Clayton Comments

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AUSTERITY AND PUBLIC LAW: ACCOUNTABILITY, JUDICIAL SCRUTINY AND CONTRACTING OUT

Austerity Britain is shrinking the public sector and accelerating the process of contracting out services. However, the legal protections contracting out gives to service users are piecemeal and inadequate, raising very real concerns about how findings of unlawfulness are to be addressed.

For example, the Care Act 2014 was designed through s 79 so local authorities could delegate its functions under the 2014 Act, as well as delegating aftercare services under s 117 of the Mental Health Act 1983. In February 2015 Northamptonshire County Council decided to outsource all its services, cutting 4000 staff, leaving 150 in-house and creating a community interest company to undertake all council services. Surrey County Council has just announced that it has saved £8m in six months by renegotiating contracts with suppliers, including IT businesses, building firms and transport companies, and that work by its procurement and other teams meant the Council has delivered £33m in savings in the last 18 months.

However, as the Local Government Ombudsman recently warned, local authorities can contract out services, but still remain responsible for their quality, and must deal with any complaints service users may have:

This accountability remains irrespective of whether the provider is a private company, a third sector organisation or another publicly-funded body.

The Ombudsman's comments were made in a report published after an investigation into Somerset County Council. [LGO Report 13019566] The report followed a complaint by a young adult with Asperger's Syndrome and hearing difficulties- where the Ombudsman found he had been left without direct support payments for 14 months because the Council through its outsourced provider inaccurately assessed his needs.

Judicial review proceedings can of course be brought against a public body's decisions to outsource and for its unlawful provision of services. But such proceedings will rarely be available against the outsourced private service provider and dealing with complaints through service agreements pose a number of serious problems for public bodies.

A public body's decision to outsource service provision can be challenged on judicial review grounds for breach of consultation provisions (e.g. ***R(Nash) v Barnett LB*** 2013]EWCA Civ 1004 where the Council breached the best value consultation requirements under s3(1) of the Local Government Act 1999 but failed to bring judicial review proceedings promptly) or for breach of the public sector equality duty under s 149 of the Equality Act 2010, as in ***R(RB) v Devon County Council*** [2013] Eq LR 113 where it was held that the local authority failed to discharge the public sector equality duty when deciding to appoint Virgin Care as the preferred bidder for a contract to provide integrated care and health services for children.

Judicial review proceedings can also be used to challenge outsourcing decisions for breach of the public procurement rules (see e.g. ***R(Gottleib) v Winchester CC*** [2015] EWHC 231 (Admin) where Lang J held that the local authority's decision to authorise variations to a development agreement was unlawful, because it failed to carry out a procurement process, as required the 2006 Regulations or on conventional judicial review grounds: for e.g. complaints of abuse of power (e.g. ***(Birmingham***

and Solihull Taxi Association) v Birmingham International Airport [2009] EWHC 1919 (Admin)), unfairness (e.g. ***R(Menai Collect) v Department of Constitutional Affairs*** [2006] EWHC 724 (Admin)) or irrationality (see e.g. ***R (Law Society) v Legal Services Commission*** [2010] EWHC 2550 (Admin)). However, the rules for standing when making procurement judicial review challenges are stricter than those which ordinarily apply to judicial review proceedings: see ***R(Chandler) v Camden LBC*** [2010] LGR 1; ***R(Unison) v Wiltshire Primary NHS*** [2012] EWHC 624 (Admin).

Where a provider of a public body's service acts unlawfully, the public body will necessarily remain liable for any adverse holdings made in judicial review proceedings. But a claimant is unlikely to succeed in any claim directly made against a contracted out provider.

The principles to be applied are firmly established, although the case law is surprisingly sparse. The orthodox approach concerning judicial review of contractual relationships is that the source of a public body's power as being statutory will not, in itself, be sufficient to make a dispute amenable to judicial review; the Court will go on to consider whether there is some additional "*sufficient public element, flavour or character*" to the situation: see e.g. ***R (Beer v Hampshire Farmers Markets Ltd*** [2004] 1 WLR 233. Normally, this will mean that a service user has no remedy when seeking judicial review against the service provider.

Consequently, in ***R v Servite Houses ex p Goldsworthy*** (2001) 33 HLR 35 two care home residents alleged that they received assurances that they would be provided with a home for the rest of their lives from their housing association landlord. Moses J held that a public body would not breach any public law obligation when a private body with whom they contract under s 26 of National Assistance Act 1948, to provide accommodation terminated that provision, and their legitimate expectation claim was dismissed. He took the view that the relationship between the private body and the authority is purely commercial and the source of the private body's power is regulated entirely by contract.

R(A) v Partnerships in Care Ltd [2002] 1 WLR 2610 was at the opposite end of the spectrum. A person with a severe personality disorder was detained under s 3(1) of the Mental Health Act 1983 in a ward at a private psychiatric hospital. The hospital managers decided to change the focus of her ward from the provision of care and treatment for patients suffering from personality disorders to the provision of care and treatment for patients suffering from mental illness, and she brought judicial review proceedings on the ground that the decision was unlawful and irrational and infringed her Article 3 and 8 rights. Keith J held that the private hospital was amenable to judicial review since the Nursing Homes and Mental Nursing Homes Regulations 1984 impose a statutory duty directly on the private hospital to provide adequate professional staff and adequate treatment facilities; furthermore, the manager's decision to detain a patient compulsorily under s 3 of the 1983 Act was an act of a public nature made "*in relation to the exercise of a public fu*nction". His approach was approved by Baroness Hale and Lord Mance in ***YL v Birmingham City Council***: see [2008] 1 AC 95 [63] and [121] respectively

The result (but not the reasoning) is the same under the Human Rights Act (HRA). The difference of approach between judicial review principles and HRA principles is somewhat surprising since the phrase for defining a hybrid public authority under the HRA, '*functions of a public nature*' in section 6(1)(b), appears to derive from the way the courts have identified the bodies and activities susceptible to judicial review: see the decision of the Court of Appeal in ***Poplar Housing v Donoghue*** [2002] QB 48 [65]. Nevertheless, the House of Lords in ***YL*** analysed the position from a Convention perspective: treating a body as a public authority as being related to the question as to whether its

actions would engage the responsibility of the United Kingdom if an application were to be made to Strasbourg.

In ***Y*** the claimant sought to prevent his removal from a private care home by relying on the HRA, alleging breaches of Articles 2, 3 and 8. The House of Lords concluded (by a majority of 3/2) that actual provision of care and accommodation under ss 21 and 26 of the National Assistance Act 1948 by the private sector care home provider (as opposed to its regulation and supervision in accordance with statutory rules) was not an inherently public function and was not a hybrid public authority under s 6 of the HRA. The approach of the House of Lords was highly controversial, arguably incorrect and its effect was reversed by s 145 of the Health and Social Care Act 2008.

The position under the HRA appears to be different in relation to housing associations. In ***Poplar Housing*** the Court of Appeal held that a housing association was subject to the HRA. When providing accommodation and then seeking possession, the housing association's role was so closely assimilated to that of the local authority that it was performing public and not private functions. Similarly, in ***R(Weaver) v London and Quadrant Housing Trust*** [2010] 1 WLR 363 the Court of Appeal accepted that a housing association was a hybrid public authority because it received a substantial public subsidy, and its allocation and management of housing stock was subject to statutory regulation.

As a result, a public body, itself, routinely remain solely liable for any adverse adjudications in judicial review proceedings which arise out of the way a contracted out private body handles its public law obligations. The only means by which the public body can regulate this situation is by the service agreement it makes with the contracted out private provider.

However, standard form boiler plate contracts drafted for outsourcing arrangements are not fit to govern the procedures which apply to public bodies and outsourced private sector operators. The standard terms processes drafted to cover a systemic breach of an outsourced IT or back-office contract are different in nature from the fact-sensitive set of circumstances which result in a judicial review defeat, and most service agreements are not sufficiently nuanced to tackle this. Furthermore, very few practitioners have positive experiences when dealing with how public bodies deal with contract management issues. Routinely, public bodies run contracts in ways which do not adhere to the formal contractual provisions and fail to lay the paper trail needed to translate councillors' complaints of bad practice into specific and cogent evidence, which could justify treating the service agreement as repudiated. In practice, public bodies are, therefore, ill-equipped to remedy contracted out service provision which the Court finds to be unlawful.

The increasing pressure to contract out public services, therefore, carries serious risks for the rule of law. Contracting out arrangements make it difficult for public bodies to respond adequately or appropriately to adverse judicial review adjudications and undermine the accountability of public sector provision to its end service users.

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