Neutral Citation no. [2003] NIQB 35 | *Ref:* **WEAC3928**

Judgment: approved by the Court for handing down | *Delivered:* **28/05/2003**
(subject to editorial corrections)

THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THE NORTH AND WEST BELFAST HEALTH AND SOCIAL SERVICES TRUST FOR JUDICIAL REVIEW

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WEATHERUP J

The application

[1] This is an application by the North and West Belfast Health and Social Services Trust for judicial review of a decision of the Mental Health Review Tribunal dated 13 February 2003 whereby it was ordered that AMM a patient in Muckamore Abbey Hospital, Antrim should be conditionally discharged.

The legislation

[2] The Mental Health (Northern Ireland) Order 1986 makes provision with respect to the detention, guardianship, care and treatment of patients suffering from mental disorder and for the management of the property and affairs of such patients.

Part II of the Order makes provision for compulsory admission to hospital and guardianship.

Part III of the Order makes provision for patients concerned in criminal proceedings or under sentence. Article 44 provides that the court may make a Hospital Order if satisfied on the evidence of two medical practitioners that the offender is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment and the court is of the opinion that the most suitable means of dealing with the case is by means of a Hospital Order. Further, Article 47 provides that where a court makes a Hospital Order and it appears to the court that it is necessary for the protection of the public from serious harm, the court may also make a Restriction Order either without limit of time or for

a specified period, by virtue of which the patient's discharge from hospital is restricted.

Part V of the Order provides for applications to the Mental Health Review Tribunal for Northern Ireland. Article 78 provides for the discharge of patients subject to Restriction Orders. This includes the provision that the Tribunal shall direct the discharge of the patient if satisfied "that he is not then suffering from mental illness or severe mental impairment or from either of those forms of mental disorder of a nature or degree which warrants his detention in hospital for medical treatment" (as provided by the operation of Article 78(2) and Article 77(1)(a)).

[3] Article 3 of the Order provides the following definitions –

> "`Mental disorder' means mental illness, mental handicap and any other disorder or disability of the mind;
>
> `Mental illness' means a state of mind which affects a person's thinking, perceiving, emotion or judgment to the extent that he requires care or medical treatment in his own interests or the interests of other persons;
>
> 'Mental handicap' means a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning;
>
> `Severe mental handicap' means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning;
>
> `Severe mental impairment' means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned."

The background

[4] The patient had been subject to Hospital Orders from time to time between 1992 and 1998. In 2000 she was admitted to hospital under Part II of the 1986 Order. On 30 April 2001, having been convicted at Belfast Crown Court of assault occasioning actual bodily harm with intent, contrary to Section 18 of the Offences Against the Person Act 1861, the patient was dealt with by way of a Hospital Order subject to a Restriction Order for four years. Upon appeal by the patient the Court of Appeal, on 17 December 2001, affirmed the sentence imposed by Belfast Crown Court. Belfast Crown Court and the Court of Appeal had the evidence of Dr McCartney, Dr Marriott and Dr Bownes, Consultant Psychiatrists, that the patient suffered from severe mental impairment as defined in Article 3 of the 1986 Order.

The Tribunal decision

[5] By Article 78 of the Order the Tribunal is required to order the release of the patient if the patient is not suffering from mental illness or severe mental impairment. It was common case that the patient was not suffering from "mental illness". Accordingly it was necessary that the Trust establish that the patient was suffering from "severe mental impairment". The definition of severe mental impairment includes the words "severe impairment of intelligence and social functioning". The Tribunal by its decision of 13 February 2003 found that these words involved two separate matters and that it was a distinct ingredient of the definition of severe mental impairment that the patient should be shown to be suffering from severe impairment of intelligence. Further, the evidence of psychological tests was that the patient had a full-scale IQ of the order of 65. The Tribunal took account of British Psychological Society guidelines suggesting that an IQ of 54 and below represented a severe impairment of intelligence but an IQ of 65 did not amount to "severe" impairment. As a result the Tribunal found that the patient was not suffering from severe impairment of intelligence and therefore was not suffering from severe mental impairment and should be discharged.

The issues

[6] The issues arising on this application resolved to two matters. First, the applicant contended that the Tribunal was in error in deciding that "severe impairment of intelligence and social functioning" required proof of severe impairment of intelligence as a distinct ingredient rather than proof of severe impairment of intelligence and social functioning as a composite ingredient of the definition. Secondly, the applicant contended that the Tribunal was in error in deciding, on the basis of the British Psychological Society guideline

that an IQ above 54 did not amount to "severe" impairment, that the patient was not suffering from severe impairment of intelligence.

Severe impairment of intelligence

[7] As to the first issue the respondent contended that the definition of "severe mental impairment" contained four ingredients, namely-

(a) a state of arrested or incomplete development of mind,

(b) severe impairment of intelligence,

(c) severe impairment of social functioning,

(d) abnormally aggressive or seriously irresponsible conduct.

On the other hand the applicant contended that there were only three ingredients and that (b) and (c) was a composite ingredient. There had been no dispute before the Tribunal that the patient suffered from a state of arrested or incomplete development of mind and severe impairment of social functioning and abnormally aggressive or irresponsible conduct.

[8] A general reading of the definition indicates that "severe impairment of intelligence" is a distinct ingredient. This conclusion is supported by the decision of the Court of Appeal in England and Wales in Megarry v Chief Adjudication Officer (Unreported 29 October 1999) which concerned the words "severe impairment of intelligence and social functioning" appearing in the Social Security (Disability Living Allowance) Regulations 1991. The appellant was an autistic child and the issue in the proceedings concerned his entitlement to the higher rate of the mobility component of a Disability Living Allowance. The qualifying conditions for the higher rate required that the appellant suffered from severe impairment of intelligence and social functioning. The Court of Appeal rejected the argument that the words required a single composite assessment of the impairment both of intelligence and social functioning.

[9] Mr Brangham QC for the applicant sought to distinguish Megarry v Chief Adjudication Officer on the ground that the social security context in that case was different from the mental health context in the present case. He stressed the need for a purposive interpretation of the legislation and the error of assuming that a composite expression is necessarily the sum of its parts and the need to look at the overall intention of the statutory scheme. He argued that the legal definitions were not clinical definitions and that in the context of mental health the statutory scheme placed the assessment of mental disorders in the hands of responsible medical officers. Having regard to the

statutory context I remain of the opinion that the definition of severe mental impairment includes a requirement that the patient suffers from severe impairment of intelligence. I do not accept that the statutory context involving responsible medical officers making assessments in the field of mental health alters the requirements of the language of the definition.

British Psychological Society guidelines

[10] The second issue concerned the significance of the British Psychological Society guidelines based on IQ scores in relation to the assessment of severe impairment of intelligence. The applicant contended that the Tribunal had determined the degree of impairment of intelligence by adopting the British Psychological Society guidelines rather than relying on the clinical judgment of responsible medical officers. On the other hand the respondent contended that the Tribunal had not determined the degree of impairment of intelligence solely on the basis of the guidelines but had merely taken account of the guidelines along with the other evidence.

[11] After the introduction of the 1986 Order the Department of Health and Social Service issued two publications, being a Code of Practice and a Guide, which concerned the operation of the Order, although neither would be definitive. Article 111 of the Order provides that the Department shall prepare a Code of Practice for the guidance of professionals. The Code of Practice at paragraph 1.13 refers to the term "severe impairment of intelligence and social functioning" and states that the words are - "not meant to restrict these definitions to persons whose intelligence level as measured by psychological tests fall below a particular figure. Assessment should take into account the total impairment both of intelligence and social functioning." Further the Department's Guide at paragraph 11 refers to the definition of "severe mental handicap" and emphasises that it includes severe instead of significant impairment of intelligence and social functioning and states that "it is entirely a matter of clinical judgment as to whether a person exhibits significant or severe impairment of intelligence and social functioning."

[12] In July 1995 the British Psychological Society published "The Mental Health (Northern Ireland) Order 1986 – Severe Mental Handicap and Severe Mental Impairment – Definitions and Operational Guidelines". The paper referred to the need for operational guidelines to promote the likelihood of consistency and equity in the interpretation of the various concepts involved under the 1986 Order. The paper noted that the definitions in the Order distinguished between "significant" impairment and "severe" impairment and recommended the IQ level of 55 – 69 for significant impairment and the IQ level of 54 and below for severe impairment.

[13] The applicant contended that the Tribunal had been in error in concluding that the patient did not suffer from severe impairment of intelligence because she had an IQ that was above the British Psychological Society figure of 54. However the Tribunal's approach was not simply to adopt the British Psychological Society guidelines as the measure of the degree of impairment of intelligence. The Tribunal regarded the IQ test as a significant indication of the degree of impairment of intelligence so that "in the absence of any other objective evidence in relation to her level of intellectual functioning" the patient was found to have significant impairment but not severe impairment. The onus was on the Trust to satisfy the Tribunal that the patient suffered from severe impairment of intelligence but as the Trust had taken the position that severe impairment of intelligence and social functioning was a composite requirement it had not led the evidence to establish that the impairment of intelligence as a separate requirement could be treated as severe. In effect the Tribunal found that it did not have evidence that the patient was suffering from severe impairment of intelligence. The Tribunal did not decide that the British Psychological Society guidelines were determinative of the degree of impairment of intelligence.

[14] The Tribunal had reports from Dr McCartney, Dr Marriott and Dr Bownes, Consultant Psychiatrists, and the oral evidence of Dr Marriott, all on behalf of the Trust, and the reports and oral evidence of Mr Blunden, Chartered Clinical Psychologist, on behalf of the patient. The case made to the Tribunal on behalf of the Trust was that severe impairment of intelligence and social functioning was a composite requirement so that a degree of impaired intelligence that was significant but not severe could amount to severe mental impairment on a holistic approach if there was a sufficiently severe degree of impairment of social functioning. Whether this was the position in any particular case was, said the Trust, a matter of clinical judgment.

[15] Dr McCartney was the responsible medical officer for the patient from October 2000 to December 2001 and he had completed a report on the patient in November 2000 and that report was before the Tribunal. He referred to the psychological testing of the patient and stated that she had "a significant impairment of intelligence" and stated his opinion that the patient was suffering from severe mental impairment as defined in the 1986 Order. Dr Marriott was responsible for the patient at all times from 1992 when Dr McCartney was not involved. She had completed a report in February 2001 that was before the Tribunal and stated her opinion that the patient suffered from severe mental impairment as defined by the 1986 Order. The report set out the IQ scores from the psychometric testing and stated that the patient "has been shown to have severely impaired intelligence". This appears to be the only reference in the evidence to the degree of impairment of intelligence being "severe" but it is apparent from the later reports and the evidence

before the Tribunal that any separate consideration of impairment of intelligence was not described as "severe". In March 2002 Dr Marriott confirmed her opinion that the patient was severely mentally impaired within the meaning of the 1986 Order. Dr Bownes, Consultant Forensic Psychiatrist, also reported on the patient in March 2001. He described the level of intellectual functioning as being consistent with mild mental handicap and his overall opinion was that the patient fulfilled the criteria for severe mental impairment under the 1986 Order. Mr Blunden reported on behalf of the patient in September and December 2002 and in reliance on the British Psychological Society guidelines, and on the need to establish severe impairment of intelligence as a separate requirement, he stated the conclusion that the patient's level of intellectual impairment was significant but not severe. Dr Marriott's response appeared in her report of January 2003 in which she supported the composite approach to the assessment of intelligence and social functioning and concluded that although the patient had a "relatively high IQ score" the degree of impairment of social functioning was such that supported a diagnosis of severe mental handicap under the 1986 Order.

[16] It is apparent that the evidence from the Trust did not seek to establish that the patient's level of intellectual impairment could be classed as "severe" and that the one reference to that effect in Dr Marriott's report of February 2001 was overtaken by the manner in which the matter was otherwise presented to the Tribunal. As the Trust had not established that the patient was suffering from severe impairment of intelligence her continued detention could not be justified.

Proof of severe impairment of intelligence

[17] Accordingly, I reject the applicant's contention that the Tribunal determined the degree of impairment of intelligence simply by adopting the British Psychological Society guidelines. Rather, the Tribunal took into account the guidelines in assessing the degree of impairment of intelligence, and it is apparent that the Tribunal would have taken into account other evidence on the degree if impairment of intelligence, had such evidence been adduced. I find that the Tribunal was entitled to take into account the guidelines, but had the Tribunal allowed the guidelines to become determinative of the issue it would have been in error. The conclusion that the guidelines are a relevant consideration is not contrary to the Code or the Guide, if each is interpreted to mean, as should be the case, that psychological tests do not determine the assessment, and clinical judgment should be based on all relevant considerations.

[18] Mr Brangham contended that the Tribunal's approach would remove the clinical judgment of responsible medical officers from the assessment of the impairment of a patient's intelligence but by reason of the matters

outlined below I am unable to accept that contention. Taking into account psychological tests does not mean that establishing severe impairment of intelligence ceases to involve clinical judgment. In the first place the nature of "intelligence" need not be limited to the results produced by IQ tests. As stated by Simon Brown LJ in Megarry v Chief Adjudication Officer in considering a publication on the subject of autism, there is a real difference between "test intelligence" and "world intelligence" so that the results of IQ tests are not a true indication of useful intelligence. This is one aspect of the situation where the applicant's emphasis on the mental health context may be significant. Further, IQ tests are not determinative. In considering the significance of IQ tests in Megarry v Chief Adjudication Officer, Simon Brown LJ stated that "the claimant's IQ as conventionally tested is likely to be the essential starting point for considering the impairment of intelligence." In any event there may be alternatives to the classification of severe mental impairment as an IQ of 54 and below as proposed by the British Psychological Society. Even if the British Psychological Society classifications are adopted, they are stated to be guidelines only and the paper expresses reservations and exceptions in relation to the application of those guidelines. The paper warned that the guidelines should be used with care. It was stated that in some individuals their level of functioning did not permit formalised assessments. For certain groups specialised tests might be used. There is additional need for caution at the transition points of classification (i.e. 55, 70). Further, the paper notes that allowance should be made for the possibility of measurement error and IQ figures should only be quoted with explicit confidence limits based on the standard error of measurement.

Conclusion

[19] In summary, I reject the applicant's contention that "severe impairment of intelligence and social functioning" is a composite requirement and find that it is necessary to establish both severe impairment of intelligence and severe impairment of social functioning. Further, I reject the applicant's contention that the Tribunal decided that severe impairment of intelligence is a matter to be determined solely on the basis of the British Psychological Society guidelines and find that the Tribunal's decision that the patient was not suffering from severe impairment of intelligence was the correct decision on the basis of the evidence presented to the Tribunal. Accordingly the application for judicial review is dismissed.