

COURT OF APPEAL, CIVIL DIVISION

**R (on the application of Heather and others) v Leonard Cheshire
Foundation and another**

[2002] 2 All ER 936; [2002] EWCA Civ 366

COUNSEL: Richard Gordon QC and Ian Wise (instructed by Coningsbys) for the appellants.

James Goudie QC and Dinah Rose (instructed by Trowers & Hamlins) for LCF.

William Henderson (instructed by the Treasury Solicitor) for the Attorney General.

JUDGES: Lord Woolf CJ, Laws and Dyson LJ

DATES: 25, 26 February, 21 March 2002

LORD WOOLF CJ.

Introduction

[1] This appeal is by two appellants, Elizabeth Heather and Hilary Callin, from a decision of Stanley Burnton J dated 15 June 2001 ([2001] All ER (D) 156 (Jun)). [*938]

At the time of the hearing before Stanley Burnton J there were three claimants but the second claimant has since withdrawn his appeal. The respondents to the appeal are the Leonard Cheshire Foundation (LCF) and the Attorney General. The appellants are long-stay patients in a home called Le Court which is owned and run by LCF. The appeal is against the dismissal of their application for judicial review of LCF's decision to close the home in the way in which it is run at present. The application was dismissed after a preliminary hearing as a result of which Stanley Burnton J held that LCF is not a 'public authority' within the meaning of that term in s 6 of the Human Rights Act 1998. It is the correctness of this conclusion which is the subject of this appeal.

[2] The Attorney General was a party to the appeal because of the responsibilities that he has for charities. He was represented by Mr William Henderson. In the court below, a further issue arose as to whether or not the proceedings constituted 'charity proceedings' within the meaning of s 33 of the Charities Act 1993. If they were charity proceedings their commencement required the authority of the Charity Commissioners or a Chancery judge. After the proceedings had started in the court below this issue became academic once the claimants obtained the necessary authority. Permission to appeal this issue was therefore not granted.

[3] Le Court is LCF's first and largest home. It is situated at Greatham, near Lis, in Hampshire. At the time of the decision in the court below it had 42 long-stay residents.

They included the then three claimants, who had all lived there for periods of more than 17 years.

[4] LCF is the United Kingdom's leading voluntary sector provider of care and support services for the disabled. The majority of the residents at the home, including the appellants, had been placed there by the social services departments of their local authority or by their health authority. In making the placements and providing the funding which the placements required, the authorities were exercising statutory powers.

[5] It was on 27 September 2000 that the trustees of LCF decided to cease to operate Le Court in its present form. They approved the development of three or four smaller, community-based homes to be located in the surrounding towns and the establishment at Le Court itself of a 16-bed, high-dependency unit. The residents, who would no longer be able to be accommodated at Le Court, were to be relocated into the community-based units. That decision was reconsidered by the trustees on 7 February 2001 and affirmed.

[6] In the proceedings for judicial review the claimants contended that in making these decisions LCF was exercising functions of a public nature within the meaning of s 6(3)(b) of the 1998 Act and so, as a public authority, was required not to act in a way which was incompatible with art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). It was argued that instead the trustees had contravened art 8 by not respecting the claimants' right to a home and failing to take into account, inter alia, promises made to them that Le Court would be their 'home for life'. In addition it was alleged that LCF had not obtained individual assessments of the claimants' needs and had failed to take into account, or ignored, LCF's own policy of providing for their residents a 'home for life'.

[7] In the court below Stanley Burnton J reserved his judgment. After he had prepared a draft of his judgment and had sent it to the parties, but before it could be delivered, this court handed down its decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [*939] [2001] 4 All ER 604, [2002] QB 48. Stanley Burnton J recognised that the judgment in Donoghue's case was of obvious relevance to his decision in this case. He therefore invited the parties to make written submissions to him as to the effect of the decision in Donoghue's case on his draft judgment. Stanley Burnton J then re-drafted his judgment, and as he explains ([2001] All ER (D) 156 (Jun)) at [12]):

'... having considered the judgment of the Court of Appeal in Donoghue's case and the parties' written submissions, I have concluded that my original decision was correct. Rather than rewrite my judgment in the light of that decision, I have retained most of the text of my draft judgment and made reference to the judgment of the Court of Appeal where appropriate. This has the disadvantage that my judgment is now unnecessarily long, and even longer than it was originally. However, if I had started afresh my original reasoning would have been lost. I hope that in general it will be obvious which parts of my judgment are new.'

[8] The course adopted by Stanley Burnton J has meant that this court has had the benefit of his own analysis and conclusions on the issues which he had to decide.

[9] Because we appreciated it was very much in the interest of the appellants and LCF that they knew the result as soon as possible, at the end of the hearing we announced to the parties that we had decided to dismiss the appeal. These are our reasons for doing so; they are not identical to those of Stanley Burnton J, but none the less we acknowledge the obvious care and skill with which he has examined the issues.

[10] JUSTICE attached considerable importance to the outcome of this appeal which they regard as being of general public importance. JUSTICE therefore sought permission which was granted to deliver written submissions in support of the appeal. Those submissions were prepared by Mr Philip Havers QC and Mr Thomas de la Mare. We have found them of considerable value.

The statutory framework

[11] The National Assistance Act 1948 places a duty on the relevant local authorities to provide accommodation for the claimants. Section 21(1) of the 1948 Act, as amended, provides:

‘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.’

[12] The accommodation, which the authorities arrange, may be provided by the authority itself or by another authority. As s 21(4) and (5) of the 1948 Act, as amended, state:

‘(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 [*940] 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, and as including references to board

and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary.’

[13] Under the 1948 Act the authority may also make arrangements for the accommodation to be provided by third parties under s 26(1) which provides:

‘Provision of accommodation in premises maintained by voluntary organisations.- (1) Subject to subsections (1A) and (1B) 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.’

This is how the claimants came to be at Le Court.

[14] Section 26(2), as amended, is also relevant since it deals with payment for the accommodation and is in these terms:

‘Any arrangements made by virtue of ... this section shall provide for the making by the local authority to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements and subject to subsection (3A) below the local authority shall recover from each person for whom accommodation is provided under the arrangements the amount of the refund which he is liable to make in accordance with the following provisions of this section.’

[15] 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 s 21 in accordance with an arrangement under s 26, it does not follow that the charity is performing a public function. Before the 1998 Act came into force, we doubt whether it would have even been contemplated that LCF in providing care homes for people in the position of the appellants would be performing a public function. Whether under the 1998 Act, LCF are performing a public function, is critical to this appeal because s 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a convention right and s 6(3) of the 1998 Act defines who is a public authority for the purpose of s 6 in these terms: ‘In this section “public authority” includes ... (b) any person certain of whose functions are functions of a public nature ...’

[16] It is to be noted that s 6(3) is not exhaustive as to who is a public authority, but LCF could only be a public authority under s 6(3). A public authority can be a hybrid body. That is, a public authority in relation to some of its functions and [*941] a private body in relation to others. This is the combined consequence of s 6(3) and (5). Section 6(5) states:

‘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.’

[17] The issue here can therefore be refined by asking, is LCF, in providing accommodation for the claimants, performing a public function?

[18] The facts of Donoghue’s case [2001] 4 All ER 604 have similarities to those in this case. In that case it was stated that the definition of who was a public authority, and what was a public function for the purposes of s 6 should be given a generous interpretation. The court went on, however, to indicate:

‘[58] ... The fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function. A public body in order to perform its public duties can use the services of a private body. Section 6 should not be applied so that if a private body provides such services, the nature of the functions are inevitably public. If this were to be the position, then when a small hotel provides bed and breakfast accommodation as a temporary measure, at the request of a housing authority that is under a duty to provide that accommodation, the small hotel would be performing public functions and required to comply with the 1998 Act. This is not what the 1998 Act intended. The consequence would be the same where a hospital uses a private company to carry out specialist services, such as analysing blood samples. The position under the 1998 Act is necessarily more complex ... Section 6(3) means that hybrid bodies, who have functions of a public and private nature are public authorities, but not in relation to acts which are of a private nature. The renting out of accommodation can certainly be of a private nature. The fact that through the act of renting by a private body a public authority may be fulfilling its public duty, does not automatically change into a public act what would otherwise be a private act. See, by analogy, *R v Muntham House School, ex p R* [2000] LGR 255.

‘[59] The purpose of s 6(3)(b) is to deal with hybrid bodies which have both public and private functions. It is not to make a body, which does not have responsibilities to the public, a public body merely because it performs acts on behalf of a public body which would constitute public functions were such acts to be performed by the public body itself. An act can remain of a private nature even though it is performed because another body is under a public duty to ensure that that act is performed.’

[19] The court in Donoghue’s case also referred (at [60]) to the fact that if a local authority, in order to fulfil its duty, sent a child to a private school-

‘the fact that it did this would not mean that the private school was performing public functions. The school would not be a hybrid body. It would remain a private body. The local authority would, however, not escape its duties by delegating the performance to the

private school. If there were a breach of the convention, then the responsibility would be that of the local authority and not that of the school.’

[20] The court in Donoghue’s case came to the conclusion that the housing association there being considered was performing a public function looking at the situation as a whole. The court did so because the role of the housing association was ‘so closely assimilated’ to that of the local housing authority. The court did, however, identify (at [65]) various features to which they attached [*942] particular importance for coming to the decision. Among those the following factors have relevance here:

‘... (iii) The act of providing accommodation to rent is not, without more, a public function for the purposes of s 6 of the 1998 Act. Furthermore, that is true irrespective of the section of society for whom the accommodation is provided. (iv) The fact that a body is a charity or is conducted not for profit means that it is likely to be motivated in performing its activities by what it perceives to be the public interest. However, this does not point to the body being a public authority. In addition, even if such a body performs functions that would be considered to be of a public nature if performed by a public body, nevertheless such acts may remain of a private nature for the purpose of s 6(3)(b) and (5). (v) What can make an act, which would otherwise be private, public, is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorised private. (vi) The closeness of the relationship which exists between Tower Hamlets and Poplar. Poplar was created by Tower Hamlets to take a transfer of local authority housing stock; five of its board members are also members of Tower Hamlets; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acts towards the defendant. (vii) The defendant, at the time of transfer, was a sitting tenant of Poplar and it was intended that she would be treated no better and no worse than if she remained a tenant of Tower Hamlets. While she remained a tenant, Poplar therefore stood in relation to her in very much the position previously occupied by Tower Hamlets.’

[21] These factors provide little assistance for the claimants’ case that in providing accommodation for the claimants LCF is performing a public function. All they can point to is that the activity of LCF is regulated (see Donoghue’s case at [65](v)) which can be an indicator that a function is public.

[22] In developing his carefully structured argument in support of the approach for the appellants, Mr Richard Gordon QC submits:

‘(i) The test of whether a particular function is or is not a “public function” so as to create, in that respect, a “hybrid” authority depends neither in whole nor in part on being able to ascribe a legislative source for the exercise of power although the presence of such a source is likely to be determinative. (ii) Essentially, the question that has to be asked in respect of the function in question is whether the authority is standing in the shoes of the state when exercising that function. If it is, then the function in question is a public function. (iii) In determining whether an authority is standing in the shoes of the state one very important principle will be whether the authority is the means by which the state achieves the exercise of its responsibilities towards individuals in a way which leaves the authority both: (i) in a position to[*943] violate convention rights that the individual would, otherwise, have against the state, and (ii) in a position to determine the “fair balance” that is required to be struck by the state when interfering with those convention rights (“the principle”).’

[23] In support of his contentions he relies upon the following facts which he contends provided the proximity which is required if LCF’s activities are to be categorised as public rather than private:

‘(a) Thirty-eight of the forty-three residents at the residential care home known as Le Court are funded by purchasing statutory authorities. Nationally, only 14% of LCF’s places are privately funded although there is-even in the case of publicly funded placements-a “top up” element from LCF’s own funds derived from voluntary income. (b) A1 and A3’s placements (Ms Heather/Callin) are funded by their welfare benefits and by social care funding by Surrey County Council pursuant to a statutory arrangement between Surrey County Council and LCF for which they are eligible by reason of their vulnerability. (c) Such placements are required, by directions issued by the Secretary of State, to be made in respect of persons aged 18 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” either directly by the local authority social services department under s 21 of the 1948 Act or (as here) by virtue of arrangements with a private provider under s 26 of the 1948 Act. (d) Where an arrangement is-as here-made with a “private” provider, such as LCF, the residential care home (the subject of the arrangement) is (materially) made subject to statutory regulation under s 26(1A) of the 1948 Act. (e) A2’s placement (Mr Ward) is funded by South West Hampshire Health Authority who could have, but did not, purchase the same health care for A2 from an NHS trust under a statutory arrangement pursuant to s 5 of the National Health Service and Community Care Act 1990 and entered into an arrangement with LCF for the self-same purpose, namely to provide NHS services to Mr Ward. (f) So far as funded residents at Le Court are concerned there is a triangular relationship between LCF, the placing/funding authority and the resident whereby the authority pays direct to LCF and LCF enters into a licence agreement with the resident in question: the relationship between the placing/funding authority and

the resident is governed entirely by public law. (g) There is no express provision in the licensing agreements between LCF and the residents permitting LCF to re-develop and/or to terminate the agreement in its general discretion or otherwise than for specific identified reason-on the face of the licence the resident is entitled to stay in the home “for as long as the Resident wishes”: neither of the placing/funding authorities has challenged the decision of LCF to re-develop.’

[24] Mr Gordon then accepts that the presence of these factors is not necessarily the end of the story. He accepts that there must be a further factor that identifies a ‘material relationship’ between the function being assumed and a potential clash with convention rights which would otherwise be enforceable against the state. Here it is argued that the clash is created by the claimants’ inability otherwise to rely on art 8 as against LCF.

[25] In his reply Mr Gordon also attempted to find a way of avoiding the difficulties which in practice would arise if a lodging house or a small private [*944] nursing home were to become a public body, for the purposes of the 1998 Act, merely because they provided a home for someone in relation to whom a public body undoubtedly is under a public duty to provide accommodation. Mr Gordon was not in fact able to provide a satisfactory solution to this dilemma.

[26] In support of his contentions, Mr Gordon relies upon the comments of Moses J in *R v Servite Houses, ex p Goldsmith* [2001] LGR 55. That was a case which was decided shortly before the 1998 Act came into force. Moses J decided that the housing association was not performing a public function and was not under any public law obligation to the applicants. As to the power of Wandsworth London Borough Council to delegate its responsibility for providing accommodation, Moses J said (at 85):

‘I cannot conclude this matter without expressing my sympathy for the applicants. This case represents more than tension between public law and private law rights, but a collision. If I am right in my reasoning, it demonstrates an inadequacy of response to the plight of these applicants now that Parliament has permitted public law obligations to be discharged by entering into private law arrangements. Whether the solution lies in imposing public law standards on private bodies whose powers stem from contract or in imposing greater control over public authorities at the time they first make contractual arrangements may be for others to determine.’

[27] In his judgment, Moses J made it clear that he did not consider it was necessary for him to consider the effect of art 8 of the convention. However, Moses J’s judgment provides a convenient introduction to what is perhaps Mr Gordon’s strongest argument, namely that for practical purposes if LCF are not at least a hybrid authority, the appellants lose the benefit of art 8 as against LCF. The fact that they may have continuing rights under art 8 as against their local authorities, Mr Gordon contends, does not alleviate their position. This is because their objective is to avoid having to leave Le Court and while their local authorities would then be under an obligation to provide an alternative home for them, this is not what they want. Mr Gordon therefore submits that,

while he accepts that the local authorities cannot avoid the duty which they owe to their 'service users' because of both s 6 of the 1998 Act and s 21 of the 1948 Act, the fact remains that effective protection of convention rights is lost as a result of the local authorities' delegating their responsibilities by relying upon s 26 of the 1948 Act. Mr Gordon adopts an observation of Laws LJ in argument that the arrangements under s 26 are but a subset of the s 21 arrangements. He contends they therefore are not intended to operate differently and this is what changes the nature of the function performed by LCF from a private to a public function. This avoids one group of 'service users', namely those for whom provision is made under s 26, being the poor relations of another group who receive direct provision under s 21 when both groups belong to the same class.

[28] Mr Gordon acknowledges that if LCF are subject to art 8, they would, like any other public authority, be entitled to rely upon art 8(2) to establish that the interference with the appellants' art 8 rights by LCF is justified.

[29] In its written submissions, JUSTICE draws attention to parliamentary material and in particular to statements of the Lord Chancellor and the Home Secretary during the passage of the 1998 Act which indicate that s 6(3)(b) should be given a generous application. Perhaps the most persuasive citation is that of the Lord Chancellor when he stated: 'Doctors in general practice would be public authorities in relation to their National Health Service functions, but not in [*945] relation to their private patients' (see 583 HL Official Report (5th Series) col 811, 24 November 1997). JUSTICE contends this approach reflects the need for there to be 'a broad and protective definition of what constitutes public authority, designed to discharge the United Kingdom's obligations under arts 1 and 13 of the convention'. In JUSTICE's view, 'if it is or would be a public function when discharged by a pure public authority, it is no less a public function when discharged by a contractual third party'.

[30] In addition, JUSTICE drew attention to comparative material reflecting the approach in other jurisdictions. However, while comparative material can be very valuable in construing the obligations under the convention, that assistance is limited where as here what is at issue is the proper interpretation of the provisions of domestic legislation, namely s 6 of the 1998 Act.

[31] Mr James Goudie QC on behalf of LCF, in fairness to his clients, draws attention to the fact that, although the court is not concerned with the merits of the appellants' case, the proposed development of Le Court is to be an evolutionary process with at present no fixed timescale. During this process there will be continuing consultation with the residents and their relatives. LCF stresses that before any decision is taken as to the future provision of care for an individual resident, that resident will have a full and thorough assessment of his or her needs and in conjunction with the local authority will be offered an alternative placement which is appropriate to their needs. This is a situation where this is ample protection for the appellants and there is no black hole into which they would sink if they failed on this appeal. In the unlikely event of LCF acting inappropriately, there would still be, as Mr Gordon accepts, the appellant's rights against the local authority under s 21 of the 1948 Act. In addition, if any promises were made to the

appellants as to a home for life, that could be contractually binding on LCF or create an estoppel. Finally, here, as pointed out by Mr Henderson on behalf of the Attorney General, there is power in charity proceedings to prevent trustees acting in a wholly unreasonable manner.

[32] Mr Goudie also submits that LCF's decision to redevelop Le Court was not amenable to judicial review at common law. Both in regard to s 6(3)(b) of the 1998 Act and judicial review, LCF was not a public authority. He, in particular, relies on *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909.

Conclusions

[33] If this were a situation where a local authority could divest itself of its art 8 obligations by contracting out to a voluntary sector provider its obligations under s 21 of the 1948 Act, then there would be a responsibility on the court to approach the interpretation of s 6(3)(b) in a way which ensures, so far as this is possible, that the rights under art 8 of persons in the position of the appellants are protected. This is not, however, the situation. The local authority remains under an obligation under s 21 of the 1948 Act and retains an obligation under art 8 to the appellants even though it has used its powers under s 26 to use LCF as a provider. In addition the appellants have their contractual rights against LCF in any event. There is also the possible protection which can be provided by the Attorney General's role but this is not a significant factor.

[34] If the arrangements which the local authorities made with LCF had been made after the 1998 Act came into force, then it would arguably be possible for a resident to require the local authority to enter into a contract with its provider which fully protected the residents' art 8 rights and if this was done, this would [*946] provide additional protection. Local authorities who rely on s 26 to make new arrangements should bear this in mind in the contract which they make with the providers. Then not only could the local authority rely on the contract, but possibly the resident could do so also as a person for whose benefit the contract was made. Here this was not a possibility because the appellants' residence at Le Court began long before the 1998 Act came into force and one feature of a case such as this is that the local authority did not when it entered into the arrangement with LCF intend that LCF should perform on its behalf its art 8 responsibilities, nor did LCF accept any such obligation. It is not without relevance that here, if the appellants are right, the result would be that the function which would previously have been a private function has become a public function in consequence of the 1998 Act coming into force and imposing retrospectively upon LCF additional responsibilities enforceable by law.

[35] The matters already referred to, can however, be put aside. In our judgment the role that LCF was performing manifestly did not involve the performance of public functions. The fact that LCF is a large and flourishing organisation does not change the nature of its activities from private to public. (i) It is not in issue that it is possible for LCF to perform some public functions and some private functions. In this case it is contended that this

was what has been happening in regard to those residents who are privately funded and those residents who are publicly funded. But in this case except for the resources needed to fund the residents of the different occupants of Le Court, there is no material distinction between the nature of the services LCF has provided for residents funded by a local authority and those provided to residents funded privately. While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private. Here we found the case of *R (on the application of the University of Cambridge) v HM Treasury* Case C-380/98 [2000] All ER (EC) 920 at 930, 940-942, sub nom *R v HM Treasury, ex p University of Cambridge* [2000] 1 WLR 2514 at 2523, 2534-2535, relied on by Mr Henderson, an interesting illustration in relation to European Union legislation in different terms to s 6. (ii) There is no other evidence of there being a public flavour to the functions of LCF or LCF itself. LCF is not standing in the shoes of the local authorities. Section 26 of the 1948 Act provides statutory authority for the actions of the local authorities but it provides LCF with no powers. LCF is not exercising statutory powers in performing functions for the appellants. (iii) In truth, all that Mr Gordon can rely upon is the fact that if LCF is not performing a public function the appellants would not be able to rely upon art 8 as against LCF. However, this is a circular argument. If LCF was performing a public function, that would mean that the appellants could rely in relation to that function on art 8, but, if the situation is otherwise, art 8 cannot change the appropriate classification of the function. On the approach adopted in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 4 All ER 604, [2002] QB 48, it can be said that LCF is clearly not performing any public function. Stanley Burnton J's conclusion as to this was correct.

The procedure adopted by the claimants

[36] This conclusion is of relevance as to the remedies which can be granted on judicial review but is not conclusive as to the scope of judicial review. As is appropriately set out in Grosz, Beatson, Duffy *Human Rights: The 1998 Act and the [*947] European Convention* (2000) p 61, as to the relationship between the scope of the 1998 Act and the scope of judicial review:

'4-04 The law on the scope of judicial review cannot, however, be determinative. First, it will be necessary for the English courts to take into account the Strasbourg jurisprudence which identifies the bodies whose actions engage the responsibility of the state for the purpose of the Convention, which, as we shall see, differs from the judicial review criteria in material respects. That jurisprudence also makes clear that the Convention's reach is determined by reference to "autonomous" concepts of Convention law and not by the manner in which national law classifies bodies or their acts. Secondly, notwithstanding the Home Secretary's statement that "the concepts are reasonably clear", the way English courts have drawn the distinction between "public" and "private" for the purpose of judicial review produced a complicated and not altogether consistent body of cases, using a variety of tests. Thirdly, as will be seen, not all the acts of "obvious" public authorities are treated as "public" for the purposes of judicial

review. In contrast, the [Human Rights Act 1998] will apply to all their acts. Nevertheless, the case law on the judicial review jurisdiction is instructive.’

[37] To the points made in Human Rights, there is to be added the distinction between the approach of RSC Ord 53 and CPR Pt 54. RSC Ord 53, r 1, in identifying cases which were appropriate for an application for judicial review, focused on the nature of the application. Was it an application for an order of mandamus, prohibition or certiorari or an application for a declaration or an injunction which could be granted on an application for judicial review, if having regard to the nature and matters in respect of which relief may be granted by way of one of the prerogative remedies, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review? CPR 54.1 has changed the focus of the test so that it is also partly functions based. Now the relevant provisions of CPR Pt 54 provide:

‘54.1 Scope and Interpretation

‘(1) This Part contains rules about judicial review.

‘(2) In this Part-(a) a “claim for judicial review” means a claim to review the lawfulness of-(i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function ...

‘54.2 When This Part Must Be Used

‘The judicial review procedure must be used in a claim for judicial review where the claimant is seeking-(a) a mandatory order; (b) a prohibiting order; (c) a quashing order; or (d) an injunction under section 30 of the Supreme Court Act 1981 (restraining a person from acting in any office in which he is not entitled to act) ...

‘54.20 Transfer

‘The court may (a) order a claim to continue as if it had not been started under this Part; and (b) where it does so, give directions about the future management of the claim.

‘(Part 30 (transfer) applies to transfers to and from the Administrative Court)’

[38] These changes have not been reflected in any complementary change to s 31 of the Supreme Court Act 1981, which still is in virtually the same language [*948] as RSC Ord 53. None the less, there was clearly set out in Mr Goudie’s skeleton argument and reflected in the decision of the court below ([2001] All ER (D) 156 (Jun) at [104]) with its reference to ‘A gap in judicial review’, an idea that if LCF was not forming a public function, proceedings by way of judicial review were wrong. This is an echo of the old demarcation disputes as to when judicial review was or was not appropriate under RSC Ord 53. CPR Pt 54 is intended to avoid any such disputes which are wholly unproductive.

In a case such as the present where a bona fide contention is being advanced (although incorrect) that LCF was performing a public function, that is an appropriate issue to be brought to the court by way of judicial review. Because LCF is a charity further procedural requirements may be involved. We express no view as to this and we heard no argument on this subject unlike Stanley Burnton J.

[39] We wish to make clear that the CPR provide a framework which is sufficiently flexible to enable all the issues between the parties to be determined. Issues, if any, as to the private law rights of the claimants have not been determined. A decision had to be reached as to what happened to these proceedings. In view of the decisions of Stanley Burnton J and this court the claimants have no public law rights. Stanley Burnton J dismissed the proceedings having given judgment. In view of a possibility of a misunderstanding as to the scope of judicial review we draw attention to this and the powers of transfer under CPR Pt 54. Subject to this we dismiss this appeal.

Appeal dismissed. Permission to appeal refused.