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**Ref: WEA10309**

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

**Delivered: 28/06/2017**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW )**

**BEFORE A DIVISIONAL COURT**

**AN APPLICATION BY JONATHAN SWEENEY**

**(by his sister and next friend MARY SWEENEY)**

**Before: Morgan LCJ and Weatherup LJ**

**WEATHERUP LJ (delivering the judgment of the court)**

[1] This is a rolled up hearing on an application for Judicial Review of a decision of the Department of Justice for Northern Ireland made on 25 October 2016 refusing to provide the applicant with a different Registered Intermediary for the purposes of consultation with his legal advisors from the Registered Intermediary provided to the applicant for the purpose of proceedings in court. Ms Danes QC and Ms Gillen appeared for the applicant and Mr McAteer for the respondent.

[2] The operation of the scheme for Registered Intermediaries ("RI") appears from the affidavit of Veronica Holland, Head of Victims and Witness Branch in the Community Safety Division of the Department of Justice. The initial proposal was for an accredited intermediary service to provide specialist assistance to victims and witnesses with communication difficulties. The scheme was extended to include vulnerable suspects and defendants prior to its introduction in May 2013. A pilot commenced at the Crown Court in Belfast for indictable only offences and was extended to all Crown Courts on 11 November 2013 for indictable only offences and subsequently extended to all Crown Court cases on 1 April 2015 and to Magistrates' Courts from 3 April 2017.

[3] The statutory scheme for the use of RIs for a witness or a defendant in court proceedings is set out in the Criminal Evidence (Northern Ireland) Order 1999 as amended by the Justice Act (Northern Ireland) 2011. The Judge issues a direction if the accused is to be examined with the aid of an RI. The use of an RI while a defendant is in consultation with legal representatives is not included in the statutory scheme and is a decision for the Department of Justice.

[4] The Registered Intermediaries Procedural Guidance Manual (Northern Ireland) Version 5 September 2016 defines a Registered Intermediary as -

“... a person who facilitates two way communication between the witness/defendant and any other participants in the criminal justice process to ensure that communication with the witness/defendant is as complete, coherent and accurate as possible. This includes the witness/suspects police interview; any identification procedures in which the witness may be involved; and the trial process up to and including the communication of the outcome of a case, if appropriate. For defendants, this would be limited to facilitating communication with the vulnerable defendant if they give oral evidence”.

[5] The grounding affidavit of Derwin Harvey, solicitor for the applicant, states that the applicant is charged with theft, false imprisonment and common assault and is awaiting arraignment at Antrim Crown Court. The applicant is described as being deaf and effectively mute and suffering from significant and severe communicative difficulties as a result of his disabilities. Medical reports from the applicant’s general practitioner, from a psychologist and from a psychiatrist speak to the applicant’s disabilities.

[6] Emma Mawhinney is a Registered Intermediary who reported on the applicant on 14 October 2016. Her conclusions were that the applicant had the ability to communicate, to give his evidence in court and that an RI should be considered for the applicant on the basis that his communication skills were compromised. Ms Mawhinney recommended a Ground Rules hearing should take place before the trial Judge, the trial advocates and the RI before the applicant gave evidence in order to consider the application of the recommendations in her report. The Ground Rules hearing was to consider (a) the conclusions and strategies set out in the report and how the applicant could be questioned most effectively, (b) any other matter relating to the way in which the applicant should give his evidence and (c) the role of the RI during the evidence. A checklist was provided for the Ground Rules hearing listing communication techniques to be used and communication techniques to be avoided. By way of example, the communication techniques to be used included maintaining a steady speech volume and not speaking abnormally slowly: allowing the applicant to use a timeline with pictures of significant events

put in order; allowing the applicant to use pictures, line drawings and symbols as appropriate to aid auditory comprehension; naming places and objects and avoiding the use of pronouns; following a logical chronological order during questioning; using a simple sentence structure and asking only one idea at a time or referring to only one event at a time. Communications techniques to be avoided included complex unfamiliar vocabulary or words; complex multi-part questions; tag questions; negatives and double negatives.

[7] On 20 October 2016 the applicant's solicitor wrote to the Department requesting a separate RI so that the consultations could be conducted confidentially and in private and the contents of those consultations be protected by legal professional privilege. The Department replied the same day stating that RIs were aware of the issue of legal privilege and quoting from the Procedural Manual.

[8] On 21 October 2016 the proceedings against the applicant were listed for review at Antrim Crown Court. The applicant's Counsel sought to enlist the Judge in support of the appointment of a separate RI to attend defence consultations. On 24 October 2016 the applicant's solicitor wrote to the Department indicating that the Judge had directed that the applicant was to have a separate RI for defence consultation. However, it is accepted by the applicant that an RI for defence consultation is outwith the statutory scheme and outwith the powers of the Judge to direct and is a matter for the Department. In a telephone conversation on 25 October 2016 between Ms Holland and the applicant's solicitor it was stated on behalf of the Department that RIs were subject to legal professional privilege and that a separate RI would not be provided to the applicant for defence consultations. However, the Department accepted that an RI should be appointed for defence consultations and that Ms Mawhinney should provide that service. It is this decision that is the subject of this application for Judicial Review.

[9] Ms Holland sets out some of the key functions of RIs -

- Establish rapport with the vulnerable person needed for their engagement at various stages of the criminal proceedings.
- Assess their communication needs through informal assessments and standardised tests.
- Describe (orally and in writing) their communication needs to criminal justice practitioners.
- Advise on the structure of questions and concepts the person has difficulty understanding.
- Facilitate communication between the vulnerable person and the parties in the case during evidence giving.
- Write reports on the vulnerable person's communication needs and strategies for managing these for use by police officers, legal representatives and the court.

[10] Ms Holland states that there is no equivalent RI scheme for suspects or defendants elsewhere in the world.

[11] The statutory scheme for the use of RIs set out in the Criminal Evidence (Northern Ireland) Order 1999 was amended by the Justice Act (Northern Ireland) 2011. Article 17 deals with witnesses and Article 21BA deals with defendants. Both provisions concern the use of interpreters as well as those known as RIs. Their function is described at 17(2) and 21BA(4) (*italics added*).

“17(1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this Article (“an intermediary”).

(2) *The function of an intermediary is to communicate -*

(a) *to the witness, questions put to the witness, and*

(b) *to any person asking such questions, the answers given by the witness in reply to them,*

*and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.*

(3) Any examination of the witness in pursuance of paragraph (1) must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which -

(a) the judge and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary, and

(b) (except in the case of a video recorded examination) the jury (if there is one) are able to see and hear the examination of the witness.

21BA(1) This Article applies to any proceedings (whether in a Magistrates’ Court or before the Crown Court) against a person for an offence.

(2) Subject to paragraph (2A), the court may, on the application of the accused, give a direction under paragraph (3) if it is satisfied—

(a) that the condition in paragraph (5) is or, as the case may be, the conditions in paragraph (6) are met in relation to the accused; and

(b) that giving the direction is necessary in order to ensure that the accused receives a fair trial.

(2A) A court may not give a direction under paragraph (3) unless –

(a) the court has been notified by the Department of Justice that arrangements for implementing such a direction have been made in relation to that court; and

(b) the notice has not been withdrawn.

(2B) The withdrawal of a notice given to a court under paragraph (2A) does not affect the operation of any direction under paragraph (3) given by that court before the notice is withdrawn.

(3) A direction under this paragraph is a direction that provides for any examination of the accused to be conducted through an interpreter or other person approved by the court for the purposes of this Article (“an intermediary”).

(4) *The function of an intermediary is to communicate –*

(a) *to the accused, questions put to the accused, and*

(b) *to any person asking such questions, the answers given by the accused in reply to them,*

*and to explain such questions or answers so far as necessary to enable them to be understood by the accused or the person in question.*

(5) Where the accused is aged under 18 when the application is made the condition is that the accused’s ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by the accused’s level of intellectual ability or social functioning.

(6) Where the accused has attained the age of 18 when the application is made the conditions are that—

- (a) the accused suffers from a mental disorder (within the meaning of the Mental Health (Northern Ireland) Order 1986) or otherwise has a significant impairment of intelligence and social functioning; and
- (b) the accused is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court.

(7) Any examination of the accused in pursuance of a direction under paragraph (3) must take place in the presence of such persons as rules of court or the direction may provide and in circumstances in which—

- (a) the judge and legal representatives acting in the proceedings are able to see and hear the examination of the accused and to communicate with the intermediary;
- (b) the jury (if there is one) are able to see and hear the examination of the accused; and
- (c) where there are two or more accused in the proceedings, each of the other accused is able to see and hear the examination of the accused.

For the purposes of this paragraph any impairment of eyesight or hearing is to be disregarded.”

[12] The statutory scheme refers to the function of the interpreter and the RI at 17(2) and 21BA(4) as being to communicate to the witness/accused the questions put and to the questioner the answers of the witness/accused. In relation to the RI, as appears from the outline provided by Ms Holland, the function of the RI is to facilitate the witness/accused in understanding the question and the questioner in receiving an answer rather than, as would be the case with an interpreter, translating the questions for the witness/accused or the answers for the questioner. The RI will be present but the witness/accused provides the answers to the questioner. The RI, having set out in the report to the Court the communication needs of the person concerned and those needs having been addressed in the Ground Rules hearing, oversees the application of those needs while the witness/accused gives evidence.

[13] Ms Holland states that “Any intervention by the RI should be based on their court report and the justification for their intervention based on the recommendations in it, which the court has accepted as part of the Ground Rules hearing. An intervention may be required where the witness or defendant does not appear to have understood the question posed (and the legal representatives subsequently need to check that the person understood a particular aspect), the question is too complicated given the person’s communication needs, the ground rules have not been adhered to or a break is needed etc. Judges may develop a practice that, if the legal representative is unable to ask the question appropriately (according to the ground rules) after two or three attempts, the RI may then be invited to suggest an alternative way to put the question. This should be discussed at the Ground Rules hearing.”

[14] The applicant’s grounds for Judicial Review are that the refusal to provide the applicant with a separate RI for defence consultation is –

- (a) incompatible with the applicant’s rights under Article 6 of the European Convention on Human Rights by breaching his right to a fair trial.
- (b) discrimination against the applicant contrary to Article 14 of the European Convention on Human Rights.
- (c) unreasonable because the respondent -
  - (a) in granting an RI to assist at consultation thereby accepted that the circumstances of this case warranted the service and it was then unreasonable to advise the applicant to seek the services of a court defender or appropriate adult.
  - (b) failed to appreciate that the role of an RI is separate to that provided by an appropriate adult.
  - (c) misdirected itself in finding that an RI is bound by legal professional privilege.
  - (d) failed to give proper reasons for refusing the request and has relied on unduly uncertain and vague reasoning, including the incorrect assertion that the RI is subject to the legal professional privilege, that an appropriate adult can perform the same role and simply stating that it is not policy and has never been provided before.
  - (e) did not afford enough, if any, weight to the fact that it is common practice to allow a separate lip reader or interpreter for the defence.

- (f) did not afford enough weight to the opinion of the medical professionals who advised that it is likely that the applicant would not understand.

[15] The applicant seeks to advance this application by reference to the impact on legal professional privilege of the failure to provide separate RIs. The applicant emphasises –

At the heart of the principle of legal professional privilege is that communications between clients and lawyers must be uninhibited (R v Derby Magistrates' Court ex parte B [1996] 1 AC 487, at 510).

Such legal advice cannot be obtained effectively unless the client is able to put all the facts before the advisor without fear that they may afterwards be disclosed and used to his prejudice (R (Morgan Grantham and Company Limited) v Special Commissioner of Income Tax [2003] 1 AC 567, at paragraph [7]).

A lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent (B v Auckland District Law Society [2003] 2 AC 736, at para [47]).

[16] The applicant contends that such an absolute and unqualified assurance cannot be given that exchanges made in the presence of the RI will be privileged and remain undisclosed. The applicant offers a hypothetical example as to how an accused may be prejudiced by the use of the same RI at defence consultation and at trial. This example postulates an accused charged with a sexual offence who at consultation admits to a sexual attraction to young girls. It is submitted on behalf of the applicant that there is real risk that the RI's view of the accused would be coloured by this disclosure and as the RI has to communicate the answers of the accused to the court and jury this privileged information was at risk of disclosure.

[17] First of all, it must be stated that the RI does not communicate the answers of the accused to the Court and jury. The accused provides the answers to the Court and jury. The RI is present advising as to the manner in which the evidence might be obtained from the accused and provided to the Court.

[18] The applicant further submits that there could be non-verbal communication by the RI in response to a question touching on the privileged information which would influence the Court and jury. Presumably the applicant is contending that the non-verbal communication of the RI results from their view of the accused having been coloured by prejudicial disclosure at consultation.

[19] The respondent's affidavit sets out the training regime for RIs. That training embraces the requirements for confidentiality and the importance of legal professional privilege. The Procedural Guidance Manual states:



“When assisting a suspect, a defendant or a defence witness the RI should be aware of legal professional privilege and must treat what they hear as confidential not disclosing anything about the defence case or what has been said to them without the defendant’s express consent.”

A footnote explains that the stated approach -

“.... is because, in order for the registered intermediary to complete a thorough and accurate assessment of the defendant’s communication needs, the information provider should be able to trust that the information disclosed will not be used elsewhere”.

[20] The Code of Practice for Northern Ireland Registered Intermediaries states –

“....they must understand the different obligations regarding data protection, confidentiality, legal professional privilege and disclosure of information between the prosecution and the defence legal teams, and must maintain their professional integrity in relation to these different obligations”.

[21] The applicant contrasts the terms of the guide for the appointment of interpreters. In “Interpreters in the Criminal Courts – A Good Practice Guide For Court Staff” issued by Her Majesty’s Courts Service under the title “Interpreters for the Court and Interpreters for the Defence” it is stated:

“Due to the potential for conflict of interest and to ensure the fairness of proceedings, an interpreter booked by the court to interpret for the defendant (the Court Interpreter) in the courtroom should not also be used outside of the courtroom by the Defence to communicate with their client.

Best practice is that –

- The Court Interpreter should not interpret for the defendant outside the courtroom setting. Any conversation, prior to the commencement of court proceedings, in order to check for language and dialect match should be conducted in the presence of an appropriate court official and should consist of a conversation between the

court official and the defendant which the Court Interpreter merely interprets.

- To ensure that there is no conflict of interest, it is recommended that the Defence arrange their own separate interpreter to the Court Interpreter for the purpose of taking instructions outside the courtroom”.

[22] The respondent distinguishes the roles of an RI and an interpreter. The RI will undertake a detailed assessment of the accused and provide a report and recommendations on obtaining evidence from the accused. It is estimated that the average pre-trial preparation between the RI and the accused takes one and half days. Continuity of service with a vulnerable individual is of importance in maintaining rapport. The involvement of a number of RIs is considered to place an increased burden on the person requiring assistance and to be counter-productive to the necessary continuity, rapport and knowledge of communication difficulties. This relationship is not a feature of the engagement of interpreters.

[23] It is apparent that the training of RIs includes the requirements for confidentiality and legal professional privilege. We do not doubt that the obligations as to confidentiality and legal professional privilege would be reinforced by legal representatives to all parties present at legal consultations with an accused. We are satisfied that a lawyer is no less able to give an absolute and unqualified assurance that what a client tells him in confidence will never be disclosed without his consent when that disclosure is made in the presence of an RI. We are satisfied that the principle of legal professional privilege would be unaffected by the use of the same RI at consultation with the accused and at trial. We accept the respondent’s assessment that the nature of the role of an RI is such that it is desirable to maintain continuity of service and provide the same RI at pre-trial consultations and at trial. Accordingly we do not accept the comparison with interpreters.

[24] The applicant presents the challenge to the decision not to provide a separate RI for defence consultations as offending the applicant’s Article 6 right to a fair trial and as amounting to discrimination contrary to Article 14 in relation to the exercise of fair trial rights under Article 6. The applicant compares the accused who requires the services of an RI with the accused who requires the services of an interpreter and for whom separate services are provided. For the reasons set out above we reject the comparison with the interpreter and are satisfied that the provision of a common RI at consultation and trial need not impact on confidentiality or legal professional privilege and would not offend fair trial rights.

[25] If, in the course of criminal proceedings, an issue should arise concerning the particular circumstances of the use of the RI in that case, the trial Judge, in the exercise of his powers to ensure a fair trial for the accused, would address the issue to prevent any breach of Article 6 rights.

[26] In addition the applicant presents the challenge on the basis that the decision is Wednesbury unreasonable. The matters relied on by the applicant are met by the respondent having agreed to provide an RI for defence consultations and this Court's rejection of the concerns about confidentiality and legal professional privilege. The application for Judicial Review is dismissed.