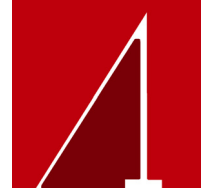


Implications of the JR47 judgement



In brief

On 31 January 2013, the Honourable Mr Justice McCloskey delivered his judgement in the case of an application by JR47 for judicial review.

This briefing outlines the key points of the judgement and its broader implications in the field of health and social care law.

The case concerned a man with a mild learning disability who had waited over six years to move out of a long stay hospital and into the community.

Background to the case

The applicant (known as JR47) is an adult diagnosed with a mild learning disability. He was a long-stay patient at Muckamore Abbey Hospital, having been admitted there in 1997 pursuant to a Hospital Order without restriction. The Hospital Order lapsed in 2000. He remained in Muckamore Abbey Hospital as a voluntary patient until June 2011 when he was placed in accommodation in the community.

Law Centre (NI) brought judicial review proceedings on his behalf against Belfast Health and Social Care Trust (the Trust) and Department of Health, Social Services and Personal Safety (DHSSPS). The basis of the judicial review was that at all material times during his compulsory, then voluntary, residence at Muckamore Abbey Hospital, he was legally entitled to have his community care needs assessed and reviewed on at least an annual basis. It was argued that the statutory duty to do so falls on the DHSSPS, and is then delegated to the relevant Trust as its statutory agent.

The judgement

In his judgement, Justice McCloskey made the following declarations:

- (a) Under Article 15 of the Health and Personal Social Services (NI) Order 1972 ('the 1972 Order') the DHSSPS and/or its statutory agent/s is/are under a duty to subject to appropriate assessment and inquiry any person within the scope of their knowledge or attention who appears to them might reasonably qualify for the enjoyment of any benefit available thereunder;*
- (b) Paragraph 2.2 of the People First guidance publication¹ generates a substantive legitimate expectation that the appropriate assessment and inquiry will take place;*
- (c) Chapters 7 & 8 of the People First guidance generate a substantive legitimate expectation that assessments of social care needs and any resulting care plan will normally accord with the frameworks specified therein; and*
- (d) finally, in those cases where an assessment has been carried out, the DHSSPS and/or its statutory agent/s is/are under a duty to provide the assessed social care benefit within a reasonable period of time.*

This ruling transforms community care duties by clearly defining the obligations of the DHSSPS and the Trust. More generally, the judgement restores principles of independent living by supporting the resettlement of voluntary patients in supported accommodation and emphasising that needs must be assessed and individuals must have care plans.

Is there a duty to assess everyone with community care needs and draw up care plans? If so, what triggers that duty?

The 1972 Order

The judgement found that the DHSSPS and its statutory agent owe a legal duty to assess and review, on a regular basis, the community care needs of all persons in Northern Ireland who appear to need services as enshrined in Article 15 of the 1972 Order.

Article 15 of the 1972 Order involves two key elements:

- 1) *to make available advice, guidance and assistance to such an extent as it considers necessary,*
- 2) *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 as it considers suitable and adequate.*

Although the language of Article 15 does not specifically refer to 'assessment', in his interpretation of the first element, Justice McCloskey stated (emphasis added), *'it is beyond plausible dispute that, in enacting Article 15(1) of the 1972 Order, the legislature contemplated that the responsible authority would **make individual assessments** in appropriate cases. Any contrary suggestion simply does not make sense.'*

The legislation² imposes a statutory duty to subject persons to appropriate assessment and inquiry as the DHSSPS and/or its statutory agent considers necessary. In considering which persons should be assessed, Justice McCloskey is unequivocal; the benefit of the statutory duty should extend to any person within the knowledge of DHSSPS who might be seen to benefit from such inquiries.

So what should therefore trigger such an assessment?

Justice McCloskey considered this at length in his judgement and concluded that the authority must first determine that the person 'might qualify for the conferral of any of the benefits available.' Therefore, in meeting the benchmark for assessment, *'possible need must, as a matter of common sense, be investigated and assessed.'*³

He held that the DHSSPS and/or its statutory agent is/are under a duty to subject to appropriate assessment and inquiry any *person* within the scope of their knowledge or attention who might reasonably qualify for the enjoyment of any benefit available under the legislation. He limited the duty of assessment to persons *'already within the knowledge or contemplation'* of DHSSPS, rather than expanding the duty to cover the discovery of new persons who may benefit.

Once an assessment has been carried out, an eligible need has been identified and consideration has been given to what provision would be suitable and appropriate, the duty to provide services arises.

What is the relevance of the *People First* guidance?

Part (b) of the judgment refers to *People First*

Paragraph 2.2 of the *People First* guidance states:

'Health and Social Services Boards [now the Trusts] will be required to assess the care needs of any person who appears to them to be in need of community care services, and to decide, in the light of that assessment whether they should provide, or arrange for the provision of, any services.'

The guidance clearly sets out the requirement for an assessment which reflects the needs of the individual and, where relevant, for community care services to be made available. Importantly, the guidance gives rise to an expectation that people can rely upon the Trust to carry out assessments.

However, while the guidance fleshes out the provisions contained in the 1972 Order, it is not legally binding on the Trust. Therefore one of the questions considered at length in JR47 was the extent to which this document could be relied upon by an individual seeking assessment.

Where a public body promises that it will confer a particular benefit on a person, or that it will act in a certain way in specific circumstances, the legal doctrine of legitimate expectation applies so that the individual may have a binding expectation that the public body will keep its promise and act accordingly.

In his judgement, Justice McCloskey declared that paragraph 2.2 of the *People First* guidance generates a substantive legitimate expectation to like effect (as Article 15 of the 1972 Order). The guidance is mandatory, clear, unqualified and reflects the statutory duty under Article 15.

Part (c) of the judgement refers to chapters 7 and 8 of *People First*

The *People First* guidance is fundamental to community care in Northern Ireland. It sets out the duties of the Trusts and the way in which these duties should practically be discharged and specify assessment and care planning procedures and methodologies, couched in clear and comprehensible terms. They prescribe the 'essential features' of a proper assessment process. Justice McCloskey concluded that chapters 7 and 8 generate a substantive legitimate expectation that assessments of social care needs and any resulting care plan will normally accord with the frameworks specified in these chapters.

Examples of the practical requirements contained in the guidance for a proper assessment include:

- the matters to be covered in a needs assessment;
- method and manner of carrying out an assessment;
- how decisions as to provision are to correspond with priority needs;
- who may be most suitable to take the role of case manager;
- who should be consulted regarding a care plan;
- the issues that should be considered when creating a care package;
- who should receive a copy of the care plan; and
- the requirement to regularly review a care plan.

JR 47 makes it clear that the guidance contained in *People First* on assessments and care plans should be considered as a structure for current practice and Trust staff ought to be aware of its contents.

Part (d) asks what is a 'reasonable time'?

Once an assessment has been carried out and a need identified, Justice McCloskey held that this creates a legal duty of provision on the Trust. This duty involves consideration of what would be suitable and appropriate in any individual case.

Further to this, the DHSSPS and the Trust are under a duty to provide the assessed social care benefit within a reasonable time. Each case will therefore be fact specific in terms of what constitutes a reasonable time frame. While there may be a resource barrier and challenges in the present economic climate, JR47 makes it very clear that the assessed benefit must be provided within a reasonable time. The question remains what is reasonable given the facts of each individual case.

Conclusion

JR47 will have positive implications for many people with a learning disability residing in long stay hospitals who want to live a more independent life.

Law Centre (NI) welcomes the judgement and looks forward to supporting timely discharge of residents in long stay hospitals with improvements in the quality of assessments which expand the use of supported living.

Notes

- 1 *People First: Care Management: Guidance on the Assessment and Provision of Community Care* can be accessed at:

www.dhsspsni.gov.uk/people_first_-_care_management_-_guidance_on_assessment_and_the_provision_of_community_care.pdf
- 2 Article 15 of the *Health and Personal Social Services (NI) Order 1972*
- 3 *In the matter of an application by JR47 for judicial review*, McCloskey J at para 70. Copy of the judgment is available online at:

[www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/\[2013\]%20NIQB%207/j_j_McCL8735Final.htm](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/[2013]%20NIQB%207/j_j_McCL8735Final.htm)

Law Centre (NI) offers an advice line to practitioners on all issues of mental health law as well as social security, employment, community care and immigration. We accept referrals of test cases and can alternatively work with members to provide any necessary support on mental health issues that a practice may need to quality assure its mental health work.

We also offer training courses for practitioners and information through our publications and website. We hold regular legal practitioner meetings in mental health, social security, community care and immigration where practitioners can exchange expertise and receive important updates.

Advice line: Mon to Fri 9.30am to 1.00pm, 9024 4401 and 7126 2433

For more information about the Law Centre: www.lawcentreni.org

© Law Centre (NI) May 2013

All rights reserved. No part of this publication may be reproduced, stored on any retrieval system or transmitted in any form by any means, including photocopying and recording, without the prior written permission of Law Centre (NI).



Lexcel
Practice Management Standard
Law Society Accredited

Law Centre®

