

Are Housing Associations public or private?

Section 6(1) of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. ‘Public authority’ includes ‘any person certain of whose functions are of a public nature (section 6(3)(b)). In relation to ‘a particular act’ a person is not a public authority by virtue only of section 6(3)(b) if the nature of the act is private (section 6(5)). A public body is one that is one that is susceptible to judicial review – the two overlap but are not identical.

As housing associations and other registered providers of social housing become ever more complex, providing an increasing range of services to their tenants which fill the voids left by cuts in public services, the distinction between public and private can be ever more blurred. Housing associations are given powers akin to those given to local authorities, in areas such as anti-social behaviour. I well remember an appearance in Walsall Magistrates Court, shortly after the power to seek an ASBO was extended to housing associations, where the Bench were annoyed by my continued denial that my housing association client had a social services department that was under any obligation to work with the young offender in front of them. “But Miss Rowlands, you act for the Council!” they said in exasperation. No, I act for a housing association but it may be a public authority or a public body, or a public authority doing a private act...

The issue first came to the fore in 2002 when the Court of Appeal in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 considered what was a public authority and what was a public function for the purposes of section 6 of the Human Rights Act 1998. They held that housing associations were hybrid bodies – part public, part private - so lettings could in some cases be private acts. This was followed by *Weaver v London & Quadrant Housing Trust* [2009] EWCA Civ 235 which made it clear that not all housing associations are public authorities and not everything they do are public acts. The touchstone is the nature of the act and how close to the State it approaches. Thus, in *Donoghue*, the housing association was standing in the shoes of the local authority. In *Weaver*, L&Q accepted that they were susceptible to judicial review as a public body. Both L&Q and Poplar Housing are large entities with substantial resources. They have taken stock transfers from local authorities and thus inherited some of the roles of the local authority. They “feel” very public.

On the other hand, the Leonard Cheshire Foundation is not a public authority when running a residential care home, even though it accommodates people to whom the local authority owed a statutory duty: *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366. An almshouse run by a charity was (probably) not a public authority in *Watts v Stewart* [2016] EWCA Civ 1247; and Southward Housing Co-Operative Ltd, a fully mutual housing association, was held not to be a public authority in *Walker’s case* [2015] EWHC 1615 (Ch).

How can you tell whether something is a public authority? Some indicia were given in *Weaver*:

- a. The possession of statutory or other special powers;
- b. Performance on a contracted-out basis of governmental services
- c. A charitable/public service motivation;
- d. Non-commercial activities;
- e. Working in a field which has state control and meets the Government’s aims;
- f. Statutory control and/or guidance;

- g. Public subsidy;
- h. The voluntary transfer of housing stock from the public sector to RSLs [registered providers];
- i. A duty of co-operation with local authorities under section 170 of the Housing Act 1996.

Some of these criteria seem dubious. Being under statutory control, for example, would apply to schools and care homes. Performing governmental services on a contracted-out basis would presumably mean that Securicor and G4S are public authorities, something from which they would no doubt recoil. Perhaps it is a matter of a combination of all these factors.

It is also necessary to look at the nature of the act. A hybrid may do public acts and private acts and it is often hard to see which is which. When a housing association grants a tenancy to a homeless person nominated by a local authority that may be a public act. When it grants a lease to a tenant under a shared ownership scheme, that may well be a private act. It's negotiated at arm's length. It is more a commercial transaction than a statutory duty.

A recent case that flagged up the importance of this issue and shows that nothing can be taken for granted is *R (Esposito) v Camden LBC*, a decision of May J in the Administrative Court on 31 July 2017. Following the horrendous Grenfell Tower fire, Camden had evacuated some of its similarly constructed towers on the advice of the fire service. It has carried out works to improve fire safety there, and although the fire service is satisfied that the imminent risk is ameliorated, many residents are critical of the works that have been done. Ms Esposito, in particular, did not wish to return to her flat, contending that there was still a risk and that the existence of that risk was itself prejudicial to her health to such a degree that the refusal of another two weeks in temporary accommodation was a breach of her article 8 rights. Camden argued that this was not a public law decision but one arising out of the contractual relationship between it and its tenants. May J rejected this argument. Although there is sadly no full transcript of her judgment currently available she is reported as saying

Public sector landlords providing social housing were not in the same position as a commercial landlord. The number of people affected and the fact that they provided social housing was sufficient to make their decisions reviewable.

Nonetheless, the claim for judicial review failed

The claimant had not made out a sufficient case that the defendant acted irrationally. The evacuation of the building was not done because of a failure of the cladding, but in response to advice from the fire brigade. The defendant was justified in asking the tenants to return. There was no basis for an art. 8 claim by virtue of the risk of fire or due to the cladding.

In *Hertfordshire County Council v Davies* [2017] EWHC 1488 (QB) Laing J gave an admirable exposition of the interrelationship of private and public law when considering the termination of a service tenancy by a local authority. The Defendant relied on section 11 of the Children Act 2004 and section 149 of the Equality Act 2010 as matters which the local authority was bound to take into consideration when considering whether to seek possession of the caretaker's bungalow. She said

I also accept that this was the exercise of a function to which section 149 of the 2010 Act and section 11 of the 2004 Act could apply in theory. However, neither of those duties confers a private law right on the Defendant. That means, on the authority of *Mohamoud and Lambourne*, that even if the Defendant could have applied for judicial review of the decision to serve the notice to quit, on the grounds that the Claimant had not complied with those public law duties, any failure to comply with them would not provide a defence to the claim for possession. Contrast the attack on the decision to increase the rent due in *Winder's* case.

These cases go to demonstrate that the distinction between public and private is far from black and white. Even a local authority – clearly public in nature – can do things which are private in nature and which therefore are less susceptible to judicial oversight. And a housing association? The issues are far from evident. Some time should always be taken in considering the nature of the entity in question, and the nature of the act before turning to the more meaty issues of whether there has been a breach of statutory or other provisions.

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