Neutral Citation No [2014] NIQB 43

Ref: **TRE9233**

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

Delivered: **04/04/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

HM's Application [2014] NIQB 43

AN APPLICATION BY HM FOR JUDICIAL REVIEW

AND

IN THE MATTER OF ARTICLES 32 AND 36 OF THE MENTAL HEALTH (NORTHERN IRELAND) ORDER 1986

TREACY J

Introduction

[1] This is a challenge to Articles 32 and 36 of the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order").

[2] Articles 32 and 36 deal with the nearest relative scheme in that order, specifically, Article 32 defines the term and Article 36 deals with the circumstances in which the County Court can appoint an alternative person to act in the capacity of the nearest relative. The Applicant complains that his Article 8 rights are interfered with because the order makes no provision for him, as patient, to apply to change his nearest relative.

Order 53 Statement

[3] The applicant sought the following relief:

> (a) A declaration that Articles 32 and 36 of the Mental Health (Northern Ireland) Order 1986 are to be interpreted in a manner that does not contravene the applicant's rights

under Articles 5 and 8 of the European Convention on Human Rights.

(b) Further or in the alternative an order of certiorari to bring up to this Honourable Court and quash Articles 32 and 36 of the Mental Health (Northern Ireland) Order 1986.

(c) Further or in the alternative a declaration that Articles 32 and 36 of the Mental Health (Northern Ireland) Order 1986 are unlawful, ultra vires and of no force or effect.

(d) An order of mandamus compelling the Department of Health and Public Safety to forthwith put in place amending legislation to remove and amend those parts of Articles 32 and 36 of the Mental Health (Northern Ireland) Order 1986 which are unlawful and/or in breach of the applicant's Convention rights under Articles 5 and 8.

[4] The grounds upon which the relief was sought included:

(a) Articles 32 and 36 are necessarily inconsistent with, and in violation of, the rights of the applicant under Articles 5 and 8 of the European Convention on Human Rights by virtue of representing infringements of those rights which are neither proportionate nor necessary in a democratic society and are accordingly in breach of Section 3 of the Human Rights Act 1998.

Factual Background

[5] The applicant is a 34 year old man who is currently a detained patient pursuant to Article 12 of the 1986 Order. He is under the care of the Northern Health and Social Care Trust ("the Trust").

[6] The applicant's current admission commenced on 15 March 2013 when he was detained by the Trust pursuant to Article 4 of the 1986 Order. Following his detention for assessment the trust detained the applicant for treatment pursuant to Article 12 of that Order. During the assessment for detention on 15 March 2013 the approved social worker was unable to determine, within the meaning of Article 32 of the 1986 Order, who the applicant's nearest relative was. It was later ascertained that the relevant nearest relative was his mother.

[7] The applicant stated at the time that he did not want his mother to be appointed as his nearest relative and the Trust instead noted the applicant's sister, S, as his nearest relative. Due to the condition of the applicant's mental health at the time of his detention the applicant does not recall the interactions with Trust staff that led to S's appointment.

[8] S lives outside of this jurisdiction, in England. She occasionally phones the applicant but has not visited him in the course of his detention.

[9] The applicant has a good relationship with his cousin and proposed nearest relative, C, who lives in Northern Ireland. C visits the applicant fortnightly and phones him several times a week. On 4 June 2013 the applicant, through his solicitors, wrote to the Trust seeking to change his nearest relative from S to C. The Trust did not respond to the letter.

[10] On 22 July 2013 C issued a notice to the Trust pursuant to Article 14(4) of the 1986 Order notifying the Trust of her intention to exercise the nearest relative's power to terminate the applicant's detention.

[11] On 26 July 2013 the Trust informed the applicant's solicitors that they would not be recognising C as the nearest relative until a formal procedure had been undertaken to change the nearest relative.

[12] On 2 August 2013 the applicant's solicitors wrote to the Trust requesting that the Trust change the applicant's nearest relative from S to C. After further correspondence between the applicant's solicitor and the Trust a pre-action letter was issued to the Trust by the applicant's solicitor.

[13] On 5 August 2013 the Trust requested more time to consider the pre-action letter. On 22 August 2013 proceedings were issued by the applicant and leave was granted on 23 August 2013.

[14] On 6 and 22 November 2013 the Mental Health Review Tribunal heard an application by the applicant to be discharged from detention. It reserved its decision and finally gave its written decision on 26 November 2013 to the effect that he should remain detained.

[15] On 23 December 2013 Judge Marrinan determined that the County Court proceedings issued by the Trust could not proceed as he did not have the necessary jurisdiction. In these proceedings the Trust had attempted to bring proceedings on the Applicant's behalf to change his nearest relative. While the Trust were a proper person to make this application to the County Court, the grounds advanced on behalf of the

applicant fell outwith those permitted by the 1986 Order at para 36. The Judge rejected the Department's contentions that Article 36 could be read compatibly with the Human Rights Act. The judgment also notes that the applicant's sister 'wishes to continue to act as nearest relative and indeed that a change may not be in his best interests'.

Statutory Framework

[16] The relevant provisions of the 1986 Order are as follows:

> "**Discharge of Patient from Detention**
>
> 14. (1) Subject to the following provisions of this Article a patient who is for the time being liable to be detained under this Part shall cease to be so liable if an order in writing discharging him from detention is made in respect of him by the responsible medical officer, the responsible authority or his nearest relative.
>
> ...
>
> (4) An order under paragraph (1) in respect of a patient who is liable to be detained under this part shall not be made by his nearest relative except after giving not less than 72 hours after such notice has been given, the responsible medical officer furnishes to that authority a report in writing certifying-
>
> (a) that in the opinion of that officer, the patient is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment and that the discharge of the patient would create a substantial likelihood of serious physical harm to himself or to other person; or
>
> (b) that the officer is not satisfied that the patient, if discharged, would receive proper care; then –
>
> (i) any order under paragraph (1) made by that relative in pursuance of the notice shall be of no effect; and
>
> (ii) a further order for the discharge of the patient shall not be made by that relative during the period of 6 months beginning with the date of the report.

...

Definition of "nearest relative"

32. – (1) For the purposes of this Order 'relative' means any of the following, that is to say –

(a) spouse;
(b) child;
(c) parent;
(d) brother or sister;
(e) grandparent;
(f) grandchild;
(g) uncle or aunt;
(h) nephew or niece.

...

(3) In this Order, subject to the provisions of this Article and to the following provisions of this Part, the "nearest relative" means the person first listed in paragraph (1) who is caring for the patient, or was so caring immediately before the admission of the patient to a hospital or his reception into guardianship, failing whom the person first so listed who is for the time being surviving, relatives of the whole blood being preferred to relatives of the same description of the half-blood, and the elder or eldest of two or more relatives listed in any sub-paragraph of that paragraph being preferred to the other or others of those relatives, regardless of sex.

...

(7) References to the nearest relative of a patient in any provision of this Order requiring the responsible authority to inform the nearest relative of a patient of any matter or furnish the nearest relative of a patient with any document shall be construed as references to the person (if any) appearing to the responsible authority to be the nearest relative of the patient

...

Appointment by County Court of acting nearest relative"

36. – (1) The County Court may, upon application made in accordance with this Article in respect of a patient, by order direct that the functions under this Order of the nearest relative of the patient shall, during the continuance in force of the order, be exercisable by the applicant, or by any other person specified in the application, being a person who, in the opinion of the court, is a proper person to act as the patient's nearest relative and is willing to do so.

(2) An order under this Article may be made on the application of –

(a) any relative of the patient.

(b) any other person with whom the patient is residing (or, if the patient is then an in-patient in a hospital, was last residing before he was admitted).

(c) any approved social worker;

but in relation to an application made by an approved social worker paragraph (1) shall have effect as if for the words "the applicant" there were substituted the words "the responsible authority".

(3) An application for an order under this Article may be made upon any of the following grounds –

(a) that the patient has no nearest relative within the meaning of this Order, or that it is not reasonably practicable to ascertain whether he has such a relative, or who that relative is;

(b) that the nearest relative of the patient is incapable of acting as such by reason of mental disorder or other illness;

(c) that the nearest relative of the patient unreasonably objects to the making of an application for assessment

or a guardianship application in respect of the patient; or

(d) that the nearest relative of the patient has exercised without due regard to the welfare of the patient or the interests of the public his power to discharge the patient from hospital or guardianship under this Part, or is likely to do so.

...

(5) While an order made under this Article is in force, the provisions of this Order (other than this Article, Article 37 and Article 71(5)) shall apply in relation to the patient as if for any reference to the nearest relative of the patient there were substituted a reference to the person having the functions of that relative and (without prejudice to Article 37) shall so apply notwithstanding that the person who was the patient's nearest relative when the order was made is no longer his nearest relative"

...

Jurisdiction of High Court in relation to property and affairs of patients

97.(1) The functions of the High Court (in this Part referred to as 'the court') under this Part shall be exercisable where, after considering medical evidence, the court is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs; and a person as to whom the court is so satisfied is referred to in this part as a patient.

...

Duty to Notify Office of Care and Protection

107.(1) Where a Board or authorised HSC trust is satisfied –

(a) that any person within its area is incapable, by reason of mental disorder, of managing and administering his property and affairs;

(b) that any of the powers of the court under Article 98 or 99 ought to be exercised with respect to the property or affairs of that person; and

(c) that arrangements in that behalf have neither been made nor are being made,

it shall be the duty of the Board or authorised HSC trust to notify the Office of Care and Protection of those matters.

[17] Section 29 of the Mental Health Act 1983 (prior to amendment) provides:

"Appointment by Court of acting nearest relative

(1) The County Court may, upon application made in accordance with the provisions of this section in respect of a patient, by order direct that the functions of the nearest relative of the patient under this part of this Act and section 66 and 69 below shall, during the continuance in force of the order, be exercisable by the applicant, or by any other person specified in the application, being a person who, in the opinion of the court, is a proper person to act as the patient's nearest relative and is willing to do so.

(2) An order under this section may be made on the application of:

(a) any relative of the patient;

(b) any other person with whom the patient is residing (or, if the patient is then and in-patient in a hospital, with last residing before he was admitted); or

(c) an approved social worker;

but in relation to an application made by such a social worker, sub-section (1) above shall have effect as if for the

words "the applicant" there were substituted the words "the local social services authority".

(3) An application for an order under this section may be made upon any of the following grounds, that is to say -

(a) that the patient has no nearest relative within the meaning of this Act, or that it is not reasonably practicable to ascertain whether he has such a relative, or who that relative is;

(b) that the nearest relative of the patient is incapable of acting as such by reason of mental disorder or other illness;

(c) that the nearest relative of the patient unreasonably objects to the making of an application or admission for treatment or a guardianship application in respect of the patient; or

(d) that the nearest relative of the patient has exercised without due regard to the welfare of the patient or the interests of the public his power to discharge the patient from hospital or guardianship under this part of the act, or is likely to do so."

[18] The relevant portions of Section 29 of the Mental Health Act 1983 (after being amended to comply with the Human Rights Act) provide:

Section 29(2)(za)

"The patient";

Section 29(2)(e)

"That the nearest relative of the patient is otherwise not a suitable person to act as such"

[19] Article 8 ECHR 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 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."

[20] The relevant sections of the Human Rights Act provide:

"Interpretation of Legislation

3.– (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section–

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

...

Proceedings

7.-(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

...

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

...

(7) For the purpose of this section, a person is a victim of an unlawful act only if he would be a victim for the purpose of Article 34 of the Convention of Human Rights in respect of that Act.

..."

[21] Article 34 of the European Convention on Human Rights provides:

"The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

[22] Order 80 Rules 1 and 2 of the Rules of the Court of Judicature (NI) 1980 provide:

"(1) In this Order-

'patient' means a person suffering or appearing to be suffering from mental disorder as defined in Article 3 of the Mental Health (Northern Ireland) Order 1986;

'person under disability' means a person who is a minor or a person who by reason of mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986 is incapable of managing or administering his property and affairs';

> 2. – (1) A person under disability may not bring, or make a claim in, any proceedings except by his next friend and may not defend, make a counter-claim or intervene in any proceedings, or appear in any proceedings under a judgment or other notice of which has been served on him, except by his guardian ad litem.
>
> (2) Subject to the provision of these Rules, anything which in the ordinary conduct of any proceedings is required or authorised by a provision of these Rules to be done by a party to the proceedings shall or may, if the party is a person under disability, be done by his next friend or guardian ad litem.
>
> (3) A next friend or guardian ad litem of a person under disability must act by a solicitor."

Arguments

Applicant's Arguments

[23] The applicant notes that identically worded provisions in England and Wales were determined by the High Court in that jurisdiction to be incompatible with the right of the patient pursuant to s5 and 8 ECHR and consequently those provisions were repealed and amending legislation brought into force. Further, in that jurisdiction, when the provisions were challenged at European level the Secretary of State for England and Wales accepted the relevant provisions breached the patient's human rights and agreed to amend the provisions without requiring the court to hear the matter. The relevant amendments, set out above, had the effect of giving the patient locus standi and the ability to make an application to the County Court to change his nearest relative. They also had the effect of widening the available grounds that an applicant can avail of for the purpose of applying to change the nearest relative.

[24] The applicant contended that the absence of a mechanism allowing him to apply to change his nearest relative represents an infringement of his human rights that is not justified or proportionate. Further the applicant submitted that the nearest relative performs an important role and holds a number of key powers in relation to the patient such as making various applications on his behalf, having access to many confidential documents relating to the patient, the right to be kept informed of matters relating to the patient, the capacity to order the discharge of the patient in certain circumstances, the right to apply to or be a party to proceedings of the Mental Health Review tribunal in relation to the patient and so on.

[25] The applicant submitted that the request to change his nearest relative is reasonable, grounded on rational reasons and could not be described as unreasonable, misconceived or vexatious. He argued that being unable to effect a change of his nearest relative constitutes a violation of his rights under Article 8 ECHR.

[26] In relation to the respondent's argument that the applicant is seeking 'an unlimited discretion in choosing (and then changing) his nearest relative', the applicant submitted that this is not the case. Instead, the applicant submitted that he seeks only the ability to make an application to change his nearest relative.

[27] In relation to the respondent's argument that the resources of the department should be 'devoted to creating comprehensive new mental capacity legislation' the applicant argued that the amendment sought is very modest and has already been drafted and implemented in England and Wales. Further, the applicant urges that if it is found that Articles 32 and 36 of the 1986 Order constitute an infringement of the rights of the patient then it would be proportionate to expend resources abating that infringement. Finally, the applicant noted that given the importance of protecting and defending the human rights of citizens, this argument was weak.

[28] In relation to the respondent's arguments that the existing legislation can be interpreted in a manner consistent with the ECHR, the applicant submitted that this is not the case and that if the County Court were to try to do so in the absence of provisions enabling the applicant to make an application to change his nearest relative it would have to cross the boundary between interpretation to amendment. The applicant further noted that given that the instant provisions are identical to provisions in England and Wales which were the subject of a declaration of incompatibility it could be said that the High Court has already considered the parameters of its power to interpret the legislation in a Convention compliant manner and has failed to find a way to do so.

[29] In relation to the respondent's argument that another party can make an application on behalf of the patient, for example the Approved Social Worker, the applicant argued that this is not the case as while there are alternative personalities to make an application to the County Court on behalf of the applicant, there is no suitable ground within the legislation upon which the desired application can be made.

[30] In relation to the respondent's argument that the proposed Mental Capacity Bill should remove any issues of compatibility from this area of the law the applicant argued that the proposed date of implementation of this bill is March 2016. The applicant contended that such a protracted schedule is woefully inadequate given the ongoing nature of the infringement of not only the rights of the applicant but an entire

category of vulnerable people. The applicant further submitted that the mechanics of legislative procedure and the politics of the executive are not relevant in terms of the issue to be determined in the instant case.

[31] In relation to the respondent's argument that there is 'no credible complaint of unsuitability made against the applicant's current nearest relative the applicant submitted that he has given coherent, rational and well considered reasons for his desire to change his nearest relative these being inter alia that the patient does not want S to be his nearest relative, that it may be harmful to his mental and emotional well-being if she continues to act in this capacity and finally that the current nearest relative does not appear to want to so act. The applicant relied on Re (E) v Bristol City Council [2005] EWHC 74 (Admin) to support the submission that these grounds of unsuitability are sufficient.

[32] In relation to the respondent's submissions regarding the applicant's lack of victim status the applicant set out some relevant principles taken from Human Rights Law and Practice (Lord Lester, Lord Pannick and Javan Herberg, 3rd Ed, Lexis Nexis Butterworths). To paraphrase, these are:

> (a) The court must analyse the concrete case before it and determine if in the concrete case there were any violations of the convention.
>
> (b) However, the victim criteria must be applied in a manner which serves to make individual applications effective and not in a rigid, mechanical and inflexible way.
>
> (c) It is sufficient to show that an applicant runs the risk of being directly affected by the measure of which the complaint is made rather than having to show that his rights have been violated by an individual measure of implementation.
>
> (d) An applicant may be an indirect victim, e.g. as a parent or spouse of the affected person.
>
> (e) A trade union cannot claim to be a victim on behalf of its members but it can assert its own rights or assist individual applicants.
>
> (f) A company can be a victim.

(g) A person does not cease to be a victim because the impugned measure caused no prejudice except possible where 'the national authorities have acknowledged either expressly or in substance, and then accorded redress for the breach of the Convention.

(h) A person may not claim to be a victim where he has not previously asserted the right on which he now relies.

(i) An applicant who is faced with an imminent act which may expose him to a breach of the convention can claim to be a victim but not until there has been a final decision which is not open to further domestic challenge.

[33] The applicant submitted that under these principles he fulfils victim status in that he can specifically point to how he has been affected by the application of Article 36 of the 1986 Order; that the conditions of his detention are clearly impacted by the construction of Article 36 of the 1986 Order; that in the alternative he clearly 'runs the risk' of being affected. The applicant also noted that this criteria should be interpreted flexibly.

[34] In relation to the respondent's arguments relating to the requirement for a 'next friend' the applicant submitted:

(a) Order 80 does not equate detention under the 1986 order to being a person under a disability. Rather the question in Order 80 is one of capacity and specifically capacity to manage and administer one's property and affairs.

(b) The decision of the Mental Health Review Tribunal does not represent evidence that the Applicant lacks capacity. The applicant is presumed to have capacity until the contrary is shown and there is no evidence pointing to incapacity before the court, in fact there is evidence showing the capacity of the Applicant to manage his property and affairs before the court.

(c) The respondent is raising this issue to delay the proceedings.

(d) The applicant is not a person under disability within the meaning of Order 80. He is a detained person suffering from a mental disorder and as such is a 'patient' within the definition of Article 3 of the 1986 order. However he has managed and administered his affairs and property for the entire period of his detention and this litigation.

(e) The next friend requirement applies only to persons under disability, not only patients. To be a person under a disability he must be incapable of managing his property and affairs.

(f) The burden of rebutting the presumption of capacity rests on the respondent.

(g) The test for litigation capacity is distinct and separate for the test for detention under the 1986 Order and as such the proposition that 'in the vast majority of cases' a person detained is also incapable of managing or administering his own affairs must fail. To equate detention under the 1986 order with a presumption of incapacity would go against the clear wording of Order 80.

(h) There is evidence that the applicant has litigation capacity. Specifically he is not a patient within the meaning of Part VIII of the Mental Health Order (Northern Ireland) 1986, secondly his solicitor is satisfied that he has capacity, and finally he has conducted previous civil proceedings in which capacity has not been an issue.

(i) The knowledge of whether a patient is incapable of managing his property and affairs is most acutely in the possession of the detaining authority and that is recognised in the provisions that exist within the Mental Health (Northern Ireland) Order 1986 for management of the property and affairs of patients.

(j) The Applicant notes that the test at 97 of the 1986 order mirrors the Order 80 test as the resulting care and protection order deals with the same issues that would make an applicant a person under disability. The Applicant further notes that in Valentines All Law it is noted that 'if a

party is not made a patient under articles 97 – 109 of the ... 1986 order... a next friend / guardian can only act if there is substantial evidence of incapacity.

(k) The Applicant notes that the threshold capacity in this case would be low.

Respondent's Arguments

[35] The respondent argued that the applicant's Convention rights are not endangered by the current system and that therefore there is no unlawfulness. Further, the applicant does not meet the victim requirement, he has not shown that the law has been applied to his detriment or shown any reasonable and convincing evidence that a violation affecting him will occur.

[36] The respondent further argued that the applicant's situation is not comparable to that of the victim in JT v United Kingdom 26494/95 (2000) ECHR 133 noting that in JT the commission stated that the 'nearest relative' statutory provisions pursued a legitimate aim.

[37] The respondent submitted that no issue arises out of the current lack of provision for the applicant himself to make an application under Article 36 as the Trust did in fact make such an application consequent upon his expressed desire. As a result, the applicant has lost nothing by the formal inability to make a personal application. The respondent argued that the applicant's Convention rights are not violated by a refusal to permit him an unlimited discretion in choosing (and then changing) his nearest relative.

[38] Further, the respondent argued that in JT the issue was that the applicant in that case could not apply to change her nearest relative in circumstances where that individual was evidently unsuitable, whereas in the instant case there is no sufficient evidence to make out that the applicant's current nearest relative is unsuitable.

[39] In relation to the applicant's argument based on Re (E) the Respondent submitted that that case does not support the applicant's argument as (a) not all relevant matters were recorded in that judgment; (b) there was psychiatric evidence of negative impact on E's health if her current nearest relative remained as such and the respondent accepted that the ongoing involvement of the current nearest relative could be positively harmful to E's health; and (c) the current nearest relative did not in fact wish to act as such.

[40] The respondent contends that the question of suitability must be one for the County Court and argued that Article 36(3) could be read in a convention-compliant manner, specifically by reading the grounds set out as inclusive (ie non-exhaustive) rather than exclusive. In this way the extension provisions in the analogous English legislation ie 'that the nearest relative of the patient is otherwise not a suitable person to act as such' could in fact be considered.

[41] In relation to the applicant's argument that the High Court in England has effectively considered the parameters of its power to interpret the legislation in a Convention compliant manner in Re (M) v Secretary of State for Health [2003] EWHC 1094 and failed to find a way to do so the respondent argued that this is not the case and a true reading of that case reveals that there was no consideration therein of whether a convention compatible reading was possible. The respondent submits that there were no contrary submissions to this effect before the judge.

[42] The respondent submits that the Section 3 interpretative obligation is a strong obligation which may even go so far as to require the court to depart from the legislative intention of parliament, and involves that the courts should always ascertain first whether, absent Section 3 there would (as opposed to might) be any breach of the convention.

[43] The respondent submits that the proceedings are vitiated as the applicant is not entitled to appear other than by next friend as he is suffering from a mental illness. This contention is based on the assertion that in circumstances where an individual is detained for treatment under the 1986 Order in the vast majority of cases such a person cannot be said to be capable of looking after his own affairs. In the instant case it is submitted that detention is necessary for the applicant and this has been confirmed by the Mental Health Review tribunal. Further, there is substantial evidence before the court of the applicant's lack of capacity to manage his affairs. In this case, then, the presumption of capacity is rebutted.

Discussion

Next Friend Requirement

[44] Rule 80(2) clearly defines a person 'under a disability' as being a person who by reason of mental disorder (as defined in the 1986 Order) is incapable of managing or administering his property or affairs. It is not accepted that there is sufficient evidence before the court to rebut the presumption of capacity, and the applicant's submission that there is in fact evidence of capacity before the court is accepted.

Victim Requirement

[45] The applicant submits that his article 8 rights are infringed by the lack of a mechanism allowing him to apply to change his nearest relative as evidenced at sections 32 and 36 of the 1986 order. It is common case that the 1986 order does not in fact contain any such mechanism. Therefore, if it is found that the relevant sections ***do*** infringe the applicant's rights then clearly he will fulfil the victim requirement as his rights will actually have been infringed by the impugned provisions.

Article 8

[46] It cannot be doubted that the role of the nearest relative involves many functions which touch upon a patient's private life. These functions were comprehensively considered in Re (M) at para 4 in relation to the identical provisions of the equivalent English legislation and it is useful to set out Maurice Kay J's analysis at length:

> "The nearest relative plays an important part in the scheme of the Act. He may make an application for admission for assessment (section 2), an emergency application for admission for assessment (section 4) and an application for admission for treatment (section 3). No application for admission or treatment under section 3 may be made by an approved social worker without first consulting with the nearest relative unless the social worker considers that such consultation is not reasonably practicable or would involve unreasonable delay (section 11(4)). The manager of a psychiatric institution in which a patient is detained has to inform the nearest relative in writing about, amongst other things, the right to apply to a Mental Health Review Tribunal, the right to be discharged, the right to receive and send correspondence and the right to consent to or refuse treatment (section 132(4)). A nearest relative may order the discharge of a patient who is detained under section 3 (section 23). Prior to exercising this important power the nearest relative can appoint a medical practitioner to examine the patient and the appointed practitioner can require the production of records relating to the detention or treatment of the patient (section 24). The right to order discharge under section 23 is limited when the responsible medical officer certifies that the patient would, if released, be likely to be a danger to himself or others (section 25). Where a patient is to be discharged other than by the order of the

nearest relative, the detaining authority is required to notify the nearest relative of the forthcoming discharge unless the patient requests that no such information is supplied (section 133(2)).

In addition to the power to order a discharge under section 23 the nearest relative may apply to a Mental Health Review Tribunal for the discharge of the patient pursuant to section 66. Moreover if someone else makes an application to the Mental Health Review Tribunal, the nearest relative must receive notice of the proceedings pursuant to rule 7(d) of the Mental Health Review Tribunal Rules. The nearest relative then becomes a party to the proceedings in the Tribunal 'unless the context otherwise requires' (rule 2(1)). Once a party to the proceedings, the nearest relative is entitled to be informed as to their progress and may be represented in the proceedings, may appear at the hearing and take such part in the proceedings as the Tribunal thinks proper (rule 22(4)). As a party, he will also receive the decision of the Tribunal and the reasons for it (rules 24 and 23). Where the nearest relative is the applicant to the Tribunal he may appoint a registered medical practitioner to visit and examine the patient and that practitioner may require production of and inspect any records relating to the detention and treatment of the patient (section 76(1)). As the applicant, the nearest relative may attend the Tribunal hearing, be heard by the tribunal, call witnesses and cross examine the witnesses (rule 22(4)). Moreover, as an applicant he also received a copy of every document received by the Tribunal (rule 12(1)). Some of these provisions may be modified by the Tribunal in the interests of the patient.

That is not intended to be a comprehensive statement of the powers and position of a nearest relative but it serves to illustrate the importance of the concept in the scheme of the act..."

[47] In JT v United Kingdom (2000) 30 EHRR CD77 at para 52 the Commission made the following remarks about the nearest relative system:

"... The Commission observes that the purpose of the nearest relative system is to ensure that a patient has a close contact

> outside the psychiatric institution with sufficient powers to intervene, as that relative considers appropriate, in the best interests of the patient. The nearest relative can also be a source of valuable information about the patient for the responsible authority. As such the nearest relative system constitutes a supplementary protection and support for the patient. Disclosure of information to the nearest relative is designed to render the system effective, by ensuring that the nearest relative acts from an informed position. Accordingly, the Commission considers that the interference pursued the legitimate aims of the protection for health and of the rights and freedoms of others."

[48] The wide-ranging powers given to the nearest relative, which would otherwise clearly infringe the patient's article 8 rights, are saved from illegality as they pursue a legitimate aim.

[49] However, I do not believe that the absence of any input by the patient himself in the selection of the nearest relative pursues any legitimate aim. The nearest relative is designed to protect the best interests of the patient. The decision of who is best placed to assess and represent those interests must necessarily take into account the views of the patient where the patient has the capacity to express such views or there exists the possibility of a complete disconnect between the important safety mechanism and the actual best interests of the patient.

[50] The inability of the patient to be heard on the issue of the identity of his nearest relative is therefore an infringement of the patient's Article 8 rights which does not pursue a legitimate aim.

Can sections 32 and 36 be interpreted in a convention compliant manner?

The limits of the S3 Interpretive Obligation

[51] The interpretive obligation in Section 3 is a wide ranging one. It is accepted that this obligation however has limits. The House of Lords in Ghaidan v Godin-Mendoza [2004] UKHL 30 grappled at length with where these limits may be. It is imperative to consider that case in detail in order to distil guiding principles for the instant application. Lord Nicholls in that case said:

> "[26] Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which convention rights are brought into the law of this country. Parliament has

decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in s3, and the courts must give effect to this intention.

[27] Unfortunately, in making this provision for the interpretation of legislation, s3 itself is not free from ambiguity.... The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with s 3(2) and s4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of s3. ...

...

[29]... It is now generally accepted that the application of s 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s3 may nonetheless require the legislation to be given a different meaning. ...

[30]... From this it follows that the interpretative obligation decreed by s3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, s3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting s3.

[31] On this first point to be considered is how far, when enacting s3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that

language, should be determinative. Since s 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that s3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of s3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration...

[32] From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under s 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But s 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention compliant. In other words, the intention of Parliament in enacting s3 was that, to an extent bounded only by what is 'possible' a court can modify the meaning and hence the effect, of primary and secondary legislation.

[33] Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary s3 seeks to demarcate and preserve. ... The meaning imported by application of s 3 must be compatible with the underlying thrust of the legislation being considered. Words implied must.... 'go with the grain of the legislation'. Nor can parliament have intended that s 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

[34] Both those features were present in re S (Minors) (Care Order: Implementation of Care Plan) [2002] 2 AC 291.... There the proposed 'starring system' was inconsistent in an important respect with the scheme of the Children Act 1989,

> and the proposed system had far-reaching practical ramifications for local authorities. Again in R(Anderson) v Secretary of State for the Home Department [2003] 1 AC 837 ... s29 of the Crime (Sentences) Act 1997 could not be read in a Convention compliant way without giving the section a meaning inconsistent with an important feature expressed clearly in the legislation. In Bellinger v Bellinger [2003] 2 AC 467 ... recognition of Mrs Bellinger as a female for the purposes of s 11(c) of the Matrimonial Causes Act 1973 would have had exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures. ..."

[52] Lord Steyn in his judgment in the same case said at para 50:

> 'there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights'.

[53] In brief, the limits of the interpretive Section 3 obligation include where the interpretation contended for 'goes against the grain of the legislation' / is contrary to some fundamental aspect of the legislation or where it would create some far-ranging practical effects which would be outwith the competency of the judiciary.

[54] At this juncture I should say that I accept the respondent's submission in Re M that there appears to have been no argument on whether the analogous provisions of the English legislation could be read in a convention-compliant manner and for this reason it cannot be said 'that the high Court has already considered the parameters of its power to interpret the legislation in a convention compliant manner and has failed to find a way to do so'.

[55] The purpose of the nearest relative, as discussed, is to protect the best interests of the applicant. It is in the best interests of the patient that he should have the opportunity to be heard in relation to whether or not the person appointed is in fact representing his best interests or indeed is capable of representing his best interests. I do not think it 'goes against the grain' of the statutory provisions to read 'or the applicant' into the list of people entitled to apply to the county court for a change of the nearest relative. Further, I do not consider it to go against the grain to read the list of grounds for a change of nearest relative to include "That the nearest relative of the patient is otherwise not a suitable person to act as such" as per the English legislation.

[56] Neither of these interpretations undermines the purpose of the scheme but in fact resonate with the fundamental purpose of the provisions. Neither do these

interpretations lead to practical effects which the court is not equipped to consider – the mechanism already exists for such an application to be made (albeit by different parties and on different grounds). Extending the provisions in this way will not alter the procedure to be undertaken by the County Court. It will remain a matter for the county court to decide on the evidence if the nearest relative should be changed.

Article 5

[57] In light of the above and in light of the fact that no arguments were advanced on the pleadings in relation to the Article 5 complaint, it is not proposed to deal with that complaint.

Conclusion

[58] For the above reasons I would grant the declaration that Articles 32 and 36 should be read as outlined above. I would deny the other reliefs sought.