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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

PATRICK FRANCIS JOSEPH McDONAGH

Campbell LJ, Higgins LJ and Girvan LJ

CAMPBELL LJ

[1] The appellant, Patrick McDonagh, who is now 40 years of age, pleaded guilty at Belfast Crown Court on 21 May 1998 to two counts of threat to kill; a count of assault occasioning bodily harm contrary to s. 47 of the Offences Against the Person Act 1861; a count of possession of an offensive weapon in a public place; aggravated burglary and inflicting grievous bodily harm and robbery. Each of these offences had been committed by him on 28 May 1997.

[2] On 19 November 1998 a hospital order was made ("the first hospital order") by the Crown Court in respect of each of these offences with restrictions and without limit of time. This order was made under articles 44 and 47 of the Mental Health (Northern Ireland) Order 1986 ("the Mental Health Order").

[3] In the following month at the Crown Court sitting at Craigavon, on 7 December 1998, the appellant pleaded guilty to the attempted murder of a fellow prisoner on 20 August 1997. A hospital order was made in respect of this offence under the Mental Health Order ("the second hospital order") with restrictions and without time limit.

[4] An application to appeal against the first hospital order was lodged on 20 March 2006 and Nicholson L.J. extended the period in which the appellant could apply for leave to appeal against the making of that hospital order. When the application for leave to appeal to the single judge was considered by Coghlin J. he indicated that he would be minded to grant leave and added that it had come to his attention that the applicant was detained on foot of a further hospital order (the second hospital order). At that stage the applicant

had not appealed against the second hospital order although, as the judge observed, the same ground of appeal may be open to him in respect of it.

[5] The appeal against the first hospital order came on for hearing on 28 March 2007 but was not concluded on that date. An application for leave to appeal against the second hospital order had been lodged on 15 March 2007 and as it contained restrictions as to discharge and was without time limit it was apparent that should the appellant succeed in his appeal against the first hospital order he would continue to be detained under the second hospital order. The court considered that it was important that any appeal against the second hospital order should be heard at the same time as the appeal against the first hospital order.

[6] At that time further instructions were being sought by the appellant's legal advisers in respect of an appeal against conviction on the ground that the plea of guilty entered by the appellant to attempted murder was not voluntary. A further notice of appeal was lodged on 12 June 2007 and leave to appeal against conviction and sentence was granted on 22 June 2007.

[7] The appeals were listed for hearing on 8 October 2007 and as it was anticipated that there would not be any significant delay before the appeal against conviction would be ready for hearing the matter was further adjourned to 24 October 2007.

The background

[8] It is necessary to say something about the appellant's medical history and the circumstances that gave rise to the two sets of criminal proceedings resulting in the hospital orders being made. The appellant had previously been the subject of a hospital order with restrictions which was made on 29 September 1993 following his conviction, on a plea of guilty, to one offence of buggery against a relative, then aged 8, and one count of assaulting the child. He was detained in Muckamore Abbey Hospital under this order until his discharge was ordered by the Mental Health Review Tribunal on 3 May 1996 after it had found that he was not suffering from either a mental illness or severe mental impairment. He remained in hospital at Muckamore Abbey as a voluntary patient until 2 September 1996 when he discharged himself against medical advice. He was readmitted to Muckamore Abbey on 24 October 1996 and discharged himself once again on 30 October 1996. He was then readmitted from 1 November to 14 November 1996 and again readmitted, as a detained patient, on 13 December 1996 and absconded on 27 May 1997. While he was at liberty he committed the offences of 28 May 1997 in respect of which the first hospital order was made on 19 November 1998.

[9] While on remand in HMP Maghaberry for the offences of 28 May 1997 the appellant shared a ward in the prison hospital with another prisoner. On

20 August 1997 when the appellant and the other prisoner were locked in the ward the cell alarm was sounded and a prison officer went to the door of the ward and the appellant shouted to him from behind the closed door "I've killed the bastard". The officer then entered the ward and he found the other prisoner lying on the floor with something blue around his neck and his face was a dark colour. He appeared to be unconscious and there was a ligature, made from pyjama bottoms, tied round his neck. The prisoner was resuscitated and taken to hospital where a blood gas analysis showed acidosis consistent with a period of asphyxiation. The prisoner claimed that the appellant made him get down on his hands and knees on the floor with his hands behind his back. The appellant then went behind him and put a cloth around his neck. He felt the appellant's knee in his back as he pulled the cloth tight causing the prisoner to choke. The prisoner described the appellant as strong and he said that he was too scared to struggle. During an interview with the police the appellant gave a different version of events to that which he had given to the prison officer when he arrived at the scene. He said that his fellow prisoner had attempted to commit suicide by strangling himself and that he rang the bell to call for assistance. It was this incident that led to the charge of attempted murder to which the appellant pleaded guilty.

The subsequent history

[10] Following conviction and sentence the appellant spent a period of time in Muckamore Abbey Hospital before he was transferred to the State Hospital, Carstairs, Lanark which is a secure hospital. He remained there until sometime in July 2005 when he was moved to the Churchill Covenant Clinic in Ayr following a recommendation that he be moved to conditions of lesser security.

[11] The removal of the appellant to Scotland took place under article 134 (4) of the Mental Health Order and section 81 of the Mental Health (Scotland) Act 1984 (the 1984 Act). Where a patient who is liable to be detained under the Mental Health Order by virtue of a hospital order is removed to Scotland under section 81 of the 1984 Act and admitted to hospital in Scotland he is to be treated under section 81(2) of the 1984 Act as if he had been admitted under an equivalent order in Scotland and, if relevant, as if he were subject to a restriction order in Scotland. The corresponding provision in the Mental Health Order is article 134(4) which provides that where a patient, liable to be detained by virtue of a hospital order, is removed from Northern Ireland in pursuance of arrangements under the 1984 Act the order shall cease to have effect when he is duly received into a hospital in pursuance of those arrangements. The first and second hospital orders and the restriction orders made by the Crown Court therefore ceased to have effect as soon as Mr McDonagh was received into the State Hospital at Carstairs.

[12] Since then there have been changes in the legislation and the 1984 Act has been replaced by the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) and repealed by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 (the 2005 Order). Article 6(2) of the 2005 Order permits the Secretary of State to authorise the removal of a restricted patient to Scotland. Under regulation 30(1) of the Mental Health (Cross border transfer: patients subject to detention requirements or otherwise in hospital) (Scotland) Regulations 2005 a patient received in Scotland following removal is treated as if his detention in hospital had been authorised by virtue of a measure under the 2003 Act or the Criminal Procedure (Scotland) Act 1995 Act, which most closely corresponds or is most similar to the measure to which the patient was subject immediately before the transfer took place. Article 134(4) of the Mental Health Order (as amended) continues to provide that, where a patient who is liable to be detained under a hospital order is removed to Scotland under the arrangements in Article 6 of the 2005 Order, a hospital order ceases to have effect once he is received into hospital in Scotland.

The appeal against the conviction of 7 December 1998 for attempted murder.

[13] The appellant appealed against the conviction for attempted murder on the ground that he was advised by his solicitor that there was no point in contesting the charge as he was already subject to the first hospital order. He claimed that he was told that whether he was convicted or acquitted he would remain subject to the first hospital order which was with restrictions and without time limit. Before he was given this advice his instructions had been that the charge was to be contested as he was denying that he had assaulted his fellow prisoner or had the intent to kill him. The case made on his behalf was that as he suffers from mild mental retardation the appellant was particularly dependent upon those who provided him with legal advice.

[14] The appellant gave evidence at the hearing of the appeal and said that when he was interviewed by the police on 24 September 1997 Mr Noel Phoenix, solicitor, of Trevor Smyth & Company was present and that another partner in that firm, Mr Clive Neville, had arranged for him to be examined by Dr Ian Bownes, a consultant forensic psychiatrist. He said that when he was being advised either one or both of these solicitors was present. The appellant said that when he arrived in Craigavon on 7 December 1997 he intended to plead not guilty and to the best of his recollection it was Mr Neville, though possibly it was Mr Phoenix, who spoke to him and explained that because of the first hospital order it was not going to make a great deal of difference if he pleaded guilty. He accepted this advice and agreed to plead guilty. His evidence was that he saw only one of the barristers who appeared for him and that was when he was in the court room but he did not at anytime see a second barrister and he did not meet or speak to either of them. The appellant said that it was after the jury had been sworn and he had

returned to a cell that his solicitor saw him and told him that whether he won or lost the case it would not make any difference and that his advice was to plead guilty. Because he had been given to understand that it was not going to make any difference he pleaded guilty to get it over and done with. He said that although he does not deny that he attacked the other prisoner he denies that he intended to kill him; otherwise he would not have sounded the alarm.

[15] During cross-examination the appellant admitted that when he was interviewed by the police he denied that he had attacked the other prisoner. He agreed that during this interview it was made clear to him that the case that was being made was that he had intended to kill the other prisoner. Counsel suggested that when he pleaded guilty to attempted murder he knew that the offence to which he was pleading guilty involved intent to kill. The appellant said that before he pleaded guilty in respect of the first case, on 21 May 1998, he did not know that his lawyers would ask the judge to make a hospital order. He claimed that on this occasion also he had not spoken to the barristers representing him before the trial.

[16] Mr Clive Neville was admitted as a solicitor in 1994 and became a partner in Trevor Smyth & Company in 1997. He agreed that the appellant was a client of his firm at the relevant time. According to the firm's ledger records all legal aid fees due in respect of the representation of the appellant were paid in the year 2002. Following this, as was the practice of the firm, all other records of the case were shredded. Mr Neville said that although he had only a vague recollection of the case he could not accept that the appellant had seen counsel who represented him only when in court and a plea was being entered on his behalf. Mr Neville said as soon as a member of the Bar is instructed by him arrangements are made for a consultation with counsel and the client. He said that it would have been made clear to the appellant that it had to be established by the prosecution that he intended to kill the victim before the crime of attempted murder was made out. Mr Neville said that the appellant would have been taken through the evidence and advised that he should not plead guilty unless he was guilty of the offence. He added that he had received a letter, dated 30 July 2004, from a firm of solicitors in Scotland seeking assistance for the appellant in Northern Ireland and no suggestion was made at that time that any improper advice had been given in the past and the request was that his firm should again act for the appellant.

[17] There is a duty on an advocate to make it clear to a defendant that he represents that he should not plead guilty to an offence unless he committed the acts constituting the offence with which he is charged and he must be allowed to exercise a free choice as to whether to plead guilty or not guilty. It appears from the transcript of the plea entered by Mr Cinnamond QC during the proceedings on 19 November 1998, leading to the first hospital order, that the appellant was denying the charge of attempted murder "at the moment".

This supports the appellant's evidence that it was at a later stage that he retracted his plea of not guilty and entered a plea of guilty. During the period that has passed since December 1998 the records of the solicitor who acted for the appellant have been destroyed and he is dependent now upon any recollection he may have and what represents his general practice as a solicitor specialising in criminal law.

[18] The medical evidence was that the appellant was fit to plead when he entered the plea of guilty. The form of the intent required for attempted murder as contrasted with, for example the crime of murder, is such that it is difficult to accept that those advising the appellant could have failed to explain this to him. On the evidence available to the prosecution it would have been difficult to see how the appellant could have avoided being convicted of attempted murder and if he was so advised it would be understandable provided that it was made clear that it remained his decision whether to plead guilty or not guilty. We found Mr Neville to be an impressive witness and accept his evidence that the appellant would have been advised that he should not plead guilty unless he was guilty of the offence of attempted murder.

[19] Making allowance for the appellant's level of intelligence and for the fact that he had been in a hospital in the intervening years we find it surprising that in the letter he wrote to Mr Neville in November 2004, containing detailed instructions, no reference is made to having pleaded guilty to attempted murder against his will.

[20] While we accept that the appellant may have been advised to plead guilty we do not accept that the decision to do so was not his own. As the conviction is not unsafe we dismiss the appeal against conviction.

The hospital orders made under article 44 of the Mental Health (NI) Order 1986

[21] The Crown Court is empowered to make a hospital order under article 44 of the Mental Health Order where a person is convicted before it of an offence punishable with imprisonment. Before doing so the court must be satisfied on the oral evidence of a medical practitioner appointed by the Mental Health Commission for Northern Ireland and on the written or oral evidence of one other medical practitioner 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. The court must also be of opinion, having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable means of dealing with the case is by means of a hospital order.

[22] In article 3 (1) of the Mental Health Order "*severe mental impairment*" is defined as meaning 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. If it appears to the court making a hospital order that having regard to the nature of the offence, the antecedents of the person and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm to do so, it may order that the person shall be subject to the special restrictions set out in section 47 of the Mental Health Order either without limit of time or during such period as may be specified in the order. This is known as "a restriction order".

[23] When the first hospital order was made on 19 November 1998 by HH Judge Markey, the court received evidence in the form of reports from three consultant psychiatrists. The Crown provided a report from Dr Fleming and reports were furnished by the defence from Dr Oliver Shanks and Dr Ian Bownes, who also gave oral evidence. In his plea in mitigation counsel for the appellant told the court that it was being asked to make a hospital order. The court was satisfied on the evidence before it that the appellant was suffering from a severe mental impairment, as defined in the Mental Health Order, warranting detention in hospital for medical treatment and further, that having regard to all the circumstances including the nature of the offence, the character and antecedents of the offender and all other available methods of dealing with him, the most suitable means of dealing with the case was by means of a hospital order.

[24] Reports from Dr Bownes of 26 November 1998 and Dr Shanks of 30 November 1998 together with the oral evidence of Dr Bownes formed the basis upon which the Judge made the second hospital order of 7 December 1998. Although we have not seen these reports or a transcript of his evidence we were assured by counsel that they were in terms similar to the doctors' earlier reports.

[25] The appellant's case on appeal is that he does not suffer from severe impairment of intelligence and that he did not suffer from severe impairment of intelligence when the first and second hospital orders were made in November and December 1998. Therefore, the Crown Court did not have power to make the hospital orders and he has been unlawfully detained on foot of them since then.

[26] To assist the appellant to make this case the Court was asked to grant an application for the reception of new evidence. This evidence falls into two categories. The first consists of medical reports and the decision of the Mental Health Review Tribunal on 3 May 1996, predating the convictions and the making of the two hospital orders, and the second category consists of reports

which have been prepared during the appellant's detention providing an assessment of his current mental state. The court admitted the evidence in both categories under s 25 of the Criminal Appeal (NI) Act 1980 as it necessary and expedient to do so in the interests of justice. The court was asked to hear the oral evidence of two medical experts who compiled reports in the second category and it acceded also to this application, under section 25 of the Act.

The medical evidence in 1998

[27] In a report dated 25 March 1998 prepared for the defence Dr Bownes refers to the hospital order that was made in September 1993. At that time the appellant's full scale intelligence quotient was found to be 66 placing him within the category of Mild Mental Retardation (IQ 50-69) according to the World Health Organisation 1992 classification of Behavioural and Mental Disorders. Dr Bownes went on to describe how in May 1996 the Mental Health Review Tribunal ordered that the appellant be discharged from detention. Dr Bownes said that on his examination of the appellant he did not detect any acute disturbances of thought process or perception. He concluded that the appellant's mild mental retardation combined with his personality and behavioural problems were such that in his view it was not appropriate for him to be managed in a prison setting. In his opinion the appellant fulfilled the criteria for severe mental impairment.

[28] Dr Oliver Shanks, in his report of 9 October 1998, also noted that on 1 September 1993 the appellant's IQ was measured at 66 and on 10 February 1997 at 67. He regarded this as showing a significant impairment of intelligence. When he examined the appellant on 7 October 1998 he appeared to be agitated and depressed and expressed no particular concern for the victims of the alleged offences. Dr Shanks accepted that the appellant was not suffering from a mental illness but found that his intelligence and social functioning were severely impaired and his behaviour was abnormally aggressive. In his opinion he was suffering from severe mental impairment and he agreed with the conclusion reached by Dr Bownes in his report of 25 March 1998.

[29] Dr Fleming who was retained by the prosecution reported on 21 October 1998. He described the appellant as a man of low IQ with limited verbal ability and language skills. There was no evidence of mental illness but the mental disorder that did exist was a combination of mental handicap and personality disorder. He regarded the appellant as a very serious risk to the safety of others for the foreseeable future. He ended his report as follows; "While personality disorder and alcohol dependence would not fulfil the criteria for mental disorder under the terms of the current mental health legislation, I do believe that the mental handicap issue alone could be considered under the terms of the legislation as severe mental impairment."

[30] Dr Stephen Young, a consultant psychiatrist at the State Hospital, Carstairs, wrote to Dr Bownes in February 1998 following an assessment that he made of the appellant in January of that year. He said that the appellant met the criteria under the Scottish Mental Health Act for detention under the mental impairment category which, as he understood it, would also meet the criteria under the severe mental impairment section of the Mental Heath Order in Northern Ireland. He suggested that a period of assessment in the State Hospital would be useful. It appears that this report was also before Nicholson LJ when he made the second hospital order on 7 December 1998.

The subsequent medical evidence

[31] The next report in chronological order is dated 11 September 2000 and is by Dr Isobel H. Campbell, a consultant forensic psychiatrist, who was retained by a firm of solicitors in Scotland acting for the appellant. Dr Campbell outlined the medical history of the appellant and recorded that he was "admitted to the State Hospital on the grounds that he suffered from mental impairment. Subsequently testing and assessment has indicated that he does not suffer from mental impairment i.e. a state of arrested or incomplete development of mind not amounting to severe mental impairment which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct." Dr Campbell added that it might be argued that he suffers from mental illness being a persistent disorder manifested only by abnormally aggressive or seriously irresponsible conduct. However it was not in her professional opinion appropriate that he be admitted to hospital since medical treatment is not likely either to alleviate this condition or prevent deterioration. In the penultimate passage of her report she wrote;

> "Although the Mental Health (Scotland) Act 1984 with its current amendment might mean that he cannot be discharged on appeal (as in her opinion he represented a serious danger to the general public) it would appear entirely likely that in terms of Northern Irish legislation he is indeed unlawfully detained since there is no provision within the Mental Health (NI) Order 1986 for treatment of personality disorder".

[32] On 22 July 2004 a meeting was held at the State Hospital, Carstairs, between medical staff from the State Hospital and Northern Ireland Health and Social Services and officials from the Northern Ireland Office, the police and the Scottish Executive. Dr Connaughton, a consultant psychiatrist at the State Hospital, said that in her opinion the appellant did not meet the criteria for detention under the Mental Health (Scotland) Act 1984. The assessment of

his IQ lay between 67 and 73 and in Scots law he would meet the tests associated with mental impairment, anti-social personality disorder and the protection of other persons under the Mental Health (Public Safety and Appeals) (Scotland) Act 1999. Dr Connaughton recommended his transfer to conditions of lesser security. Concern was expressed at the meeting about the risk to the appellant in the community in Northern Ireland should he return there and it was suggested that a threat assessment be made by the police. At a meeting held later on the same day it was agreed that time was required to look at the appropriate options with a view to a possible transfer to conditions of lesser security. It was following these meetings that the appellant was transferred to Churchill clinic in Ayr.

[33] The most recent reports before this court are from Dr Graeme McDonald and Dr Michael Curran both of whom also gave oral evidence. Dr McDonald provided a report dated 6 August 2007 following an examination of the appellant on 6 July 2007. From his examination he was not aware of any facts that brought the appellant within the description severe mental impairment. He did not regard the appellant's measured quotient of 70 as borderline as 5 to 10 points in either direction of this would, in his opinion, still put him well outside the description of severe mental impairment. Dr McDonald accepted that in practice there may be other factors which may cause a person with a relatively high measure IQ to be deemed to be suffering from severe mental impairment however, he found no evidence to suggest that any of these factors was present. He had no doubt that there was consistent evidence of impairment of social functioning but he was unable to say if this was severe. He described the appellant as currently being capable of excellent self care and to manage skills of everyday living. Dr McDonald said that his social functioning may have improved with treatment but any severe impairment of intelligence is unlikely to have improved. In his opinion the appellant does not and has not suffered from severe mental impairment as defined in the Mental Health Order.

[34] Dr Curran examined the applicant on 27 September 2007 at the request of the Public Prosecution Service. In his opinion, which he based on the more recent IQ estimations, the appellant does not have a severe impairment of intelligence. He referred to the primary emphasis in the reports from Dr Shanks, Dr McDonald (sic) Dr Fleming and Dr Bownes as "having failed to appreciate the second branch of the diagnoses of severe mental impairment namely the level of the patients social functioning." He added that had he been sitting as a medical member of a Mental Health Tribunal he would not have accepted a responsible medical officer's diagnoses of severe mental impairment. In his opinion the applicant should not have been considered at anytime to have had severe mental impairment or severe impairment of social functioning within the Mental Health Order.

[35] The words "severe impairment of intelligence and social functioning" in the definition of severe mental impairment in article 3 of the Mental Health Order are found in other legislation. In s.45 of the Sexual Offences Act 1956 "defective" was defined as meaning a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning. In R *v Hall* (1988) 86 Cr.App. R. 159 the court held that the words specified two conditions which must be present in every case before a person is a defective within the meaning of the Act.

[36] In *Megarry v Chief Adjudication Officer* (1999) 143 SJ LB 267 the phrase 'severe impairment of intelligence', one of the qualifying conditions for payment of the higher rate of the mobility component of disability living allowance under the Social Security (Disability Living Allowance) Regulations 1991, was considered by the Court of Appeal. Simon Brown LJ delivering the judgment of the Court gave the example of a claimant with Down's syndrome. He may well have a very low IQ but suffer little if any social dysfunction. How, he asked, is one to decide whether in a given case the extensive impairment of one function, taken with the limited impairment of the other, is sufficient overall to categorise the impairment of both as severe? He concluded that a claimant must establish both severe impairment of intelligence and severe impairment of social function.

[37] The definition in the Mental Health Order was considered by Weatherup J. in *North and West Belfast Health and Social Services Trust's Application* [2003] NIJB 274 where he rejected the contention that "severe impairment of intelligence and social functioning" is a composite requirement and held that it was necessary to establish both severe impairment of intelligence and severe impairment of social functioning. Counsel for the Crown in the present appeal did not seek to challenge this decision and, in our view, was right not to do so. Counsel referred to a subsequent decision of Weatherup J. in *D an application for Judicial Review* (2004) NIQB 74 where the judge was satisfied that severe impairment of intelligence had been assessed by reference to wider matters than IQ tests. Recognising the distinction between severe impairment of intelligence and severe impairment of social functioning Weatherup J. acknowledged that there are practical matters that in the exercise of clinical judgment may bear both on social functioning and on the assessment of intelligence. A similar point is made in the judgment of Simon Brown LJ in *Megarry* (supra) where he said that "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."

[38] As the President of the Queen's Bench Division, Sir Igor Judge, in R v. D [2006] EWCA Crim 1139 observed –

> ". . . current understanding of the workings of the mind is less than complete."

Baroness Hale pointed out in R (B) v. Ashworth Hospital Authority [2005] 2 All ER 289 at paragraph 31 –

> "Psychiatry is not an exact science. Diagnosis is not easy or clear cut. As this and many other cases show a number of diagnoses may be reached by the same or different clinicians over the years. As this case shows, co-morbidity is very common. It is not easy to disentangle which features of the patient's presentations stems from a disease of the mind and which stems from his underlying personality traits."

[39] The mental health problems of individuals pose particular difficulties for the individual concerned and for society since the problems can have a serious impact on persons other than the individual himself. It is necessary to strike a proper balance between the right of the individual to personal autonomy and the right of members of the public not to be exposed to serious danger. In the case of a person who commits serious offences which put third parties in danger a court is faced with a choice between subjecting that person to the ordinary processes of the criminal system (one of the purposes of which is to reduce the possibility of further crime) or placing the individual in the care of the mental health services. The making of a hospital order places the individual in the mental health sphere. As pointed out by Mustill LJ in R v. Birch [1989] 11 Cr App Rep (S) 102 the philosophy behind the mental health legislation provisions in the criminal field has been to assimilate the position of an offender subject to a hospital order without restriction on discharge to that of a civil patient compulsorily admitted and detained pursuant to the civil law provisions of the Mental Health Acts. A restriction order affects the circumstances in which the patient is detained and leads to the possibility of indeterminate confinement. Since hospital orders in civil mental health detention are clearly closely connected and since the legislative basis for detaining an individual on the civil side must be clearly defined and hedged about with protections to ensure proper review procedures to prevent abuse the legislative provisions giving rise to the statutory powers of mental health detention require to be construed with caution and scrupulous care. They must also be drawn and construed so as to minimise the risk of arbitrariness and of individualised and idiosyncratic diagnosis on the part of experts whose views will often carry great, if not decisive, weight in any decision making. This is the context in which the terminology in article 3 of the Mental Health Order falls to be construed. We agree with the reasoning of the Court of Appeal in *Megarr*y and that of Weatherup J.

[40] Counsel submitted on behalf of the Crown that the psychiatric evidence before the judges when they made the hospital orders did not rely solely on the results of the IQ tests and that the overall assessment of the appellant was based on a combination of factors as determining the issue of impairment of intelligence. In particular, Dr Bownes makes it clear in both his report and his oral evidence to the court that his opinion is based on a range of issues including a number of clinical interviews, advice from staff and the medical notes of the appellant.

[41] It was argued on behalf of the Crown that there is therefore no proper basis for suggesting that the appellant has been unlawfully detained on foot of the hospital orders as the evidence available to both courts fully justified making hospital orders.

[42] If there has been a change of circumstances in the appellant's condition since the two hospital orders were made the Court of Appeal is not the forum for review. The legislation anticipates that a person's mental state may improve and change as a result of treatment and provides for review and revocation by the Secretary of State. For example, under article 48 of the Mental Health Order if the Secretary of State is satisfied that a restriction order is no longer required for the protection of the public from serious harm he may direct that the patient shall cease to be subject to the special restrictions set out in Article 47(2).

[43] The question for this court is whether the appellant suffered from 'severe impairment of intelligence and social functioning 'when the first and second hospital orders were made in 1998. As already noted Dr Bownes referred to "the combination of [the appellant's] mild mental retardation (Full Scale IQ 66) with his personality and behavioural problems" as making it inappropriate for him to be managed in the prison setting. It was his belief that the appellant lacked the personal resources and skills required to cope effectively within the prison environment. He expected him to continue to experience the onset of 'neurotic' symptomatology in situations where he felt particularly stressed or under pressure and that his tendency to unpredictable aggressive outbursts would continue to cause considerable management problems for those involved in his care in prison.

[44] In Dr Bowne's report it is not demonstrated that the impairment of the appellant's social functioning had any bearing on his "useful intelligence" to borrow the description used by Simon Brown LJ in *Megarry.* During his oral evidence when the first hospital order was made Dr Bownes was asked if the appellant "was suffering from severe mental impairment" (the question continues "in 1986" but this would appear to be a reference to the 1986 Order). The witness answered in the affirmative without elaboration.

[45] Dr Shanks found that the IQ tests, which were conducted in relatively settled periods, gave results that were consistent and showed 'a significant impairment of intelligence.' He described the appellant's behaviour as abnormally aggressive and he considered that he was suffering from 'severe mental impairment'. There is nothing in this report to suggest that the appellant's social functioning had any bearing on the severity of the impairment of his intelligence.

[46] Dr Fleming in his report referred to the IQ level in the 60's as consistent with diagnoses of mental handicap. In his opinion the appellant suffered from a combination of mental handicap and personality disorder. He believed that the mental handicap issue alone could be considered under the legislation as severe mental impairment.

[47] The report from Dr Young dated 3 February 1998 following his visit to see the appellant, at the end of January 1998, refers to him as having a full scale IQ in the mid 60's. Dr Young goes on to say that the appellant met the criteria under the Scottish Mental Health Act for detention which, as he understood it, would also meet the criteria for detention under the severe mental impairment section of the Northern Ireland Order. In section 1(2) of the 1984 Act "mental impairment" is defined as meaning "a state of arrested or incomplete development of mind not amounting to severe mental impairment which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned; and cognate expressions shall be construed accordingly". As noted, in the Order "severe mental impairment" is defined as meaning "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; and cognate expressions shall be construed accordingly". It is not clear to which condition Dr Young was referring.

[48] Dr McDonald in his evidence to this court said that in 1998 a responsible body of opinion held the view that severe impairment of intelligence and severe impairment of social functioning could be taken together. So, mild impairment of intelligence coupled with severe impairment of social functioning could be regarded as severe mental impairment. As the report from Dr Fleming shows he regarded mental handicap in itself as sufficient to establish severe mental impairment since he refers only to personality disorder and not to social functioning.

[49] Dr McDonald has expressed the opinion that the appellant does not and has not suffered from severe mental impairment. This opinion is based on the measure of the appellant's intelligence which is unlikely to have improved since 1998. Dr Curran agrees and in his opinion not only did the appellant not

have severe mental impairment at any time but also did not have severe impairment of social functioning. Since social functioning may improve with treatment it is not possible to be sure that this has not occurred and this latter part of Dr Curran's opinion has therefore to be treated with caution. The measure of intelligence is different and is unlikely to have changed with the passage of time. Furthermore the evidence is that in this case it cannot be regarded as being a borderline measurement. In May 1996 the Mental Health Review Tribunal considered that he did not suffer from a mental illness or severe mental impairment. Dr Campbell considered that he did not suffer from mental impairment when she saw the appellant in September 2000 and the more recent evidence confirms that he did not suffer from severe impairment of intelligence in 1998 when the two hospital orders were made. In light of this evidence and the fact that it was not generally appreciated at that time that both severe impairment of intelligence and severe impairment of social functioning had to be established to come within the definition of 'severe mental impairment' in the Mental Health Order we allow the appeal against each of the hospital orders. It is now for the court to substitute the sentences that could have been passed by the Crown Court.