

# Care Homes Briefing

Solicitors

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## Are Care Homes subject to the Human Rights Act?

On the 30 January 2007, the Court of Appeal ruled<sup>1</sup> that private care homes cannot be classified as public bodies even if the residents who are placed there are from local authorities. However, given the public importance of this issue, the Court granted permission for the case to be referred to the House of Lords.

In making its decision, the Court considered two cases. The first appeal, involved Mrs Johnson and others who were residents at a care home maintained by London Borough of Havering (“Havering”). The residents were seeking to prevent Havering from transferring them to a private sector-controlled care home.

The second appeal involved 83-year-old Alzheimer patient, Mrs YL who wished to stay in a private care home. She objected to the move on the basis that to move her would be a violation of her human rights to family life.

In Johnson, the issue that arose was whether the transfer from a care home maintained by Havering to a private care home fell within the ambit of the Human Rights Act 1998 Section 6 (3)(b) even if the private care home was not a public authority. In YL, the second appeal, the issue consider there was whether the private care home

could be classified as a public authority pursuant to Section 6 (3)(b) of the Human Rights Act 1998.

The cases were heard together because they raised the same point regarding the European Convention on Human Rights: What is the meaning of “control” of private care homes that are used by local authorities under Section 26 of the National Assistance Act 1948 (“the 1948 Act”)? Local authorities can discharge their welfare obligations under Section 21 of the Act 1948 by arrangements with a private third party. Therefore, the issue considered by the Court was whether, private care homes can be classified as a public body under Section 6(3)(b) of the Human Rights Act 1998 because of the provision of local authority services.

### Johnson

In Johnson, the claimants the argued that they would lose their Article 8 protection by being transferred to a private sector care home. The Court recognised however, that a person who is removed from the private care home would still remain the responsibility of the local authority pursuant to Section 21 of the 1948 Act. The authority will continue to have Article 8 obligations towards that resident as well as Section 21 obligations. The right to compel the local authority to intervene and offer resources and protection for the residents which are in a private care home will remain in place. The Court concluded that the change in resident’s legal position that occurs when a home is transferred from public to private control is insufficient to amount to a breach of the Human Rights Act.

<sup>1</sup> R(on the Application of Johnson) –v- Havering London Borough Council  
YL –v- Birmingham City Council and Others [2007] AH ER (D) 271

## Mrs YL

In YL a dispute arose between family members of Mrs YL and Southern Cross, the care home provider where she was a resident. It was the view of Southern Cross that it was necessary to terminate the care contract for Mrs YL as her family's behaviour was becoming disruptive in the running of the care home. Therefore, Mrs YL was required to seek an alternative placement with another care home. The Court considered whether a private care home can be considered a public authority pursuant to Section 6(3)(b) of the 1998 Act.

The Court was referred to the previous case of *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936 (Cheshire) which held that the Human Rights Act did not apply in such cases.

*Cheshire* involved a private charity which carried out its function on behalf of a local authority (which was a public body). In *Cheshire* the question was whether an intrinsically private act performed by a private body could become a function of a public nature. The private care home's enforcement of its own contract despite it was assisting a public body in its discharge of public functions, did not amount to a public act so as to make the Human Rights Act apply.

The Court following the authority set down in *Cheshire* held that the private care home when accommodating Mrs YL was not a public authority under section 6 (3)(b) of the 1998 Act.

### In this the correct answer to the point?

Despite its ruling, the Court considered that the appeal raised fundamental questions as to the operation of Convention rights and obligations in domestic law. Further, given the fundamental questions raised, the

Court provided answers to preliminary points had it not been bound to follow the authority set down in *Cheshire*.

The Court considered the evidence in YL that had been provided by the Southern Cross, that of the 29,000 beds which were provided in the United Kingdom about 80% are funded by Social Services departments of local authorities. In the care home in which Mrs YL was a resident, 60 of the 72 residents were publicly funded. The figures presented undermined the claim that care homes were providing an essentially private service. The Court considered that for care homes to continue to thrive they must be providers of a public obligation. Also, the fact of the close relationship local authorities have in discharging their section 21 duties should be a strong indicator that the care of persons placed in care homes is itself a public function.

Furthermore, given the fact that care homes are subject to rigorous regulatory standards and effectively stand in the shoes of the local authority to discharge its public duties pursuant to section 21, this also suggests, that care functions of care homes are of a public nature.

### Permission granted to appeal to the House of Lords

On the basis of its public importance, the Court considered that it might benefit from reconsideration. Therefore, the Court granted permission to appeal to the House of Lords as to whether care homes could be considered public authorities.

It therefore remains to be seen whether the House of Lords will rule that the Human Rights Act is to apply. In the meantime, where residents' placements are to be terminated, care should be taken to consider the possible implications of the Act.

**Marja Lasek-Martin**  
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