when the Mental Capacity Act 2005 come into force. But in my view the former provisions do no more than reflect the common law doctrine of necessity, and anyway only operate in limited circumstances, while the 2005 Act, not yet in force, will apply (expressly) to all carers whether or not they are a public authority, and is neutral. None of these provisions assists analysis of the general activity of providing accommodation and care to care home residents.

85. Mr Sales also suggests, as a further factor, that the existence of an essentially private or personal element in a relationship between a service provider and the beneficiary (as with fostering) would point against any conclusion that the provider (eg a foster parent) was a public authority. But Mr Pannick responds that it is often where there are private relationships that the protection of the Convention is most needed, and Mr Fordham for Justice, Liberty and the British Institute of Human Rights as interveners positively asserts that foster parents are a public authority under section 6(3)(b). Another category which Mr Sales argues falls outside section 6(3)(b) is the private landlord, with whom or which a local authority makes arrangements for the provision of accommodation in discharge of its duties to the homeless under section 188, 190, 200 or 204(4) of the Housing Act 1996. Mr Pannick would wish to leave that open, while Mr Fordham submits that private landlords generally should be seen as falling within section 6(3)(b), whenever the accommodation is paid for by public funding, even if only by housing benefit. In the event, I consider that it is unnecessary and unwise to follow Mr Sales and Mr Fordham into any definite analysis of these particular cases, the circumstances of which have not been examined at all closely before the House.

Guidance to the interpretation of section 6(3)(b)

86. Section 6(3)(b) is a domestic law provision with no direct parallel in European human rights or domestic jurisprudence. Various guides to

its interpretation have been suggested. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] QB 48, para. 65, Lord Woolf CJ considered that section 6 was "clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review". Several recent authorities (eg *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin); [2002] 1 WLR 2610 and *R (Beer) (trading as Hammer Trout Farm) v Hampshire Farmers' Markets Ltd* [2003] EWCA Civ 1056; [2004] 1 WLR 233) have indeed assimilated the tests.

87. However, it is clear from the House's decision in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 AC 546 and *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100 that, while authorities on judicial review can be helpful, section 6 has a different rationale, linked to the scope of State responsibility in Strasbourg. In the latter case (at para 29), my noble and learned friend Lord Bingham of Cornhill said of the Act's general aim that:

> "…. the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg."

In *Aston Cantlow,* section 6 was specifically addressed. My noble and learned friend Lord Nicholls of Birkenhead said (para 6):

> " …. the broad purpose sought to be achieved by section 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights".

The rationale was further spelled out by my noble and learned friend Lord Rodger of Earlsferry (paras 160 to 163) who said:

> "160 …. Prima facie, …. , when Parliament enacted the 1998 Act …. , the intention was to make provision in our domestic law to ensure that the bodies carrying out the functions of government in the United Kingdom observed the rights and freedoms set out in the Convention. Parliament chose to bring this about by enacting inter alia section 6(1), which makes it unlawful for "a public authority" to act in a way that is incompatible with a Convention right. A purposive construction of that section accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs."

In paragraph 163 Lord Rodger concluded that:

> "In the present case the question therefore comes to be whether a PCC is a public authority in the sense that it carries out, either generally or on the relevant occasion, the kind of public function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs."

My noble and learned friends Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote, all, I understand, accepted this rationale at paras 52, 87 and 129 respectively. Lord Hope observed that, although the domestic case law on judicial review might be helpful, it could not be determinative of what is a core or hybrid public authority and "must be examined in the light of the jurisprudence of the Strasbourg Court as to those bodies which engage the responsibility of the State for the purposes of the Convention".

88. Section 6(3)(b) merely elucidates section 6(1), to which Lord Nicholls and Lord Rodger referred in paras 6 and 160. Further, Lord Rodger's use of the phrase "either generally or on the relevant occasion" in para 163 makes explicit that the rationale applies as much to the identification of a person exercising a function of a public nature under section 6(3)(b) as it does to the identification of a core public authority.

89. A second point which emerges from *Aston Cantlow* is that, with the general purpose of section 6 thus identified, the rule in *Pepper v.*

Hart [1993] AC 593 provides no further assistance. In paras 161 to 162, Lord Rodger expressly rejected a submission that reference to Hansard was permissible as an aid to construing the term "public authority" in section 6 (adding only that, had it been, it would have confirmed his view). Lord Hope agreed (para 37) that the Court of Appeal had (in rejecting a contrary submission based on *Pepper v Hart*: cf [2001] EWCA Civ 713; [2002] Ch 51, para 29) rightly declined to look at Hansard for assistance. Lord Scott, in agreeing (para 129) with the reasons given by Lord Hope and Lord Rodger for concluding that the parish council of Aston Cantlow was not a core public authority, can, as I read his opinion, also be taken to have agreed with their rejection of Hansard, although disagreeing on the application of section 6(3)(b). No submission was made to the House to the effect that any of these statements was wrong, or that *Pepper v Hart* has any greater relevance on this appeal than in *Aston Cantlow.*

90. The House was shown two substantial, and informative, reports of the Joint Committee on Human Rights of the House of Lords and House of Commons on "The Meaning of Public Authority under the Human Rights Act" (the Seventh Report of Session 2003-04, HL Paper 39 and HC 382, and the Ninth Report of Session 2006-07, HL Paper 77 and HC 410). But, so far as these reports recite particular statements made during either House's consideration of the 1998 Act (which, on any issue relevant to this appeal, seem to have been very limited), such statements must be left on one side. So far as these reports proceed on the basis that Parliament had any particular intention, that is the issue which the House has to determine according to relevant principles of statutory construction.

91. Thirdly, Lord Nicholls at paras 7 to 12 in *Aston Cantlow* expressed more detailed views on the characteristics of those bodies or persons which might constitute either core or hybrid public authorities. At para 7, he said that "behind the instinctive classification" as "governmental", and as core public authorities, of organisations such as government departments, local authorities, the police and the armed forces lay "factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution"; and he referred to an article by Professor Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act": [2000] PL 476, as valuable in this connection. At para 9 he explained section 6(3)(b) as addressing situations where in the interests of efficiency and economy or otherwise, functions of a governmental nature were discharged by non-governmental bodies, sometimes as a

result of privatisation, sometimes not. He gave as "obvious" examples the running of prisons by private organisations and the discharge of regulatory functions by organisations in the private sector such as the Law Society, or one might add the Bar Council. Further, while a core public authority was disabled from having any Convention rights (cf article 34), a hybrid authority was not so disabled in respect of any act of a private nature, and:

> "Giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary" (para 11).

Finally, there was, in his view, "no single test of universal application" to decide whether a function was of a public nature, "given the diverse nature of governmental functions and the variety of means by which these functions are discharged today". However:

> "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" (para 12).

Lord Nicholls's view supports not only a broad application of section 6(3)(b) but also a factor-based approach such as Mr Sales in particular advocated. On the other hand, none of Lord Nicholls's specific examples is close to the present case.

State responsibility in the Strasbourg case law

92. In the light of the rationale of section 6 identified in *Aston Cantlow*, it is logical to start by considering whether Strasbourg case law offers any clear guidance on the scope of State responsibility in the present field. In my opinion it lacks any case directly in point. But two relevant principles appear. First, the State may in some circumstances be responsible for failure to take positive steps to regulate or control the activities of private persons where there will otherwise be a direct and

immediate adverse impact on a person's Convention protected interests. Second, the State may in some circumstances remain responsible for the conduct of private law institutions to which it has delegated state powers. The case law does not always distinguish clearly between these principles.

93. Examples of the first principle are *Botta v Italy* (1998) 26 EHRR 241 and *Marzari v Italy* (1999) 28 EHRR CD 175 (failure to protect an individual's right to respect for private life) and *Z v United Kingdom* (2001) 34 EHRR 97 (local authority's failure to protect children known to be suffering ill-treatment). In *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [2003] LGR 423, Sullivan J on the same principle held responsible a local authority which in breach of article 8 failed to act for over 20 months on assessments of need under section 47 of the National Health Service and Community Care Act 1990, which should have led it to arrange care and accommodation under section 21 of the National Assistance Act 1948, as amended.

94. *Storck v Germany* (2005) 43 EHRR 96 falls under the same principle. The Federal Republic was responsible in respect of the applicant's confinement in a private clinic in circumstances not authorised by a court or any other state entity, in view of (a) the lack at the time of any system for supervision by state authorities of the lawfulness and conditions of confinement of persons treated in such a clinic, and (b) the use of police force to return the applicant to the clinic after she had fled (paras 90 and 91). At one point (para 103), the European Court of Human Rights in *Storck* noted that the State could not "completely absolve itself from its responsibility" by delegating its obligations:

> "…. the State is under an obligation to secure to its citizens their right to physical integrity under article 8 of the Convention. For this purpose there are hospitals run by the State which co-exist with private hospitals. The State cannot completely absolve itself from its responsibility by delegating its obligations in this sphere to private bodies or individuals."

This was followed by a reference to *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112 and the observation that "similarly, in the present case, the State remained under a duty to exercise supervision and control over private psychiatric institutions" (para 103). It is clear that the basis

of responsibility in *Storck* was not some general responsibility for every misdeed in the clinic, but responsibility under the first principle for the State's supervisory and policing failures.

95. *Costello-Roberts* itself is not an easy case to analyse. This is because the court held that there was in fact no breach of any Convention duty. The issue was whether the particular corporal punishment ("slippering") suffered by a pupil in a private school had infringed his Convention rights, and it was held that it was not of a severity to infringe either of articles 3 and 8. But the court started by considering the State's potential responsibility, in which regard the United Kingdom argued "the English legal system had adequately secured the rights guaranteed by articles 3 and 8 …. by prohibiting the use of any corporal punishment which was not moderate or reasonable" (para. 26). The court concluded however that in "the particular domain of school discipline, the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the Convention if it proves to be incompatible with article 3 or article 8 or both". The basis was said to be the State's duty to secure to its children their right to education, including an appropriate school disciplinary system, which "cannot be said to be merely ancillary to the educational process", the co-existence of independent and state schools, in circumstances where the right to education is guaranteed equally to pupils in both, and the State's inability to "absolve itself from responsibility by delegating its obligations to private bodies or individuals" (para 27). While the Court in *Storck* treated the State in *Costello-Roberts* as responsible under the first principle, the actual reasoning in *Costello-Roberts* is open to the wider interpretation that the State may under the second principle have a non-delegable or vicarious responsibility for education, at least for such acts of a private school as may be said to be central to its educational role. In Professor David Feldman's *Civil Liberties and Human Rights in England* 2nd ed (2002) p 97, he suggests that other aspects of a private school's activities, such as its contractual relations with parents, could fall outside its public functions. This might in turn suggest that termination of contractual relations would fall outside the Convention protections. It was along such lines that Buxton LJ [2007] 2 WLR 1097 may have been thinking in the present case when he suggested that "a hybrid body may be directly impleaded in the protection of some Convention rights but not of others" (para 78). But this was not a theme pursued by any side before the House.

96. Footnotes to the relevant passages in both *Costello-Roberts* and *Storck* refer to *Van der Mussele v Belgium* (1983) 6 EHRR 163. That

case concerned a complaint by a pupil advocate that he was compelled to represent clients without fee. It was the Belgian State's obligation under article 6(3)(c) of the Convention to administer a system of free legal assistance in criminal matters. Belgian domestic legislation in turn obliged the Belgian Bar Association to provide such a system. As the European Court of Human Rights said, "legislation 'compels them to compel' members of the Bar to 'defend indigent persons'". The Court continued: "Such a solution cannot relieve the Belgian State of the responsibilities it would have incurred under the Convention had it chosen to operate the system itself" (para 29). In the next sentence, the court pointed out that the domestic legislation expressly obliged pupil advocates to act in cases assigned under the free legal assistance scheme. In the event and since pupil advocates had chosen to enter the profession, the legislative scheme was held consistent with the Convention. The case was not so much one of potential responsibility for delegated acts, as one of potential responsibility for the State's own legislative scheme.

97. The second principle is that the State may in some circumstances remain responsible for the manner of performance of essentially state or governmental functions or powers which it has chosen to delegate to a private law institution. Examples are provided by *Wós v Poland* (Application No 22860/02) (unreported) 1 March 2005 and *Sychev v Ukraine* (Application No 4773/02) (unreported) 11 October 2005. In *Wós* a Minister in the Polish cabinet in 1991 established the Polish-German Reconciliation Foundation under the Foundations Act 1984, a statute enabling persons to establish private law foundations to carry out socially and economically useful goals complying with the basic interests of the Republic. The Minister and his successor had as founder full control over appointments to the Foundation's boards, over the amendment of its statute and its dissolution. The Foundation's capital consisted of DEM 500m contributed by the Federal Republic of Germany under treaty with Poland, and the Foundation's role was to use such moneys to compensate victims of Nazi persecution. As a result of further international negotiations culminating in 2000 in an agreed Joint Statement signed by inter alia the Federal Republic and Poland, the Foundation also acquired in 2001 the role of disbursing to Polish resident claimants further moneys contributed by the Federal Republic and German companies to a German Foundation established to compensate victims of slave and forced labour. The court held that "the specific circumstances of the present case give rise to the conclusion that the actions of the Foundation …. in respect of both compensation schemes are capable of engaging the responsibility of the State" (para 74). It said that the State's choice of "a form of delegation in which some of its powers are exercised by another body cannot be decisive for

the question of State responsibility ratione personae" (para 72) and that delegation to a body operating under private law of the Polish State's obligations arising out of international agreements could not "relieve the Polish State of the responsibilities it would have incurred had it chosen to discharge these obligations itself, as it could well have" (para 73).

98. In *Sychev* the State had established a private law commission to which were delegated certain State powers relating to the execution of court judgments. The court did not find it necessary to discuss whether or not the commission was or was not in itself a State authority for the purposes of article 34, but said that "It suffices to note that the body in question exercised certain State powers at least as regards the execution of court judgments" (para 54). The distinction drawn may be seen as mirroring that between core and hybrid public authorities in English domestic law. The court went on to say that "the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law" (para 54). It also made points about the absence of any judicial or administrative control over the commission which could have invoked the first principle I have mentioned.

The relevance of European case law

99. The first principle does not assist to determine whether Southern Cross is a public authority under section 6. State and governmental bodies have an important role in regulating and supervising the activities of many private bodies and persons, including care homes. But it is not suggested that Southern Cross occupied any such regulatory or supervisory role. The second principle recognises that there may be certain essentially state or governmental functions, particularly involving the exercise of duties or powers, for the manner of exercise of which the State will remain liable, notwithstanding that it has delegated them to a private law body. It is necessary to consider whether the provision of care and accommodation in a private care home under an arrangement made with a local authority falls within this principle. The above analysis confirms that Strasbourg case law contains no case directly in point. In contrast with *Sychev*, a private care home does not acquire or exercise any obvious State power or duty. In contrast with both *Wós* and *Sychev*, it is not established and capitalised by the State for state purposes. The ambit and significance of the reasoning in *Costello-Roberts* is less clear, but the case concerns the very different field of education, where the court may, on one view, have considered

that any activity bearing centrally on the provision of education was a non-delegable State function, whether it is provided by a state or under private contractual arrangements in a private school. The case does not indicate that the same can or should be said of the provision of care and accommodation.

The meaning of section 6(3)(b) in domestic law

100. Coming against this background to the interpretation of section 6(3)(b), the phrases "public authority" and "functions of a public nature" are readily understandable and applicable in cases of what Lord Nicholls called "special powers" or functions of a "governmental" nature in *Aston Cantlow* [2004] 1 AC 546, paras 7 and 9. Thus, local authorities were granted power, by section 111(1) of the Local Government Act 1972, to do "any thing …. which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions", and in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, 29F Lord Templeman said that "the word 'functions' embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions".

101. On the other hand, as both *Aston Cantlow* and *R (West) v Lloyd's of London* [2004] EWCA Civ 506, [2004] 3 All ER 251 show, the mere possession of special powers conferred by Parliament does not by itself mean that a person has functions of a public nature. Such powers may have been conferred for private, religious or purely commercial purposes. Conversely, there can be bodies without special statutory powers amenable to judicial review, as shown by *R v Panel on Take-overs and Mergers, Ex p Datafin Plc* [1987] QB 815 and *R v Code of Practice Committee of the Association of the British Pharmaceutical Industry, Ex p Professional Counselling Aids Ltd.* (1991) 3 Admin LR 697, cited by Moses J in *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, 74b. In *Datafin*, the Panel was as a matter of fact entrusted with an extensive and vital regulatory role in the public interest, and that was sufficient to make it susceptible to judicial review. In *Code of Practice Committee*, applying *Datafin*, judicial review was available in respect of the administration by a trade association of a code of practice which it had voluntarily developed in conjunction with the Department of Health, and which was obligatory for members and followed in practice by non-members. I do not doubt that such bodies would in respect of their regulatory functions also constitute a public authority

under section 6(3)(b). In *Datafin* Sir John Donaldson MR said [1987] QB 815, 826, 834, 835 that:

> "Lacking any authority de jure, it [the take-over panel] exercises immense power de facto …."
>
> "…. the panel is a truly remarkable body, performing its function without visible means of legal support. But the operative word is 'visible', although perhaps I should have used the word 'direct'. Invisible or indirect support there is in abundance. Not only is a breach of the [City] code [on Take-overs and Mergers], so found by the panel, ipso facto an act of misconduct by a member of the Stock Exchange, and the same may be true of other bodies represented on the panel, but the admission of shares to the Official List may be withheld in the event of such a breach. …. "
>
> "The picture which emerges is clear. As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions."

102. The reasoning in *Datafin* has been welcomed for underlining the importance for the public of the role and de facto power exercised by the Take-over Panel, but regretted in so far as it retained as a supporting factor, in the passage at p 835, the imputed governmental source of the power: see Murray Hunt "Constitutionalism and the Contractualisation of Government in the United Kingdom" published in *the Province of Administrative Law* (ed Taggart) (1997), p 29. But it should be no surprise that the usual source of the "functions of a public nature" addressed by section 6(3)(b) is legislative or governmental, when section 6(3)(b) is intended to reflect in domestic law the scope of the State responsibility which the Convention addresses. The concept "governmental" or "of government" was found useful in *Aston Cantlow* by Lords Nicholls, Hope, Hobhouse and Rodger at paras 10, 49, 88 and 159. The existence and source of any special powers or duties must on any view be a very relevant factor when considering whether State responsibility is engaged in Strasbourg or whether section 6(3)(b) applies domestically. On this point, I prefer Mr Sales' submissions, that it is necessary to look at the context in which and basis on which a contractor acts, to Mr Pannick's submission, that all that is appropriate is to look at what a contractor "does". There is, for example, a clear conceptual difference between the functions of a private firm engaged

by a local authority to enforce the Road Traffic Regulation Act 1984, as amended, on a public road and the activities of the same firm engaged by a private land-owner or a local authority to enforce a private scheme or parking restrictions of which notice have been given on a private property or estate. Mr Pannick in his own submissions seeks to identify what Southern Cross does by reference to the duties which the council owes.

103. Typical State or governmental functions include powers conferred and duties imposed or undertaken in the general public interest. I shall not attempt to identify the full scope of the concept of "functions of a public nature", any more than Lord Nicholls did in *Aston Cantlow*. But some further consideration is appropriate of his suggested hallmarks of a public authority. As stated, these were, in the case of a core public authority and in addition to special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest and a statutory constitution. All these factors can readily be understood to throw light on the nature of a person's functions. When considering section 6(3)(b), Lord Nicholls suggested as factors, again in addition to statutory powers, the extent that a body is publicly funded or is "taking the place" of central government or local authorities or is providing a public service: [2004] 1 AC 546, para 12. These are more generally expressed factors, to which I address some further comments.

104. In the Court of Appeal Buxton LJ [2007] 2 WLR 1097, para 72 considered it arguable that Southern Cross did indeed "stand in the shoes of the local authority as it discharges its public duties under section 21", but Mr Pannick in my view rightly did not endorse that approach. That powers or duties may in some circumstances be delegated to others is clear - witness the examples, given by Lord Nicholls, of privately run prisons and the regulation (at that time) of the solicitors' profession by the Law Society or the example of the private contractor entrusted with responsibility for enforcing the Road Traffic Regulation Act. Section 101 of the Local Government Act 1972 enables a limited form of delegation, whereby arrangements may be made for the discharge of local authority functions by a committee or subcommittee or an officer of the authority or by any other local authority. More significantly, under section 70 of the Deregulation and Contracting Out Act 1994, the Secretary of State may specify statutory functions which may be discharged by a person other than the authority primarily responsible for them. Section 72 provides that any acts or omissions of a person so authorised shall be treated for all purposes as done or omitted to be done by or in relation to the authority. Examples

of such orders include the Contracting Out (Management Functions in relation to certain Community Homes) Order 1996 (SI 1996/586) and the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (SI 1996/3205). In such cases, while the acts or omissions are by statute attributed to the authority, there is a clear basis for regarding the authorised delegate as a person having functions of a public nature within section 6(3)(b). But no delegation of that sort exists in relation to the council's functions under section 21 of the 1948 Act.

105. Democratic accountability, an obligation to act only in the public interest and (in most cases today) a statutory constitution exclude the sectional or personally motivated interests of privately owned, profit-earning enterprises. Public funding and the provision of a public service are most easily understood in a similar sense. In a much looser sense, the self-interested endeavour of individuals usually works to the general benefit of society, as Adam Smith noted. But more than that is required under section 6(3)(b). The difficulty is where to draw the line. Public funding takes various forms. The injection of capital or subsidy into an organisation in return for undertaking a non-commercial role or activity of general public interest may be one thing; payment for services under a contractual arrangement with a company aiming to profit commercially thereby is potentially quite another. In every case, the ultimate focus must be upon the nature of the functions being undertaken. The deployment in *Poplar Housing* [2002] QB 48, apparently as a decisive factor in favour of the application of section 6(3)(b), of the close historical and organisational assimilation of Poplar Housing with the local authority is in my view open to the objection that this did not bear on the function or role that Poplar Housing was performing.

106. Other domestic legislation adopts the concept of public authority, in particular the Race Relations Act 1976 and the Freedom of Information Act 2000. The different contexts of these statutes mean that they offer very limited assistance in the construction of the Human Rights Act 1998. Their technique was to set out (differing) lists of bodies which were to be regarded as public authorities, either for all purposes or in respect of certain functions. The Race Relations Act thus lists various Royal Colleges (Anaesthetists, General Practitioners, Nursing, Surgeons, etc), the Bank of England and the BBC, the General Council of the Bar and the Law Society each "in respect of its public functions", as well as a large number of other bodies generally. Neither Act includes in its list any private company or organisation offering services comparable to those rendered by Southern Cross, though that is,

as stated, of little relevance in view of their different contexts. Of some interest is however a power conferred on the Secretary of State by section 5 of the Freedom of Information Act to designate as a public authority for the purposes of the Act any person not listed who either "(a) appears ….. to exercise functions of a public nature, or (b) is providing under a contract made with a public authority any service whose provision is a function of that authority". The careful distinction between (a) and (b) highlights the point that a person with whom a public authority contracts for a service which it is the function of that authority to provide is not axiomatically exercising a function of a public nature. Under the Freedom of Information Act, there might be reason to extend the benefit of the Act to such a person. But section 6(3)(b) of the Human Rights Act only extends the concept of a public authority to a person within (a).

Analysis of Southern Cross's role

107. In submitting that Southern Cross in providing care and accommodation has and is exercising functions of a public nature, Mr Pannick relies on the statutory framework which led to the council's involvement and to the placement of YL with Southern Cross. That consists primarily in the National Assistance Act 1948 as amended in (inter alia) 1972, 1990 and 1992. The Act as amended reads:

> **"**21 Duty of local authorities to provide accommodation
>
> (1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing—
>
> (a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; and
>
> (aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.
>
> ….
>
> (2A) In determining for the purposes of paragraph (a) or (aa) of subsection (1) of this section whether care and attention are otherwise available to a person, a local authority shall disregard so much of the person's resources as may be specified in, or determined in accordance with,

regulations made by the Secretary of State for the purposes of this subsection.

….

(4) Subject to the provisions of section 26 of this Act accommodation provided by a local authority in the exercise of their functions under this section shall be provided in premises managed by the authority or, to such extent as may be determined in accordance with the arrangements under this section, in such premises managed by another local authority as may be agreed between the two authorities and on such terms, including terms as to the reimbursement of expenditure incurred by the said other authority, as may be so agreed.

(5) References in this Act to accommodation provided under this Part thereof shall be construed as references to accommodation provided in accordance with this and the five next following sections … ."

108. Section 22 requires a local authority to recover from any person to whom accommodation is provided under section 21 a payment consisting of the full cost to the authority of providing such accommodation or such lower rate as the authority may assess that such person is able to pay. Section 26 provides:

"Provision of accommodation in premises maintained by voluntary organisations

(1) Subject to subsections (1A) and (1C) below, arrangements under section 21 of this Act may include arrangements made with a voluntary organisation or with any other person who is not a local authority where—

(a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a) or (aa) of that section, and

(b) the arrangements are for the provision of such accommodation in those premises.

(1A) Arrangements must not be made by virtue of this section for the provision of accommodation together with nursing or personal care for persons such as are mentioned in section 3(2) of the Care Standards Act 2000 (care homes) unless—

(a) the accommodation is to be provided, under the arrangements, in a care home (within the meaning of that

> Act) which is managed by the organisation or person in question; and
>
> (b) that organisation or person is registered under Part II of that Act in respect of the home."

109. Section 26(2) and (3) require arrangements made under section 26 to provide for payments by the local authority to the accommodation provider "at such rates as may be determined by or under the arrangements" and for the resident to refund the local authority either in full or according to his or her ability to pay. Section 26(3A) enables the local authority, the resident and the service provider to agree instead for the resident to pay direct to the provider any share that he or she would otherwise have to refund to the local authority and for the local authority to be liable only to pay the balance to the provider.

110. Mr Pannick submits that the 1948 Act gives effect to a basic state or public responsibility to *provide* care and accommodation for those in need. In *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366; [2002] 2 All ER 936, para 15, Lord Woolf CJ said:

> "If the authority itself provides accommodation, it is performing a public function. It is also performing a public function if it makes arrangements for the accommodation to be provided by LCF. However, if a body which is a charity, like LCF, provides accommodation to those to whom the authority owes a duty under section 21 in accordance with an arrangement under section 26, it does not follow that the charity is performing a public function."

Taking as his premise Lord Woolf's first two sentences, Professor Paul Craig argues with force that the nature of a function does not alter if it is contracted out, rather than performed in house ("Contracting Out, the Human Rights Act and the Scope of Judicial Review" (2002) 118 LQR 551). But Professor Dawn Oliver in the article in 2000 to which Lord Nicholls referred and in a later article in 2004 ("Functions of a Public Nature under the Human Rights Act", [2004] PL 329) pertinently observes that it is a fallacy to regard all functions and activities of a core public authority as inherently public in nature. All such functions and activities are subject to the Convention, because the authority is a core public authority. It only becomes necessary to analyse their nature, if and when they are contracted out to a person who is not a core public

authority. Some of them may then on analysis be private in nature. Reference to a core public authority performing a public function when providing care and accommodation is potentially confusing.

111. How then is the provision of care and accommodation to be regarded? The House was taken to the history and amendments of the 1948 Act and to the more remote background of the Poor Law abrogated by section 1 of that Act. Mr Pannick submits that the Act gave effect to an essential duty of the State to provide care and accommodation for the needy. As originally enacted, section 21 made it the duty of every local authority "to provide" residential accommodation for persons in need of care and attention not otherwise available to them. This function was under section 21(3) to be exercised in accordance with a scheme. The accommodation was under section 21(4) to be provided in premises managed by the local authority, or by another local authority on terms to be agreed between them. However, under section 21(5) references to accommodation provided were to be construed as references to accommodation provided in accordance with the five next sections, and section 26(1) stated that, notwithstanding anything in the foregoing provisions, a scheme under section 21 "may provide for the making by a local authority ….. of arrangements with a voluntary organisation managing any premises for the provision of accommodation in those premises".

112. In 1972, section 21 was amended to its present form, whereby a local authority's duty is expressed generally as being to "make arrangements for providing …. accommodation" not otherwise available for those in need of care and attention. With effect from 1 April 1993, as a result of amendments made in 1990 and 1992, sections 21 and 26 enable arrangements to be made not merely with a voluntary organisation, but also "with any other person who is not a local authority". In 2000 section 26(1A) was further amended by section 116 of, and paragraph 1(1)(3) of Schedule 4 to, the Care Standards Act 2000 to require any such arrangements for care and accommodation to be with a care home registered under the 2000 Act. Mr Pannick points out that in its modern form the 1948 Act still retains headings suggesting a duty of provision on the local authority (most obviously, the heading to section 21: "Duty of local authorities to provide accommodation").

113. In response, Mr Arden submits that the appellants' propositions are supported neither by history nor by the amended form of the legislation. As a matter of history, he observes that the State's duty to address the needs of the poor "often took the form of cash payments"

(Neville Harris, *Social Security Law in Context* (2000) p 71). Further, attention should focus on the modern form of the 1948 Act, and this 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.

114. In my view it is appropriate to focus on the modern form of the 1948 Act. This is particularly so when contracting with a care home such as Southern Cross only became possible from 1 April 1993, when the legislation was amended to formulate the local authority's duty as being to arrange care and accommodation. Neither the concept nor the extent of a function of a public nature is immutable in either national or European law (cf also per Lord Rodger in *Aston Cantlow* [2004] 1 AC 546, para 159). The modern legislation distinguishes clearly between a local authority with a statutory duty to arrange care and accommodation and a private company providing services with which the local authority contracts on a commercial basis in order to fulfil the local authority's duty to arrange care and accommodation. My noble and learned friend Lord Hoffmann summarised the effect of the modern form of legislation, aptly also for present purposes, in *R v Wandsworth London Borough Council, Ex p Beckwith* [1996] 1 WLR 60, 64C-D:

> "The duty of the council under section 21 is to make "arrangements" for providing residential accommodation for certain classes of people. Subsection (4) says that the accommodation must be managed by the local authority or by some other authority. But this is expressed to be subject to section 26, which says that "arrangements under section 21 of this Act" (not, notice, "*the* arrangements *made* under section 21 of this Act") may include arrangements with the private sector. The draftsman is therefore not saying that homes in the private sector may be included in the collective of homes which the council has to provide. He is saying that the *concept* of "arrangements" which has been used to define the council's duty in section 21 is to include arrangements with the private sector. This produces an altogether different result: it extends the meaning of the concept by which the council's duty is defined. Any arrangements which fall within the extended definition will satisfy the council's duty."

A rider that perhaps calls for mention is that it is not, and could not be, suggested that a local authority has no continuing duty in respect of the

suitability of a placement, once made. As Moses J observed in *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, 66d:

> "It remains under a duty to see that the applicants' needs are met and if necessary to re-assess them. It remains under an obligation to ensure that the arrangements which it has made continue to be sufficient to meet the needs of those qualified for such community care provision".

115. 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. The duty on a local authority under section 21 constitutes a safety net, conditional upon care and attention being "not otherwise available". In practice, this means that, if a person assessed as in need of care and accommodation has more than £21,000 capital and can arrange care and accommodation or (for example through relatives) make arrangements for it, then the local authority will not be further involved. In contrast with the position relating to the national health service, the default position is one in which the local authority is not involved. I can see no basis, and none was really suggested, on which a private care home could somehow be regarded as exercising functions of a public nature in providing care and accommodation for "self-funders", those who or whose relatives could fund and make their own arrangements. The local authority's involvement is aimed at making arrangements (including funding) which put those in need in effectively the same position as those "self-funders" Once such arrangements are made, the actual provision of care and accommodation is a different matter, which, as the modern legislation recognises, does not need actually to be undertaken by the local authority and can take place in the private sector, as it does for those who or whose relatives are able to make arrangements including funding for themselves.

116. In providing care and accommodation, Southern Cross acts as a private, profit-earning company. It is subject to close statutory regulation in the public interest. But so are many private occupations and businesses, with operations which may impact on members of the public in matters as diverse for example as life, health, privacy or financial well-being. Regulation by the State is no real pointer towards the person regulated being a state or governmental body or a person with a function of a public nature, if anything perhaps even the contrary. The private and commercial motivation behind Southern Cross's operations does in contrast point against treating Southern Cross as a person with a

function of a public nature. Some of the particular duties which it has been suggested would follow – a duty not to close the home without regard to the Convention right to a home of publicly funded residents, and perhaps even a duty to give priority to accepting such residents into the home – fit in my view uneasily with the ordinary private law freedom to carry on operations under agreed contractual terms, even accepting (as I would) that, if the Convention applied, a private care home would be able to invoke that freedom as a relevant factor under article 8(2).

117. A private care home company provides services for residents in its care homes, which do not – and should not – depend in their nature or quality on the person with whom it contracts to provide such services. Age Concern England in a memorandum dated January 2006 annexed to the Joint Committee of the House of Lords and House of Commons of March 2007 was aware of this, and observed that "it would also be inequitable if self-funders – who pay higher fees (often called the 'self-funders rate') – had less legal protection than residents whose lower fees are met by the local authority" (para 3.5). Age Concern's only antidote was to recommend some form of legislation (paras 8.4 to 8.5). In my view, however, a submission which leads to such a distinction being drawn under section 6(3)(b) of the Human Rights Act is inherently questionable. Care homes would be bound to be, and to make their staff, aware of the distinction between Human Rights Convention protected and other residents. If it came to an issue like closure of a wing of a home or relocation of some residents during works, there could be an incentive (it might be argued even a legal duty) to give priority to the wishes and demands of publicly funded residents. To distinguish between different residents in the same care home on the basis of their ability to make the relevant contractual arrangements necessary to gain entry to the home appears undesirable.

118. Some differences do of course exist between care home residents whose placement is arranged under section 21 and residents whose placement is privately arranged. Every resident, privately or publicly funded, must consent, either personally or through a representative, to being admitted to the particular care home. A privately funded resident has, subject to space and funds, a choice of care homes. A publicly funded resident also has the choice which care home to enter, at least if the necessary funds exist to meet any consequential top-up liability. All care home residents have common and criminal law rights not to be mistreated (including any claims that may, perhaps, exist for breach of statutory duty). But a privately placed resident will either be party to a contract with the care home or be resident as a result of a contract

covering his or her residence made by a representative or relative. In contrast, the only contract covering the publicly funded resident's placement may be between the local authority and the care home, although YL was through her representative party to the tripartite arrangements described at the start of this opinion. On the other hand, even if a publicly funded resident is not party to any contract with the care home, he or she will (unlike privately funded residents) have public law rights, including the right to invoke the protection of the Human Rights Convention, as against the local authority. These will enable him or her effectively to place on the local authority the onus to take any steps open to it as against the care home to protect the resident's human rights.

119. In my view the differences mentioned do not either justify or require a different approach to the application to the care home of the Convention as between privately and publicly funded residents in one and the same care home. Apart from any contractual arrangements, the care home should view and treat all such residents with equality. Their contractual arrangements differ, but not in any way which indicates that publicly funded residents need additional protection compared with privately funded residents. A publicly funded resident's Convention rights against the local authority may even mean that he or she is in some respects already more amply protected than a privately funded resident. As to the direct application of the Convention as against a care home, it is less incongruous to distinguish between residents in privately owned, profit-earning care homes on the one hand and residents in a local authority owned and managed care home on the other hand, than it is to distinguish between publicly and privately funded residents in one and the same care home. Residents in a local authority owned and managed care home have the protection of the Convention not because the function of providing care and accommodation for those in need is inherently public in nature, but simply because a local authority is a core public authority, all of whose activities are, whatever their nature, subject to the Convention under section 6(1) of the Human Rights Act.

120. The House was referred to a number of previous domestic authorities. The decision which I would reach on this appeal fits within them. Before the Human Rights Act came into force, in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, the court granted judicial review of a health authority's decision to close one of its National Health Service nursing homes; and in an illuminating judgment in *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, Moses J concluded that a private care home company was not exercising a public function in relation to residents placed with it under contract with the

local authority, in the absence of any statutory source or underpinning for its operations and although the nature of its activities was "a matter of public concern and interest". At p 81 Moses J said this was "not to say that a fresh approach ought not to be adopted so that the court can meet the needs of the public faced with the increasing privatisation of what were hitherto public functions", but that, if this was to be done, it would have to be in a higher court. For my part, however, his reasoning remains persuasive, and the essentially contractual source and nature of Southern Cross's activities differentiates them from any "function of a public nature", even though it is (as often in the private sector) a matter of public concern, interest and benefit that reputable, efficient and properly regulated providers of such services should exist.

121. In *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 Admin; [2002] 1 WLR 2610, Keith J held that section 6(3)(b) covered the functions performed by a mental nursing home registered under the Registered Homes Act 1984 in which the claimant, who had a severe personality disorder, was compulsorily detained pursuant to section 3(1) of the Mental Health Act 1983. He distinguished the circumstances before him, admission by compulsion, from those in the then first instance decision of Stanley Burnton J in *R (Heather) v Leonard Cheshire Foundation* [2001] EWHC 429 (Admin), residence by choice – a fact which, Keith J [2002] 1 WLR 2610, para 25 thought that Stanley Burnton J "rightly considered as critical". I agree.

122. Finally, in *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2003] EWCA Civ 1056; [2004] 1 WLR 233, the county council, which had previously run farmers' markets under statutory powers, set up a non-profit making company to run such markets on a contractual basis on publicly owned land to which the public had, and at common law had the right of, access for the sale of goods. The Court of Appeal held that, despite the lack of any statutory source or underpinning for the company's role, the company was both performing a function of a public nature under section 6(3)(b) and subject to judicial review. An important element in this decision was the common law right of access of the public to such markets, which was being regulated by the company in succession to the council: cf *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052. There is in the present case no such right or feature in relation to Southern Cross. Publicly funded residents have public law rights against the local authority, but no common law right of access to or residence in any private care home, other than under a contractual arrangement with whomsoever made.

Conclusion

123. For these reasons I would hold that Southern Cross in providing care and accommodation for YL was not and is not exercising functions of a public nature within section 6(3)(b) of the Human Rights Act 1998. I would leave entirely open the position of those operating in the different areas of health and education services, but I agree with the reasoning and conclusions regarding privately owned care homes such as Southern Cross's contained in the opinions of Lord Scott of Foscote and Lord Neuberger of Abbotsbury which I have had the benefit of seeing in draft. If further protection or regulation is considered to be necessary in respect of privately owned care homes, in addition to that which is available under common law or statute and for which local authorities may contract as indicated in paragraph 80 above, the means may already be available to achieve this under the Care Standards Act 2000. And, if additional protection is to be achieved by statutory means, it is no matter for regret that this should be done without distinguishing between residents in one and the same care home who on the one hand arrange and fund their own care and accommodation and others who on the other hand benefit from local authority assistance to arrange and fund such care and accommodation. I would accordingly dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

Introductory

124. Where a "person [is] by reason of age, illness [or] disability in need of care and attention which [would] not otherwise [be] available to [her]", the local authority "in whose area [she] is ordinarily resident" becomes liable, under sections 21(1)(a) and 24(1) of the National Assistance Act 1948 ("the 1948 Act") as amended, to "make arrangements for providing … residential accommodation" for her. By virtue of section 21(5), "accommodation" in this context extends to such "board and other services, amenities and requisites" as she needs, and in this speech I shall refer to these services as "care and accommodation". Such care and accommodation can be provided by the local authority itself (sections 21(4), 22 and 23), by another local authority (section

24(4)), or by "a voluntary organisation or … any other person [who] manages premises which provide for reward [such] accommodation" (section 26(1)).

125. The issue raised on this appeal is whether, in a case where a local authority performs its duty by arranging and paying for care and accommodation in a privately owned care home, the person concerned can claim that the proprietor of the care home is thereby someone "certain of whose functions are functions of a public nature" within the meaning of section 6(3)(b) of the Human Rights Act 1998 ("the 1998 Act"). The appeal arises from facts, and in a historical context, which are fully set out in the opinions of my noble and learned friends, Baroness Hale of Richmond and Lord Mance, which I have had the privilege of reading in draft.

126. I agree with the conclusion reached by Lord Mance, and with his reasons for reaching that conclusion. However, as the issue raised on this appeal is of some importance, and as it has resulted in a sharp difference of opinion in this House, it seems appropriate to explain my thinking, although, in doing so, I do not intend to detract from my agreement with Lord Mance's reasoning.

127. If the provision of care and accommodation in circumstances such as those of the instant case is a function falling within subsection (3)(b) of section 6 of the 1998 Act ("section 6"), then, by virtue of section 6(1), it would be "unlawful" for the proprietor of the care home "to act in a way which is incompatible with a Convention right" of that person. Thus, a resident of a privately owned care home, whose care and accommodation is paid for (in whole or in part), or even (possibly) whose care and accommodation has simply been arranged, by a local authority would have rights against the proprietor of the home ("the proprietor") in addition to those that would lie under contract, common law or purely domestic legislation.

128. While the issue can be relatively easily and briefly expressed and explained, it is much harder to resolve with confidence, as is demonstrated by the sharp difference of opinion revealed in the four preceding opinions. Any reasoned decision as to the meaning of section 6(3)(b) risks falling foul of circularity, preconception and arbitrariness. The centrally relevant words, "functions of a public nature", are so imprecise in their meaning that one searches for a policy as an aid to interpretation. The identification of the policy is almost inevitably

governed, at least to some extent, by one's notions of what the policy should be, and the policy so identified is then used to justify one's conclusion. Further, given that the question of whether section 6(3)(b) applies may often turn on a combination of factors, the relative weight to be accorded to each factor in a particular case is inevitably a somewhat subjective decision.

129. In the light of section 6(3)(b), section 6(1) has been interpreted as applying to two types of public authority, namely "core" public authorities "whose nature is governmental in a broad sense", and "hybrid" (or "functional") public authorities, only some of whose functions are of a public nature - see the discussion in the speech of Lord Nicholls of Birkenhead in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, at paras 7 to 9. Under section 6(5), an entity which would otherwise be a hybrid public authority is nonetheless not to be treated as such in relation to an act "the nature of [which] is private", but this exception does not apply to core public authorities.

130. Section 6 is, at least in some respects, not conspicuous for the clarity of its drafting. Thus, there was some debate before your Lordships as to whether there was a distinction between "acts" and "functions" in the section. In my view, both as a matter of ordinary language and on a fair reading of the section, there is a difference between "functions", the word used in section 6(3)(b), and "act[s]", the word used in section 6(2) and (5) and defined in section 6(6). The former has a more conceptual, and perhaps less specific, meaning than the latter. A number of different acts can be involved in the performance of a single function. So, if this appeal succeeds, a proprietor providing care and accommodation pursuant to section 26(1) of the 1948 Act would be performing a "function", which, while "of a public nature", would involve a multitude of acts, many of which would be private – eg contracting for the purchase of food or for the consumption of electricity.

131. Accordingly, a core public authority is bound by section 6(1) in relation to every one of its acts whatever the nature of the act concerned; there is therefore no need to distinguish between private and public acts or functions of a core public authority. On the other hand, a hybrid public authority is only bound by section 6(1) in relation to an act which (a) is not private in nature and (b) is pursuant to or in connection with a function which is public in nature.

132. Having made those preliminary points about section 6, I turn to the specific issue in the present case. In that connection, in the light of the arguments addressed to us, I propose to consider that issue in three stages. First, I shall discuss the individual specific factors which are said to bring the performance of a contract for the provision of care and accommodation between a proprietor and a resident, paid towards or arranged by a local authority pursuant to sections 21 to 26 of the 1948 Act, within the ambit of section 6(3)(b). Secondly, I shall address a policy argument based on those factors which involve "contracting-out", that is, the system whereby a core public authority, most commonly a local authority, contracts to pay a private company to carry out services which the authority is statutorily liable to provide. Thirdly and finally, I shall express my conclusion by considering these various factors together in the context of wider issues of principle.

A particulate analysis

133. It may be helpful to start by considering a simple case of a person who independently enters into a contract with a proprietor for the provision to her of care and accommodation in a privately owned care home. In such a case, I have some difficulty with the notion that the proprietor would be thereby performing a function within section 6(3)(b). Although Mr Pannick QC, for Mrs YL, did not concede this, Mr Sales QC, on behalf of the Secretary of State, did so. That concession was, in my view, at least on the face of it, realistic and correct. In such a case, there would simply be a private law contract for the provision of care and accommodation. At any rate at first sight, it is hard to see why, in performing such a contract, the proprietor would be carrying out a function "of a public nature".

134. Reliance was placed on the fact that care homes are subject to detailed rules and supervision under the provisions of the Care Homes Regulations 2001 (SI 2001/3965). That is not, in my opinion, a telling reason for saying that, in providing care and accommodation to a private person, the proprietor of a care home is carrying out a function of a public nature. There is no identity between the public interest in a particular service being provided properly and the service itself being a public service. As a matter of ordinary language and concepts, the mere fact that the public interest requires a service to be closely regulated and supervised pursuant to statutory rules cannot mean that the provision of the service, as opposed to its regulation and supervision, is a function of a public nature. Otherwise, for example, companies providing financial services, running restaurants, or manufacturing hazardous material

would ipso facto be susceptible to being within the ambit of section 6(1).

135. It was also said that it is in the public interest that the old and infirm are cared for, and that there are charities which offer the sort of services which care homes provide. In my opinion, that feature does something, but relatively little, to justify the view that section 6(3)(b) applies where care and accommodation are provided in a privately owned care home. The fact that a service can fairly be said to be to the public benefit cannot mean, as a matter of language, that it follows that providing the service itself is a function of a public nature. Nor does it follow as a matter of logic or policy. Otherwise, the services of all charities, indeed, it seems to me, of all private organisations which provide services which could be offered by charities, would be caught by section 6(1). It is in the public interest that health, education, housing, indeed food, is available to everyone. That cannot mean that those who provide such commodities on a commercial basis (including private hospitals, private schools, private landlords, and food retailers and distributors) therefore fall within the scope of section 6(3)(b).

136. It was also suggested that the fact that it will almost always be the vulnerable who are provided with care and accommodation in care homes indicates that such provision falls within section 6(3)(b). This point was advanced partly on the basis that the Strasbourg court has indicated that such people are entitled to particular protection under the Convention: see for example *Botta v Italy* (1998) 26 EHRR 241, para 32. I do not think that that point goes much further than the argument based on the quasi-charitable nature of, and the detailed regulations applicable to, the function. The fact that the vulnerable are entitled to particular protection ties in with the detailed regulatory regime which the government has imposed on those who run care homes, but it does not appear to me to go to the point in the present case.

137. The factors so far mentioned are not, I accept irrelevant to the issue that has to be decided on this appeal, but I do not find them persuasive on their own. Accordingly, subject to wider policy considerations indicating otherwise, it appears to me that a straightforward arrangement whereby a proprietor of a care home agrees to provide care and accommodation for a person under a private contract would not engage section 6(3)(b).

138. The same conclusion must logically apply where the contract for the provision of care and accommodation in a privately owned care home is arranged and/or paid for by a third party, such as a relative of the person concerned. In other words, by entering into (whether pursuant to an arrangement with that person or a third party) and performing a contract for the provision of care and accommodation for a person "who by reason of age, illness [or] disability [is] in need of care and attention which is not otherwise available to [her]", a care home proprietor does not appear to me to be performing a "function" which is, at least intrinsically, "of a public nature", at least in the absence of telling reasons of policy or principle to the contrary.

139. As I see it, the basis for justifying a different conclusion in this case essentially rests on three further factors. First, the contract whereby Southern Cross Healthcare Ltd agreed to provide Mrs YL with care and accommodation was made as a result of Birmingham City Council carrying out its duty to arrange for care and accommodation for Mrs YL under section 21(1) of the 1948 Act under its "umbrella agreement" with Southern Cross. Secondly, the majority of the care home charges for Mrs YL's care and accommodation were paid to Southern Cross by Birmingham, pursuant to the same statutory duty. Thirdly, Birmingham itself could have provided Mrs YL with care and accommodation pursuant to the 1948 Act.

140. While the statutory involvement of Birmingham can fairly be said to give the function performed by Southern Cross in providing care and accommodation for Mrs YL a public connection, I do not consider that it can, at least on its own, convert that function into one "of a public nature" which engages section 6(3)(b). Birmingham's function in connection with the provision of the care and accommodation, according to its counsel, Mr Arden QC, fairly can be described as being of a public nature, but that is not really in point for two reasons.

141. First, at any rate in the context of section 6, it is meaningless, and therefore potentially misleading, to describe a function of a core public authority as being "of a public nature", as that concept (like that of "an act which is private") has relevance only to hybrid authorities. Secondly, even if Birmingham performed a function of a public nature by arranging the care and accommodation in accordance with its statutory duty, that would not mean, either as a matter of logic or policy, that the actual provision of the care and accommodation to Mrs YL by Southern Cross pursuant to a private law contract must thereby be converted from what would otherwise be a function of a private nature into one of a

public nature. If the Ministry of Defence placed an order for military materiel with a private manufacturer, the Ministry could fairly be said, as a matter of ordinary language, to be carrying out a function of a public nature in placing the contract, but it would not follow, in my opinion, that the manufacturer would be carrying out a function of a public nature in performing the contract.

142. The fact that Southern Cross was paid by Birmingham for the provision in its care home of care and accommodation for Mrs YL does not appear to me to render such provision a "function of a public nature", at any rate on its own. It may well be that an activity of an entity which is not a core public authority is often unlikely to be a "function of a public nature" if it is not ultimately funded by a core public authority, but, again as a matter of logic and language, it cannot be a sufficient condition, in my view. Otherwise, the activities of every employee and every supplier of a core public authority would be within section 6(1).

143. The existence of the umbrella agreement between Birmingham and Southern Cross does not, in my view, take matters further. It merely reflects the fact that Birmingham recognises that it will have to perform its statutory duty under section 21(1) of the 1948 Act to a number of persons, and that it wishes to have the basis on which it gives effect to the "arrangements", which it has to make under section 21(1) of the 1948 Act, identified in advance.

144. The fact that Birmingham, as a core public authority, could have provided care and accommodation for Mrs YL in a care home which it ran itself seems to me to be a factor which assists the contention that Southern Cross is performing a function of a public nature, but only to a limited extent. It is certainly not a sufficient condition: indeed, it appears to me to be more like a necessary condition. While it would be wrong to be didactic in this difficult area, I suspect that it would be a relatively rare case where a company could be performing a "function of a public nature" if it was carrying on an activity which could not be carried out by any core public authority. On the other hand, I would not accept that the mere fact that a core public authority, even where it is the body funding the activity, could carry out the activity concerned must mean that the activity is such a function. Apart from anything else, there must scarcely be an activity which cannot be carried out by some core public authority.

The argument based on "contracting-out"

145. It is, I think, appropriate to consider in a little more detail the combined effect of two of the factors just discussed, namely the fact that Birmingham paid for the care and accommodation and the fact that Birmingham could have provided the care and accommodation itself. It was suggested that these two factors throw up a general point of principle, namely that section 6(3)(b) should apply to a case where a core public authority contracts-out one or more of its functions to a private company. This was a concern which weighed heavily with the Joint Committee [of the House of Lords and the House of Commons] on Human Rights, as may be seen in two of their reports on "The Meaning of Public Authority under the Human Rights Act" – [2003-4] HL Paper 39, HC 382 and [2006-7] HL Paper 77, HC 410.

146. There is undoubted force in the point that, if a person would have Convention rights if a service was provided by a core public authority, she should not lose them merely because the service is contracted-out by that authority to a private company. It is a point which has been made in a number of articles and reports. In paragraph 41 of the first of the two reports, quoted in support of Mrs YL's case before your Lordships, the Joint Committee said that it would mean that the existence of Convention rights would be "dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary (in human rights terms) criterion of the body's administrative links with institutions of the state". However, it seems to me that there are several countervailing arguments, some of which apply to the present type of case, while others are of more general application.

147. First, this is not a case of contracting out a duty: under the 1948 Act, Birmingham does have a duty to arrange for the provision of care and accommodation for Mrs YL, but it has no duty to provide such care and accommodation itself. The 1948 Act requires a local authority to arrange and, where necessary, to pay towards or for, care and accommodation for a person falling within section 21(1)(a); however, the 1948 Act does no more than to permit a local authority to provide the care and accommodation through its own care homes (and your Lordships were told Birmingham did not have any homes capable of providing for Mrs YL's needs).

148. Secondly, where a company carries on a business providing services for individuals, it appears to me that there is a difference

between (a) a core public authority supporting, or subsidising, the business generally (eg a care home all of whose expenses are met either as they arise or by a grant intended to cover all such expenses), and (b) such an authority funding services provided by the business to specific individuals (eg some or all of a care home's care and accommodation charges for a person who is not well off). I consider that it is easier in the former case to contend that the business as a whole is therefore a function "of a public nature", than it is in the latter case to contend that the services provided to the specific individuals constitute such a function. That is not so much because it seems unattractive to have two categories of resident in a single care home. It is more that section 6(3)(b) appears to me to be concerned primarily with "functions", or services, as such, rather than with the identity of the person who is paying for the provision of the services, or the reason for payment (although such factors are not, in my view, irrelevant). I agree in this connection with the views expressed by my noble and learned friend, Lord Scott of Foscote in paragraph 27 of his opinion which I have had the benefit of seeing in draft.

149. Thirdly, Mrs YL continues to enjoy Convention rights in respect of the provision of care and accommodation provided under section 21 of the 1948 Act against Birmingham, even after the care and accommodation was provided to her. It is true that, at least in some circumstances, those rights could be of somewhat less value in practice than if they existed against the proprietor, but I am not persuaded that any such disadvantage would be likely to be significant, let alone substantial. Further, as the documentation in this case illustrates, the contractual terms which a local authority is often able to impose on a proprietor of a care home with whom it makes arrangements under the 1948 Act may well ensure that a person's rights against the proprietor are pretty similar in practice to those which would be enjoyed against the local authority.

150. Fourthly, much of the concern of those who consider that contractors under contracting-out arrangements should have a Convention liability co-extensive with that which the contracting-out authority would have, is based on the nature of the powers given to contractors under such arrangements. This is illustrated by the reference to "the type of power" in the extract from paragraph 41 of the Joint Committee Report quoted above. In the present type of case, however, the proprietor of a care home is not given significant, if any, statutory powers, a point discussed in a little more detail below.

151. Fifthly, the arbitrariness identified in the same extract from the Joint Committee report, if this appeal fails, is at least equalled by the arbitrariness, if this appeal succeeds, of the existence of Convention rights of a private care home resident depending on whether her care and accommodation is being paid for (or was arranged by) the local authority, as opposed to herself or her family. Quite apart from that, I agree on the aspect with what Lord Scott says in paragraphs 29 and 30 of his opinion.

152. Sixthly and more generally, I consider that, in answer to the policy argument for allowing this appeal on the basis of contracting-out, there is a policy argument for dismissing it on the same basis. It is thought to be desirable, in some circumstances, to encourage core public authorities to contract-out services, and it may well be inimical to that policy if section 6(1) automatically applied to the contractor as it would to the authority. Indeed, unattractive though it may be to some people, one of the purposes of contracting-out 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. I am in no position to decide on the relative strength of the two competing policy arguments: that is a matter for the legislature. However, the fact that there are competing arguments makes it hard to justify the courts resolving the instant issue by reference to policy.

153. Seventhly, it does not seem to me that, as a matter of ordinary language, an activity is "a function of a public nature" merely because it is contracted-out, as opposed to its being provided directly, by a core public authority. If an activity were thereby automatically rendered such a function, it would mean that activities such as providing meals or cleaning and repairing buildings could be caught. Referring again to the Ministry of Defence contracting for the manufacture of military materiel, it seems to me that the private manufacturer's activities would not be within section 6(3)(b) even though the Ministry could have manufactured the materiel in its own factory.

A wider perspective

154. The factors which I have so far considered to support the case for saying that, by providing care and accommodation for Mrs YL pursuant to an agreement with Birmingham, Southern Cross was performing a "function which is public in nature" are, in summary form:

a. The existence and detailed nature of statutory regulation and control over care homes;
b. The provision of care and accommodation for the elderly and infirm is a beneficial public service;
c. The elderly and infirm are particularly vulnerable members of society;
d. The care and accommodation was provided pursuant to the local authority's statutory duty to arrange its provision;
e. The cost of the care and accommodation is funded by the local authority pursuant to its statutory duty;
f. The local authority has power to run its own care homes to provide care and accommodation for the elderly and infirm;
g. The contention that section 6(3)(b) should apply to a contracting-out case.

155. For the reasons so far given, I consider that each factor, at least if taken individually, would be insufficient to render the provision of care and accommodation by Southern Cross in its care home to Mrs YL a "function of a public nature". However, it must be right to consider the effect of the various factors together, and, indeed, in the broader policy context. There is no doubt that, if one takes the various factors which I have summarised together, rather than examining the effect of each one separately, Mrs YL's case looks significantly stronger, but I still do not find it very persuasive. Each factor has some force, but, for the reasons already given, not very much force, at least in my opinion. Without some other, more powerful, wider, or policy, consideration to support the contention that section 6(3)(b) applies, I do not consider that the combination of the factors so far discussed serves to establish that Southern Cross is performing a function "of a public nature" in providing care and accommodation to Mrs YL in its care home.

156. I turn to what may be characterised as wider, policy, considerations. In that connection, the House was referred to a number of decisions concerning judicial review. The issue as to the meaning of the words "functions of a public nature" in a statute concerned with incorporating the Convention into domestic law does not necessarily involve quite the same principles as the question of whether a decision of a particular body is susceptible to judicial review. However, particularly given that the meaning of section 6(3)(b) is ultimately an issue of domestic law, the similarity in the character of the two issues, and the overlap of factors which come into play on the two issues, satisfies me that such decisions are of real assistance. So far as the effect of the cases on the present issue is concerned, there is nothing which I

can usefully add to Lord Mance's analysis and conclusion in paragraphs 100 to 105 of his speech.

157. While the question of the effect of section 6(3)(b) is one of domestic law, it seems to me that the Strasbourg jurisprudence is of also help, especially in the light of what has been said in your Lordships' House about the purpose of the 1998 Act, and section 6 in particular. In paragraph 34 of his speech in *R(Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, Lord Nicholls of Birkenhead said that the 1998 Act was "not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg", and in paragraph 29 of his speech in *R(SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, my noble and learned friend, Lord Bingham of Cornhill said, to much the same effect, that the purpose of the 1998 Act "was not to enlarge the rights or remedies of those … whose Convention rights have been violated". These general observations are consistent with the views expressed by Lord Hope of Craighead and Lord Rodger of Earlsferry in relation to section 6(3)(b) at paragraphs 45 to 51 and paragraphs 158 and 159 respectively in *Aston Cantlow* [2004] 1 AC 546.

158. Indeed, the observations of this House in *Aston Cantlow* [2004] 1 AC 546 are in my opinion of more specific assistance to the resolution of the present appeal. Lord Hope and Lord Rodger said that the Strasbourg court jurisprudence on the effect of article 34 of the Convention (which restricts applications to the Strasbourg court to "any person, non-governmental organisation or group of individuals …") was relevant when considering whether an entity was a "core public authority".

159. Even more to the point, Lord Hope also said at paragraph 49 that "'public functions' in this context is thus clearly linked to the functions and powers, whether centralised or distributed, of government". In the following paragraph, he referred to article 34 as extending to "a person or body … established with a view to public administration as part of the process of government". Lord Rodger referred in paragraphs 159, 160 and 163 to entities "exercising governmental power", "carrying out the functions of government" and having the "public function of government". This is very much in line with the broader approach of Lord Nicholls: in paragraph 10, while stressing that it was "no more than a useful guide", he said that in the light of "the repetition of the description 'public'" in section 6(3)(b), "essentially the contrast being drawn is between functions of a governmental nature and functions, or

acts, which are not of that nature". To similar effect, Lord Hobhouse of Woodborough invoked the test of a function which is "governmental in nature" and of entities which are "inherently governmental" in paragraph 88.

160. With the assistance of this guidance, and looking at other policy issues, the following considerations (which, in some cases, have already been mentioned and, in other cases, overlap to some extent and are not ranked in order of importance), are in point:

a. The activities of Southern Cross in providing care and accommodation for Mrs YL would not be susceptible to judicial review;
b. Mrs YL would not, I think, be treated by the Strasbourg court as having Convention rights against Southern Cross, and she retains her Convention rights against Birmingham;
c. Southern Cross's functions with regard to the provision of care and accommodation would not be regarded as "governmental" in nature, at least in the United Kingdom;
d. In relation to its business, a care home proprietor such as Southern Cross has no special statutory powers in relation to those it provides with care and accommodation, or otherwise;
e. Neither the care home nor any aspect of its operation, as opposed to the cost of the care and accommodation provided to Mrs YL and others in her situation, is funded by Birmingham;
f. The rights and liabilities between Southern Cross and Mrs YL arise under a private law contract.

When taken together, these considerations establish to my satisfaction that the provision of care and accommodation by Southern Cross to Mrs YL, despite being arranged and paid for by Birmingham pursuant to its statutory duty under sections 21 to 26 of the 1948 Act, is not a function "of a public nature" within section 6(3)(b).

161. I have already explained that I agree with Lord Mance's analysis of what the position would be in relation to judicial review. The Strasbourg jurisprudence has also been admirably discussed in his speech, and it would be otiose for me to repeat his analysis. The decisions are not all entirely easy to reconcile, but it appears to me that they support the arguments put forward by Ms Beverley Lang QC for Southern Cross. First, Southern Cross would be regarded as falling within article 34 in connection with the provision of care and accommodation to Mrs YL. Secondly, and more controversially,

Southern Cross would not be susceptible to a claim in the Strasbourg court at the suit of Mrs YL. In other words, to interpret section 6(3)(b) as giving Mrs YL Convention rights against Southern Cross would appear to involve extending her rights in a way inconsistent with the observations quoted above from *Quark* and *Denbigh*. Further, as already discussed, she has substantial Convention rights against Birmingham.

162. Also of real significance, in my view, is the not unrelated point arising from the reference in the speeches in *Aston Cantlow* [2004] 1 AC 546 to the governmental character of the functions covered by section 6(3)(b). As Lord Rodger explained in paragraph 159, "the exact range of governmental power will vary … from state to state". Providing care and accommodation in a care home would not, in my opinion, be seen in this country as being a function which was of a character which could be described as "governmental", in the normal sense of that word. The fact that local authorities are empowered to run care homes no more justifies a contrary conclusion than the fact that they enter into maintenance or cleaning contracts in respect of their buildings or run restaurants for their staff justifies the view that such activities are governmental functions.

163. It is true, as Lord Bingham points out, that the state has accepted responsibility for the past 60 years for ensuring that care is provided for the old and infirm who cannot support themselves. However, that does not mean that the actual provision of such care to an individual is a function of a public nature, or that it would be perceived as being a governmental function, at least in a privately owned care home, even if paid for, as in her particular case at least in part, by a core public authority.

164. The state provides education and health to everyone, and indeed it is obliged by the Convention to provide education. However, that certainly does not mean that the provision of health or education services in a private school or hospital is a function of a public nature, and, at least as at present advised, that would apply, in my view, even where the costs of the recipient of the service happens to be paid for by a core public authority. Similarly, local authorities provide free or subsidised accommodation for those who need it, but that does not mean that a private landlord falls within section 6(3)(b), even if its tenants receive rent support (including direct payment to the landlord) from a local authority. There are state pensions for every retired worker, and public sector workers receive earnings-related pensions, but that does not mean that a private company managing those pension funds, or

underwriting of the pensions, would thereby be exercising a function of a public nature.

165. As already mentioned, it seems to me much easier to invoke public funding to support the notion that service is a function of "a public nature" where the funding effectively subsidises, in whole or in part, the cost of the service as a whole, rather than consisting of paying for the provision of that service to a specific person. Section 6(3)(b) is primarily concerned with functions and what is entailed with them (eg statutory powers and duties) rather than to whom they are provided, or indeed who provides them. Thus, it appears to me to be far easier to argue that section 6(3)(b) is engaged in relation to the provision of free housing by an entity all of whose activities are wholly funded by a local authority, than it is in relation to the provision of housing by an independently funded entity to impecunious tenants whose rent is paid by the local authority.

166. In my judgment, it is of particular importance in relation to the issue which we have to decide that a proprietor of a care home is not given significant, or indeed (as far as I am aware) any, coercive or other statutory powers, over its residents, whether they are in the care home pursuant to an arrangement with a local authority or otherwise. If proprietors had such powers, that would be a powerful reason for justifying the conclusion that a function was "public in nature". Running a prison, discharging a statutory regulatory regime (Lord Nicholls's examples in paragraph 9 of *Aston Cantlow* [2004] 1 AC 546), maintaining defence (as is mentioned by Lord Bingham) and providing police services, which are plainly functions falling within section 6(3)(b), carry with them such powers.

167. I accept that the fact that some statutory power is attached to a function may not always determine that the function is "of a public nature". Indeed, if it were, *Aston Cantlow* [2004] 1 AC 546 may well have been differently decided (and see also *R(West) v Lloyd's of London* [2004] EWCA Civ 506, [2004] 3 All ER 251). In *Aston Cantlow* [2004] 1 AC 546, para 147, Lord Rodger said the existence of a statutory power was not "sufficient" to bring the function within section 6(3)(b), and he characterised the existence of such a power as an "imprecise criterion for identifying [a public] authority". However, the existence of a relatively wide-ranging and intrusive set of statutory powers in favour of the entity carrying out the function in question is a very powerful factor in favour of the function falling within section 6(3)(b). Indeed, it may well be determinative in many cases, because such powers are very

powerfully indicative of a public institution or service. (For completeness, I should add that the source of the powers need not always be statutory: see, by analogy, *R v Panel on Take-overs and Mergers Ex p Datafin Plc* [1987] QB 815).

168. In paragraph 63 of his speech in *Aston Cantlow* [2004] 1 AC 546, Lord Hope of Craighead approached the issue slightly differently. He held that section 6(3)(b) did not apply because "the liability [in question] arises as a matter of private law". Although he dissented in the answer on this aspect, Lord Scott appears, in paragraph 131, to have thought this the right approach. The liability of Southern Cross to provide Mrs YL with care and accommodation in the present case similarly "arises as a matter of private law". That is illustrated by the fact that Mrs YL was (or her relatives were) free to choose which care home she went into, and took advantage of that right by selecting a care home more expensive than Birmingham was prepare to pay for, and funding the difference. Indeed, although provided as a result of a core public authority carrying out its duty to arrange and pay towards its cost, the services provided in this case, are very much of a personal nature, as well as arising pursuant to a private law contract between Southern Cross and Mrs YL.

169. Mr Fordham QC, for the Interveners, Justice, Liberty and BIHR, made much of the point which I have already briefly mentioned, namely the alleged anomaly which would result if the question of whether a person whose care home was paid for (or arranged by) the local authority would have Convention rights should depend on whether the care home was run by the local authority or a private entity. Even if that can be characterised as an anomaly, it is a point which seems to me to be of little relevance. It is inherent in the scheme of section 6 that any service provided by a core public authority is caught, whereas it is only if the service falls within section 6(3)(b) that it is caught where the service is provided by anyone else. It would in my view, if anything, be rather more of an anomaly in my view if inhabitants of a privately owned care home, who were funded in whole or in part by a local authority, had Convention rights, whereas other inhabitants, who paid for themselves but were in an otherwise identical situation, did not. In any event, the balancing exercise in the case of a resident who claimed her Convention rights were being infringed, would be different in a care home run by a local authority (who would have no Convention rights) from a care home with a private proprietor (who would be able to pray in aid his own Convention rights).

Conclusion

170. Accordingly, for the reasons given by Lord Mance, as well for those given by Lord Scott, and for the additional reasons I have set out, I am of the view that the provision of care and accommodation by Southern Cross to Mrs YL, even though it was arranged, and is being paid for, by Birmingham pursuant to sections 21 to 26 of the 1948 Act, does not constitute a "function of a public nature" within section 6(3)(b). Accordingly, I would dismiss this appeal.

171. Finally, it is right to add this. It may well be thought to be desirable that residents in privately owned care homes should be given Convention rights against the proprietors. That is a subject on which there are no doubt opposing views, and I am in no position to express an opinion. However, if the legislature considers such a course appropriate, then it would be right to spell it out in terms, and, in the process, to make it clear whether the rights should be enjoyed by all residents of such care homes, or only certain classes (eg those whose care and accommodation is wholly or partly funded by a local authority).