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*Judgment: approved by the Court for handing down  
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ICOS No. 13/101026

**THE COUNTY COURT IN NORTHERN IRELAND**

**SITTING IN ANTRIM**

**NORTHERN TRUST**

**-v-**

**EMcC, HM**

**& DEPT OF HEALTH, SOCIAL SERVICES & PUBLIC SAFETY**

HEARD BEFORE HIS HONOUR JUDGE MARRINAN

ON

MONDAY, 23<sup>RD</sup> DECEMBER 2013

**RULING**

*Transcript prepared from FTR recording by:*

*J Harper*

*Official court reporter*

1 RULING:

2 JUDGE MARRINAN: In the matter of the Mental Health (Northern  
3 Ireland) Order 1986, application is made by Miss Kelly,  
4 an approved social worker, under Article 36 of the Mental  
5 Health (Northern Ireland) Order 1986 ('the Order') to  
6 appoint a person as the nearest relative of the patient.  
7 Miss Kelly is effectively a representative of the  
8 responsible authority which in this case is the Social  
9 Care Trust ('the Trust'). The first named Respondent is a  
10 lady I will call EMcC, she is the patient's sister and is  
11 presently acting as nearest relative for her brother, the  
12 second named Respondent.

13 The role of the nearest relative is described  
14 comprehensively in the judgment of Maurice Kay J in  
15 R-v-Secretary of State for Health [2003] EWHC 1094  
16 (Admin) paras 4, 5 and 6 (see further where this is  
17 quoted extensively in the patient's skeleton argument).  
18 It is noted that the first named Respondent, the present  
19 nearest relative, resides in England. The Department of  
20 Health, Social Services and Public Policy (hereinafter  
21 reared to as 'the Department') is a notice party to this  
22 application and sought leave to be made a respondent to  
23 the application under the provisions of Order 52.64 of  
24 the County Court rules for the purposes solely of  
25 allowing it to address the court on matters of law before  
26 it. It is of relevance that the patient is currently  
27 pursuing judicial review proceedings against the  
28 Department. Bearing in mind the Provisions of Order 58 of  
29 the Rules, the overriding objective rule, the court  
30 acceded to the Department's request and so directed.

1           The patient is currently detained under the Order and  
2 suffering from a relevant mental illness. In a recent  
3 review on 26th November 2013 the Mental Health Review  
4 Tribunal directed that the patient remain detained. The  
5 first Respondent took no part in the proceedings, but has  
6 made it clear in a letter written to the Applicant, which  
7 the court has seen, of 2nd October 2013 that she wishes  
8 to continue to act as nearest relative and indeed that a  
9 change may not be in his best interests.

10           The factual background to this application is set out  
11 in detail in paras 1 to 7 inclusive of the second  
12 Respondent's skeleton argument. In essence the patient  
13 would prefer his cousin, Mrs EMCQ, who lives in Northern  
14 Ireland and with whom he is said to have a good  
15 relationship, to replace his sister who lives in England  
16 and who is said by him not to have visited him since his  
17 detention in March 2013. It is right to say that his  
18 sister points out that she has kept in regular contact  
19 with him although she has not been to visit. It is said  
20 that his cousin, Mrs EMCQ, regularly visits him in  
21 hospital and takes an active interest in his treatment  
22 and detention in hospital.

23           It is agreed that in Northern Ireland the patient does  
24 not have the right to bring this application to the  
25 County Court. The relevant legislation in England is the  
26 Mental Health Act 1983 as amended ('the Act') and it is  
27 noted that it was amended by the Mental Health Act 2007  
28 to permit the patient to bring such an application. In  
29 the judicial review proceedings it is asserted that the  
30 Trust's failure to act on the patient's request to change

1 his nearest relative was incompatible with the patient's  
2 rights under Articles 5 and 8 of the European Convention  
3 on Human Rights ('the Convention') and in breach of the  
4 Trust's duties under the Human Rights Act 1998 to act in  
5 a manner compatible with Convention rights.

6 The Trust's position before me is that the existing  
7 nearest relative is entirely suitable. She herself argues  
8 that this is so and that she has always acted in the  
9 patient's best interests for reasons set out in her said  
10 letter. The grounds on which this present application may  
11 be made out are set out in Article 36(3) of the Order.  
12 The 1983 Act as amended replicates these grounds exactly  
13 in Section 29(3), but there is a further ground at (3)(e)  
14 that an application for an order may be made on the  
15 ground that, *"The nearest relative of the patient is*  
16 *otherwise not a suitable person to act as such."* This  
17 additional ground was added to the English legislation by  
18 the Mental Health Act of 2007.

19 The history of pre-action protocol correspondence in  
20 relation to the judicial review proceedings is set out in  
21 the applicant's skeleton argument in paragraphs 9 to 15  
22 inclusive. Rather curiously, the legal advice obtained by  
23 the Applicant Trust in this case indicates that there was  
24 no ground, no proper ground or no statutory ground, on  
25 which the Trust could bring this present application (see  
26 para 16 of the Applicant's skeleton argument). In  
27 essence, despite that advice, the Trust have brought this  
28 application so that the court can determine whether or  
29 not it has jurisdiction to grant the application. It is  
30 therefore facilitating the bringing of an application

1 which could not be brought by the patient. I have never  
2 before come across an application such as this where the  
3 Applicant itself acknowledges that it cannot make out any  
4 grounds to grant the application as the law currently  
5 stands.

6 In the judicial review proceedings the patient is the  
7 Applicant, the Department is now the Respondent whereas  
8 the Trust becomes a notice party. Paragraph 19 of the  
9 applicant's skeleton recites that:

10 *"The issue in the judicial review proceedings*  
11 *is that Articles 32 and 36 of the order are*  
12 *allegedly inconsistent with and in violation*  
13 *of the rights of the patient (the applicant*  
14 *in the judicial review proceedings) under*  
15 *Articles 5 and 8 of the European Convention*  
16 *on Human Rights by virtue of representing*  
17 *infringements of those rights which are*  
18 *neither proportionate nor necessary in a*  
19 *democratic society, and are accordingly in*  
20 *breach of Section 3 of the Human Rights Act*  
21 *1998. In terms, the patient applicant in the*  
22 *review complains that he is unable to apply*  
23 *to the County Court under Article 36 of the*  
24 *Order to have that court determine who should*  
25 *act as nearest relative namely his cousin and*  
26 *the ground for bringing such an application*  
27 *should be extended."*

28 In other words, the challenge proceeds on the basis that  
29 the legislation in England is Convention compliant  
30 whereas the failure to amend the Order in Northern

1 Ireland renders it non-Convention compliant. The  
2 legislation in England was eventually amended in 2007, as  
3 described above, in the light of the decision of the  
4 European Court of Human Rights in JT -v- United Kingdom  
5 [2000] ECHR 133, that the law on this point, which was  
6 then absolutely identical in all relevant aspects to the  
7 current law in Northern Ireland, violated the applicant's  
8 Article 8 Convention rights.

9 Faced with this situation the Trust has effectively  
10 facilitated the bringing of this application even though  
11 it believes that the existing nearest relative is  
12 entirely suitable and accepts that none of the grounds in  
13 Article 36(3) the Order are made out. In paragraphs 45  
14 to 47 inclusive of its skeleton argument it directs the  
15 Court's attention to the decision in R(E)-v- Bristol City  
16 Council [2005] EWHC 74 i.e. when England was still  
17 working to the unamended 1983 Act, in all relevant  
18 respects therefore identical to the current corresponding  
19 provisions of the Northern Ireland Order. In that case Mr  
20 Justice Bennett specifically commented on the application  
21 to the County Court to order that the functions of the  
22 nearest relative are carried out by a named person, and  
23 in paragraph 10 of his judgment he noted:

24 *"Section 29 of the Mental Health Act provides*  
25 *a limited mechanism whereby a County Court*  
26 *can order that the function of the nearest*  
27 *relative of the patient be carried out by a*  
28 *person, in its opinion, is a proper person to*  
29 *act as the nearest relative of the patient*  
30 *and is willing to do so. However, the grounds*

1           upon which the County Court could make such  
2           an Order are limited to those set out in  
3           subsection 3 of Section 29 and, so far as the  
4           instant case is concerned, none of those  
5           matters apply."

6           That is also the position in the present case. Of course  
7           Section 3(1) of the Human Rights Act 1998 requires that  
8           the court, insofar as it is possible to do so, should  
9           read and give effect to legislation in a way which is  
10          compatible with Convention rights. Article 6(1) of the  
11          same Act makes it unlawful for a public authority,  
12          including a court, to act in a way which is incompatible  
13          with the Convention right. However, in R-v-Secretary of  
14          State for the Home Department [2003] 1 Appeal Cases 837,  
15          Lord Steyn drew a distinction between what he called  
16          interpretation and interpolation inconsistent with the  
17          plain legislative intent. He said that Section 3 of the  
18          Human Rights Act 1998 is not available where the  
19          suggested interpretation is contrary to express statutory  
20          words or is by implication necessarily contradicted by  
21          the statute (see para 23 of his judgment).

22          I remind myself that the County Court is a creature of  
23          statute and lacks entirely the inherent jurisdiction  
24          enjoyed by the High Court. Therefore it depends on the  
25          legislature to grant it powers that it can then exercise  
26          judicially. In the Re:M case Maurice Kay J noted at para  
27          10 of his judgment, dealing with the powers of the County  
28          Court that it *"is not possible to construe Sections 26  
29          and 29 compatible with Article 8 without crossing the  
30          line into judicial amendment as opposed to construction."*

1 In Re:E -v- Bristol City Council [2005] EWHC 74 (Admin)  
2 Bennett J dealing with Section 29 of the Mental Health  
3 Act (the equivalent of our Article 36 the Order) stated  
4 that *"the grounds upon which the County court could make*  
5 *such an Order are limited to those set out in Section 3*  
6 *and Section 29"* and so far as the instant case is  
7 concerned none of those matters apply. It is important to  
8 note that these judgments of the High Court in the  
9 Re:M-v-Secretary of State for Health and Re:E-v-Bristol  
10 City Council were decided after the enactment of the  
11 Human Rights Act 1998 and after the decision in JT.

12 It seems to me that there is a certain irony in this  
13 application in that neither the applicant Trust nor the  
14 person affected i.e. the patient, argue that any of the  
15 grounds for making an Order as set out in Article 36(3)  
16 of the Order apply. Neither of them argue that the court  
17 can interpret the plain words of the Order (an order in  
18 council) to import a ground that would enable this court  
19 to grant an application on the alleged unsuitability of  
20 the current nearest relative. The primary parties to this  
21 application therefore are in a somewhat uncomfortable  
22 agreement that this court has no power to make an order  
23 on any of the statutory grounds obviously available.  
24 Undeterred by this display of unanimity the Department  
25 has argued that should the court conclude that a literal  
26 interpretation of Article 36 may violate the patient's  
27 Convention rights then the court itself is under an  
28 obligation where possible - and those words are important  
29 - to read and interpret the Order in a manner compatible  
30 with the Convention. That principle is of course accepted



1 and is unremarkable.

2 Counsel for the Department relied on the judgment of  
3 Lord Nicholls delivering the leading judgment of the  
4 House of Lords in Ghaidan-v-Mendoza [2004] 3AER, page  
5 411. This is set out in full detail in the Department's  
6 skeleton argument in paragraph 22 and I don't propose to  
7 repeat it here. The Department notes the lack of a fifth  
8 ground in Article 36(3) of the Order as it stands but  
9 argues that this Article could be interpreted, if  
10 necessary, to ensure Convention compatibility by reading  
11 in the grounds set out on the fifth ground as inclusive  
12 rather than exclusive. As it says in para 31 of its  
13 skeleton:

14 *"On this approach the provision could be read*  
15 *in such a way that the enumerated grounds are*  
16 *not exclusive grounds on which such an*  
17 *application could be made."*

18 And in para 32 it goes on:

19 *"Where an applicant's Convention rights so*  
20 *required any grounds advanced in support of*  
21 *an application could be considered, subject*  
22 *of course to the judgment of the County Court*  
23 *under Article 36 as to whether or not the*  
24 *application should be granted."*

25 One observes that if this argument is correct, and is a  
26 bold argument, it appears to be at odds with the clear  
27 statement of the High Court in England in the Re:M and  
28 Re:E cases referred to above. If correct, it would follow  
29 that the relevant statutory amendments made in England  
30 seven years after the JT case in 2007 were in fact

1 unnecessary as the perceived mischief addressed by those  
2 amendments could and should have been dealt with by the  
3 judiciary at the level of the County Court working and  
4 interpreting the pre 2007 legislation so as to make it  
5 Convention compliant. In R(Rusbridger) -v- Attorney  
6 General [2003] UKHL 38 [2004] 1 AC 357, Lord Hutton noted  
7 at para 36:

8 *"It is not the function of the courts to keep*  
9 *the statute book up-to-date."*

10 And later:

11 *"Sections 3 and 4 of the Human Rights Act*  
12 *1998 are not intended to be an instrument by*  
13 *which the courts can chivy Parliament into*  
14 *spring-cleaning the statute book."*

15 It should be observed that the scope of Section 3(1) of  
16 the Human Rights Act of 1998 is designed to afford the  
17 citizen the benefit of Convention rights *"so far as it is*  
18 *possible"* without the need for further legislation.

19 The decision in JT-v-United Kingdom was in 2000. The  
20 terms of settlement confirmed that the United Kingdom  
21 government undertook to amend the relevant legislation to  
22 provide the patient with the power to make an application  
23 to the County Court to have the nearest relative replaced  
24 where the patient reasonably objected to a certain person  
25 acting in that capacity. In Re: M-v-Secretary of State  
26 for Health, the Secretary of State admitted that Sections  
27 26 and 29 of the Mental Health Act 1983 (the exact  
28 equivalent of our Articles 32 and 36 of the Order) were  
29 incompatible with Article 8 of the Convention i.e. the  
30 right to respect for private and family life. The

1 Secretary of State in England and Wales acknowledged the  
2 incompatibility but stated that he intended to enact  
3 amending legislation in the form of a comprehensive  
4 Mental Health Bill with a view to a root and branch  
5 reform of the 1983 Act.

6 In the present case the Department in para 17 of its  
7 skeleton argument pointed out that a proposed Mental  
8 Capacity Bill was being worked on. Again, this appears to  
9 be likely to be a root and branch approach and reform of  
10 the 1986 Order. One suspects that it may take a  
11 considerable time to enact this proposed legislation.

12 It appears that it never occurred to the legal team  
13 for the secretary of state in the Re:M case to suggest to  
14 Maurice Kay J that he could interpret the impugned  
15 English legislation in a way that renders it Convention  
16 compliant, yet that very argument is addressed to this  
17 court by the Department. In granting the declaration of  
18 incompatibility sought the learned judge in Re:M said at  
19 para 23:

20 *"The incompatibility was identified a*  
21 *considerable time ago. Its removal is*  
22 *anticipated in the JT case settlement has not*  
23 *taken place yet. The matter is an important*  
24 *one, not only for the Applicant but*  
25 *potentially for many others too."*

26 By extension, the identical provisions in Northern  
27 Ireland are affected by the declaration of  
28 incompatibility. Any amending measure is a matter for  
29 government and not for the court. As the learned judge  
30 said in para 18 of the Re:M case:

1           *"In a case such as this it is not for the*  
2           *court to insulate the Minister from such*  
3           *pressure."*

4           A further quote:

5           *"It is not for the court to decide between*  
6           *the different routes to the achievement of*  
7           *compatibility or to seek to give a steer in*  
8           *the direction of one route or the other."*

9           Section 3(1) of the Human Rights Act 1998 requires the  
10          court in construing Articles 32 and 36 of the Order (an  
11          order in council) so far as possible to interpret those  
12          provisions in a way which is compatible with the  
13          patient's rights under the Convention. This may include  
14          reading down provisions which would otherwise breach  
15          Convention rights or reading broadly the words used and,  
16          on occasion, reading in necessary safeguards to protect  
17          such rights.

18          It has been said that after the 1998 Act the role of  
19          the court is not to find the so-called true meaning of  
20          the provision but to find, if possible, the meaning which  
21          best accords with Convention rights. However, it is clear  
22          to me from the jurisprudence that there are limits to  
23          such an approach if the courts are not to usurp the  
24          Constitutional role of the legislature. It seems to me  
25          that to add in, in this particular menu of possible  
26          grounds in Article 36(3) for making an Order, further  
27          grounds such as occur to the court to be Convention  
28          compliant would be a step too far. If the Department's  
29          contention in this present case is correct then the long  
30          awaited change in the law in England in 2007 was quite

1 unnecessary. The meaning contended for by the Department  
2 in this case would involve the court rewriting its powers  
3 under the Order and I am satisfied that such a step would  
4 clearly cross the line between proper interpretation,  
5 even liberal interpretation, and outright amendment of  
6 the law. This is not the role of the higher courts, still  
7 less it is the role of the County Court.

8 I believe the Court's powers are as set out by Bennett  
9 J in the Re: E case in 2005 to which I have referred  
10 earlier. It is therefore not possible to find a meaning  
11 of Articles 32 and 36 which accords with Convention  
12 rights. The court finds therefore that none of the  
13 grounds set out in Article 36(3) of the 1986 Order are  
14 made out in this present case and dismisses this  
15 application. I would only add that I have delayed making  
16 this ruling because I was awaiting the decision from the  
17 Mental Health Review Tribunal which might have rendered  
18 this decision irrelevant and academic.

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