

Business and Human Rights

How can the forthcoming Scottish Human Rights Bill best address the issues arising in the context of business and human rights?

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Executive Summary

This report discusses the current position in law regarding private businesses in Scotland and their human rights obligations. Amnesty International UK (AIUK) has commissioned a Briefing to assist in future Scottish regulation. The UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2021, although challenged in the UK Supreme Court, defined private actors exercising functions of a public nature in different terms compared to the Human Rights Act 1998, s.6. The issue considered is whether the different definition would be sufficient to hold all private actors responsible across Scotland.

Data collected showed that UK company law cannot assist in the attribution of human rights obligations to private businesses. This is because the ways in which businesses can become liable under company law are mainly common law-based, and third parties are safeguarded only when it comes to obligations arising from commercial contracts. In this regard, the most effective solution would be to make clear in the contract between the State and a private business that human rights standards should be protected, respected, and fulfilled.

The definition of “public functions” established in s. 6 of the Human Rights Act 1998 and interpreted by courts is too restrictive. The case law shows that a contract by itself will not be sufficient to hold private business liable for human rights obligations. Courts need a series of factors that will amount to the private business having “assumed” the obligation.

This report recommends that there must be additional statutory guidance providing a clear test in the interpretation of “public functions”. The test may be borrowed from other areas of law, such as the Environmental Information Regulations 2004, which provide a clearer test. By implementing the recommendations, Scots law will present a more robust and accessible legal framework that ensures the application of human rights in the country.

Introduction

Building on the Human Rights Act 1998 and Scotland Act 1998, the Scottish Government has proposed the progression of a Scottish Human Rights Bill (the Bill). The Bill will need to address the issue of a statutory human rights framework being applicable to private actors when they are exercising functions of a public nature. The UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2021 ('the UNCRC Bill') can provide a useful structure and content for the proposed Bill. Following the UK Government's challenge of the Bill and subsequent decision by the UK Supreme Court on the 6th of October 2021,¹ the revised UNCRC Bill is scheduled for debate on 7 December 2023.² However, this aspect of the UNCRC Bill has not been the focus of any amendments and is not expected to change. Amnesty International UK (AIUK) has commissioned a Briefing that will assist in consultations and engagement with the Scottish Parliament as the Bill progresses.

Business enterprises may have adverse impacts on human rights. It is necessary to provide clarity on whether public functions provided by private actors, including individuals or corporate actors, fall under human rights law and whether all businesses within Scotland have an obligation to respect, protect, and fulfil human rights. According to international principles, businesses engage with human rights through their own activities or business relationships, which can involve State entities.³ Since the 1940s and more prominently during the Thatcher's government, privatisation and outsourcing has been extensively used in the UK, such as in the water, electricity, education, and health care sectors. Regardless of business structure- i.e., a business entity that is fully privately owned- international human rights guidance is clear that private providers should be subject to the same regulations imposed on public entities when fulfilling a public obligation.⁴

¹ REFERENCE by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42.

² Reintroduction anticipated September 2023.

³ United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) HR/PUB/11/04.

⁴ See General Comment 24 of the UN Committee on Economic, Social and Cultural Rights, page 7, paragraph 21.

The UNCRC Bill places incorporated human rights duties on private actors exercising public functions. It states the following:

“(3A) “functions of a public nature” includes, in particular, functions carried out under a contract or other arrangement with a public authority.

(3B) Functions are not excluded from being functions of a public nature for the purposes of subsection (3)(a)(iii) solely because they are not publicly funded.

(4) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(a)(iii) if the nature of the act is private.”

This report explores the issues arising in the context of business and human rights, particularly whether the definition above will ensure legal clarity and certainty for duty bearers and right holders in the future Scottish Human Rights Bill. Nevertheless, the current body of law and judicial interpretation of the matter is established based on the Human Rights Act 1998 s.6, which provides the following:

s. 6(3): “In this section ‘public authority’ includes— (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.” s. 6(5): “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.”

The current Scottish Government consultation on a new human rights framework for Scotland also contemplates ensuring that private actors carrying out devolved public functions should also carry duties to act in compliance with any new human rights legislation.⁵

The aim is to critically evaluate how Scots law can address those issues through the following objectives:

- To investigate how liability is extended in the business context.

⁵ Scottish Government, A Human Rights Bill for Scotland: Consultation, June 2023, p 9.

- To explore how the law defines organisations carrying out functions of a public nature and public authorities.
- To evaluate how UK human rights law has interpreted the above.
- To provide recommendations on future regulation.

Methodology

This project employs doctrinal data collection methods. Data was collected from case law, legislation, and other legal provisions in both UK and international law.

Findings & Analysis

- 1) Company law is of little assistance in the matter attributing human rights obligation to private corporate actors.
- 2) Other areas of law may contribute to defining “functions of a public nature”.
- 3) The current position in law and judicial interpretation are unsatisfactory to connect human rights infringements to non-state actors.
- 4) The statutory definition delivered originally in the UNCRC Bill will not be sufficient without additional statutory guidance.

(1) Company law is of little assistance in the matter

There are several types of companies in the UK. They can be summarised as follows:

- Public limited company (plc): can be limited by shares or guarantee, quoted on the market, open to public ownership.
- Private company limited by shares: cannot be owned by the general public, liability of its members is capped to the amount, if any, of the unpaid shares held.⁶

⁶ Companies Act 2006 section 3(2).

- Company limited by guarantee: private or public company, each member agrees to contribute a nominal sum upon the winding up of the company.⁷
- Unlimited company: each member is jointly and severally liable for the debts of the company.

A company is distinct from its shareholders,⁸ meaning that in limited companies, upon incorporation, members are not personally liable for company debts and may not be liable for corporate actions. However, due to its abstract legal personality, natural persons must make all its decisions and actions.

Corporate liability can arise when shareholders or directors authorize wrongdoing, or under general doctrines of common law like agency and delict (tort) law, or under statutory rules.

Contractual liability

When a company contracts with a third party through its directors or shareholders collectively,⁹ the contract is valid. Even if the power to enter the contract exceeds what the company's Articles of Association confer, the contract stands due to modern company law protecting third parties.¹⁰

Contractual liability could be helpful in resolving issues of business and human rights **if** human rights provisions are introduced into commercial contracts. When the State contracts with a private entity, adding a provision obligating the private entity to uphold human rights standards could mitigate business impacts on human rights.

⁷ Companies Act 2006 section 5.

⁸ Salomon v A Salomon and Co Ltd [1897] AC 22.

⁹ A company can become contractually bound to another person in two ways. See Companies Act 2006, s. 43(1). The first is by written contract to which the company's common seal is affixed, or if signed by two authorised signatories, or by a director in the presence of a witness, and is the contract is expressed to be executed by the company. See Companies Act 2006, s. 44(2) and (4). The second way is where a person who was acting under the authority (express or implied) of the company has made a contract on behalf of the company. See Companies Act 2006, s.43(1)(b).

¹⁰ See Companies Act 2006, s.40. Although directors may be liable for acting in breach of the articles.

Although there is a growing demand for human rights clauses in commercial contracts, no binding legal instrument mandates their implementation.

Previous research conducted on FTSE 100 companies' use of international social accountability standards in supply chain contracts reveals that contractual framing in relation to human rights standards needs to be explicit on the duties between passed through the contract.¹¹ This work demonstrates that without clear contractual standards that explain the standards expected from businesses, holding business to account for human rights breaches is not possible. As such, when government contracts out its public responsibilities, the contract should include express language detailing which statutory human rights obligations private actors will need to assume.

While not specifically related to a company carrying out a public function, a case that is currently live in the Scottish system may shed further light on the connection between contracts and business activity between parent companies domiciled in Scotland and subsidiaries engaging in activities abroad. In *Hugh Hall Campbell KC v. James Finlay (Kenya) Limited*, Kenyan tea harvesters are pursuing their Scottish domiciled corporate employer in Scottish courts due to their inability to access justice for injuries suffered in the course of their employment in Kenya.¹² Here, the pursuing claimants have direct contractual relations with the defending company which are, in most cases, also overseen by a union in Kenya. In the most recent stage of the proceedings, the Court found that while most factors raised by the defenders pointed to Kenya as the appropriate forum for the case, the barriers to the pursuers in accessing justice in Kenya under the variable applicable laws, including the complex matrix of contracts, demanded that the case proceed in the Scottish system.¹³ This case could open up an opportunity for foreign workers working for Scottish domiciled companies in foreign jurisdictions to raise claims for substandard working conditions resulting in illness or injury that would otherwise go unvindicated. It is relevant here as

¹¹ K McCall-Smith and A Ruhmkorf, 'From International Law to National Law: The Opportunities and Limits of Contractual CSR Supply Chain Governance' in V Ulfbeck, A Horowitz and K Mitkidis (eds), *Law and Responsible Supply Chain Management: Contract and Tort - Interplay and Overlap* (Routledge 2019) pp 15-45.

¹² *Hugh Hall Campbell KC v. James Finlay (Kenya) Limited* [2023] CSOH 45.

¹³ *Ibid.* [153] – [158].

it has the potential to shed further light on the relationship between private contracts and limitations on access to justice.

Agency law

A second scenario for company liability is through agency law principles. An agent can only act with authority, which can be actual or ostensible. Actual authority arises from a consensual agreement, while ostensible authority is what appears to others. If a principal represents that an agent has authority, the principal cannot later deny the agent's authority, especially if the representation is not communicated to third parties, and they continue relying on the agent's ostensible authority.¹⁴

In the context of business and human rights, a company would be liable if it were contracting with a third party as an agent of the State. In this scenario, a company would need to act either under actual authority given by the State, expressly or impliedly, or ostensible authority. The latter must meet certain requirements¹⁵:

- (a) Authority was represented to the contractor,
- (b) Representation was made by a person who had actual authority to manage the business of the company,
- (c) The contractor relied on the representation as a reason for entering into the contract,
- (d) The company had the capacity to enter contracts, and the company was not precluded from authorising the person acting as agent to make the contract in question on its behalf.

A crucial point of the agency relationship as elaborated in UK common law is that when an agent acts on behalf of a principal, the agent does not become a party to the contract.¹⁶ The agent will act on behalf of the principal, which means that the contract is between the principal and the third party, the agent then owes no duties towards the

¹⁴ *AMB Generali Holding AG v Manches* [2005] EWCA Civ 1237.

¹⁵ *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, per Diplock LJ [500]-[510].

¹⁶ See P. Davies, *Gower's Principles of Modern Company Law*, (Sweet & Maxwell, 2021), 354-356.

third party. This renders agency law of little assistance in the context of human rights obligations.

Delictual liability

A company can be liable in delict (tort) law under the principle of vicarious liability. When employees commit torts, the company may be held vicariously liable for the tort committed if there is a close connection between the tort and the employment.¹⁷ A company as a principal may also be vicariously liable for the torts of an agent. A relationship other than employment or agency can give rise to vicarious liability where the harm is done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit, and the risk of wrongful act is created by the defendant as a result of assigning those activities to another person.¹⁸ Vicarious liability would hence not be applicable to the business and human rights context.

Statutory liability

Finally, a company can be directly liable under statutory law. In this regard, a company can commit, for instance, criminal offences if *actus reus* and *mens rea* are satisfied. For instance, under the Corporate Manslaughter and Corporate Homicide Act 2007, a company can be found guilty to cause a person's death as a result of the way its activities are organised or managed.¹⁹ Statutory law seems to provide the best solution to the issue of business and human rights.

(2) Other areas of law may help define “functions of a public nature”

Human rights law is not the only area of law that could provide insights into a definition of private entities carrying out functions of a public nature or being “public authorities”. For instance, the Environmental Information Regulations 2004 and the General Data

¹⁷ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11.

¹⁸ *Cox v Ministry of Justice* [2016] UKSC 10.

¹⁹ Corporate Manslaughter and Corporate Homicide Act 2007, s.1.

Protection Regulation (GDPR) offer a broader explanation on which entities will fall under the test.

The Environmental Information Regulations 2004 places public authorities under a duty to provide the public with access to environmental information that they hold. Under the Regulations of 2004, private companies can be public authorities. E.ON UK was found to be a public authority because it is:

- entrusted with the performance of a public service (electricity and gas) by statute,
- responsible for the generation and supply of energy – this constituted a service in the public interest and had a clear environmental impact,
- afforded “special powers” (i.e., power of entry) that went beyond the normal rules of private law.²⁰

This definition provides clear steps to ascertain a private company conducting functions of a public nature. Accordingly, any privatisation or outsourcing that has given statutory powers to an entity and the activity in question is in the public interest satisfy the test. It provides clear boundaries between a private company and a company that has been entrusted by contract or legislation to carry out a public function. For instance, Heathrow Airport Limited, although the State conferred it powers by various legal provisions, it was found not to be a public authority because none of these powers were entrusted by the State to provide a service to the public interest on its behalf.²¹ Just to name a few companies and sectors that have been privatised by statute: British Airways with the Civil Aviation Act 1980; British Telecom with the Telecommunications Act 1984; public transportation, such as buses, with the Transport Act 1985.

²⁰ Available at <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617169/fer0678164.pdf>

²¹ *Heathrow Airport Ltd v Information Commissioner* [2021] UKFTT 2020_0101 (GRC), available at [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2861/Heathrow%20Airport%20Ltd%20\(EA-2020-0101\)%20Allowed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2861/Heathrow%20Airport%20Ltd%20(EA-2020-0101)%20Allowed.pdf)

Article 6(1)(e) of the GDPR states that:

“processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller”

‘In the exercise of official authority’ covers public functions and powers that are set out in law, or to perform a specific task in the public interest that is set out in law.

It is most relevant to public authorities, but it can apply to any organisation that exercises official authority or carries out tasks in the public interest.

Article 6(3) requires that the relevant task or authority must be laid down by domestic law. This will most often be a statutory function. However, Recital 41 clarifies that this does not have to be an explicit statutory provision, as long as the application of the law is clear and foreseeable. This means that it includes clear common law tasks, functions, or powers as well as those set out in statute or statutory guidance.²²

(3) The current position in law and judicial interpretation is unsatisfactory

The Joint Committee on Human Rights published a report in 2007 and their evaluation of the law current at the time showed that the position in law is uncertain and the judicial interpretation of “functions of a public nature” is insufficient to maintain the protection of human rights.

They proposed a short-term solution and a long-term solution. In the short-term, it will be necessary for any Bill which provides for the contracting-out or delegation of public functions to identify clearly that the body which performs those functions will be a public authority for the purposes of the Human Rights Act. For example, s26 of National Assistance Act 1948 should be amended to reflect that private care home providers are functional public authorities. The Sectors identified for potential amendments were the Community Care Act 2000, the National Assistance Act 1948,

²² <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/a-guide-to-lawful-basis/lawful-basis-for-processing/public-task/>

and the Police and Justice Act 2006. However, it was noted that a sector-by-sector approach can lead to inconsistency in the application of the HRA.²³ Therefore, it will not be an effective long-term solution.

The long-term solution would be to amend the definition of “public authority” with the following:

“For the purposes of s. 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the function.”

The latter solution most resembles the definition found in the UNCRC Bill. The question of how effective this solution is in practice will be considered below.

(4) The statutory definition in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill will not be sufficient without additional statutory guidance

Based on the judicial interpretation of s.6 of the Human Rights Act 1998, the definition of private actors exercising functions of a public nature will need broader and clearer statutory guidance. The most important points derived from UK case law will be summarised in the following.

In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* (2001),²⁴ the Court was called to declare whether a housing association registered as a charity was carrying out a public function when it sought to evict one of its tenants. It was stated that renting out of accommodation is a private act, and simply because a public body would be fulfilling a public duty by transferring its performance, the public authority would not transfer its duty.²⁵ Although ultimately the housing association was deemed to carry out a public function because it was so closely assimilated to

²³ <https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/77.pdf> at 44.

²⁴ [2001] EWCA Civ 595.

²⁵ At [69]-[70].

the authority in the performance of the function, the suggestion is that a contractual arrangement alone (without express reference to obligations in carrying out a public function?) is not sufficient to catch a private body to be under the HRA.

Chief Justice Lord Woolf proposed a generous interpretation of “public function”. He stated that there must be a feature or combination of features which impose a public character on the act, such as the statutory authority for the task carried out, the degree of control exercised by a public body over the function, and how closely the acts in question are entangled in the activities of the public body.²⁶

Similarly in *R (Heather) v Leonard Cheshire Foundation* (2002),²⁷ a charity providing accommodation to those whom the local authority owed a duty under National Assistance Act 1948 was found not to be performing a public function. According to the Court of Appeal, there was no special characteristic of the relationship between the local authority and the charity that would suggest that it should be considered a hybrid public authority. With no other evidence- the charity had no power under statute, there was no difference between the nature of services provided by the charity to privately funded residents or publicly funded-²⁸ the claim was insufficient to prove that the charity was carrying out a function of public nature. What distinguished this case from the instance in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* (2001)²⁹ is the fact that there no factors indicating the charity to have functions of public nature. It did not step in the shoes of the local authority- as previously mentioned, it did not have any statutory powers and there was no close relationship with the local authority.

In *Aston, Cantlow and Wilmcote (Parochial Church Council of the Parish of) and anr v Wallbank and anr* (2003),³⁰ it was acknowledged that there is no single test of universal application to distinguish a public function from a private one, but there are factors that can be taken into account for this exercise, such as whether the body is publicly

²⁶ Ibid at [69].

²⁷ [2002] 2 All ER 936.

²⁸ At [35].

²⁹ [2001] EWCA Civ 595.

³⁰ [2003] UKHL 37.

funded, exercising statutory powers, taking the place of central government or local authorities, or providing a public service.³¹

For the latter point, the recent Equality Act 2010 Code of Practice could be helpful.³² There, the meaning of “function of a public nature” of the Human Rights Act 1998 is expressed in clearer terms. It states that *‘in relation to private or voluntary organisations this would cover activities carried out on behalf of the State and which are not similar in kind to services that could be performed by private persons.’*³³ Moreover, *‘whether or not an activity is a service to the public, or a public function, will depend on all the circumstances of the case. Many of the activities that a public authority carries out are services to the public – for example, the provision of social care, library or leisure services. Activities such as these will be subject to the provisions of the Act relating to the provision of a service to the public.’*³⁴

The House of Lords in *Aston, Cantlow and Wilmcote (Parochial Church Council of the Parish of) and anr v Wallbank and anr*³⁵ stated that the function performed is determinative to the question of whether an authority is public.³⁶ The term “public functions” is linked to the functions and powers of the government.³⁷ Citing *Holy Monasteries v Greece* (1995) 20 EHRR 1, the Court indicated that the test is whether a non-governmental body was established with a view to public administration as part of the process of government.³⁸

The church was not regarded as a governmental organisation, i.e. a core public authority, because it has nothing to do with central or local government, it is not accountable to the general public for its functions, it receives no public funding and it

³¹ Ibid, at [12].

³² Available at https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf.

³³ At 11.15. Illustrative examples are: determining frameworks for entitlement to benefits or services; law enforcement ; receiving someone into a prison or immigration detention facility; planning control; licensing; enforcement of parking controls, trading standards, environmental health; exercise of statutory powers under mental health and children legislation; regulatory functions; and investigation of complaints. See paragraph 11.16.

³⁴ At 11.17.

³⁵ [2003] UKHL 37.

³⁶ Ibid, at [41].

³⁷ Ibid, at [49].

³⁸ Ibid, at [50].

statutory powers conferred by the Chancel Repairs Act 1932 are not exercisable against the general public.³⁹ The State has not surrendered or delegated any of its functions or powers to the Church.⁴⁰ Regarding the hybrid public authority issue, the Court stated that the function of chancel repairs is in the public interest, yet the nature of the act is to be found in the obligation that is to be enforced. The enforcement is of a civil debt, and therefore it is of a private nature.⁴¹

YL v Birmingham City Council (2008)⁴² is an important case for the debate on “public function”. The subject matter at issue concerned a private care home providing accommodation and care to residents under arrangements with the local authority (Birmingham City Council). The result was that the care home was adjudicated to be exercising functions of a private nature.

First, the majority judgment relied on the fact that the care home was a business for profit, received no public funding, had no special statutory powers, and entered into private contracts with residents.⁴³ For publicly funded residents,⁴⁴ the fee was charged and paid for a service, there was no element of subsidy from public funds.⁴⁵ A private authority will not be bound by section 6 if the act is private in nature. It is necessary to look at the context in which and basis on which a contractor acts.⁴⁶

It was noted that not all functions and activities of a “core” public authority are public in nature, they are subject to the Convention because the authority is a core public authority, yet if those activities are contracted out to a private body, they may be private in nature.⁴⁷ The only involvement of a local authority in regard to help those in

³⁹ *Ibid*, at [59].

⁴⁰ *Ibid*, at [61].

⁴¹ *Ibid*, at [64].

⁴² [2008] 1 AC 95.

⁴³ *Ibid*, at [26].

⁴⁴ I.e., residents placed there by local authorities. The fees are paid by local or health authorities, there is no element of subsidy from public funds.

⁴⁵ *Ibid*, at [27].

⁴⁶ *Ibid*, at [102].

⁴⁷ *Ibid*, at [110].

need of care and accommodation is aimed at making arrangements, the actual care and accommodation is a private matter.⁴⁸

The dissenting judges, Lord Bingham and Baroness Hale, promoted a wider scope of the definition. Lord Bingham stated that the factors to take into consideration are the nature and extent of the public interest of the action,⁴⁹ the nature and extent of any statutory power or duty in relation to the function,⁵⁰ and the extent to which the state regulates, supervises and inspects the performance of the function.⁵¹ Baroness Hale looked at why the section was drafted to cover certain private providers and looked at parliamentary debates for the rationale.

The purpose and meaning of the HRA 1998 in relation to public authorities and bodies performing a public function was expressed in the Government's white paper as following: *'The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies); local government; the police; immigration officers; prisons; courts and tribunals themselves; and, to the extent that they are exercising public functions, companies responsible for areas of activity which were previously within the public sector, such as privatised utilities.'*⁵² When determining whether a body is performing a public function, it is the nature of the function performed that matters.⁵³ A public function is something that is done for or by or on behalf of the people as a whole.⁵⁴ Thus, functions of a public nature include the regulation of care homes delegated to a private body by a public authority.⁵⁵

⁴⁸ Ibid, at [115-116].

⁴⁹ Ibid, at [7].

⁵⁰ Ibid, at [8].

⁵¹ Ibid, at [9].

⁵² Ibid, at [54].

⁵³ Ibid, at [61].

⁵⁴ Ibid, at [62].

⁵⁵ Ibid, at [63].

Ultimately, Lord Bingham’s test relied on an activity performed pursuant to statutory arrangements and at public expense. For Baroness Hale it was sufficient to have statutory arrangements.

The most recent judicial interpretation of “function of a public nature” is the case of *Ali v Serco* (2019).⁵⁶ Following *YL v Birmingham City Council* (2008)⁵⁷, the Court held that the fundamental distinction between a private and a public function is that the former operated according to private law obligations and responsibilities, the public law responsibility rests on the authority charged with it.⁵⁸ The fact that a private body contracts with a public authority for the latter to fulfil a public law responsibility is immaterial, the services provided by the private law body are still on a private law basis.⁵⁹ The private body would not be under the same obligation of the public authority just because the authority discharged its obligation by arranging a contract with a third party.⁶⁰ The asylum-seeker’s complaints in public law is against the Home Secretary, not the private body that provided the accommodation.⁶¹ The activity was purely commercial, there was no public subsidy or statutory power involved.⁶²

Recommendations

It is clear that the current legal position is restrictive. While the contractual arrangement between the State and private businesses alone should be sufficient to extend human rights obligations, courts have established that other factors are necessary to be present. Based on the above findings and analysis, it is recommended that:

1. The contract between the State and private actors should include a clear indication that the latter is under an obligation to protect, respect, and fulfil

⁵⁶ *Ali v Serco* [2019] CSIH 54.

⁵⁷ [2008] 1 AC 95.

⁵⁸ *Ali v Serco* [2019] CSIH 54, at [54].

⁵⁹ *Ibid*, at [54].

⁶⁰ *Ibid*, at [55].

⁶¹ *Ibid*, at [56].

⁶² *Ibid*, at [22].

human rights. By doing so, the contract could circumvent the issue of proving other factors in Court.

2. The Scottish Parliament must enlarge on the detail of human rights obligations through statutory guidance in addition to the statutory definition provided in the Bill.