'For whose benefit?' (1997)

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A range of recent decisions in the higher courts have restricted the scope of local authority obligations as a result of the application of an inexpert, unsubstantiated perception of public policy. Where Parliament imposes a statutory obligation to provide welfare, the courts seek to limit it. This thread can be traced through very recent decisions in the areas of housing, social security and child law.

Housing

The most stark example of judicial legislation in the area of housing, is probably to be found in the speech of Lord Brightman in *Pulhofer v. Hillingdon BC*[1]. His lordship took the view that, while local authorities had to find 'accommodation' for homeless people (in some circumstances under the 1977 Housing (Homeless Persons) Act), that accommodation did not have to be 'reasonable accommodation'.[2]

Lord Brightman found, with the unanimous support of the House of Lords, that the accommodation described was satisfactory 'accommodation' for the Pulhofer family. In Lord Brightman's view, the 1977 Act is an Act which saves the homeless from a lack of any help rather than imposing an obligation on local authorities to house them.

Parliament stepped in to alter the legislation to include a standard of suitability of that accommodation. Despite that deliberate change to reverse the informal judicial policy, Lord Hoffmann's leading speech in the House of Lords in *Awua v. Brent LBC*[3], explicitly approves the principle set out in *Pulhofer*. Lord Hoffmann distinguished between the time for which accommodation was offered and the quality of the accommodation that was offered. With reference to the time for which accommodation was offered, he held that it need be neither permanent nor settled; provided that it was 'accommodation' rather than simply 'shelter'.

In the words of Lord Brightman in *Pulhofer*, while the Act had the word 'Housing' in its short title, 'it [was] not an act which impose[d] any duty on a local authority to house the homeless'. Rather the Act was intended 'to assist persons who are homeless, not an Act to provide them with homes.' What this statement did not take into account is that there *are* circumstances under the statute in which local authorities must provide accommodation, yet that

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[1] [1986] AC 484.
[2] For detailed discussion of this area, see *The Law on Homelessness* by Alastair Hudson (Sweet & Maxwell, 1997).
[3] [1995] 3 All ER 493.

accommodation may not be suitable for the particular applicant and therefore will not remove the mischief addressed by Parliament in the statute.

Similarly, Lord Hoffmann in *Awua* approved the principle that accommodation need only be something more than mere shelter but need not satisfy some larger criteria despite the express history and sense of the legislation. Lord Hoffmann identified as merely 'inconvenient'[4] the result that *Pulhofer* required applicants to put themselves onto the street before they would be homeless because unsuitability of accommodation was not ground enough to make them homeless. This was clearly far from the real intention of that new statutory code.

The local authority is required to *'balance the priority needs of the homeless on the one hand, and the legitimate aspirations of those of their housing waiting list on the other hand'* [writer's emphasis]. That is, there are some people whose rights under statute are legitimate and other people whose rights under statute are not legitimate in some way. Therefore, the judiciary is reaching ad hoc policy decisions on which particular sectors of the population are entitled to call on which particular social resources, both in the absence of expert evidence and that policy being a legal issue before them. This is surely a matter for local government to ascertain through examination of its budget and for central government to work out through taxation policy and its policy in respect of local government funding. It cannot be the business of informal, judicial legislation.

Further Lord Brightman in *Pulhofer* considered that those people who were contending that they were homeless should only be allowed to commence judicial proceedings in 'exceptional cases'. (This was at a time when judicial review was the only remedy available to applicants.) Further than limiting the sense of those statutory rights, these dicta constituted the effective withdrawal of the ability of many people to access their rights under the homelessness legislation.[5]

In this context, the decision of the Court of Appeal in *Ben-el-Mabrouk*[6] does suggest that where the authority has great housing demands made of it, these general circumstances will govern the question whether or not accommodation is suitable, rather than concentrating solely on the intrinsic suitability of the accommodation itself. Therefore, the court has decided that it is entitled to consider the broader housing requirements of the local authority and its area, in deciding whether or not accommodation is suitable. The attitude of the courts is purposive and not strictly concerned with the provisions of the statute. Local authorities are not having obligations imposed on them but are enabled to decide which obligations to follow and which not.

[4] at p.497.
[5] The Housing Act 1996 has introduced a new appeals mechanism which is yet to be tested in the higher courts.
[6] (1995) 27 HLR 564.

This attitude has been promulgated by a similarly constituted House of Lords in *O'Rourke v. Camden London Borough Council*[7] where the plaintiff had applied to the defendant local authority to be housed on leaving prison, under the terms of the homelessness provisions of the Housing Act 1985. The plaintiff sought to be housed, *inter alia*, on the basis that he was in priority need. The local authority provided him with temporary accommodation and then evicted him on the basis that he was not, in their opinion, in priority need.

The plaintiff brought an action for damages for unlawful eviction without provision of alternative accommodation, as required by s.63 of the 1985 Act. The county court judge struck out the plaintiff's claim on the basis that it disclosed no cause of action - the only course, in his opinion, being to bring proceedings for judicial review of the defendant local authority's decision. The House of Lords followed *Cooks v. Thanet D.C.*[8] and took the view that it was unlikely that Parliament had intended the legislation to create private law rights of action in favour of the plaintiffs. Therefore, he was not entitled to damages for wrongful eviction.

The plaintiff argued that the legislation sought to provide protection for a limited class of person and therefore ought to be construed as creating a private right of action. The defendant contended, successfully, that the legislation ought to be construed as being enforceable in public law by individual homeless people who then have locus standi to bring judicial review proceedings. In the words of Lord Hoffmann, delivering the leading judgement: '.. the Act is a scheme of social welfare, intended to confer benefits at the public expense on grounds of public policy'.[9] The view is that it is public money which is being spent to house homeless people on grounds of 'general public interest'. The judiciary is abstracting to itself, again, the power to identify that public policy.

While it is true to say that local authorities are acting in their public function when they exercise their powers under the housing legislation, it is difficult to see why this should excuse them from private law claims which would obtain against a private landlord simply because the wrong was committed while performing its statutory function. It is submitted that there is no external factor, in the context of housing the homeless, which ought to excuse the local authority from this liability. Unlike cases of force majeure where governmental powers are exercised *in extremis* (as under war conditions), the local authorities should be required to refrain from committing civil wrongs, such as wrongful eviction, or face the usual civil penalties in damages when they do.

The second reason for Lord Hoffmann's excuse of the local authority in *O'Rourke* was that the authority was required to exercise a large degree of judgement by the legislation, in a way that made his lordship reluctant to impose the usual civil penalties on the public body in the ordinary course of

[7] [1997] 3 All ER 23.
[8] [1982] 3 All ER 1135.
[9] *op cit.* 26.

their activities.[10] Again, local authorities are excused strict liability on the grounds of the perceived scope of their responsibility. Failure to impose a scheme of stricter liability in the courts simply enables local authorities carrying out their duties in a less rigorous fashion.

Children

The judiciary's permissive approach to the elasticity of local government obligations can also be seen in the context of their responsibilities to children in their care. In *Barrett v. Enfield London Borough Council*[11] the plaintiff had been in the care of the local authority from the age of ten months. In the following 17 years, the plaintiff was moved to nine different homes and sought to bring an action against the local authority claiming damages in respect of the development of psychiatric illness caused by the frequent re-locations.

The plaintiff claimed that the local authority had failed to show the standard care that would be expected of a responsible parent. This standard of care was said to include an obligation to plan for the child's future as well as an obligation to ensure the plaintiff's security and to provide suitable social workers.

The Court of Appeal held that it would be contrary to public policy to impose a duty of care on a local authority in this situation. The reasoning was that the obligation would have had to be fixed in relation to decisions which ordinary parents are required to make on a daily basis. The Court of Appeal held that, on the basis that it would be unreasonable to impose the obligation on ordinary parents, such an obligation could not be imposed on local authorities standing *in loco parentis*.

The Court of Appeal accepted that liability could attach vicariously to the authority in respect of social workers' negligence in implementing local authority decisions. Oddly, the Court of Appeal also accepted that this would create a liability for the local authority where its officers negligently implemented a policy but, seemingly, it would not create a private civil liability for the local authority for failing to have a policy or for having a negligent policy. In the latter case, the only redress would be by judicial review.

Social security

Circumstances where individuals are reliant upon state benefits do not offer any buffer against legalistic, overly-subtle distinctions between those who are, and those who are not, entitled to receipt of benefits. In joined appeals before the House of Lords[12], the applicants sought attendance allowances in respect

[10] *op cit.* 26 *supra*.
[11] [1997] 3 All ER 171.
[12] *Cockburn v. Chief Adjudication Officer; Secretary of State for Social Security v. Fairey* [1997] 3 All ER 844.

of 'frequent attention throughout the day in connection with bodily functions', further to the Social Security Contributions and Benefits Act 1992.[13]

F was deaf and required an interpreter to use sign language to communicate with others. It was held that the inability to hear and the requirement for an interpreter arose in connection with a 'bodily function'. In the court's view, the frequency with which the attention was required depended upon the need to enable the applicant to live a 'normal life'.

C was incontinent and sought the benefit in connection with the cost of her daughter cleaning her laundry. C's daughter collected the laundry, took it away, washed it, and then returned it to C. The majority opinion of the House of Lords was that there was no 'attention' within the statute because the laundry was *taken away* to be washed. The practice of taking the washing away could not be 'frequent attention' designed to assist the claimant with her bodily functions.

Therefore, C's claim was dismissed, while F's claim was upheld.

The distinction between these cases is extremely narrow. C's requirement for attention equally directly as a result of a mis-performing 'bodily function'. However, benefit was denied where the aid is provided by alternative means. The court did not consider the need which had to be met by the benefit, but rather the means by which the benefit was being met. 'How' was elided with 'why'.

Conclusion

The conclusion drawn from this necessarily brief survey is that local authorities' statutory obligations are not being enforced by the higher courts in a way that imposes strict interpretations of those duties on them. The reason for this drift in judicial largesse is an informal development of policy based on an assumed scarcity of local authority resources and a concomitant reluctance to overstretch social welfare budgets.

This policy is ill-informed and, worse, it is straightforwardly unconstitutional. There can be no doubt that judicial policy-making in the area of local government obligations amounts to legislation by the back door. Policy pronouncements in Supreme Court decisions are made without any expert knowledge of local government financing. Moreover, deliberate curtailing of statutory obligations constitutes an infringement on the intention of Parliament with reference to the provision of social welfare services. Judicial attitudes to local authority obligations under statute therefore impact directly on individual citizens' access to social welfare benefits.

[13] Specifically ss. 72(1)(b) and 64(2)(a).