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Articles, notes and correspondence should be addressed to Professor F. M. B. Reynolds, 61 Charlbury Rd, Oxford OX2 6UX, England. Books for review should be addressed to J. Edelman, Keble College, Oxford OX1 3PG, England : fax (+44) 1865–272742.
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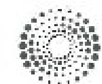
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NOTES

OUTSOURCING ADMINISTRATIVE ADJUDICATION

In the London Borough of Brent, initial decisions, about whether applicants were eligible for public housing under Pt VII of the Housing Act 1996 (the Act), were made by employees of the council. However, the conduct of reviews of such decisions (under s.202 of the Act) was outsourced to a company called Housing Reviews Ltd (HRL). The reviews in issue in *Heald v Brent LBC* [2009] EWCA Civ 930; [2009] H.R.L.R. 34 were conducted by a Mr Perdios, who described himself as an "independent reviews manager" of HRL. Mr Perdios said in evidence that 13 local authorities "currently instructed" (at [8]) his company to conduct reviews of homelessness decisions; and that he had conducted some 3,500 reviews. Of these, 158 were appealed to the county court and HRL successfully defended 95 per cent of the appeals (at [24]).

The appellants in *Heald*, who were dissatisfied with the outcomes of their respective reviews, argued that it was unlawful for Brent to outsource the conduct of the reviews to HRL and that the arrangement infringed art.6 of the European Convention on Human Rights (ECHR), which creates a right to a fair hearing by an independent and impartial tribunal in the determination of citizens' civil rights and obligations. The Court of Appeal decided against the appellants on both grounds. Both of the appellants' arguments raise issues of what we might call "constitutional design" and pose a general question of whether there are any legal limits on the power of governmental agencies to outsource functions to non-governmental entities (NGEs).

The theoretical significance of the decision in *Heald* is hard to overestimate. Since the late 20th century, administrative lawyers around the world have been expressing serious disquiet about the impact of privatisation and outsourcing on public accountability for the provision of welfare and essential services. Relevant litigation has mainly focused on their impact on the availability of judicial review. On the whole, lawyers and scholars have treated the limits of privatisation and outsourcing as essentially a political rather than a legal question; although in the

United States there is a significant, if relatively small, body of literature and case law exploring the legal—and, more significantly—constitutional propriety of various instances of privatisation and outsourcing. Particularly worthy of note, too, is the recent decision of the Israeli Supreme Court to the effect that privatisation of prisons is unconstitutional because transferring responsibility for managing a prison to a contractor aiming at profit would violate the basic rights of prisoners to dignity and freedom (*Academic Center for Law and Business v Minister of Finance*, SCJ 2605/05, November 19, 2009).

The fundamental constitutional issue that underlies the decision in *Heald* concerns the nature of the state (or "government"). An appropriate starting point is the proposition that the very concept of a constitution assumes the existence of a state that is distinguishable from "civil society" but is involved with it in various ways. We can identify a spectrum of widely differing and strongly held views about the appropriate functions of the state and the appropriate nature of its involvement in social and economic life. A view located at one end of the spectrum is sometimes encapsulated in the concept of the minimal "night-watchman" state. The views of supporters of a strong, welfare and regulatory state sit at the other end of the spectrum. All such views, however, presuppose the existence of an entity—the "state"—with a set of basic functions that are in some sense definitional of the entity and that distinguish it from civil society. It would seem to follow that there is some set of "state" or "governmental" functions that could not, as a matter of basic constitutional principle, be privatised or even, perhaps, outsourced. In other words, there must be some constitutional limit to the transfer of functions from governmental organs to NGEs. The devilish question, of course, concerns the precise location and nature of that limit.

Even in legal systems (such as those of the United States and Australia) that are based on a formal constitutional document, this is a difficult question to answer because, typically, such documents do not address it directly, many having been drafted long before the advent of the political, economic and social conditions that have led to its being posed. In the United States, the Appointments Clause is of some relevance here as undoubtedly, in both the United States and Australia, is the separation of powers (especially judicial power) inherent in the architecture of the Constitution. In *Heald*, the constitutional backdrop to the court's consideration of the appellants' first argument was the doctrine, fundamental to the British constitution, of Parliamentary supremacy. Section 202(4) of the Act provides that when an applicant requests review of an initial decision, "the authority ... shall review their decision". Section 70(2) of the Deregulation and Contracting Out Act 1994 provides that if a Minister by order so provides, a function of a local authority "may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the local authority whose function it is". In 1996 the Secretary of State so provided in relation to various functions under the Act, including that of conducting reviews under s.202 of the Act. None of the relevant legislative provisions was found by the court to be unclear or ambiguous or to leave any room for interpretation in favour of the appellants. In *Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 A.C. 430, Lord Bingham of Cornhill and Lord Millett expressed doubt as to whether the 1996 Order, properly interpreted, authorised outsourcing of what Lord Millett (at [49]) described as a "quasi-judicial"

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power. However, in the Court of Appeal in *Heald* Stanley Burnton L.J., with "very great respect", rejected these doubts in the face of the "clear" (at [50]) words of the 1996 Order.

There is at least one significantly underexplored aspect of the Court of Appeal's consideration of the appellants' first argument. In evidence, Brent's own "Review Manager" pointed out that, under the contract with HRL, the company's obligation was to "make recommendations" to Brent about the outcome of reviews, and that it remained open to Brent to reject such a recommendation (at [30]), which would become a "decision" only when accepted by Brent's Review Manager. In systems—such as those of the United States and, especially, Australia—where the concept of "judicial power" has express constitutional significance and is, consequently, more highly elaborated than in English law, the distinction between "recommendations" and "decisions" would be central to answering the question of who could properly exercise an adjudicative function such as that in issue in *Heald*. It seems reasonable to think that exercising "judicial power", in some sense of that difficult term, is one of the functions, definitional of a state, which could not constitutionally be transferred to an NGE even in the absence of an express prohibition to that effect (such as is contained in the Australian Constitution in relation to "the judicial power of the Commonwealth"). One need not be a strong advocate of "common law constitutionalism" to think that at least some aspects of the adjudication of the legal rights and obligations of citizens (especially vis-à-vis the state) belong exclusively to state organs. It is, perhaps, surprising that the terms on which local authorities may "authorise" persons to exercise adjudicative functions appear to be unregulated by primary or delegated legislation. As Sedley L.J. said, it was something for Brent to "sort out" (at [66]). It is also noteworthy that the Court of Appeal showed no interest in how recommendations of HRL were, in practice, processed by Brent—no doubt because it thought, as Sedley L.J. so succinctly put it, that "the issue does not go to the legality of contracting out the review function" (at [66]).

Whereas *Heald* concerned reviews of homelessness decisions by an NGE, the issue in *Begum* was whether an arrangement, under which reviews of such decisions were conducted by employees of the local authority, infringed art.6 ECHR on the ground that the review officer was not sufficiently independent. The House of Lords held that the homelessness decision-making process looked at as a whole—including the possibility of appeal to the county court—complied with the Convention. Ironically, the doubts of Lord Bingham and Lord Millett, noted above, about the lawfulness of the outsourcing of the review function, were expressed in response to an argument that an arrangement under which reviews were conducted by an NGE would be more likely than the existing arrangement to satisfy the requirements of art.6. In support of their second (ECHR) argument, the appellants in *Heald* suggested that HRL, being in the business of providing review services to local authorities, had a commercial interest in recommending that reviews be resolved adversely to applicants in an appeal-proof way (at [40]). They also pointed out that HRL had no contractual security because Brent could terminate the contract on one month's notice if HRL's services were no longer required (at [11]).

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Put crudely, the Court of Appeal's response to the appellants' second argument was that if the arrangement in *Begum*, under which reviews were conducted by employees of the authority, could pass muster, so also could an arrangement such as that in *Heald* because an NGE would "not necessarily" be less "independent" or "impartial" than an employee (at [52], [64]). True enough, HRL had no security; but, said Stanley Burnton L.J., public employees, too, may be vulnerable in various ways to the displeasure of their political masters (at [56]). Puzzlingly, he also thought that the fact that HRL had 13 authorities on its books "confer[red] a certain independence in relation to each of them" (at [56]). As for impartiality, he concluded that no "objective and well-informed observer" would think that a person conducting reviews under a commercial contract would have any greater incentive than a local authority employee to favour its contractor's interests over those of applicants for housing. In the somewhat complacent words of Sedley L.J.,

> "starting from such a low base [as that established in *Begum*], delegation of the review function to a competent outsider on the kind of terms we have seen in this case, whatever its weaknesses, probably offers more in the way of independence and impartiality than the in-house system."

Independence and impartiality are certainly fact-relative and context-sensitive concepts. Once it has been accepted that there is no objection in principle to a particular outsourcing arrangement, these concepts are unlikely to provide reliable protection against the "hollowing out of the state". A critical, but unstated, assumption underlying the reasoning of the Court of Appeal is that art.6 contains no resources, beyond the concepts of independence and impartiality, for imposing limits on the outsourcing of adjudicative functions. In particular, it is assumed that the word "tribunal" has no connotation of publicness and carries no implication that the decision-maker in question is a government agency. Sedley L.J. adverts to the issue, noting that the "modern forum" for the exercise of adjudicative powers is "the independent tribunal" (at [64]). He goes on to observe that in the context of homelessness, by contrast, the adjudicative review function has been retained within the administrative structure; and then, laconically, that "into this framework ... the power to contract out has been introduced" (at [65]). At this point the doctrine of parliamentary supremacy exerts its sway to prevent questioning of the shift of responsibility from public to private adjudicator. The move is too fast, and the connotation and implications of the word "tribunal" deserve more attention.

The appellants in *Heald* apparently argued that the outsourcing arrangement was objectionable because HLR was not "democratically accountable". This is true, of course. But unfortunately, it is also true of employees of housing authorities. For that very reason, Stanley Burnton L.J.'s response that Brent "made [HLR's recommendations] ... its own" (at [53]) is beside the point: the councillors of Brent were "politically accountable" for review decisions regardless of who made them and of the terms on which Brent might outsource the review function. This is not to say that accountability may not, in principle, be relevant to the legality of outsourcing. Even if the outsourcing of a particular function (such as managing a prison, for instance) is not prohibited, its legality could be made to depend on the nature of the arrangements put in place for monitoring the performance of the function and for calling the contractor to account. Nevertheless, it is important not

to equate legality and accountability because there may be some functions that the state must retain regardless of the modes and extent of accountability of the functionary.

Finally, it must be noted that both the House of Lords in *Begum* and the Court of Appeal in *Heald* merely assumed that homelessness decisions determine "civil rights" and engage art.6 ECHR. However, in *Tomlinson v Birmingham City Council* [2010] UKSC 8; [2010] 2 W.L.R. 471 the Supreme Court held that because housing authorities exercise significant discretion in performing their functions under Pt VII of the Act, homelessness decisions are not subject to the requirements of art.6. This decision only marginally reduces the significance of *Heald*. Significant areas of governmental decision-making are subject to art.6, and the domestic constitutional issues raised by the case remain as important as ever.

Peter Cane
Australian National University College of Law

ACADEMIC FREEDOM AND THE COURTS

Recent events in the United Kingdom have focused attention on the protection at law of academic freedom. Institutional academic freedom may be defined as the freedom of a university to determine its scholarly agenda and system of governance, notwithstanding dependence on external support. Individual academic freedom may be similarly defined as the freedom of individual university members to determine their own scholarly agenda, including how to pursue and present their research, notwithstanding dependence on institutional support. While such freedoms sit in tension, they share a basis in the liberal ideal of the pursuit of truth through teaching, discussion and scholarly research.

It is a truism that this ideal is currently under threat, and with it academic freedom itself. The source of the threat is complex and varied, but includes changes in the economy, scientific research, and British higher education policy. One result of these changes has been what W.R. Cornish described in the Herchel Smith Lecture for 1991 as "a rising determination to see how far the research conducted in institutions of higher learning can be turned to industrial account", and a pressure on the British university in general to operate more as Technopolis than as Academe ([1992] E.I.P.R. 13 at 13, 14).

Courting the market can be a dangerous game, as intellectual property scholars understand. The reason is its utilitarian conception of value, which sits uneasily with the democratic and moral conceptions to which the aims of universities are most appropriately referred. This was demonstrated by the announcement of the Higher Education Funding Council of England in 2009 that funding for English universities would henceforth depend on the "impact" of their research. In the debate that followed the question arose, what protection can academic freedom expect from the courts? (Mroz, "Leader: Rise Up, Freedom Fighters", *The Times Higher Education*, February 11, 2010)).

Accountability; Constitutional rights; Contracting out; Homelessness; Local housing authorities' powers and duties; Public functions; Right to independent and impartial tribunal; Statutory reviews