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*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

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IN THE HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JENNIFER CONNOR
FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an appeal from the decision of Higgins J of 25 March 2004 whereby he dismissed the appellant's application for judicial review, which was directed against the Trust's failure to permit her (as a person subject to a guardianship order) to live, on a full-time basis, with her husband, Mr Kenneth Connor.

Factual background

[2] The applicant is now aged 55, her date of birth being 22 April 1949. She has received psychiatric treatment for a number of years. In 1996 she was treated for brain damage. This was believed to be the result of chronic alcohol abuse. From March 1997 until July 1998 she was a patient in Holywell Hospital and for much of that time was detained under the Mental Health (Northern Ireland) Order 1986. Between July 1998 and February 2000 she was the subject of a guardianship order and lived at Chisholm House.

[3] On 7 February 2000 the Mental Health Tribunal revoked the guardianship order and the appellant then went to live with Mr Connor. From that time onwards the trust's officers noticed a sharp decline in Mrs Connor's condition. She sustained a number of injuries for which she gave a variety of explanations, many of which were implausible. In March 2000 she

suffered bruising to her face and arms. On this occasion she claimed that she had tripped over the pole of a washing line. In September 2000 she sustained bruising to her legs and face. She attended hospital at this time as she suffered kidney failure. Staff at the hospital stated that the bruising was due to "carpet burns". In late September 2000 Mrs Connor had another fall, over a paving stone, and broke a bone in her wrist.

[4] On 7 December 2000 Mrs Connor was discovered at her home with major bruises over her body and face. She was thin, frail and weak and confused about time and place. The trust officers who dealt with her at that time have stated that although Mrs Connor appeared to have been injured and ill for several days, her long-term partner, now her husband, did not obtain medical assistance for her. She was admitted to Antrim Area Hospital and the doctor who treated her there reported that her injuries were non-accidental. Mrs Connor has averred that these injuries were inflicted by her ex-husband who came to her house looking for money and that she told Mr Connor not to seek medical assistance for her as she was concerned that if the police became involved, through a doctor, that her ex-husband's behaviour would reflect badly on her son who had just started a career as an officer in the army.

[5] On 12 December 2000 Mrs Connor was detained under the 1986 Order and transferred to Holywell Hospital. In June 2001 Mrs Connor appealed to an Appeal Tribunal against her detained status; her detained status was upheld. In November 2001 she was transferred to Chisholm House as a detained patient. In May 2002 she became the subject of a guardianship order which remains in force. She is currently diagnosed as suffering from cognitive impairment as a result of long-term alcohol abuse.

[6] Mrs Connor married Kenneth Connor on 22 November 2002. The trust indicated that she should be allowed to go on honeymoon within Northern Ireland. Judicial review proceedings were commenced relating to this decision. These proceedings resulted in an agreement that she could go to Dublin on honeymoon provided, in the interests of her own safety, she permitted her situation in Dublin to be monitored occasionally by An Garda Siochana and staff from the trust. The couple spent three days in Dublin without incident and Mrs Connor returned to Chisholm on 3 December 2002.

[7] Mrs Connor claims that from the time that she returned from honeymoon, she had expressed the wish to live with Mr Connor at their matrimonial home. The trust maintains that it first became aware of this on receipt of a letter from her solicitor dated 10 December 2002 asking for confirmation that the trust would permit Mrs Connor to reside with her husband with immediate effect. On 12 December 2002, before this letter was received, the existing guardianship order was renewed and thereafter Mrs

Connor was permitted to have one overnight visit per week with her husband.

[8] In the report prepared for the application to renew the guardianship order the risks of harm to Mrs Connor were summarised as follows:

“Mrs Connor’s ability to care for herself, within a structured environment such as a hospital or residential care, has improved over the last year. However ... many of her difficulties in relation to independent living remain. She appears to continue to have memory deficits and has demonstrated little, if any insight into any of the potential dangers attached to returning to the environment in which she was consistently subject to physical injury and deterioration in her physical and mental health. She appears to have little insight into the negative effects of alcohol use on her physical and mental health.

Mrs Connor continues to be unable to spontaneously make plans and carry them through in her daily living skills, although she does react to prompting from others and fitting in with the organisational systems of a hospital or residential unit. She would not be able to cope with living independently, and consequently remains very open to exploitation. She would be in a very vulnerable position, should she return to her previous home circumstances, as she informs she would like to do.

...

Mrs Connor would be unlikely to survive for very long, should she return to her previous circumstance, as she lacks the capacity to protect herself from serious physical harm.”

[9] Mrs Connor then began judicial review proceeding against the trust’s decision to require her to reside at Chisholm House, on the basis that this decision constituted breach of her rights under article 8 and article 12 of the European Convention on Human Rights and Fundamental Freedoms. Leave was granted on 2 April 2003.

[10] On 25 March 2003 it was reported that there were no concerns in relation to Mrs Connor’s mental health and that she was attending appointments as arranged in relation to her physical health difficulties. At a

case discussion on 26 March 2003 the trust decided to permit Mrs Connor to have two consecutive overnight visits, Thursday and Friday nights. It was intimated that if two overnight stays went well for a period the trust would consider extending these. At the case meeting on the 8 May there was general satisfaction with Mrs Connor's progress. Mr Spiers for the trust ended the meeting by explaining that :

“... through working together it was hoped long term the periods of leave could be increased and eventually Mr and Mrs Connor would live together seven days a week if there were no problems concerning us as guardian.”

[11] At a case meeting on 26 June 2003 the trust decided to permit the appellant to have three consecutive overnight stays at home (Thursday night to Saturday night). It was suggested at the meeting (prior to Mr and Mrs Connor being present) that it would be beneficial for assessment purposes if Mrs Connor was allowed more prolonged periods of home leave.

[12] At the case meeting on 11 September 2003 concern was expressed that, since that last meeting, Mrs Connor was reported to have drunk alcohol, (two/three glasses of wine, with her daughter). It was decided not to increase the number of overnight stays at home because of the trust's concern about the consumption of alcohol and the fact that Mrs Connor had returned early from home leave; had not been consistently attending Antrim New Horizons, (part of Action Mental Health, a voluntary organisation operating within Northern Ireland to provide rehabilitation and training to people suffering or recovering from mental illness); and was taking more Kapake, a highly addictive painkiller, for a sore back.

[13] In a social work report dated 1 October 2003 it was stated that since 26 June 2003 the periods of home leave being availed of by Mrs Connor and her attendance at Antrim New Horizons had been erratic but it was also reported that the staff at Chisholm House had raised no concerns about Mrs Connor's periods of leave or in relation to her mental and physical well-being. Mrs Connor disputed the statement that her compliance with home leave was erratic. She often takes a taxi back to Chisholm House and this was what caused a variation in the time of arrival. In relation to the incident about alcohol Mrs Connor explained that a friend of her daughter's had prepared a meal and wine was served with the meal; she drank around half a glass out of politeness. She claimed that her behaviour demonstrated an awareness of, rather than a lack of insight into, her problems.

[14] Judgment was delivered on 25 March 2004 dismissing the appellant's application for judicial review. Since that date the trust has continued to review Mrs Connor's circumstances. In May 2004 a Mental Health Review

Tribunal decided that she should remain subject to guardianship. In September 2004 the trust reviewed her circumstances and extended her home leave to four consecutive nights a week (Thursday to Sunday). Currently Mrs Connor is seen by a mental health social worker each Monday and by a community psychiatric nurse or social worker each Friday. Her circumstances are to be reviewed again by the Trust in December 2004.

Statutory Background

[15] Guardianship is governed by the Mental Health (Northern Ireland) Order 1986. A guardianship order may only be made if the patient is suffering from mental illness or severe mental handicap and it is necessary in his interests that an order is made (article 18). A guardianship application may be made by the nearest relative of the patient or by an approved social worker. The making of a guardianship order confers on the guardian certain specified powers including the power to require the patient to reside at a specified place. Article 22 provides: -

“22. – (1) Where a guardianship application, duly made in accordance with the provisions of this Part and forwarded to the responsible Board within the period allowed by paragraph (2), is accepted by that Board, the application shall, subject to regulations, confer on the Board or person named in the application as guardian, to the exclusion of any other person –

- (a) the power to require the patient to reside at a place specified by the Board or person named as guardian;
- (b) the power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training;
- (c) the power to require access to the patient to be given at any place where the patient is residing to any medical practitioner, approved social worker or other person so specified.

(2) The period within which a guardianship application is required for the purposes of this Article to be forwarded to the responsible Board is the period of 7 days beginning with the date on which the patient was last examined by a medical practitioner

before giving a medical recommendation for the purposes of the application.

(3) A patient received into guardianship in pursuance of a guardianship application may, subject to the provisions of this Order, be kept under guardianship for a period not exceeding 6 months beginning with the day which the guardianship application was accepted, but shall not be so kept for any longer period unless the authority for his guardianship is renewed under Article 23."

Article 23 makes provision for the duration and renewal of guardianship orders. Article 24 makes provision for the discharge of guardianship orders.

[16] The trust, as a public authority, is subject to section 6 (1) of the Human Rights Act 1998, which provides that it is unlawful for a public authority to act in a way that is incompatible with a convention right. The convention right principally relied on by the appellant is article 8. It provides: -

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[17] The appellant also relies on article 12, which provides: -

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

The decision on the judicial review application

[18] Both before this court and Higgins J the respondent trust accepted that its decision to require Mrs Connor to live in Chisholm House constituted an interference with her article 8 rights. It submitted, however, that this decision was taken in accordance with law and was both necessary to safeguard Mrs Connor and proportionate in its pursuit of that aim.

[19] At paragraph [22] of his judgment Higgins J set out the argument made on behalf of the appellant that the trust had failed to have due regard to the applicant's rights under article 8 and article 12. He said: -

“It was submitted by counsel on behalf of the applicant that the proper approach in this type of case is for the respondent to demonstrate the necessity of the restrictions imposed, against the background of the applicant's rights to marry, found a family and reside with her husband. To that end the test was ‘necessity’ and no more, in order to achieve the objective. Counsel for the applicant submitted that the various reports and assessments written by the social workers and others and relied on by the respondent, do not demonstrate that the Trust considered the applicant's situation against the background of her right to marry and found a family or her right to a private and family life. As counsel so pertinently put it, there was no analysis of the applicant's situation ‘through the prism of the European Convention’ nor was there any analysis of the alternatives that might be open to the Trust.”

[20] The learned judge dealt with the approach required of social workers in approaching the question of the convention rights of a person subject to a guardianship order in paragraph [26] of his judgment as follows: -

“Social workers require to write reports for Courts or, as in this case, in support of the appointment of a guardian. I do not consider that they require to specify in their reports any Convention rights that might be engaged or to fashion their reports around them. They require to know and to act in accordance with the European Convention, but not to write reports like legal judgments. Where, as in this instance, a Court is considering the actions social workers have taken, it is for the Court to determine whether their actions are in conformity with, or in breach of, a Convention right. It was suggested that in this case the social workers appear not to have had at the forefront of their minds the applicant's right to reside with her husband. While that ‘right’ may not be specifically mentioned in the reports, it is clear that the Trust were actively considering the relationship between the applicant and her husband and the question of overnight stays. In those circumstances

the Trust were dealing with the substance of the issue in the context of where and with whom the applicant should reside.”

[21] The judge concluded that the requirement that Mrs Connor should reside at Chisholm House was necessary and justified and that it was proportionate to her needs and circumstances. He therefore dismissed her application for judicial review.

The appeal

[22] For the appellant Mr Larkin QC submitted that the judge was wrong not to have recognised that the failure of the trust to address her article 8 rights rendered their decision insupportable. He suggested that the judge’s conclusion that the decision of the trust was proportionate was unsupported by analysis and that, in any event, the judge’s view that it was not in breach of article 8 could not substitute for a proper process of reasoning by the decision-maker itself.

[23] Mr Larkin also argued that the right enshrined in article 12 encompassed the right to cohabit. The decision of the trust interfered with that right. Since the only limitations that may be read into Article 12 are those that relate to national laws regulating the exercise of the right to marry, such as, for example, those relating to the age or capacity of the parties, the trust’s decision to restrict the appellant’s cohabitation with her husband constituted a breach of article 12.

[24] For the respondent Mr Toner QC submitted that the overall aim of the mental health professionals in this case was to achieve a return to home living for the appellant consistent with her safety. It was argued that this approach was entirely ‘convention friendly’ and captured the essence of the proper approach. To suggest that professional reports must make specific reference to the convention elevated form above substance. The convention must be concerned with substance and not form and courts should look behind the appearances and investigate the realities of the procedure in question.

[25] On article 12 Mr Toner argued that it conferred a general right to marry and found a family “but contracting states may impose proportionate restrictions on the right in pursuit of legitimate aims” (paragraph 4.12.6, Lester & Pannick *Human Rights Law and Practice*, 2nd Edition). If article 12 extended to cohabitation, this must likewise be subject to proportionate restrictions in pursuit of legitimate aims, in this case the health and safety of the appellant.

Article 8

[26] As already noted, the trust has accepted that their decision to restrict the number of days that the appellant may spend with her husband amounts to an interference with her article 8 rights. The only issues that arise therefore are whether the restriction is in accordance with law; whether it is necessary in a democratic society; and whether it is proportionate. The first of these issues is easily dealt with; article 22 (1) (a) of the 1996 Order clearly authorises the trust to require the appellant to reside at Chisholm House. The remaining two issues may be considered compendiously.

[27] It is well settled that in order to satisfy the requirement of proportionality three criteria must be satisfied: -

- (i) The legislative objective must be sufficiently important to justify limiting a fundamental right;
- (ii) The measures designed to meet the legislative objective must be rationally connected to that objective – they must not be arbitrary, unfair or based on irrational considerations;
- (iii) The means used to impair the right or freedom must be no more than is necessary to accomplish the legitimate objective – the more severe the detrimental effects of a measure, the more important the objective must be if the measure is to be justified in a democratic society – see Lester & Pannick paragraph 3.10.

[28] It is for the state to justify the interference. Generally this will require that the public authority responsible for the impugned decision recognises that there is interference with the applicant's article 8 right and satisfies itself that such interference is essential in order to fulfil the objective that has prompted it. The interference should be no more than is necessary to achieve that aim – see, for instance, *Hatton v United Kingdom* [2003] 37 EHRR 28.

[29] There is no evidence that the trust ever recognised, much less addressed, the interference with the appellant's article 8 rights. In none of the documents generated by the trust's consideration of her case can any reference to article 8 be found. Mr Toner claims that what the trust officers were embarked upon in considering Mrs Connor's case was 'in essence' an article 8 exercise. We cannot accept that argument. The consideration of whether an interference with a convention right can be justified involves quite a different approach from an assessment at large of what is best for the person affected. The trust's consideration of Mrs Connor's case clearly partakes of the latter of these.

[30] In some cases it will be possible for a court to conclude that the interference with a convention right is justified, even though the decision-maker has not approached the question in that way. Such cases will be confined to those where no outcome other than the course decided upon could be contemplated. This is not such a case. It is impossible to say that if the trust had recognised its obligation not to interfere more than was necessary with Mrs Connor's convention right, it is bound to have come to the conclusion that it did. As Higgins J so aptly put it, there was no "analysis of the alternatives that might be open to the trust". Absent such analysis, it is not possible to say that the decision was proportionate.

Article 12

[31] In light of our conclusion on article 8 it is not strictly necessary for us to express a final view on the appellant's arguments under article 12. We would be slow, however, to accept that this confers on a married person an absolute right to unlimited cohabitation with their spouse, whatever the circumstances. If, for instance, the state were aware of a "real and immediate threat" [*Osman v United Kingdom* [1999] 1 FLR 193] to the life of a spouse if he or she continued to live with their married partner, it is inconceivable that it would be relieved of its positive obligation to protect their right to life because the spouse had an absolute right to cohabitation.

[32] Our provisional view therefore is that if article 12 applies to cohabitation (as to which we express no concluded opinion) this can only confer a qualified right. Such a right could be interfered with by the state where such interference is necessary in a democratic society and is proportionate.

Conclusions

[33] The trust ought to have considered the appellant's request that she be permitted to live permanently with her husband on the basis that refusal of that request involved an interference with her rights under article 8 of ECHR and that such interference required to be justified and should be confined to the minimum necessary to secure the objective of protecting the appellant. This decision cannot therefore stand and the appeal is allowed and the refusal of the trust to accede to the applicant's request is quashed.

[34] It will be necessary for the trust to consider the appellant's request afresh in light of the appellant's article 8 rights and the guidance provided by this judgment.