

HUMAN RIGHTS

In the assessment process



Aim

The purpose of this briefing is to highlight not only the importance of human rights in the assessment process but also the need for social services staff to comply with human rights statute and case law. Following the judgement in the case of Jennifer Connor, it is advisable for trusts to record all possible alternatives that could meet an individual's care needs showing an analysis of the effect of each alternative on the individual's human rights.

The final decision relating to the individual's care must then be one that is the least restrictive and/or detrimental to the individual concerned.

The court case - the facts

Mrs Connor suffered from mental illness and from in or around 1997 had intermittently been detained and sometimes made subject to Guardianship Orders under the Mental Health (NI) Order 1986. In November 2002, she married her partner and wished to permanently reside with him. At the time, she was subject to a Guardianship Order which required her to reside in a certain residential care home. She challenged the trust's decision and the matter was eventually heard by the Court of Appeal.

Her principal argument was that requirement for her to reside in residential care and not with her husband was a breach of her rights under Article 8 of the European Convention of Human Rights. The Court held that there had been a breach of her Article 8 rights.

The legislation

In October 2000, the Human Rights Act 1998 came into force in Northern Ireland and embedded the European Convention of Human Rights into domestic law. Since then, the decision making, actions (and sometimes omissions) of public bodies, which include trusts, must be consistent with domestic law and with the Human Rights Act. Since the Act

came into force, an individual's human rights should be at the forefront of any assessment of that individual's needs and any decisions relating to her/his care.

The Convention rights

Article 8 is one of the most relevant in the context of community care. It provides:

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

Interfering with an Article 8 right

Article 8 is a qualified right in that it is possible to interfere lawfully with the right in certain circumstances.

Where an article 8 right is engaged it can be interfered with if;

- the interference/ restriction is in accordance with the law;
- it is necessary in a democratic society, for example for economic reasons; and
- it is proportionate in pursuance of the legitimate aim.

In a social welfare context, the key principles of most relevance are the need for the action to be 'the least restrictive interference' and overall to be 'balanced'. In the Connor case, the judges held that this could only be achieved by a full analysis of all alternatives open to the trust.

The hearing

"The failure of the trust to address a user's Article 8 rights rendered their decision unsupported".

Connor 2004

The trust involved in the Connor case accepted that its decision to require Mrs Connor to live in a named residential home constituted an interference with her Article 8 rights. It contended that this decision was taken in accordance with law (S 22(1) of the Mental Health Order 1996) and was both necessary to safeguard Mrs Connor and therefore proportionate in its pursuit of that aim.

The case put forward by Mrs Connor's legal representatives centred on the argument that the trust had failed to adequately demonstrate the necessity of the restrictions imposed against her convention right to found a family and reside with her husband. It was their submission that the trust in its various reports and assessments had not shown that it had considered Mrs Connor's situation against the background of her right to a private and family life. There was no analysis of her situation 'through the prism of the European Convention' nor was there any analysis of the alternatives that might be open to the trust.

The Court of Appeal judges agreed and upheld Mrs Connor's application. It held that the trust in the Connor case had failed to demonstrate adequately that its decision to require Mrs Connor to live separately from her husband was the least restrictive in the circumstances. It was the Court's view that, where an individual's Article 8 rights are interfered with, there should be an analysis of the alternatives open to the trust.

Without such analysis a Trust decision interfering with an individual's Article 8 rights could not possibly be proportionate.

The Court of Appeal judges found that the trust had unjustifiably interfered with Mrs Connor's Article 8 rights.

The Connor case has been referred to and has influenced judgements in later cases in particular the decision in *Re AR v Homefirst* (NICA 2005).

Advice following the judgement

Assessment of need has a central role to play in the provision of community care and correct assessment is crucial to the provision of appropriate care

to meet an individual's needs. An individual's human rights should be at the core of correct assessment. The Connor judgement serves to re-emphasise this point. Trusts must approach every assessment of need from a human rights perspective. By recording analysis of alternatives, trusts will be able to demonstrate that appropriate consideration has been given to a person's human rights.

In assessment documentation, a mere reference to the fact that a user's article 8 rights have been 'considered' is not sufficient. The trust's decision maker must look at all alternatives available in the particular circumstances of an individual's situation. The effect of each alternative on the individual's human rights should be analysed and documented. If the final decision involves an interference with the individual's Article 8 rights, that interference should be confined to the minimum necessary to secure the objective of providing appropriate care to her/him.

Patricia Southern

Legal Adviser (Community Care)

Law Centre (NI)

© Law Centre (NI) 2006

The Community Care Legal Advice Service is funded by the four health and social services boards.

An advice line operates from the Law Centre's Belfast and Derry offices between 9.30 am and 1 pm daily. The community legal advisers are Patricia Southern (028 9024 4401) and Vincent Shiels (028 7126 2433).

Note: Although every effort is made to ensure the information on these pages is accurate and up-to-date, Law Centre (NI) cannot be held liable for any inaccuracies and their consequences. The information should not be treated as a complete and authoritative statement of the law.



INVESTOR IN PEOPLE

Law Centres®

Available in large text format on request from the Law Centre's Publications Department: telephone 028 9024 4401, and on our website at www.lawcentreni.org