
The Charity Law Practice Review

HUMAN RIGHTS, PUBLIC AUTHORITIES AND CHARITIES

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The Human Rights Act 1998 makes it unlawful for 'a public authority' to act in a way which is incompatible with a Convention right.³ Section 6(3)(b) of the 1998 Act provides that 'a public authority, includes:

'any person certain of whose functions are functions of a public nature.'

Such a person is not a public authority if the nature of the act is private.⁴

It is the aim of this article to consider whether and in what circumstances charities are public authorities for the purposes of the 1998 Act and in respect of which acts they must recognise Convention rights. Consideration will also be given to the test which might be applied in determining whether a particular charity is a public authority.

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³ Human Rights Act 1998, s.6(1). 'Convention rights' are the rights and freedoms set out in Articles 2 to 12 and 14 of the European Convention on Human Rights, Articles 1 to 3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol as read with Articles 16 to 18 of the Convention, s.1(1).

⁴ *Ibid*, s.6(5).

Charities

The position of charities in English law was recently summarised by Mummery LJ in *Gaudiya Mission v Brahmachary*⁵ as follows:

‘Under English law charity has always received special treatment. It often takes the form of a trust, but it is a public trust for the promotion of purposes beneficial to the community, not a trust for private individuals. It is, therefore, subject to special rules governing registration, administration, taxation and duration. Although not a state institution, a charity is subject to the constitutional protection of the Crown as *parens patriae*, acting through H. M. Attorney General, to the state supervision of the Charity Commission and to the judicial supervision of the High Court.’

Any thought that charities ‘special treatment’ extends to their total exclusion from obligations imposed by the Human Rights Act 1998 is quickly dispelled by a consideration of the debates in both the House of Lords and House of Commons during the passage of the Act. The Home Secretary said:⁶

‘The Bill had to have a wide definition of a public authority that went at least as wide as and took account of the fact that over the past 20 years, an increasingly large number of private⁷ bodies, such as companies or charities, have come to exercise public functions that were previously exercised by public authorities.’

In reply to a question as to whether the Royal National Lifeboat Institution would be a public body, Mr Straw replied that it would be in respect of the public functions it performed but not in respect of all its charitable functions.⁸

The Lord Chancellor not only considered that charities might be within section 6(3)(b) of the 1998 Act but that it was right that they should be so. He said:⁹

⁵ [1997] 4 All ER 957, 963.

⁶ Hansard H C Vol. 306 col. 775 (16th February 1999).

⁷ Cf. quote at fn. 5 which classified charities as ‘public trusts’ in the more usual way.

⁸ Hansard H C Vol. 314 col. 407 (17th June 1998).

⁹ Hansard H L Vol. 583 col. 800 (24th November 1997).

'If a court were to uphold that a religious organisation, denomination or church, in celebrating marriage, was exercising a public function, what on earth would be wrong with that? If a court were to hold that a hospice, because it provided a medical service, was exercising a public function, what on earth would be wrong with that? Is it not also perfectly true to say that schools, either underpinned by a religious foundation or a trust deed, may well be carrying out public functions? If we take, for example, a charity whose charitable aims include the advancement of a religion, the answer must depend upon the nature of the function of the charity. For example, charities that operate, let us say, in the area of homelessness, no doubt do exercise public functions. The NSPCC, for example, exercises statutory functions which are of a public nature, although it is a charity. We believe that the principles of the Bill are right and that the courts will come to answers in which the public will have confidence.'

This latter quote not only serves to confirm the potential applicability of the 1998 Act to charities but also highlights the wide variety of actions undertaken by charities which, potentially at least, must be carried out in a way which is compatible with Convention rights. Convention rights particularly relevant to charities are the right to respect to private and family life in Article 8, the right to freedom of thought, conscience and religion in Article 9, the right to freedom of expression in Article 10 and the right to enjoyment of the Convention rights and freedoms without discrimination in Article 14. These rights can be relevant not only to the carrying out of the purposes of a particular charity but also potentially to administrative acts, for example the employment of staff¹⁰, necessary to carry out those charitable purposes.

In any consideration of the applicability of the 1998 Act to charities it should be remembered that 'charity' covers a very diverse range of organisations in terms of size, structure and operation. A small number of charities, 0.3% of all registered charities, have income over £10,000,000 a year whereas 36% of charities have income less than £1,000 a year.¹¹ Charities may be unincorporated or incorporated. They may carry out their purposes by giving grants or they may be actively involved in providing services, in many cases under contract to local authorities or health authorities.¹² They may operate in this country or overseas.

¹⁰ See Oliver, *Common Values and the Public-Private Divide*, (1999) 142; Morris, 'The Human Rights Act and the public-private divide in employment law', [1998] ILJ 27.

¹¹ See [1998] Ch. Comm. Rep. Annex i.

¹² The increasing involvement of charities in the contract culture is well documented, see for example Hawley, *From Grants to Contracts* (1992); Flynn, 'A mixed blessing? How the contract culture works' in Hanvey and Philpot (eds), *Sweet Charity: The Role and workings of voluntary organisations* (1996).

The question remains as to which charities will be held to be public authorities, carrying out public functions, and required not to act in a way incompatible with Convention rights. It would seem sensible to seek guidance as to the test to be applied to determine whether a body is a public authority in the debates on the Act.

Parliamentary Debates

The Parliamentary debates on the 1998 Act do not reveal any one simple test to be applied in determining what is a public authority. Rather a number of different approaches are suggested. The Home Secretary stated that as a minimum 'public authority' should be interpreted to cover those bodies which would be recognised as such by the European Court of Human Rights in Strasbourg.¹³ He then went on, however, to opine that the courts in considering whether an organisation was a public authority, should look to the jurisprudence which has been developed in the context of judicial review.¹⁴

In relation to determining whether an organisation is potentially within section 6(3)(b) of the 1998 Act the Lord Chancellor offered the following guidance:¹⁵

'I ask the noble Baroness, Lady Young, to abstain from asking herself the question: is this a public authority just looking at the body in the round? That is what clause 6(1)¹⁶ invites us to do. However, clause 6(3)(b) asks whether the body in question has certain functions – not all – which are functions of a public nature. If it has functions of a public nature, it qualifies as a public authority.'

¹³ Hansard H C Vol. 314 cols. 406, 408, 433 (17th June 1998).

¹⁴ Hansard H C Vol. 314 cols. 408-410 (17th June 1998).

¹⁵ Hansard H L Vol. 583 col. 796 (24th November 1997), see also col. 797.

¹⁶ 'Public authority' there to be interpreted to include 'obvious' public authorities such as government departments, local authorities and the police, Hansard H C Vol. 314 col. 409 (17th June 1998).

The Home Secretary also stressed the importance of 'public function' in determining whether an organisation was a public authority.¹⁷ He then continued, however:¹⁸

'Bodies established by statute, and with statutory functions, must properly be regarded as public authorities, but that is too narrow a criterion to stand on its own.'

A deliberate policy decision was taken by the Government not to include in the Act a list of those bodies which qualify as public authorities.¹⁹ It is perhaps interesting to note that for the purpose of freedom of information a definite list of bodies which are public authorities has been produced.²⁰

A common thread emerging from the Parliamentary debates is that 'public authority' is to be given a wide, rather than a narrow, meaning.²¹ What is 'a public authority' is to be developed by the courts flexibly on a case by case basis.²²

Strasbourg Case law

The Home Secretary, in the Parliamentary debates, made reference to bodies recognised in Strasbourg case law. Although Convention rights bind the State²³ and complaints can only be brought against the State, the European Court of Human Rights has been prepared to take a wide definition of 'State'. 'State' covers not only obvious bodies such as the courts and local authorities but has

¹⁷ Hansard H C Vol. 314 cols. 409, 413 (17th June 1998).

¹⁸ Hansard H C Vol. 314 col. 413 (17th June 1998).

¹⁹ Hansard H L Vol. 583 col. 796 (24th November 1997).

²⁰ See Freedom of Information Bill cl. 2 and Sched. 1.

²¹ Hansard H L Vol. 583 col. 475 (18th November 1997); Vol. 584 col. 1262 (19th January 1998); H C Vol. 306 col. 775 (16th February 1998). See also Bamforth 'The application of the Human Rights Act 1998 to public authorities and private bodies.' (1999) 58 CLJ 159.

²² Hansard H L Vol. 583 col. 796 (24th November 1997); H C Vol. 314 col. 410 (17th June 1998)

²³ European Convention on Human Rights, Art. 1.

been held to cover less obvious bodies such as the Belgium Bar Association to whom responsibility for Belgium's free legal aid system had been delegated.²⁴

The Strasbourg court has made it clear that the State cannot absolve itself from its Human Rights responsibilities by delegating its obligations to private bodies or individuals.²⁵ Thus the United Kingdom was held responsible for the actions of an independent school to whom State responsibilities for educating children had been delegated.²⁶

In order to determine whether a body is one for which the State will be held responsible, the Strasbourg court looks to the degree of State control or independence of the body in question. Relevant factors are the extent of dependency on the State for funding and the extent of the State's influence in the daily operation of the relevant organisation.²⁷

European Court of Justice

Although not referred to in the Parliamentary debates, guidance as to where the dividing line falls between public and private bodies can also be found in cases on the direct effect of European Directives.²⁸ The jurisprudence of the European Court of Justice lays down that an individual can enforce a Directive not only against the State but also against an emanation of the State. Thus in *Foster v. British Gas*²⁹ the European Court of Justice ruled:³⁰

²⁴ *Van der Musselle v Belgium* judgment of 23 November 1983 Series A no. 70

²⁵ *Costello-Roberts v The United Kingdom* judgment of 25th March 1993 Series A no. 247-C para 28.

²⁶ *Ibid.*

²⁷ See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995) p. 630; *Hilton v The United Kingdom* No. 12015/86, 57 DR 108; *Young, James and Webster v The United Kingdom* A 44 paras 48-49 (1981) and B 39 Com Rep para 169 (1979).

²⁸ The guidance is particularly relevant as the European Court has long interpreted Community law in the light of fundamental human rights, see *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle Getreide* Case 11/70 [1970] ECR 1125, 1134 and is now obliged to respect fundamental rights as laid down in the European Convention on Human Rights by Article 6(2) of the Treaty of European Union as amended by the Treaty of Amsterdam.

²⁹ [1990] 3 All ER 897; see also *Marshall v Southampton and South West Hampshire Area Health Authority* [1986] 1 CMLR 688.

³⁰ *Ibid.*, 922.

‘A body, whatever its legal form, which has been made responsible pursuant to a measure adopted by the State, for providing a public service under control of the State and has for that purpose special powers beyond those which resulted from the normal rules applicable in relations between individuals is included among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon.’

On that basis, British Gas was held to be an emanation of the State, or in other words, a public body.

Similarly, the governing body of a voluntary aided school has been held to be an emanation of the State.³¹ In coming to that conclusion the Court of Appeal had regard to the powers given by the Education Acts 1944-1993 to local education authorities and the Secretary of State which could be exercised to control governors of voluntary aided schools.

Judicial Review

In the course of the debate on the definition of ‘public authority’ the Home Secretary said:³²

‘The most valuable asset we had to hand was jurisprudence relating to judicial review. It is not easily summarised and could not have been simply written into the Bill, but the concepts are reasonably clear and I think that we can build on them.’

This would appear to indicate that charities seeking to know whether they must act compatibly with the Convention simply need to ask whether, at present, they would be subject to judicial review. The answer, however, may not be immediately apparent.

Originally the remedy of judicial review was only available if the source of the power being exercised by the body in question was statutory or derived from the prerogative or other delegated power.³³ The type of bodies amenable to judicial review was extended by the decision of the Court of Appeal in *R v Panel on*

³¹ *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1997] 3 CMLR 630.

³² Hansard H C Vol. 314 col. 409 (17th June 1998).

³³ See *R v Criminal Injuries Compensation Board ex p. Lain* [1967] 2 QB 864.

*Take-overs and Mergers, ex p. Datafin plc*³⁴ to bodies carrying out a public function. In that case Donaldson MR said:³⁵

‘Possibly the only essential elements are what can be described as a public element, which can take many forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to jurisdiction.’

The ambit of judicial review was described by Lloyd LJ in the *Datafin* case as follows:³⁶

‘Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of the power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review....But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public functions, or if the exercise of its functions have public law consequences, then that may, as counsel for the applicants submitted, be sufficient to bring the body within the reach of judicial review.’

Since the *Datafin* case, the courts have considered a number of different factors when determining whether a body was subject to judicial review. The courts have asked, if the non-statutory body in question did not exist, would the Government intervene to create a body to perform its functions.³⁷ The source of the power of the body remains a relevant factor³⁸ but in the case of a non-statutory body attention is given to whether the body has been ‘underpinned’ by an agency or organ of the State³⁹ or whether it has been woven into any system of government

³⁴ [1987] 1 QB 815.

³⁵ *Ibid.* 838.

³⁶ *Ibid.* 847.

³⁷ *R v Advertising Standards Authority ex p. Insurance Services plc* (1989) TrLR 169; *R v Football Association ex p. Football League* [1993] 2 All ER 833.

³⁸ *R v Football Association ex p. Football League* supra; *R v Disciplinary Committee of the Jockey Club ex p. Aga Khan* [1993] 1 WLR 909.

³⁹ *R v Football Association ex p. Football League*, supra, 848.

control.⁴⁰ The courts have also considered whether the body had monopolistic powers⁴¹ and the importance of the body in public life.⁴² An important factor is whether the person seeking judicial review has a contractual relationship with the body in question⁴³ or has consented to be bound by the decisions of the body.⁴⁴

In the *Datafin* case Donaldson MR said:⁴⁵

‘In all the reports it is possible to find enumeration of factors giving rise to jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors.’

Subsequent cases have confirmed that no one factor is decisive.⁴⁶ Thus despite the government probably being driven to regulate racing if the Jockey Club did not, it was not subject to judicial review at the behest of an applicant who had entered into an agreement with the Club.⁴⁷ In contrast, it has been suggested, obiter, that the Jockey Club could be the subject of judicial review in other circumstances.⁴⁸ Similarly, the Football Association was regarded as having virtually monopolistic

⁴⁰ *R v Disciplinary Committee of the Jockey Club ex p. Aga Khan* supra, 921; *R v Cobham Hall School* ex p. S [1998] ELR 389

⁴¹ *R v Panel on Take-overs and Mergers ex p. Datafin plc* supra; *R v Football Association ex p. Football League* supra; *R v Disciplinary Committee of the Jockey Club ex p. Aga Khan* supra.

⁴² *R v Football Association ex p. Football League* supra; *R v Disciplinary Committee of the Jockey Club ex p. Massingbred-Munday* [1993] 2 All ER 207.

⁴³ *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302; *R v Disciplinary Committee of the Jockey Club ex p. Aga Khan* supra.

⁴⁴ *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth ex p. Wachmann* [1992] 1 WLR 1306.

⁴⁵ Supra, 838.

⁴⁶ See *R v Insurance Ombudsman Bureau ex p. Aegon Life Assurance* [1994] CLC 88,93

⁴⁷ *R v Disciplinary Committee of the Jockey Club ex p. Aga Khan* supra

⁴⁸ *Ibid*, 930 per Farquharson LJ; *R v Disciplinary Committee of the Jockey Club ex p. Massingbred-Munday* supra, 219 per Neill LJ; *R v Jockey Club ex p. RAM Racecourses* [1993] 2 All ER 225, 244 per Stuart Smith LJ, 245 per Simon Brown J.

powers but it was not underpinned by any organ of the State and was not subject to judicial review.⁴⁹

The courts have indicated that a similar consideration of a group of factors will be necessary in order to determine if a charity is amenable to judicial review. In *Scott v National Trust for Places of Historic Interest or Natural Beauty*⁵⁰ Robert Walker J held that the National Trust was to be subject to charity proceedings under section 33 of the Charities Act 1993 not judicial review proceedings but went on to say:⁵¹

‘I do not think that it is helpful, or even possible, to consider the broad question of whether any charity, or even any charity specially established by statute, is subject to judicial review. Charities are, as Nicholls LJ said, many and various. But the National Trust is a charity of exceptional importance to the nation, regulated by its own special Acts of Parliament. Its purposes and functions are of high public importance, as is reflected by the special statutory provisions (in the field of taxation and compulsory acquisition) to which I have already referred. It seems to me to have all the characteristics of a public body which is, prima facie, amenable to judicial review, and to have been exercising its statutory public functions in making the decision which is challenged.’

‘A Public Authority’

The possible sources of authority as to what is ‘a public authority’ suggested in the Parliamentary debates and the debates themselves not only do not reveal clear guidance but raise potential contradictions particularly for charities and analogous bodies. For example, if guidance is sought from the jurisprudence developed in the context of judicial review an independent school is not a public body.⁵² By comparison, if the jurisprudence developed by the European Court of Human

⁴⁹ *R v Football Association ex p. Football League* supra, 848 per Rose LJ.

⁵⁰ [1998] 2 All ER 705.

⁵¹ *Ibid*, 716.

⁵² *R v Fernhill Manor School ex p. A* [1994] ELR 67, see also *R v Muntham House School ex p. R* [2000] *Times* 26th January cf. *R v Cobham Hall School ex p. S* [1998] ELR 389 (independent school subject to judicial review when the dispute concerned the statutory assisted place scheme).

Rights in Strasbourg is applied an independent school is a public body.⁵³ If the same jurisprudence is applied a body with no State funding and subject to no State control in its operations it would not be a public authority.⁵⁴ The Home Secretary, however, stated⁵⁵ that the Royal National Lifeboat Institution, which satisfies both of those criteria, would be a public body in respect of its public functions.

The one common thread which emerges from all the possible sources of what is 'a public authority' is 'public function'. Section 6(3)(b) of the Human Rights Act 1998 itself defines 'a public authority' by reference to carrying out functions of a public nature and makes such an authority liable in respect of public acts only.⁵⁶ During the Parliamentary debates on the Act, the Lord Chancellor stressed that in determining whether a body is a public authority focus should be on the functions carried out rather than the body as a whole.⁵⁷ This would seem to follow from the purposes of the 1998 Act of requiring compliance with Convention rights when decisions are made or actions taken which inevitably focuses on functions rather than status.

This focus on public function would seem to indicate greater affinity with the law of judicial review rather than that of the Strasbourg Court or the European Court of Justice. In setting out the ambit of judicial review in the *Datafin* case⁵⁸ Lloyd LJ referred to the body in question "exercising public functions". In contrast, Strasbourg case law does not refer to 'public function' as such although it does regard an emanation of the State as one providing a public service.⁵⁹ The European Court of Justice looks to the powers of the body in question.⁶⁰

It would appear therefore that whether a charity must act compatibly with the Convention depends upon whether the charity is carrying out a public function.

⁵³ *Costello-Roberts v The United Kingdom* judgment of 25th March 1993 Series A no. 247-C.

⁵⁴ See the text at fn.27.

⁵⁵ Hansard H C Vol. 314 col. 407 (17th June 1998).

⁵⁶ Human Rights Act 1998, s. 6(5).

⁵⁷ Hansard H L Vol. 583 col. 796 (24th November 1997); see text at fn. 5 supra; see also Hansard H C Vol. 314 col.s 409-410 (17th June 1998).

⁵⁸ [1987] 1 QB 815; see the text at fn. 6 supra.

⁵⁹ *Foster v British Gas* [1990] 3 All ER 897, 922; see the text at fn. 9 supra.

⁶⁰ See the text at fn 30.

Further, the question cannot be answered by looking at the charity in isolation from what it is actually doing and, in particular, the activity that is the source of complaint. Similarly, the question cannot be answered by looking at the activity in isolation. An activity by one charity may be a private act but the same activity may be part of carrying out a public function when done by another charity. Just as the courts have considered a number of factors in determining whether a body is subject to judicial review, it is suggested that the courts will examine a range of factors in determining if a charity is carrying out a public function.

'Public Function'

Consideration of the various sources of guidance suggested in the Parliamentary debates of the 1998 Act indicates the factors which may be relied upon by the courts in determining if a charity is carrying out a public function. It is not considered that the presence or absence of any one of the factors listed below will be decisive; rather the courts will consider the factors in the context of the purpose of the 1998 Act.

An important factor will be whether there is a statutory base for the functions of the charity. In considering any statutory base, there is a need to distinguish between a statutory underpinning to the charity itself and a statutory basis for a particular activity of the charity. Where the charity itself has a statutory base, a further distinction should probably be made between those charities founded by a Public General Act of Parliament, for example, the National Trust⁶¹ or the Construction Industry Training Board⁶² and those founded by private Act of Parliament. Many older charities were founded by private Act of Parliament; if founded today they would probably simply be companies limited by guarantee and it is not considered that the same weight would be attached to such statutory base. Similarly, although an exercise of the prerogative, too great a weight is unlikely to be attached to the fact that a charity was founded by, or later acquired, a Royal Charter.⁶³ More attention is likely to be given where a body, although not founded by statute, is given charitable status by statute, for example, foundation schools.⁶⁴

⁶¹ The National Trust Act 1907.

⁶² The Industrial Training Act 1982. The Construction Industry Training Board is listed as a public authority in Sched. 1 to the Freedom of Information Bill.

⁶³ See, in the context of judicial review, *R v Disciplinary Committee of the Jockey Club ex p. Aga Khan* [1993] 1 WLR 909; *R v Royal Life Saving Society ex p. Howe* [1990] COD 440.

⁶⁴ Schools Standards and Framework Act 1998, s. 23(1)(b)

Some charities are given statutory authority to carry out particular work and such authority would be a highly relevant factor in determining whether or not they were carrying out a public function. For example, under section 31(9) of the Children Act 1989, the NSPCC has power to apply to the court and to have a child placed under their care where they believe the child has or is likely to suffer significant harm. Under section 18 of the Adoption Act 1976 Barnados as an approved adoption agency is empowered to apply to the court for a declaration that a child is eligible for adoption and to take parental responsibility in the meantime.

Other charities indirectly carry out statutory functions where they provide a service that is required to fulfil a statutory obligation imposed on central or local government. For example, a housing association may provide short term accommodation for homeless people who are referred to it by a local authority carrying out its duties under the Housing (Homeless Persons) Act 1977⁶⁵ or a charity for the elderly may provide residential or nursing home accommodation care for a local resident for whom a local authority is obliged to make arrangements following an assessment under the National Health Service and Community Care Act 1990.⁶⁶ In determining whether a charity is carrying out a public function the terms of the contract under which the housing or care is provided may be relevant. For example, is the charity obliged to take, or merely consider, persons in need referred to it by the local authority? In other words, to what extent is the work of the charity woven into the statutory provision?^{66a}

Depending upon the activities of the particular charity a relevant factor may be whether, if the charity was not in existence, the government would have to make provision for the particular activity to be carried out. An example for which that may be a relevant factor is the rescue function of the RNLI. Other circumstances in which the question of possible government intervention may be a relevant factor are in relation to the disciplinary functions exercised over members of a profession by their controlling charitable body and the provision by charities of medical facilities not otherwise available. By analogy, another factor that may be relevant is whether the charity has been set up to carry out a function that was previously carried out by central or local government. For example, a number of

⁶⁵ See, for example, *Bruton v London Quadrant Housing Trust* [1997] 4 All ER 970.

⁶⁶ For a judicial consideration of the provisions of the 1990 Act see *R v Sefton BC ex p. Help the Aged* [1997] 4 All ER 532.

^{66a} See *R v Servite Houses and Wandsworth LBC exp Goldsmith and Chatting* [2000] unreported 12th May Moses J (a charitable housing association providing a home for persons assessed by the local authority as in need of residential accommodation not subject to judicial review in respect of closure).

local authorities have recently transferred their leisure facilities to charities.⁶⁷ In addition a number of Non Departmental Government Bodies are charitable, for example, The British Film Institute⁶⁸ and the Arts Council.⁶⁹

The source of a charity's funds, either for general purposes or for a specific activity, could be a relevant factor in determining whether the charity is carrying out a public function. It is suggested that in considering the extent of state funding⁷⁰ and the extent of the dependence on the State, it will be irrelevant whether the funding is direct, as in the case of a charity such as the British Council,⁷¹ or indirect through an intermediary such the Higher Education Funding Council in the case of individual universities. In the context of funding it will be important to concentrate on the function in question and not the body as a whole. It is not unusual for a charity to be funded by income from investments and/or grants for its general operations but to have one or more particular projects funded by central or local government grant or contract. In this regard the recent programme of the Princes Youth Business Trust to place 30,000 young people into self-employment with half the cost of £100 m. to be met by the Government, may be a relevant example.⁷²

The provision of certain facilities or services might be regarded as a public function because they are services or facilities that it would be expected the State will provide. One basis on which services or facilities may be regarded as part of the State's function is if they are in connection with what the European Convention on Human Rights regards as a fundamental right. Accordingly, provision of education⁷³ may be regarded as a public function in the light of Article 2 to the First Protocol which states that:

'No person shall be deprived of the right to education.'

⁶⁷ See Tameside Sports Trust (registered charity No. 1074808).

⁶⁸ Registered charity No. 293 798e.

⁶⁹ Registered charity No. 313039.

⁷⁰ State funding for charities here means funding beyond and in addition to the tax reliefs available to all charities.

⁷¹ The British Council, registered charity No. 209131, receives core grant in aid from the Foreign and Commonwealth Office.

⁷² See Press Release dated 17th June 1999.

⁷³ See *Costello-Roberts v The United Kingdom* judgment of 25 March 1993 Series A no. 247-C paras 27-28.

Provision of a marriage ceremony may also be regarded as a public function in the light of Article 12 that states a fundamental right to marry.⁷⁴ This factor will be of particular importance in determining if certain educational and religious charities are public authorities for some of their functions. An allied factor may be the extent to which the State controls a particular activity by regulation and inspection. A relevant example may be the statutory system of registration and inspection imposed by the Residential Homes Act 1984 on residential care homes and nursing homes, many of which are run by charities.

A final factor that may be relevant in determining whether a charity is carrying out a public function is the importance to the nation of the work of the charity.⁷⁵ This may well be a relevant factor in determining whether charities such as museums and art galleries are carrying out a public function in preserving their respective collections.⁷⁶

Conclusion

The Human Rights Act 1998 potentially has important implications for charities in requiring those which are public authorities to act compatibly with the Convention. Regrettably, it is far from clear which charities will be public authorities and in respect of which functions. The concept of public authority will be worked out on a case by case basis by the courts and at this stage all that is possible is to suggest possible factors which the court may take into account in determining whether or not a charity is a public authority.

⁷⁴ See Hansard H L Vol. 583 col. 800 (24th November 1997) and the text at fn. 9 above.

⁷⁵ See *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 716 in the context of judicial review; see the text at fn. 50 above.

⁷⁶ A number of museums and galleries, largely co-inciding with those exempt under Schedule 2 to the Charities Act 1993, are listed as public authorities in Schedule 1 to the Freedom of Information Bill.