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(subject to editorial corrections)*

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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 FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW BY KIERAN KELLY

AND IN THE MATTER OF A DECISION OF THE WESTERN AND
SOUTH EASTERN HEALTH AND SOCIAL CARE TRUSTS

MORGAN LCJ

[1] This is an application for leave to issue judicial review proceedings against the proposed respondents by reason of their ongoing failure to discharge their duty to the applicant under Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 ("the 1972 Order"). The applicant contends that Article 15 of the 1972 Order imposes a duty on the respondents to assess and keep under review the applicant's social care needs, to create a care plan that addresses those needs and to provide the necessary social care services. Ms Maguire appeared on behalf of the applicant and Ms Smyth QC on behalf of the proposed respondents. I am grateful to each of them for the assistance that they have given in their detailed and helpful oral and written submissions. I also want to acknowledge the professionalism and persistence of the Law Centre in preparing this case on behalf of this applicant who for many years has been on the fringes of the mainstream of society. The work in this case is another typical example of the important role that the Law Centre plays in the protection of vulnerable people in our society.

[2] The applicant is a 53-year-old man. He is a chronic alcoholic and as a result had amassed a criminal record with approximately 225 convictions by 2013 including a

conviction for sexual offences as a result of which he is on the sex offenders register. He has been further convicted since then. His convictions have mainly been for assault, criminal damage, alcohol-related offences, riotous/disorderly behaviour and theft. He has spent regular periods in prison as a result of sentences imposed in respect of those offences. He has been diagnosed by Dr Bownes as suffering from a dis-social personality disorder. In 2014 Dr McNally, a clinical psychologist in the Learning Disability Service, diagnosed him as having a mild to moderate learning disability. It is also considered that by reason of his alcohol consumption he may have suffered some cognitive impairment. At the time of the hearing before me he was serving a sentence of six months imprisonment for assault, criminal damage and indecent behaviour and was due to be released from custody on 22 June 2017.

Statutory Scheme

[3] The general duty of the Department of Health to promote an integrated system of social care designed to secure social well-being in the people of Northern Ireland is now contained in section 2 of the Health and Social Care (Reform) Act (Northern Ireland) 2009. The specific responsibility for delivery of those services is contained in Article 15 of the 1972 Order:

"15. - (1) In the exercise of its functions under section 2(1)(b) of the 2009 Act the Department shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate.

(1A) Arrangements under paragraph (1) may include arrangements for the provision by any other body or person of any of the social care on such terms and conditions as may be agreed between the Department and that other body or person.

(2) Assistance under paragraph (1) may be given to, or in respect of, a person in need requiring assistance in kind or, in exceptional circumstances constituting an emergency, in cash; so however that before giving assistance to, or in respect of, a person in cash the Department shall have regard to his eligibility for receiving assistance from any other statutory body, and, if he is so eligible, to the availability to him of that assistance in his time of need."

It is common case that the responsibility for identifying the persons in need requiring assistance for the purposes of Article 15 (2) of the 1972 order falls upon the respondent Trusts.

[4] In the early 1990s the government published "People First: Community Care Northern Ireland in the 1990s" ("the People First paper"). This paper was designed to build on the report of Sir Roy Griffiths entitled "Community Care: Agenda for Action" which was designed to secure that the right social services were provided in good time to the people who needed them most and that the people receiving help would have a greater say in what was done to help them. The main changes in order to achieve those objectives included an expectation that resources would be targeted more effectively by assessing individuals needs more systematically and tailoring care packages more precisely to meet those needs within available resources. The paper also identified the expectation that full use would be made of the independent sector. It acknowledged that the family would continue to be the major supplier of social and personal care but recognised the important part that the voluntary sector played.

[5] The People First paper was focused on the needs of elderly people and those with a mental illness, mental handicap or physical disability. The strategy was to ensure that such people should be enabled to live in the community in their own homes whenever possible and to participate as fully as possible in regular work, social and educational activities. The underlying objective was to move people from residential accommodation back into the community.

[6] The Griffiths Report recognised the importance of assessment. The People First paper acknowledged that the primary purpose of assessment was to ensure that services were tailored to individuals' particular needs. It was not, however, the Government's intention that everyone needing care and support in the community should be referred for a comprehensive multidisciplinary assessment. Those delivering the service were expected to reach their own views about when a more comprehensive assessment reassessment involving two or more professional disciplines should be triggered. That would depend upon the complexity of the case and the level of resources involved. It would ultimately be a matter for professional judgement. The paper indicated that the comprehensive assessment process should always be activated when the decision to be taken was whether the client should move on a permanent basis into a residential care home, nursing home or continuing care hospital unit, or back from one of these into the community. Assessments should take account of the wishes of the individual. The paper also recognised the need to ensure that there was sufficient coordination so that each of the agencies providing assistance knew what the others were doing. The Government wished to

see a range of different service providers with the statutory, private and voluntary sectors working together.

[7] In conjunction with the People First paper a further paper entitled "Care Management: Guidance on Assessment and the Provision of Community Care" ("the Guidance paper") was published. The Guidance paper focused on the arrangements necessary for the care management assessment, including comprehensive assessment, of those clients whose social care needs involved a decision as to whether the client should move on a permanent basis into or out of some form of continuing care or where those needs were otherwise particularly complex. Among the principles applicable were the requirement to respond flexibly and sensitively to the needs of individual clients and their carers, to focus on enabling people to go on living at home for as long as practical and to intervene no more than was necessary. It was noted that the previous assessment arrangements were generally geared to determining eligibility for a particular service or set of services. The new arrangements focused on the actual needs and wishes of clients and their carers and they aimed to provide or arrange the provision of services which would meet those particular needs and wishes.

[8] The Guidance paper provided for an initial screening process to determine whether comprehensive procedures ought to be called into play. The level of assessment required varied according to complexity of need and the information already available. Considerable skill and judgement was required in determining the criteria for detailed assessment. Comprehensive assessment embraced physical, mental and social functioning. Detailed information on all areas was not necessarily required for every case. The broad areas included physical health, mental health, capacity for the activities of daily living and self-care, abilities and lifestyle, the contribution of informal carers, social network and support and housing, finance and environmental factors.

[9] The most detailed consideration of the legal consequences of the interplay between these various arrangements in this jurisdiction is that of McCloskey J in JR47 [2013] NIQB 62. He concluded that Article 15 of the 1972 Order must be construed so as to impose on the responsible authority a duty to assess those who, in its opinion, might qualify for the conferral of any of the benefits available thereunder. I do not need to set out the detailed assessment in that case with which I agree but the broad principles applicable to this case which do not seem to be in any significant dispute are as follows:

- (i) The applicant is a person in need for the purposes of Article 15 (2) of the 1972 Order.

(ii) By reason of his being such a person in need there is an obligation on the respondents to make an assessment in respect of him.

(iii) The form of assessment can be influenced by the extent of material already available in relation to the applicant.

(iv) The assessment must be directed at the applicant's needs and not simply an exercise of identifying those services or supports already in existence which might be beneficial to him.

(v) The nature and form of the assessment and the support to be provided is a matter of discretionary judgement for the professionals involved.

The Background

[10] I gave leave to the respondent Trusts to submit a number of affidavits in respect of the background. The principal deponent was Brian Simpson, a forensic team manager employed by the Western Trust, who was a registered mental health nurse by profession and had 28 years' experience of working in the field. In summary his assessment of the applicant was that he misuses alcohol and this regularly features in his offending. In his dealings with the applicant he has found that he can be pleasant, amenable and cooperative but also can be volatile, defiant, rude and threatening. He is managed under the PPANI arrangements as a Category 1 offender and he has a designated risk manager in the PSNI. His name will remain on the Sex Offenders Register until 2023.

[11] Mr Simpson first became involved with the applicant in 2010 when part of a team to discuss the long-term safe management of the applicant in the community after his release from custody at that time. At that stage a report was commissioned from Dr Bownes, consultant psychiatrist, who concluded that the applicant did not suffer from any form of learning disability or mental illness of a nature or severity that would render him incapable of taking full responsibility for his socially offensive and impulsive behaviours. On 18 July 2012 Dr McHugh, a consultant psychiatrist in adult learning disability in the Western Trust, concluded that the applicant did not have a learning disability from the beginning but that most of his cognitive onset could now be accounted for by his years of alcohol misuse.

[12] On 5 November 2012 Mr Simpson attended a further review meeting in respect of the applicant who was now due for release in 26 November 2012. Following that meeting he contacted the housing officer within the prison service and NIHE. On the morning of his release the applicant was arrested in Coleraine for disorderly behaviour and placed back in prison. He was subsequently released in February

2013 and was allocated a house in the Lisburn area. By April 2013 he was back in prison and was assessed by Dr Heal, a specialist in forensic psychiatry, as showing no evidence of significant cognitive impairment or significant impairment in his capacity in relation to forming decisions about his accommodation needs or his abstinence from alcohol. About the same time Dr Bownes expressed the view that it could be reasonably argued that he should be considered a vulnerable person in need of care requiring an individualised package of social care.

[13] As a result of a further meeting with the applicant in prison on 29 May 2013 to arrange for steps to be taken in relation to his release from custody he was referred for reassessment by Dr McHugh, consultant psychiatrist. He was referred to the ADEPT addiction service in prison. Arrangements were made for him to register with a GP. A CT scan and EC?G were carried out to exclude any physical causes for his difficulties. There was difficulty with this placement because by reason of his sexual offending and general background he was considered a danger to other occupants. The Probation Service arranged for hostel accommodation on his release on probation in February 2014.

[14] Regrettably the applicant had a further period in prison which led to a further meeting with Mr Simpson in the prison on 30 September 2015. He subsequently attended the meeting with representatives from NIHE, PSNI, SOLACE (Support and Opportunities for those living with Addictions in the Community Environment), Housing Rights Service and the applicant's solicitor. The applicant was adamant at that stage that he did not want any Trust involvement. Mr Simpson had a further meeting with the applicant on his release from custody on 30 October 2015 having arranged for Housing Rights to meet him and take him to his tenancy address in Enniskillen. He suggested various activities that the applicant might pursue but he declined because he liked to do his own thing. The applicant said that he did not want to go back into prison and that when he drinks he gets into trouble with the police. A few days later Mr Simpson and a senior social worker practitioner called by arrangement with the applicant but he did not let them in because he was suffering from a hangover. A few days after that Mr Simpson was received by the applicant along with the senior social worker and he appeared to be coping well in his flat. His benefits were in place and he had received a Community Care Grant and purchased a number of essential items. The applicant stated that he intended to abstain from alcohol. He said that he did not require support from the Community Addiction Service or referral to other support organisations. He agreed to continue to engage with SOLACE and Housing Rights Floating Support. At the applicant's solicitor's request Mr Simpson notified him that the applicant had declined the support offered by the Trust.

[15] On 21 December 2015 Mr Simpson again visited the applicant and offered support but was told that the applicant did not want anyone. He made a further arrangement to visit 11 January 2016 in the company of the applicant's solicitor, who was anxious to encourage the applicant to accept support, and two members of staff from Housing Rights. When Mr Simpson knocked on the door the applicant shouted "get the fuck away from my door". He then kicked the door as a result of which Mr Simpson became concerned for his own safety and returned to his car.

[16] The applicant was returned to prison in 2016. Mr Simpson arranged to meet him on 1 December 2016 and 17 February 2017 but the applicant did not attend either meeting. He met the applicant on 6 March 2017 with Claire Hughes, a learning disability forensics team social worker in the Western Trust. Representatives of the NIHE and First Housing were also there. The applicant accepted that alcohol was his biggest downfall and got him into trouble. He agreed to a referral being made to the Community Addiction Service in the Western Trust.

[17] Mr Simpson contacted his GP to make the relevant referral. He let the manager of the Community Addiction Service know that the referral was coming. He also contacted SOLACE who confirmed that the applicant attends with them on a Monday and has dinner but refuses to engage with them in relation to his alcohol problem.

[18] On 13 March 2017 Claire Hughes and Mr Simpson met the applicant at his home. They discussed the areas in which he needed some help and the applicant said that he could look after himself. He could cook, wash himself and keep his flat tidy. He said that he feels bored at times and that he has nothing to do. He said that he might consider the services provided by Fermanagh New Horizons from which he had previously been barred because of his behaviour when he had consumed alcohol. They discussed the referral made to the Community Addiction Service and the applicant agreed that he needed to address his use of alcohol.

[19] The applicant was committed to custody on 21 March 2017 with a release date of 22 June 2017. Mr Simpson noted that since the issue of these proceedings in May 2013 there had been a significant change in the applicant's circumstances. He had held a tenancy in Enniskillen since October 2015 and had demonstrated the capacity to sustain independent living in the community. He has also registered with a GP and the Western Trust had taken the lead role in convening multidisciplinary meetings involving a number of statutory bodies and voluntary organisations. There has been regular liaison between the various statutory bodies and professionals involved with the applicant. There have been continuing attempts to engage the applicant in an assessment of need and Mr Simpson has tried to engage interest in

referral to a number of services, in particular the Community Addiction Service. Referral has now been made.

[20] In a further affidavit sworn on 5 May 2017 Mr Simpson indicated that he had spoken to the manager of the ADEPT service who considered the applicant a suitable candidate for the service. The service begins six weeks before the applicant's release date during which time relationships develop and the casework worker liaises with other professionals in the community. The same caseworker engages with the prisoner whilst in prison and in the community. There had been five previous attempts to engage the applicant with ADEPT but the applicant would not agree to a referral to a community-based drug and alcohol service as he did not believe that he needed any further support.

[21] The arrangements put in place for his release involved him being met at the prison and transported to his home in Enniskillen, settled into his home making sure that the electricity was working, calling to meet him during the week of his release and thereafter on a twice-weekly basis depending on need, liaising with other professionals and tailoring the applicant's support to meet his individual needs offering him psychosocial and practical support as required. Assistance in the community will continue through ADEPT for a further six months.

[22] Mr Simpson referred to a report prepared by Ms Hughes in which she noted engagement with the ADEPT service, the arrangements with the GP for a health check and referral to the Community Addiction Team, the continued engagement with SOLACE although there had been no harm reduction work, his prospective engagement with Housing Rights and a referral to Fermanagh New Horizons to be considered depending on the applicant's sobriety. Mr Simpson indicated that he would continue to be involved with the applicant as lead professional in the Western Trust.

The applicant's case

[23] It is accepted by the respondents that a comprehensive assessment as described in the Guidance paper has not been carried out on the applicant. Such an assessment was not required by the Guidance paper and was not appropriate given the work done with and on behalf of the applicant over many years. The applicant's submission was that in this case a comprehensive assessment was required. The first question that arises concerns delay. These proceedings were stayed by agreement of the parties in May 2013 at a time when the applicant returned to prison. The subsequent resumption of the application coincided with the enquiries from the court office as to whether the application was still live. It is apparent from the history set out above that in the period between 2013 and 2017 various steps were being

taken to accommodate the applicant during those periods when he was released from prison and in some at least his solicitor was involved. I do not consider that it is open to the applicant to revive four years later the case initially made but I consider that I should address the adequacy of the compliance with the Article 15 (2) duty during the period of three months prior to the hearing of the application before me on 12 May 2017 and thereafter in light of the additional materials which I allowed to be introduced.

[24] In his grounding affidavit sworn on 16 February 2017 the applicant noted the assistance that he has had from Housing Rights, NIHE and SOLACE. In his affidavit he asserts that the respondents have not provided him with the support he needs. He asserts that he has a learning disability on the basis of the assessment made by Dr McHugh. He said that he often runs out of food and money and finds it difficult to manage these things. It is quite telling that despite the litany of events described above that there is not a mention of any contact with Mr Simpson or any person from the Trust. That was certainly consistent with Mr Simpson's assertion that the applicant did not wish to receive any assistance from the Trust. On one view the failure to disclose that he had informed the Trust that he did not want them to assist could constitute a lack of candour but in my view it should not affect the outcome of this application. I note that the applicant since March 2017 appears now to have taken a positive view of the assistance that the Trusts can provide. The applicant confirmed that he would engage, cooperate and work with the Trusts in his affidavit of 24 February 2017.

[25] In support of the submission that the applicant required comprehensive assessment Ms Maguire relied on a number of affidavits. The first was from Annette McCartney, assistant housing services manager for the NIHE. She said that Maura Donaghy was the only sustaining tenancies officer in Enniskillen. She provided low-level support to all new tenants in the Fermanagh district usually meeting them twice-weekly for 30 minutes over a period of three months and gradually reducing that period. She had started working with the applicant in October 2015. The initial support provided was intensive and time-consuming. The applicant drank heavily when he received money from benefits as a result of which he did not have enough money for food and he became unkempt and his flat exceptionally unclean. In those circumstances crisis loans were organised and food hampers collected. That support had reduced because the applicant reacts aggressively while under the influence of alcohol and has not progressed in managing his own tenancy.

[26] An affidavit by Ms McEleney from Housing Rights indicated their involvement with the applicant since September 2015. She described situations where they could not gain entry to the applicant's flat because he was so intoxicated. In those

circumstances he was unable to manage his finances and ran out of money for food. It was not uncommon for him to block his Post Office card by entering the wrong PIN. Ms McEleney felt that the applicant's needs were not being met.

[27] A similar affidavit was provided by Maria Thomson of First Housing Aid and Support Services who again referred to the difficulties caused by the applicant's alcohol consumption. This had a knock-on effect in relation to his ability to manage his finances and support himself. She considered that the applicant needed a support package provided by the Western Trust to assist him in shopping, withdrawing money, counting his money, attending the GP and getting and taking medication. It should be noted that these were all areas where the applicant had refused support from the Trusts.

[28] The final piece of evidence upon which the applicant relied was a social work report by Mr Nigel Spiers. He noted that the applicant had a period of at least 20 years of a chaotic lifestyle with severe misuse of alcohol and associated consequences for himself and others and society. He had no family support. He recognised that the People First paper and the Guidance paper were not written with people such as the applicant in mind. He found, however, that the provisions were relevant to the applicant's circumstances. He noted correctly that the applicant had not been comprehensively assessed but that there have been numerous assessments usually undertaken by one discipline but no coordination by one professional of contributions from different disciplines. He suggested identifying in the Trust structure the most appropriate professional who would hopefully be acceptable to the applicant and who would coordinate a package.

Consideration

[29] Mr Spiers never met the applicant but it is clear that his review of the papers accepted that a considerable amount of time over many years has been expended by many staff from a range of professions in both respondent Trusts. Mr Spiers commented upon the fact that there had been numerous assessments usually undertaken by one discipline but he does not seem to have given weight to the fact that there were numerous multidisciplinary meetings with a view to identifying the appropriate support for the applicant. On any view this was a case in which Mr Simpson had the benefit of a lengthy period of contact with the applicant and a wide range of investigations in terms of his physical and mental health, his activities, his interests and his capacities. He was exceptionally well placed to make a judgement about his needs.

[30] Mr Simpson concluded that the core problem in respect of the applicant related to his consumption of alcohol. There is undeniable evidence throughout the papers

to indicate that this assessment was plainly correct. Associated with that issue was the fact that the applicant was unreceptive of any assistance offered to him until he had actually reached crisis point. That conclusion was in essence corroborated by the affidavit of Ms Thompson on behalf of First Housing Aid and Support Services.

[31] Having identified the core issue there is abundant evidence of the efforts which had been made to involve the applicant in services and supports which are focused on addressing this troublesome issue and addressing other activities in which he could get involved. An addiction of this kind at this stage of his life clearly presents enormous challenges for the applicant and he requires all the professional support that can be made available to him. There are signs that he is more receptive to that support than he has been in the past. It is plain from the conclusions of the report by Mr Spiers that the building up of trust between the applicant and the person supervising this package is likely to be of great advantage to him. The considerable improvement in the applicant's relationship with Mr Simpson augurs well for the future.

[32] The other important aspect of this case is that Mr Simpson has had the opportunity with others to see how the applicant copes when his alcohol consumption is under a measure of control and does not lead to chaos. He noted that the applicant had kept his flat tidy and managed his resources during significant periods from 2015 on. If he accepted the support that was being offered to him in relation to his alcohol consumption Mr Simpson was satisfied that he would be perfectly capable of looking after himself. The arrangements to monitor the applicant through ADEPT, First Housing and other agencies were part of a package designed to identify ongoing needs.

[33] Shortly before his release date on 22 June 2017 it became apparent that there had been a fire at the premises which he had been occupying in Enniskillen which rendered them uninhabitable. As a result there was some delay in the provision of permanent accommodation on his release from prison. There was obviously concern that this may lead the applicant back to his formerly chaotic lifestyle. He was released from prison on 20 June 2017 and did not attend the Salvation Army night shelter arranged by NIHE. He did, however, make contact with NIHE in Enniskillen on 23 June 2017 where he was provided with accommodation at Derrylin, close to his previous address. First Housing provided him with a food hamper. He signed the sex offenders register on 24 June 2017 and Mr Simpson was informed by police that he appeared not to be drinking. Mr Durkan from ADEPT visited on 27 June 2017 and brought in his post and belongings from prison. He was sober and happy with his accommodation. He was also substantially in credit in terms of State benefits. On 30 June 2017 Ms Donaghy of NIHE contacted Mr Simpson to indicate that the

applicant had been drinking and apparently had been doing so since release from prison.

Conclusion

[34] The issue is whether there is an arguable case with a reasonable prospect of success that the decision by Mr Simpson not to engage in a comprehensive assessment of the applicant's needs fell outside the area of discretionary judgement open to him. The facts outlined above indicate that Mr Simpson had a long involvement with the applicant and therefore was well placed to make a judgement about his needs. He had the benefit of extensive investigations and consideration of the outcomes at numerous multidisciplinary meetings.

[35] He identified the applicant's drinking as being the core of his problems. It is unarguable that the papers and affidavits of all of the deponents in this case recognise that this is the case and that the applicant is desperately in need of assistance in order to help him cope with his addiction. It is also plain that for long periods the applicant has been unwilling to engage with that support. All of the investigations indicate that he has the capacity to make that decision for himself despite the seriously adverse consequences for him. If he can manage to cope with his drinking the evidence adduced by Mr Simpson indicates that he is perfectly capable of looking after his own affairs with relatively limited assistance.

[36] In identifying the core of the issue and the means by which it may be addressed I consider that Mr Simpson was acting well within the area judgement open to him and I consider that his discretionary decision to assess the applicant in the manner that he did is also well within the bounds of what is required. It is apparent from this case that the response to the assessment is dynamic and it is likely that services will have to respond to the circumstances as they develop. Hopefully the indications that the applicant is willing to engage with the Community Addiction Service and ADEPT augur well for the future. I am satisfied that the Trusts are entitled to take into account the support provided by other voluntary agencies as part of the package available to the applicant by way of monitoring and support. If, of course, that commitment changes the Trust will have to consider how, within its own resources, that change should be addressed.

[37] For the reasons given I refuse leave for judicial review. I should make it clear, however, that my decision is based on the commitment of the Trust to ensure that monitoring and support services are continued and recognizing that the Trust may have to reconsider how to respond to the applicant's needs if the situation changes.