

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

Delivered:	25/3/04
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY JENNIFER CONNOR
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

HIGGINS J

[1] This is an application for judicial review of a decision of Homefirst Community Health and Social Services Trust (the Trust), whereby “it declined to permit the applicant to reside with her husband in his home as their matrimonial home”. The applicant is 54 years of age and has been known to Psychiatric Services since 1996. At that time she was being treated for brain damage thought to have occurred as a result of chronic alcohol abuse. From March 1997 to July 1998 she was an inpatient in Holywell Hospital and for much of that time was detained under the Mental Health Order. Since July 1998 she has been variously detained under the Mental Health Order or the subject of a Guardianship Order under the same legislation and her physical and mental condition have given cause for serious concern. During that period she has suffered physical injuries, some of a serious nature.

[2] On 7 December 2000 the applicant was found at her home with major bruises over her body and face. She was admitted to Antrim Area Hospital and the doctor who treated her there reported that her injuries were non-accidental. The applicant was thin, frail and weak as well as confused about time and place. She appeared to have been injured and ill for several days, but her then long term partner, now her husband, did not obtain medical assistance for her. On 12 December 2000 the applicant was detained under the Mental Health Order and transferred to Holywell Hospital. In June 2001 an Appeal Tribunal upheld her detention. On 28 November 2001 she was transferred to Chisholm House as a detained patient. In May 2002 she became the subject of a guardianship order with effect from 12 December 2001. The present diagnosis is of cognitive impairment as a result of alcohol abuse.

[3] The applicant married her long term partner on 22 November 2002. She was allowed leave 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 the applicant returned to Chisholm on 3 December 2002. On 10 December 2002 the applicant's solicitor wrote to the Directorate of Legal Services asking for confirmation that the Trust would permit the applicant to reside with her husband with immediate effect. The Guardianship Order was renewed on 12 December 2002. Thereafter the applicant was permitted to have one overnight visit per week with her husband. No reply to the letter of 10 December 2002 was received by the applicant's solicitor and another letter was sent on 21 January 2003.

[4] The present proceedings are brought on foot of an Order 53 Statement dated 17 February 2003 and supported by an affidavit by the applicant dated 13 February 2003. The relief sought is –

- “i. an order of certiorari to bring up into this Honourable Court and quash a decision of Homefirst Community HSS Trust whereby it has declined to permit the applicant to reside with her husband in his home as their matrimonial home;
- ii. a declaration that the said decision is unlawful, ultra vires and of no force or effect;
- iii. an order of mandamus directing the Trust to address the applicant's request to be permitted to reside with her husband in his home as their matrimonial home fairly, in accordance with law and in accordance with any judgment or direction of this Honourable Court.”

[5] In her affidavit dated 13 February 2003 the applicant states that she can see no reason why she should not be permitted to live with her husband and indicates her agreement to undergo community psychiatric care should she be permitted to reside with her husband. Leave was granted on 2 April 2003.

[6] A social worker employed by the respondent swore an affidavit in reply to the applicant's affidavit. In this the social worker deposed that the letter from the applicant's solicitor had not reached the Trust by the date on which the guardianship order was renewed. The social worker deposed also that a specific assessment of the applicant and her circumstances would be

carried out, relating to the residence and leave issues. The social worker exhibited the report on which the guardianship order was renewed. In this report she identified the risks perceived to the applicant. In her recommendations she stated that it appeared unlikely that the applicant would be able to cope living independently and that there were strong social grounds present for guardianship to be continued, with Chisholm House being named as the appropriate residence. The social worker was unable to recommend the applicant's husband as guardian, in view of his apparent inability to offer the necessary care and protection from physical harm that the applicant required.

[7] In March 2003 it was agreed between the applicant and the Trust that the applicant should stay overnight with her husband on two consecutive nights. By then the Trust had embarked on a multi-disciplinary assessment of the applicant and her husband. This involved advice from a consultant forensic psychiatrist and a referral to the community addictions team. The psychiatrist examined the applicant on 27 May 2003 and on 22 September 2003. He found the applicant to have " limited insight to the need to totally abstain from the use of alcohol ". He wrote that she had no " effective strategies that she could engage regarding both avoiding inappropriate alcohol use or managing negative emotional states such as boredom, unhappiness, frustration or failure to attain her objectives." He stated -

"I would feel that if [the applicant] were to relapse to her previous pattern of alcohol abuse as a result of any of the aforementioned trigger factors there would inevitably be an extremely deleterious effect on her mental well-being, her social and interpersonal functioning and consequently her capacity to safely manage independently in the community."

He went on to state -

"In my opinion [the applicant] has made significant progress regarding her recovery from very serious alcohol related disorders as a result of the medical care, structure, support and predictability of her current management plan. I consider that she remains vulnerable to relapse of her medical problems and that without the current level of statutory support and voluntary sector involvement a continued positive prognosis is likely to be jeopardised."

He concluded by stating -

“In my opinion any dramatic change in the applicant’s current management plan would be ill-advised.”

[8] He then made various recommendations about what would be required before the applicant could live in the matrimonial home.

[9] The social worker filed a further affidavit on 30 September 2003 exhibiting the minutes of various case discussions about the applicant’s case as well as her report dated 1 October 2003. The applicant responded by an affidavit filed on 13 October 2003 in which she joined issue with the Trust’s contention that she was seeking to judicially review “ a process “. In addition she responded to the various matter set out in the case discussions and the reports of the psychiatrist and the social workers. In particular she denied the suggestion that her husband was responsible for the injuries found on 7 December 2002.

[10] Mr Larkin QC together with Mr Scofield appeared on behalf of the applicant and Mr Toner QC and Miss Smyth appeared on behalf of the Trust. The case made by the applicant is that the decision of the Trust to require the applicant to reside at Chisholm house is in breach of her rights under Article 8 and Article 12 of the European Convention on Human Rights. The Order 53 statement alleges a breach of Article 6 but this was not pursued at the hearing nor was it contended that the restriction imposed on the applicant’s liberty by the guardianship order was sufficient to deprive her of her liberty within the terms of Article 5 of the Convention. The making of guardianship orders is governed by the provisions of the Mental Health (NI) Order 1986 the relevant provisions of which are –

“18. – (1) A patient who has attained the age of 16 years may be received into guardianship, for the period allowed by the following provisions of this Part, in pursuance of an application (in this Order referred to as ‘a guardianship application’) made in accordance with this Article.

(2) A guardianship application may be made in respect of a patient on the grounds that –

- (a) he is suffering from mental illness or severe mental handicap of a nature or degree which warrants his reception into guardianship under this Article; and
- (b) it is necessary in the interests of the welfare of the patient that he should be so received.

(3) A guardianship application shall be founded on and accompanied by two medical recommendations and a recommendation by an approved social worker and—

(a) each medical recommendation shall be given in accordance with Article 20 by a medical practitioner and shall include—

(i) a statement that, in his opinion, the ground set out in paragraph (2)(a) applies in relation to the patient; and

(ii) such particulars as may be prescribed of the grounds for that opinion;

(b) the recommendation by the approved social worker shall be in the prescribed form and shall include—

(i) a statement that, in his opinion, the ground set out in paragraph (2)(b) applies in relation to the patient;

(ii) the reasons for that opinion; and

(iii) a statement as to whether he is related to the patient and of any pecuniary interest that he may have in the reception of the patient into guardianship."

[11] Thus 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 be made.

"19. — (1) Subject to the following provisions of this Article, a guardianship application may be made by—

(a) the nearest relative of the patient; or

(b) an approved social worker,

and such a person is, in relation to a guardianship application made by him, referred to in this Order as 'the applicant'."

[12] 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. It is in these terms -

“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 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 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 on 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.

“23. – (1) Authority for the guardianship of a patient may, unless the patient has previously been discharged, be renewed under this Article –

- (a) from the expiration of the period referred to in Article 22(3), for a further period of 6 months;
- (b) from the expiration of any period of renewal under sub-paragraph (a), for a further period of one year,

and so on for periods of one year at a time.

(2) Within the period of 2 months ending with the day on which a patient who is subject to guardianship under this Part would cease under Article 22(3) or this Article to be so liable in default of the renewal of the authority for his guardianship –

- (a) the responsible medical officer shall examine the patient or obtain from another medical practitioner a report on the condition of the patient; and, if it appears to him that the ground set out in Article 18(2)(a) continues to apply in relation to the patient, he shall furnish to such approved social worker as the responsible may direct a report to that effect in the prescribed form along with the report first mentioned if such a report has been obtained; and
- (b) that approved social worker shall consider whether the ground set out in Article 18(2)(b) continues to apply in relation to the patient; and if it appears to him that it does continue so to apply, he shall furnish to the responsible a report to that effect in the prescribed form along with the report or reports furnished to him under sub-paragraph (a).

(3) Where a report is duly furnished to the responsible under paragraph (2)(b), the authority for the guardianship of the patient shall be thereby renewed for the period prescribed in that case by paragraph (1).

(4) Where a report under paragraph (2)(b) is furnished to the responsible, it shall, unless it discharges the patient –

(a) cause him, his nearest relative and his guardian to be informed;

(b) forward to the Commission a copy of the report and of the report or reports referred to in paragraph (2)(a).

(5) Where the form of mental disorder specified in a report furnished under paragraph (2)(a) is a form of disorder other than that specified in the guardianship application, that application shall have effect as if that other form of mental disorder were specified in it.”

Article 24 makes provision for the discharge of guardianship orders.

“24. – (1) Subject to the following provisions of this Article, a patient who is for the time being subject to guardianship under this Part shall cease to be so subject if an order in writing discharging him from guardianship is made in respect of him by the responsible medical officer, an authorised social worker or his nearest relative.

(2) The responsible medical officer shall make an order under paragraph (1) in respect of a patient subject to guardianship under this Part where he is satisfied that the patient is not suffering from mental illness or severe mental handicap of a nature or degree which warrants his remaining under guardianship.

(3) An authorised social worker shall make an order under paragraph (1) in respect of a patient subject to guardianship under this Part where he is satisfied that it is not necessary in the interests of the welfare of the patient that he should remain under guardianship.”

[13] Section 1 of the Human Rights Act 1998 (the 1998 Act) brought into effect for the purposes of that Act, Articles 2 to 12 and 14 of the European Convention on Human Rights. Section 1 of the 1998 Act took effect from 1 October 2000. By section 2 of the 1998 Act a Court, in determining a question which has arisen in connection with a Convention right, must take into

account, inter alia, any judgment, decision, or declaration of the European Court of Human Rights. Section 3 of the 1998 Act provides that so far as it is possible so to do, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention Rights. Section 6 makes provision for public authorities and states –

“6.-(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(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”

The respondent Trust is a public authority.

[14] The applicant did not contest the lawfulness of the guardianship order or the naming of the respondent Trust, with a nominated social worker, as guardian, as being other than in accordance with domestic law. Nor was the validity of the applicant’s marriage in issue. Thus the application focussed on a narrow though, undeniably, important issue, namely whether the applicant could be denied her choice as to where to reside after her marriage.

Article 8 of the Convention 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.”

Article 12 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.”

[15] It was submitted by the applicant that it was implicit within the right to marry and found a family protected by Article 12, that a party to the marriage had a right to live with the other party to the marriage contract. Furthermore it was argued that the right to respect for private life in Article 8 afforded a person the right to choose where he would live. In addition it was submitted that the right to family life protected by Article 8, encompassed the marriage relationship between spouses and the right to live with one's husband or wife, as the case may be. The respondent contended that if the right to respect for private and family life envisaged in Article 8, extended to the right to live with one's husband or wife, a public authority was permitted to interfere with the exercise of that right where to do so was in accordance with the law and necessary in a democratic society for the prevention of disorder or crime or for the protection of health. In this instance the exercise of the right to require the applicant to live in a specified place was in accordance with domestic law under Article 22 of the Mental Health Order and was necessary to protect the health of the applicant or to prevent her suffering injury. The requirement to live at Chisholm House and thereby not with her husband, was proportionate to the risks she faced if she was to live in the community.

[16] The applicant contended that the decision not to permit her to live with her husband was disproportionate to her particular circumstances. The following reasons were cited –

“The applicant's firm wish to be permitted to reside with her husband at the matrimonial home;

The relative lack of other family contact or interest which the applicant enjoys;

The applicant's willingness to be involved with community psychiatric care. Support in the community in different ways can be provided virtually on a daily basis;

The wide-ranging nature of the other powers available to the Trust under article 22(1) of the 1986 Order to require the applicant to attend at places for various reasons or to require access to be given to her by any person specified. In particular, the Trust has not shown any compelling reason why these powers are not sufficient to permit any valid health concerns it may have about the applicant to be met;

The fact that Mr Connor is accepted by the Trust as the applicant's nearest relative;

The length of time since the applicant came to any harm whilst residing with her husband;

The satisfactory nature of contact and overnight visits between the applicant and her husband over a period of the last year;

The proximity of the family home (Carrickfergus) to the facilities available at Chicholm House (Ballyclare) and/or the Trust's nominated guardian and Community Mental Health Team (Whiteabbey)."

[17] Recognizing that the rights protected in Article 8 are not absolute, but subject to interference by a public authority which is proportional to the circumstances, the applicant relied also on the right to marry and to found a family established in Article 12 of the Convention. This right, the applicant contended, is an absolute right and not subject to the same restriction as Article 8.

[18] In support of the contention that the applicant enjoyed a right to reside with her husband the applicant relied on a passage from the judgment of the European Court in *Abdulaziz, Cabales and Balkandali v UK* 1985 7 EHRR 471 in which it was stated –

"62. Furthermore, the expression 'family life', in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of Article 12, for it is scarcely inconceivable that the right to found a family should not encompass the right to live together."

[19] This comment was made in the context of immigration rules that prevented three husbands from joining or remaining with their wives (the applicants), who were lawfully and permanently settled in the United Kingdom. The Court found no breach of Article 8 and no breach of Article 12 was argued.

[20] The respondent acknowledged the applicant's right to private and family life and that, in this instance, the Trust's actions restricted that right. However it was contended that the requirement that the applicant reside in Chisholm House was in accordance with the law as expressed in the Mental Health (NI) Order 1986 and was necessary in the applicant's circumstances and proportionate to them. The respondent accepted that the onus lay on the Trust to show that the restrictions imposed on the applicant were indeed proportionate to her circumstances. It was submitted that the recent history of the applicant still gave rise to genuine concerns for her health and safety. While there had been some signs of improvement it was submitted that the overall situation justified the Trust adopting a cautious approach, with continual assessment of that situation. Since the marriage of the applicant the Trust had increased the overnight stays to three per week. It was contended by the Respondent that this was a process in which no firm decision had been made and as such was not subject to judicial review or alternatively that the application was premature. While the applicant's situation was subject to

continual assessment it could not be said, in my opinion, that there was no decision that was subject to judicial review. The Trust as guardian had decided to exercise their right to decide where the applicant should live. Within that decision the applicant was permitted to stay overnight with her husband on some nights of the week. It is the number of over night stays which is the subject of the continuing process, in the first instance. That might lead to an increase in the number of overnight stays or a removal of the requirement by the guardian that the applicant should live at Chisholm House. In those circumstances it could not be said that the decision by the Trust, as guardian, to determine where the applicant should live and which remains extant, is not subject to judicial review.

[21] The respondent submitted that Article 12 of the Convention was not engaged. The applicant was able to marry as she did and the founding of a family is unlikely to arise, given the age of the applicant and her husband. The right of the married couple to live together was acknowledged. However, it was submitted, correctly in my view, that this is not an absolute right. Furthermore it was submitted that the applicant was already subject to a guardianship order at the time she married and both she and her husband were well aware of that fact and its consequences.

[22] 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. If the Trust's principal concern was for the safety of the applicant there was ample evidence that she could be harmed in many other ways. There are large parts of the day during which she is unsupervised and allowed to leave Chisholm House and go into the community. In failing to assess her situation against, at least, her right to co-habit with her husband as a married woman, it was submitted that the Trust have failed to take account of a relevant consideration and on this ground alone the Trust's decision should be quashed.

[23] Counsel for the respondent took as his starting point Article 2 of the Convention. This provides that "Everyone's right to life shall be protected by law". Though the injuries sustained by the applicant were not life threatening they were serious and a threat or attempt to take life is sufficient to engage Article 2. In securing the guardianship order and requiring the applicant to

reside at Chisholm House, the respondent was acting to protect the applicant's rights under Article 2. The reports exhibited by the respondent demonstrate how the Trust reacted and responded on a regular and frequent basis to the applicant's needs and circumstances. It was submitted that these responses were proportionate to the applicant's needs. A number of matters were highlighted – the incident involving alcohol in England, the inability of her husband to provide supervision of the applicant during the week, the shortening of pre-arranged visits as well as her husband's own consumption of alcohol.

[24] The report from Dr Bownes is instructive and helpful in providing an insight into the applicant's circumstances and needs. The guardianship order, which is not disputed, provides the degree of security and protection that the applicant requires. Is the additional requirement, permitted under the guardianship legislation, that the applicant reside at Chisholm House contrary to Article 8 and/or Article 12 of the Convention. The 'right' asserted is a 'right' to reside where the applicant wishes, namely with her husband. That, per se, is not an absolute right, known to or protected by the Convention. As was stated in *Abdulaziz and Others*, supra, it is implicit in the right to found a family. A mother who endangered or might endanger the health or well-being of her children through her addiction to drugs, could not assert a right to reside with them, come what may. Such a 'right' as exists, must give way to the necessity of circumstance. The right protected by Article 8 is a right to respect for private and a family life. The respect afforded to private and family life must give way to the necessity to prevent crime or protect health. Article 12 must be subject to the same restraint. Thus the issue is whether the Trust requirement that the applicant reside at Chisholm House is a necessary response or proportionate to the applicant's needs and circumstances.

[25] In one sense this is a difficult if not a troubling case, in which a married woman of mature age is denied the right to reside with her husband. It is a rather unusual situation. The guardianship order and the necessity for it is not challenged. It is against that background that the Court has to consider the actions of the respondent Trust.

[26] 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.

[27] The case made by the Trust was that the requirement to reside at Chisholm House was necessary for the overall protection of the applicant and proportionate to her needs and circumstances. The approach adopted by the Trust is endorsed and confirmed by an experienced forensic consultant psychiatrist. I am satisfied that no breach of Article 8 or Article 12 has been made out. The applicant's 'right' to reside with her husband has been interrupted. The requirement that she should reside at Chisholm House is both necessary and justified and is proportionate to her needs and circumstances and is not contrary to law. The application for judicial review is refused.