

11 MAR 2011

Form 40 (version 1)
UCPR 35.1

CLERK OF THE COURT

AFFIDAVIT OF BRETT COLLINS – 11 March 2011

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Administrative
Registry	Sydney
Case number	2010/408528

TITLE OF PROCEEDINGS

Plaintiff	Saeed Dezfouli (by his Tutor, Brett Collins)
First defendant	Mental Health Review Tribunal
Second defendant	Justice Health

FILING DETAILS

Filed for	Saeed Dezfouli (by his Tutor, Brett Collins), plaintiff
Legal representative	Peter O'Brien, O'Brien Solicitors
Legal representative reference	11/010-C
Contact name and telephone	Peter O'Brien (02) 9262 1891

FR

AFFIDAVIT

Name Brett Collins
 Address Suite 204
 4 Goulburn Street
 SYDNEY NSW 2000
 Occupation Coordinator, Justice Action
 Date 11 March 2011

I affirm:

- 1 I am the tutor of Saeed Dezfouli, the plaintiff in these proceedings.
- 2 I am the Coordinator at Justice Action.
- 3 Justice Action is a community-based organization of human rights activists. The objective of Justice Action is to raise awareness of contentious issues in the legal system. Our areas of focus include prisons, prisoners and mental health within the justice system. Through campaigns and the *Just Us* newspaper, we aim to rally support for our causes and promotion of human rights in Australian legal institutions.
- 4 Saeed Dezfouli was brought to my attention by a Sydney mental health worker around late 2005 or early 2006. I began to correspond with Mr Dezfouli and, at Mr Dezfouli's request, I became his primary carer in 2009. In this role, I have been involved in Mr Dezfouli's Mental Health Review Tribunal (MHRT) reviews as a support and a representative.
- 5 On 8 September 2010, Mr Dezfouli sent me a letter requesting that s162 of the *Mental Health Act* (NSW) 2007 not apply to him, so that he would have permission to publish his own name and speak out about the conditions for mental health patients in NSW. Annexed and marked with the letter A is a copy of that letter.
- 6 Mr Dezfouli has told me that he wishes to write letters and disseminate material to organisations, the media, politicians and others concerning his treatment as a mental health patient, and the treatment of those around him. He has told me that he wishes to put his name on such letters and material.
- 7 On 16 September 2010 I sent an email to the Mental Health Review Tribunal, outlining Mr Dezfouli's requests and attaching his letter. I asked that the matter be raised at Mr Dezfouli's next review hearing. Annexed and marked with the letter B is a copy of that email.

 FR

- 8 On 20 September 2010, Greg James QC replied to my email. He requested details of the publication Mr Dezfouli wanted to publish in, and all the material that Mr Dezfouli would rely upon in his application. Mr James also stated that the issue would be raised at Mr Dezfouli's upcoming review. Annexed and marked with the letter C is a copy of that email.
- 9 On 30 September 2010, the MHRT heard Mr Dezfouli's review and his application under s162. Annexed and marked with the letter D is a copy of those Tribunal proceedings.
- 10 In those Tribunal proceedings, Mr Dezfouli relied principally on a document titled *Challenge to the Tribunal's Ban on Saeed's Name*, dated 30 September 2010. Annexed and marked with the letter E is a copy of that document.
- 11 In those Tribunal proceedings, no decision was reached on the issue of the s 162 application, because the Tribunal required further submissions from both Justice Health and Mr Dezfouli.
- 12 On 15 October 2010, I received an email from Justice Health representative Mr Sterry. That email stated that Justice Health would not be submitting any further documents and that they would no longer be a party to the proceedings. Annexed and marked with the letter F is a copy of that email.
- 13 On 24 November 2010 I sent an email to Mr James, informing him that Mr Dezfouli would not be making any further submissions in respect of his s 162 application, and that Mr Dezfouli relied on the submissions made at the MHRT Review on 30 September 2011. I requested a decision in light of Justice Health's cessation of involvement. Annexed and marked with the letter G is a copy of that email.
- 14 On 25 November 2010 Mr James sent me a letter in response to my email. The letter stated that the matter was struck out on 24 November 2010, because the Tribunal had not been provided with the details of the publication for which approval was sought. Annexed and marked with the letter H is a copy of that letter.
- 15 On 8 December 2010, I filed a form in the Supreme Court of New South Wales, consenting to act as Mr Dezfouli's tutor. I have been acting in the capacity of Tutor for Mr Dezfouli since that time.
- 16 On 8 December 2010, I filed a Summons Commencing an Appeal in the Supreme Court of New South Wales. I filed that summons on behalf of Mr Dezfouli, in the capacity of his Tutor.



- 17 On 11 January 2011, the Mental Health Review Tribunal filed and served a notice of appearance, submitting to the orders of the Court, save as to costs.
- 18 Around mid-January 2011, Peter O'Brien of O'Brien Solicitors agreed to represent Mr Dezfouli at his appeal on a pro-bono basis.
- 19 On 2 February 2011, Peter O'Brien filed a Notice of Appearance with the Supreme Court of New South Wales.
- 20 The first mention of the matter was on 4 February 2011. The matter was adjourned to 18 February 2011.
- 21 On 16 February 2011, Justice Heath filed and served a notice of appearance, submitting to the orders of the Court, save as to costs.
- 22 On 18 February 2011, leave was granted for Mr Dezfouli to file an amended summons in the proceedings. Leave was also granted for the Attorney General to intervene in the proceedings.
- 23 On 4 March 2011, O'Brien Solicitors filed and served an amended Summons Commencing an Appeal.

AFFIRMED at

Suite 504
Level 5
265 Castlereagh Street
Sydney NSW 2000

Signature of deponent

Signature of witness

Name of witness

Address of witness

Suite 504
Level 5
265 Castlereagh Street
Sydney NSW 2000

Capacity of witness

Solicitor

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

A

08.09.10

SAEED S. DEZFOULI
Forensic Hsp.

To: Brett Collins
My Primary Carer

Dear Brett,
Would you please contact MHRT and to
inform them that I don't want s. 162
of MHA 2007 to apply to me.

I will be thankful for your assistance.

Yours sincerely,



Saeed S. Dezfooli



peter obrien <obriensolicitors@gmail.com>

FW: Mr Saeed Dezfouli's name s.162 MH Act application

Brett Collins <brett@justiceaction.org.au>

Fri, Mar 4, 2011 at 2:19 PM

To: Fiona - O'Brien Solicitors <info@obriensolicitors.com.au>

From: Brett Collins <brett@justiceaction.org.au>

Date: Thu, 16 Sep 2010 18:44:16 +1100

To: MHRT <mhrt@doh.health.nsw.gov.au>, Greg James
<gjame@doh.health.nsw.gov.au>

Conversation: Mr Saeed Dezfouli's name s.162 MH Act application

Subject: Mr Saeed Dezfouli's name s.162 MH Act application

Dear Mental Health Review Tribunal,

Mr Saeed Dezfouli has asked me as his Primary Carer to make this application on his behalf to the MHRT.

I have attached his letter regarding the matter. He requests that the provision of s.162 of the Mental Health Act for his privacy be waived and for him to be allowed to use his name in his campaign for his release and to highlight the unfairness of his treatment and that of others by the Health Department.

He says that the section is intended to protect him from exploitation and exposure by the media, but instead it is being used to protect the Health Department from being held accountable for the treatment of citizens entitled to care and assistance. It has been used to prevent the exposure of the system and allow abuses of the human rights of nameless, faceless, dehumanised mental health patients.

As his Primary Carer I support his application as do his other friends working with Justice Action. We believe he has the right to his name, to be recognised as a unique person, distinguished from others in the same way as are other citizens.

He wants to make a personal expression of how he feels and has taken a course involving political and public policy which he wants to influence using his particular experiences within the mental health system. Saeed wishes to publish his material and generally make observations about his life and concerns, and propose better ways to deal with mental health issues.

In short he wants his right to having his own name returned to him, and for the provision intended for his benefit not to be yet another abuse of power against him as a human being.

We ask that you urgently give him your consent as he has a public statement to make.

Yours faithfully,

Brett

Brett Collins

Coordinator

JUSTICE ACTION

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----- End of Forwarded Message



SaeedsttName8/9/10.pdf

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peter obrien <obriensolicitors@gmail.com>

FW: Mr Saeed Dezfouli's name s.162 MH Act application

Brett Collins <brett@justiceaction.org.au>

Fri, Mar 4, 2011 at 2:21 PM

To: Fiona - O'Brien Solicitors <info@obriensolicitors.com.au>

From: Greg James <gjame@doh.health.nsw.gov.au>

Date: Mon, 20 Sep 2010 09:56:40 +1000

To: Brett Collins <brett@justiceaction.org.au>, "rbrab@doh.health.nsw.gov.au" <rbrab@doh.health.nsw.gov.au>, John Feneley <jfene@doh.health.nsw.gov.au>, Sarah HANSON <shans@doh.health.nsw.gov.au>, Anina Johnson <Anina.Johnson@agd.nsw.gov.au>

Subject: RE: Mr Saeed Dezfouli's name s.162 MH Act application

Dear Mr Collins

An application under Section 162 can be listed at the next review hearing . Please provide the detail of what publication you wish approved and all the material on which you rely as soon as possible

From: Brett Collins [mailto:brett@justiceaction.org.au]

Sent: Friday, 17 September 2010 1:43 PM

To: MHRT; JAMES, Greg

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

This email has been scanned for the NSW Department of Health by the MessageLabs Email Security System. The Department regularly monitors emails and attachments to ensure compliance with its Electronic Messaging Policy.

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This email has been scanned for the NSW Department of Health by the MessageLabs Email Security System. The Department regularly monitors emails and attachments to

ensure compliance with its Electronic Messaging Policy.

Transcript of proceedings on 30 September 2010 before the Mental Health Review Tribunal

Panel:	Greg James QC	President
	Peter Shea	Psychiatrist
	Lynn Houlahan	Other Member

Present:

Saeed Dezfouli
Ms Christine Nash, barrister
Mr Paul Bodisco, barrister;
Mr Andrew Dikha, solicitor;
Mr Brett Collins, Justice Action;
Mr Luke Blake, public observer.

Dr Adrian Keller, Medical Superintendent, Forensic Hospital;
Dr Goh, Psychiatric Registrar;
Ms Yiota Zingirlis, Forensic Psychologist;
Steven, Registered Nurse;
Mr Gavin Gray, Occupational Therapist;
Ms Elouise Davis, Social Worker;
Mr Trevor Perry, Justice Health;
Mr Michael Sterry, Justice Health;

Ms Anina Johnson, Crown Solicitor's Office;
Mr Bernard Ripperger, Department of Justice and Attorney General;

Shakil Mallik – Mental Health Review Tribunal

James Simply to get some idea of issues, as you know, the Tribunal has to have a review once every six months at least. We've adjourned and adjourned it and we've had the benefit of a fairly extensive chronology setting out the history of these proceedings in conjunction with the Supreme Court proceedings and I think you have that Ms Nash.

Nash I do, thank you.

Collins Is it possible to wait until the patient comes in because so ...

James No it's not because I'm trying to find out what the issues are today so we can work out where we're at. Do you have a copy of the chronology Mr Collins?

- Collins Yes I do.
- James Right OK. Does everybody have a copy of the chronology?
- Johnson I've got some spares.
- James If you can let the solicitor have one. Now does everybody have a copy of the Justice Health submission? Good. Ms Johnson do you have any written submissions?
- Johnson I haven't, no.
- James That's all right. Mr Ripperger, do you have any written submissions? Good. Mr Perry, you don't have any contribution in writing? Good. Anybody else got any contributions of any other kind in writing?
- Sterry Can I just make a comment in relation to the submission ...
- James No. Because all I'm doing is making sure that everybody has got the papers because before we do anything we'll wait until the patient comes but I'm just trying to make sure everyone has got all the paperwork.
- Collins Well here's the original submission that's.
- James Well, wait here for a moment. There's a lot of material that we've got from you Mr Collins and I need to see that I've got that clear and if everyone else has got it. We have various emails to which my response has been to take it up, take the s.162 matter up at this hearing, including an email of 16 September. We have a document headed "Challenge to Tribunal's ban on Saeed's name" which goes for about 4 pages and annexes s.162 and, for reasons that I do not comprehend yet but no doubt you'll enlighten me, something from a magistrate named Paula Russell.
- Collins? No. That's actually a six page document.
- James Is it, good. We also have an application dated 16 September, to which is attached a letter from Mr Dezfouli, which said that he didn't want s.162 to apply to him and he's thankful for your assistance. There's an informal off the record approach to me, dated 1st of September; there's a letter of concern about, what

is it, the 1st of September about Our Pick Reports; there is a letter of August the 9th which was addressed to me as a member of the Mental Health Review Tribunal. It appeared to be accompanied by a whole lot of envelopes which somebody seemed to think the Tribunal would at its own expense distribute on their behalf. It is not a mail centre and it's not available to distribute to anyone particularly since it may contain material that is in breach of s.162. The Tribunal does not act either for Woolworths, people selling wine, or any variety of product. We do not put things in members' pigeon holes simply cause people ask us to.

Collins Scott your secretary said you did.

James It was not my secretary. You spoke to the man who works on the Reception and

Collins Right and he said you .

James And we do not distribute your material to our members. If you want to go to the trouble of distributing your material, having regard to s.162 of the Act, feel free to do whatever you think you're entitled lawfully to do, but do not try to enlist the Tribunal. We will not be in it.

There was also a letter of the 12th February providing various things to be changed and there was a profile of Mr Dezfouli, dated 21st of January which contains two documents and I that's probably the mass of material, Mr Collins, that you'd sent. Is there any further written material that you wanted to provide to us for this present hearing?

Collins No, I think that's it.

James All right. Mr Dikha there's some correspondence with you by email simply concerning an application for adjournment. Oh, hang on there's more people arrived. Okay, we've got all.... Mr Dezfouli is now with us.

Dezfouli Yes.

James We're still trying Mr Dezfouli to get clear what documents we're all supposed to have before we start. Who do we have at the back there? We have: Dr Goh; Eloise Davis, social worker; Gavin Graham, physical therapist; Yiota

Zingirlis, psychologist; Nurse Stephen from Clovelly Board.

Right, there is also some backwards and forwards emails with Mr Badisco and Ms Nash concerning whether there was an application for adjournment. Is there still an application for adjournment?

Oh.. and Dr Keller has now arrived.

Is there still an application for adjournment?

Nash There is. In relation to the actual review of Mr Dezfouli's mental condition, but in relation to the publication, I thought perhaps we could go on with that argument. But in relation to Mr Dezfouli's condition, it really is because Dr Westmore was asked to provide a report outlining a treatment program and we haven't got that. So, it's on that basis.

James Well, I understand that. Back on the 31st July there was a letter from Messrs Donellan and company setting out the various things that might have been sought in terms of care, treatment and detention. They are very much to the same effect as what's being sought in the Supreme Court summons.

Nash Right.

James Now, they've been on the table since the 31st July.

Nash Right.

James But I gather you're not in a position to go ahead with them today because of the absence of the evidence from Dr Westmore. Is Dr Westmore coming?

Nash Not to my knowledge.

Dikha I tried calling him three times yesterday, but didn't get to talk to him once

James Well, all right. The Supreme Court proceedings, I think are adjourned until November.

Johnson 23rd November.

James Okay. And that's not for hearing. That's still on the strike out application.

Johnson That's right.

James Okay.

Collins It's not Mr Dezfouli's problem of course. That's actually come from the Crown.

James Sorry?

Collins To be fair, Mr Dezfouli hasn't held it up at all. That's because the Crown has actually attempted to strike out the action.

James Mr Collins, the basis of striking out the action is that it is of no substance, frivolous and vexatious, procedurally inept, spent many months without specifying what it was all about and frankly, that is a perfect example, ~~one~~ would've thought, of somebody mucking around for a very lengthy period of time.

Collins Okay, but you did say there wasn't a decision.

James Now this is not on the table today.

Collins Sure, but to be fair, you did say there wasn't a decision and yet there wasn't a request for that decision and for the change of the circumstances of Mr Dezfouli. Now, that was not correct and that actually held up the case from the very beginning. So it certainly wasn't Mr Dezfouli's problem.

James I'm sorry? Mr Collins, Mr Collins, that is not on the table today.

Collins No, no, but to be fair any criticism to Mr Dezfouli for holding up the appeal, would be wrong.

James I shall say it a third time Mr Collins. It is not on the table today.

Collins That's okay, that's fine, but we should be keeping it in mind.

James There is further material in particular seeking that the matters that were raised in the letter of July be taken up with Justice Health so they were in a position to

give us their views as to those matters. Now, if that aspect can't go ahead today because we're required every six months to embark on the review or at least every six months, we have no option but to go ahead. We don't have the power to keep adjourning things so that we don't undertake the reviews every six months. On the other hand, that doesn't preclude anybody from raising exactly the same issues at a hearing to be convened as soon as you're in a position to go ahead with it.

Nash I thank you for that.

James Which gives you exactly the same result as you'd get by way of an adjournment anyway.

Collins Mr James, we've made it very clear that we are here, we are not going ahead with the review today and there is a provision under the s.46 of the

James Mr Collins, I am going ahead with the review today and so is the Tribunal.

Collins Right, well, we're not participating. We've made that very clear from the beginning.

James Right, feel free.

Nash If I can just speak and that is that on the one hand, you're obviously quite correct in what you say. On the other hand, however, under Division 4, sub-division 1, s. 61(4), it does actually state that the period within which a particular review under this section must be held, may on the motion of the Tribunal or on the application of the patient, or the primary carer of the patient, be extended by the Tribunal to a maximum of twelve months.

James You're now referring to the Mental Health Act 2007?

Nash 1990. The Mental Health Forensic Provisions Act 1990. It's number ten. It's under division 4, sub-division 1, s.61(4).

James Yep. You are now referring to section 60 ... That is a different thing to adjourning. That allows us to extend the period within which we needn't have a review. Now I don't understand that your patient doesn't want these things dealt with, but he wants them dealt with when he's ready to present the evidence on

them.

Nash Correct.

James Okay. We wouldn't extend the period. What we'd do is have the review when it suits. When it suits you and you've got your material together.

Nash Right.

James But, that doesn't mean we're going to stop having reviews. We're still bound by the statute and it still has this primary obligation that we have to undertake the review every six months.

Collins No. It says twelve months.

James We don't want to leave ..

Collins It says twelve months, Mr James

James Mr Collins, if you insist on interrupting, I'll ask for you to be removed.

Collins Okay. Okay. Just disagreeing. It's not a problem.

James We are still bound to have our reviews primarily every six months and we don't want to leave Mr Dezfouli in a situation where he is not able to come forward and have his review. The purpose of the review is for him, not for the benefit of Justice Health.

Nash I think the reason why there's been some resistance to that is that it is anticipated that unless and until we get a final report from Dr Westmore, (a) which will show, maybe, that Mr Dezfouli is now fit; (2) it will have a treatment plan, I think it is anticipated that nothing will change.

James Okay. We'll go back to s.61(1). We may review his case at any time. There is no reason why we can't bring it on as soon as you've got any information whether it is a treatment plan, or an opinion, or whatever.

Nash So, it could be next week?

James Yeah. Sure. Secondly ... Oh, it has to give enough time for all the rest of the documentation to arrive. Secondly, there's no reason for us necessarily to make Orders.

Nash Right.

James Have a look at section 47. We may make Orders. Now what would happen of course is that the status quo in the existing Orders would continue unless or until we made any other Order.

Nash Right, so..

James So the only difference is between us conducting a review where everybody agrees there's nothing to warrant any change at the moment, offering you the opportunity to come back when you've got either Dr Westmore, or anybody else's material that makes a difference, and an application under s.162.

Nash Right.

James Now, if you have a think about that, the only difference between that and an adjournment is that we actually meet our statutory obligation. While you're looking at that, you may want to have a chat to Mr Collins.

Dr Keller? I take it, that you have no problem with this review simply concluding without us having to make any new Order in relation to Mr Dezfouli?

Keller No, the Hospital would have no problem with that.

James Mr Sterry as counsel? Ms Johnson?

Johnson The Attorney doesn't have a view on that. There'd be no difficulty.

James Doesn't have a view at all?

Johnson We don't have any view on the merits of the matter, so there's no...

James Yes, of course. But from the Attorney's viewpoint, the Attorney has no difficulty with there being no new Order made in relation to Mr Dezfouli at today's hearing, but the opportunity to come back and have a further hearing on care,

detention and treatment at any time.

Johnson That seems appropriate and we would say ...

Nash About the Tribunal making Orders in the meantime?

James Yeah, we would make Orders in the ... we wouldn't change the existing Orders unless there was something that somebody needed change.

Collins Mr Dezfouli has a very firm view on this matter and we've discussed the matter very clearly. Now, I hear the Attorney General says as far as they're concerned that haven't got a view. We have a very strong view on it. And, if it is intended for Mr Dezfouli's benefit that there is a review now, he wants that not to happen now. He wants the matter to come before the Supreme Court as has scheduled...

James There is no reason...

Collins Can I just finish what I'm saying please? Thankyou.
And he feels strongly that he doesn't want the review to happen here, regardless of whether or not there are Orders or otherwise. He wants the review that happened in February to be appealed and

James All right...

Collins Can I just finish what I'm saying please?
And that that appeal be heard before the Supreme Court as it should've been in the earlier stages after February at the time of the first appeal and since he's been held back because of the actions of others, he wants to bring it to appeal as soon as possible. He does not want to participate in review at this stage and is quite adamant about that matter.

James Okay. Does anybody else have anything further to say on that?

Nash I was wondering if it would be possible for me just to take a few moments to speak with Mr Dezfouli and to Mr Collins outside?

James If you would like to, by all means...

Nash Just to perhaps clarify...

James I'd suggest you use that room, it may be necessary to get some instructions.

Nash Thankyou. I think it just might simplify things.

Nash, Collins, Dezfouli, Bodisco and Dihka left room for conference

Nash Thank you very much for the adjournment in order to confer with Mr Dezfouli and Mr Collins. It has been explained and understood that the Tribunal has to go ahead today. However, as far as the actual participation of Mr Dezfouli and Mr Collins before the Tribunal in relation to a review today, it's unwilling.

James Look, they needn't participate. Something occurred to me while you were out there that I should make quite clear. The conducting of a review now does not affect Supreme Court proceedings at all.

Nash Yes

James And as far as we're concerned having regard to exactly the same practice that the Court adopted in a matter of Petrovich, one can add to the things appealed against.

Nash Yes.

James Every review and result until the Supreme Court hands down its decision. So, you can add in each decision along the way.

Nash Yes.

James So there's no suggestion that it will disadvantage Mr Dezfouli in the conduct of the appeal.

Nash Yes.

James Particularly, of course, um as I understand it Dr Keller the position from the Hospital's viewpoint is that they don't wish to add additional material today or seek any change, you're not in a position to put Dr Westmore's material...

- Nash No.
- James Before us, and the last adjournment was there so that you could.
- Nash That's right.
- James And you can't be deprived of that. The only aspect that worries me further is that under s.47(4), if we conduct a review we must make a recommendation as to fitness, but the only recommendation one could practically make at this point in time, absent Dr Westmore's plan, and in the light of what Dr Westmore had said previously, is that there should be an investigation of Mr Dezfouli's fitness for trial.
- Nash Yes.
- James Now that is pointless in the normal course of things because Mr Dezfouli has been found unfit and was found not guilty by reason of mental illness at the special hearing.
- Nash Yes.
- James It would be open to Mr Dezfouli to request the Director of Public Prosecutions if he is fit to try him.
- Nash Yes
- James And to take whatever steps people might be minded to take in the normal criminal justice process.
- Nash Yes
- James The Director of Public Prosecutions might say no, and then interesting legal questions with which the Tribunal is not concerned may arise.
- Nash Yes.
- James It would be likely that if he were tried, sorry, if he were found fit, tried and convicted of manslaughter or murder or whatever maybe the course of those proceedings that the time that he spent in custody would be taken into account.

Nash That's right.

James Albeit, he might be regarded as a mentally ill person

Nash Hmm hmm

James In custody. In which case, he'd change the status of forensic patient to correctional patient

Nash Yes

James In which case your previous submission about s.67 would be accurate.

Nash Yeah

James But as a forensic patient at section I think 47?

? Oh.. 46

James 46?

Nash Hmm hmm

James And 45 that apply to him and 47 that apply to him rather than section 60. To the same effect that it still talks about the 12 months.

Nash Yes.

Yes, the unfitness of course was in March 2004, so obviously there's been a lengthy period of time and that could've changed.

James Sure, 12 months since the finding of unfitness has well gone by.

Nash Yes

James But the Act doesn't preclude asking for a further trial.

Nash That's right.

Nash That's right.

James Albeit, he might be regarded as a mentally ill person

Nash Hmm hmm

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James 46?

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Nash Yes.
Yes, the unfitness of course was in March 2004, so obviously there's been a lengthy period of time and that could've changed.

James Sure, 12 months since the finding of unfitness has well gone by.

Nash Yes

James But the Act doesn't preclude asking for a further trial.

Nash That's right.

James Now, that's a matter for you and your client.

Nash That's right.

James But the only recommendation that we could make on a review is that the question of unfitness in the light of what Dr Westmore had said on the previous occasion, be investigated.

Nash Yes

James Right. On the review, otherwise, there's nothing much else that we need to look at.

Nash Right.

James Has anybody got anything else that we need to consider on the review?
Well, in that case I can dispose of that in short form now.

This is the resumed review under s.46 of the Mental Health Forensic Provisions Act 1990 of the care, detention and treatment of Mr Said Dezfouli who has been detained and treated at the Forensic Hospital.

The chronology is set out as follows, taking it from the chronology that's already been included.

The Supreme Court proceedings seek relief against the Tribunal alleging error on the part of the Tribunal. They are not orders against Justice Health, consequent thereon. Very much to the effect of what is sought as the substantive orders as to care, detention and treatment the Tribunal should make on a review. However, it is common ground that Mr Dezfouli had wished to have the evidence of Dr Bruce Westmore placed before the Tribunal and that evidence is not presently forthcoming. That evidence particularly speaks to a management plan, Dr Westmore's previous opinion related almost exclusively to the issue of fitness. Dr Westmore raised a strongly arguable basis for an examination and investigation into the issue of whether Mr Dezfouli is now fit for trial. The Act does not preclude a trial. On the other hand, the prospects of a trial being able to be conducted fairly at such a time remote from the events that gave rise to the trial are another thing entirely for the criminal justice system. Mr Dezfouli may or may not be minded with the advice of counsel to try to return to the criminal justice system. That can be raised by him and his counsel with the

Director of Public Prosecutions. Since the Tribunal must make a recommendation under s.47(4), it recommends that his fitness to be tried for the offence be further investigated and otherwise we'll conclude that the appropriate course to take is that the current arrangements for his care, detention and treatment should continue subject to the Tribunal reconvening a hearing to examine those matters as soon as the evidence is forthcoming to warrant a further hearing. That can be done, bearing in mind s.46 at any time. Although the period within which a review can be extended within which a review must be held can be extended. In fact, all that allows for is the prospect of not holding a review within 12 months. Mr Dezfouli would well want to have a review within that 12 month period at his instigation. This decision of the Tribunal, in terms of content and merit, is precisely to the effect of the decision under appeal and thereby if it's wished to challenge it, may be brought within the ambit of the appeal formally, if it's wished without delaying the appeal, or informally, in that the Tribunal will abide by the decision on appeal of the Supreme Court and apply that to each and every review that it may conduct of Mr Dezfouli in the future.

There remains, however, an application under s.162 of the Mental Health Act 2007 – that section precisely considered, looks to the identification of a person having a matter before the Tribunal and certain other categories of persons involved in Tribunal proceedings. It is notorious that there have already been publications. It seems that such publication as has been made, has made it to the Launceston Examiner, on a back page. This is not a widely circulated newspaper. Apparently, publications have also occurred by leaflet and on a web page. A web page to which the populace do not resort in great number. Those publications have identified Mr Dezfouli. Section 162 seems to speak quite directly in respect of them. However, it's important to draw everybody's attention to s.154. 154 or 151?

Johnson 151(4)

James Section 151, sub-section 4.
Section 151, sub-sections 3 and 4.

Explaining all of that background to everyone for the purposes of hearing the submissions, the scheme of the Act appears to be that you're not to name or identify a patient. But, if you wish to restrict the publication, generally, of the proceedings before the Tribunal, or the material given in the Tribunal, you have

to persuade the Tribunal that it is desirable to do so for the welfare of the person who has the matter before the Tribunal or for any other reason.

Now, Mr Sterry, reviewing your written submissions, you put two primary submissions. They are one, that publication should not be permitted in the interests of Mr Dezfouli and secondly, the publication should not be permitted in the interests of other people.

In the Fitter matter, the Tribunal concluded that Ms Fitter had capacity and having capacity had an entitlement to a degree of autonomy such as an entitlement to make her own mistakes if she went public. On the other hand, there was no other person who might be affected adversely by that publicity. As I understand Justice Health submissions, you're concerned that publishing the identity or matters that might lead to the identity of staff of Justice Health or other patients, would apply adversely to them.

Ms Johnson, I understand the general position to be a view that s.162 was enacted with a view to protecting the identity of patients to preserve patients from the effect of the stigma that might otherwise be associated with suggestions that they may have mental health problems in coming before the Tribunal.

Johnson I think that's right..

James Very similar to protecting children under the criminal legislation.

Johnson I think that's right.

James Section 154, however, applies more widely and the onus changes.

Johnson I think that's right. The other thing I think is worth noting is that in the predecessor legislation, so the Mental Health Act 1990, the consent of the patient was a specific .. both the consent of the Tribunal and the consent of the patient were required. The consent of the patient is no longer part of the test in s.162 .

James Or 154.

Johnson Or 151(4)

- James Section 151(4) yeah.
- Johnson But my submission would be that that doesn't mean that the views of the patient are disregarded, they should be taken into account and given whatever weight the Tribunal thinks as a matter of fact they should be given.
- James And the normal course we'd take is if someone has capacity, then we would regard them as having a sufficient degree of autonomy to be able to make their own mistakes.
- Johnson I think that's ordinarily right. Once someone has capacity, they can agree to things. The difficulty is with forensic patients, who are defined not having capacity.
- James Well there may be other considerations ... You say that forensic patients are defined not to have capacity?
- Johnson I suppose on, one view of s.162 in that the consent of the patient is no longer relevant..
- James Yes, sorry. 154..
- Johnson Sorry, s.151(4)..
- James Yes s.151(4)
- Johnson Again, I would say that the.. it's a matter for the Tribunal to consider whether the patient has capacity to understand and to consent to those ...
- James And to work out what capacity is in that context.
- Johnson Yes. And what are in the best interests of the patient in that context.
- James Why is there a best interest test?
- Johnson Because the Tribunal more generally has an obligation to make orders that are for the care, treatment and control of patients and the least restrictive orders that they can.

James And if we've got the least restrictive principle, we apply that to 151(4) and 162?

Johnson I think you start, interestingly, in this context you start from the presumption, which is the reverse of the presumption in ordinary court proceedings, that patients... Normally, court proceedings are both open and publicly reported. The reverse presumption is the case here.

James Why? The Act says 151(3) that the proceedings of the Tribunal are to be open to the public.

Johnson But normally you would.. presumption is that you would name a party to proceedings.

James Ah.

Johnson And the reverse is the case here.

James Yep. Yep. Yes, I understand that, not naming, but

Johnson Yes.

James But what about the content? 151(4) states. That's public isn't it? Unless..

Johnson That's absolutely right. So normally the content would be public but the naming wouldn't and you start from the same presumption as you do in ordinary court proceedings that the content can be freely reported provided that the person is not named.

James I should indicate that whilst you were in the whatever room it's called.

Nash The annex.

James The annex. I asked Ms Johnson to supply me with that... there's a long line of authority including a Leveller Magazine case and a decision of Justice McHugh's in relation to publication and suppression at Coroner's Courts and so forth, and the most recent case which involved an attempt to suppress the names and identity of persons connected with proceedings on the basis that they might, if they were named, get mental illness. Which was decided yesterday or the day before?

Johnson I think it was yesterday.

James Yeah in the Federal Court by Justice Flick in a matter involving Ms Kirsty...

Johnson I can't remember her surname.

James Do you have a copy of the case?

Johnson It was the David Jones... Yes I've got it here.

James It was the David Jones publicist.

Nash Oh right. Yes.

James Where they reviewed ...

Nash It's almost like the shoe's on the other foot in that case.

Johnson Fraser-Kirk.

James Now, if I have a quick look through here .. Yeah, *John Fairfax Group v Local Court, NSW*. And *Witness v Marsden*, is the other one that may be useful.

If I could get somebody to photocopy the front page of that. Have you got a photocopier readily at hand? All I need is the front page. And then you two can share them.

Nash Thank you.

James Right, now that leads me to the belief that having looked at all the written material, things seem to be going off half cocked. You're concerned to allow Mr Dezfouli to use his name, but to use his names in publications. And the publications are going to contain content and the content, among other things, I would be amazed if it didn't, are going to relate to criticisms of the operation of the Mental Health Review Tribunal, which means, s.162 is engaged. But more importantly, you're concerned to publish the sort of things that are under 151(4) which nobody seems to have looked at yet. Justice Health is concerned that publications under 151(4) will impact adversely on Justice Health's staff, other patients and they may have a concern, I don't know how much of a concern it is,

that it may impact adversely on Mr Dezfouli. But I haven't seen anything by way of evidence and particularly not in the report of Dr O'Dea and so forth, concerning those matters. Now, from the practical viewpoint, the shoe is on the other foot as Ms Nash has said. You may need, given you've only had one night on which to do it, the opportunity to put on evidence and to also put some submissions as to what should or should not be the subject of any restrictions under 151(4) because the simple name restriction is not causing anybody any problem. You made two comments at the end of your written submissions that were peculiarly apposite. They were firstly, that there was no need to make any order under s.152 because there's nothing new going to be published. It's already been published.

Sterry Um, I don't think there was a specific reference to 152.

James No it wasn't it was under 162.

Sterry Yeah.

James So we should give you the opportunity to look to 154 and particularly as to what, bearing in mind, the least restrictive principle, if there is to be publications restricted, what restrictions should there be and to what extent. An order prohibiting or restricting the publication or broadcast of any report of proceedings before the Tribunal; An order prohibiting or restricting the publication of evidence given before the Tribunal; or of matters contained in documents lodged with the Tribunal; or evidence from contents of documents.

And we have your submissions on the name. But it's pointless having the name without having the content.

Alright, Ms Nash – does that answer to some extent, your client's concerns?

Nash I think it does. Can I just come back to something you said earlier in terms of capacity and just refer you to um, Dr Westmore's reports which I believe you do have.

James I wouldn't do that for the moment. Dr Westmore raises the very real prospect that Mr Dezfouli does have capacity.

Nash That's right. Yes.

- James On the other hand, capacity means capacity for particular purposes. If I have otherwise perfect capacity but I am firmly of the belief that I go home at night and feed my dragon, people might think I'm fairly unusual, but I still retain capacity. Sir Arthur Conan Doyle had capacity to do all manner of things but firmly believed in the fairies in the bottom of his garden, because he was given photographs of them. That didn't mean he lacked capacity to write novels, to conduct business affairs and so forth. The issue is capacity to be able to determine whether he should publish and run press campaigns or whether that is a manifestation of his particular illness. And I understand the clinical position to be as put by some of the Justice Health doctors that such a campaign and some of the attitudes Mr Dezfouli evinces, indicates or are symptomatic of his illness, so that to pander to it, is simply to produce a situation not to his benefit but adverse to him. Is that right Dr Keller?
- Keller That summarises it well.
- James Yep. And putting the staff and other patients of the Hospital at risk.
- Nash I was going to come to another part, though, of the report in which Dr ..
- James Well, let me add this part. He doesn't have capacity to decide to do that, if he is not able to reason with a degree of composure and rationality as to whether he should do it or not. That's a short version of the test and I've had that recorded. I've taken it from Sir Owen Dixon in Porter.
- Nash Yes.
- James And if he is.. It's one thing to say I have capacity. I choose to exercise it to my own detriment. It's another thing not to be able to resist doing something to your own detriment because your disease causes you to do it.
- Nash I was going to say and I accept everything you say, um, what I was going to simply say is that in another part of the report where Dr Westmore expresses opinion he has the capacity to address the Tribunal itself. That's what I was coming to.
- James We know, (laugh) Mr Dezfouli has a number of times skilfully and with a wonderful command of English, addressed the Tribunal already.

Nash I see.

James But look, having raised this, I don't want all this to go off on a false premise. Um, Mr Dezfouli, his array of lawyers and assistants may wish, notwithstanding the volume of paper we've already got, to focus on the big issue here which is -- what is it he wants to publish? where does he want to do it? Because at the moment what we're being asked for is carte blanche and we simply can't give it.

Nash I accept that.

James But if we know the nature, the general nature at least, for instance, Ms Fitter, we did not get to see the program beforehand. But, we were given sufficient to know there was a documentary on a particular TV channel and it would have this general content.

Nash Right.

James We'd have to have a minimum of that to know the forum in which we're working. That will enable Justice Health to put in some submissions concerning the issues we've identified under 162 and 151(4). That will enable with a little bit of luck a regularisation of what's been going on so far. That will enable the Attorney General to advise or enable the Attorney General to get advice and will enable us to get proper submissions.

Nash Um. I appreciate you've asked the staff of Justice Health to actually give a little bit more detail of what they would like excluded. This may or may not assist..

James It's wanted both ways.

Nash Yes (laugh). I was going to say, this may or may not assist, um I've been given I suppose what is actually on the Justice Action website, a print of that and most people have probably seen that.

James Would you rather not make admissions?

Nash (Laugh). Okay.

James Whether policemen like it or not, we'd rather not receive admissions.

- Nash All right. I think that we'll wait in that case to see ..
- James You can feel free. But, what I suggest you do is put your written submissions in. Exchange them amongst yourselves. If we need to reconvene a hearing for the benefit of anybody, one side or the other, we will. We can actually do it by video link which would save a parade of people having to go through all that machinery outside. And, because this is a peculiarly legal and factual task ...
- Nash That's right.
- James Not connected with clinical role, except as impinges on it in relation to the effects on other people.
- Can I keep this, or, no, even better, I'll give it back to you and get you to send ..
- Johnson That's yours, that's fine.
- James Now, we've got .. Now, what sort of time frame..
- Nash I've just been asked to clarify that the written submissions are to show what's going to be published, where it's going to be published and the purpose of the publication?
- James Yep. Oh, I don't think I care particularly about the purpose. No, we're not too much interested in the purpose. We're interested in .. The important thing to look at is what might be the effects on Mr Dezfouli and on other people.
- Nash Yes.
- James Now, if Mr Dezfouli decides that he wants to publish some sort of attack on the operation of the Mental Health Review Tribunal in the Norfolk Island Daily Examiner, we won't care a hoot. On the other hand, if he's concerned to publish things that might impinge on any of the staff out here, it's a different thing entirely.
- Nash Yes, Mr Bodisco reminds me that um, although you having stated if it's on Norfolk Island, it doesn't matter, but if it's AAP gets hold of the website, then you can't control where it goes.

James Precisely. It may go all over the world. But the concern is that it might do harm to him or others.

Nash Yes.

James Or affect the welfare to be putting it in wider terms.

Nash No, I can appreciate that. Um, I think probably, the best thing is for me to confirm with Mr Dezfouli ..

James I think you'd better add something else to it. Of course, um, when you look at 154 and 162 it's not just Mr Dezfouli's publications, it's the publication of anybody.

Nash That's right.

James So, that applies. At the moment Mr Dezfouli may or may not publish some things, but certainly others are asserted to have published things and signed them and wanted the Mental Health Review Tribunal to help them out in doing it. Which it's not doing.

Nash Now, as far as the date by which you would require these submissions.

James Well, anybody who wants to do any publishing better get them in quick. You can't use the name for the moment. They aren't restricting the content for the moment. So, therefore, everybody had better get their submissions in within say a fortnight.

Nash Thank you.

James I'm not saying we'll deal with them in a fortnight, but I'm saying ..

Nash No.

James You'd better get them in within a fortnight.

Now, Mr Sterry there is one thing in your submissions I should take up, bearing in mind there are Supreme Court proceedings running. There is no general rule which you're not allowed to comment generally and publicly about court

proceedings. There is a rule that you're not allowed to, using the old terminology, scandalise the judiciary or attempt to bring the proceedings into such disrepute as might intimidate others from being engaged in the proceedings. They being sub-categories of contempt. But over and above that, public debate concerning issues that are before the Court and the Court's role, is perfectly acceptable without having to get into an implied constitutional right of political discussion. It's something very similar. And similarly, a public debate about the provisions of the law is perfectly acceptable provided you don't want to create a trust in favour of a testamentary trust in favour of it, cause it doesn't stand as a charitable trust.

Sterry Providing that its not prejudicial information it is ..

James Yeah. People can happily debate what the state of the law should be. They can happily debate principles that are involved in court cases provided they don't try to influence the outcome.

Sterry Yes.

James Or attack the judges.

Sterry Yes.

James As Mr Collins is aware from an episode many years ago at Darlinghurst. He can tell you about Justice O'Brien.

Nash I might make enquiries outside.

James Mr Collins was acquitted of contempt.

Collins No, no, found guilty.

James Oh, were you?

Collins I was given four weeks in jail.

James Were you, oh? He was handing out leaflets to jurors as they were leaving the court room.

- Collins I was only quoting judges. They can't complain about that.
- James Oh, well they did and I thought you were actually acquitted, but anyway.
- Nash If you'd been on the Bench, he would've been.
- James I doubt that. I very much doubt it. On that one, no. It was Justice O'Brien, who was the judge in question.
- Nash That's why I made the distinction.
Should there be an exchange of submissions
- James Well you're all adults ...
- Nash Yes, I just wanted to know..
- James You won't be able to do anything until Dr Keller and his legal advisers, including Mr Sterry and the Crown Solicitor's Office who act for Justice Health in another capacity involving Mr Dezfouli, all put their heads together and work out what is the focus and what the evidence should be and what restrictions if anything they want. Now, that leads me to the next one.
- I understand that because there's been deathly silence for so many months, um, Ms Johnson, that there is no need for anybody to persevere with whatever the application was made in relation to Mr Dezfouli having access to his medical records. He hasn't protested, Justice Health hasn't protested. It's sitting still on the books of the Tribunal, can I simply at this stage note that this application is not presently proceeded with and if anybody wants to bring it back again at any other time they can do so?
- Collins Well, no. It quite clearly becomes..
- James It's not his application. It's Justice Health's.
- Collins Okay. So we assume he has access to those records..
- James Dr Keller?
- Keller I'll need to refresh my memory and look at the specifics of the application.

James That's my point. It's about not letting him have access to his medical records and he's having access to his medical records.

Keller Well, we never submitted that he..

James No, no.

Johnson I think he's getting access to edited copies, as I understand it.

Nash Yes, that's right.

James But at the moment, is there any need for me to keep that one extant. If anyone wants to fight about it, they can come back another day.

Keller Certainly, from our perspective there's no need

James Good, right.

Johnson I think that's right, but I haven't had an opportunity to speak with Mr Mendon about it. Perhaps if I could contact the Tribunal ...

James He was the poor unfortunate that offered to intercede and mediate, you may recall.

Johnson He was. Out of respect to him and to make sure I haven't misunderstood anything, perhaps if I can undertake to contact the Tribunal and let them know.

James We will simply note that it's not proceeded with. We'll bring it back if ever it need be. We can use the equity procedure - until further order.

Johnson Thank you.

James It's our books cleared on that one too. All right? Everybody happy?

Nash Thank you very much.

James Bye.

Submission to Mental Health Review Tribunal 30/9/2010

Challenge to Tribunal's Ban on Saeed's Name

The Importance of a Name in Society: Ownership, Recognition and Identity

-My name may have buoyancy enough to float upon the sea of time. ~ Richard Watson Gilder~

Saeed Dezfouli has been held as a forensic patient since 2002. The New South Wales Mental Health Act 2007 (MHA) is currently preventing Saeed Dezfouli from using his own name in his fight to gain freedom. Section 162 of the MHA states that:

(1) A person must not, except with the consent of the Tribunal, publish or broadcast the name of any person:

(a) to whom a matter before the Tribunal relates, or

(full reference in annex 1)

Since this case involves significant matters affecting other patients, Justice Health powers and that of the Mental Health Review Tribunal (MRHT), Saeed wants to ensure it is conducted openly in the public, with him being able to express himself. Justice Action agrees with him entirely as the secrecy has allowed abuses to occur in the past without adequate accountability.

Saeed requests that the provision of s.162 of the Mental Health Act for his privacy be waived and for him to be allowed to use his name in the campaign for his release and to highlight the unfairness of his treatment and that of others by the Health Department.

He says that the section is intended to protect him from exploitation and exposure by the media, but instead it is being used to protect the Health Department from being held accountable for the treatment of citizens entitled to care and assistance. It has been used to prevent the exposure of a system that allows the abuse of the human rights of nameless, faceless, dehumanised mental health consumers.

We believe Saeed has the right to have his name recognised as a unique and to be distinguished from others, as are other citizens.

He wants to make a personal expression of how he feels and has taken a course involving political and public policy, which he wants to influence using his particular experiences within the mental health system. Saeed wishes to publish his material and generally make observations about his life and concerns, and propose better ways to deal with mental health issues.

In short he wants his right to having his own name returned to him, and for the provision intended for his benefit, not to be yet another abuse of power against him as a human being.

The administration of the MHRT has even blocked all 119 Tribunal members from receiving the OUR PICK Report, a report that highlights abuses of power and corruption within NSW health and Justice Health, because it mentions Mr Dezfouli's name. In

addition the MHRT has threatened legal action against media outlets that have shown an interest in making the story of Saeed Dezfouli public, if they attempt to use Mr Dezfouli's name without the explicit permission of the MHRT.

Use of discretion (Ferguson example)

Laws surrounding an individual's use of their own name in the public forum have been somewhat flexible in the past. For instance in the recent, high profile, Dennis Raymond Ferguson case, Magistrate Paula Russell at Parramatta local court, on 10 December 2009, allowed Mr. Ferguson to use his own name in the public arena despite s.18.2 of the Child Protection (Offenders Prohibition Orders) Act 2004 stating that his name must be kept private for his own protection. Magistrate Russell used her discretionary powers to ensure Mr. Ferguson could use his own name. He was therefore able to raise the profile of his story and expose the unacceptable actions of the police. (See annex 1 for transcript).

If there can be a degree of flexibility in relation to this law, in the above case, then perhaps we should consider whom these laws are really meant to protect. Laws surrounding the use of an individual's name by that individual should be assessed on a case-by-case basis. If the individual is aware of the potentially negative consequences of making their name public and they believe the positive consequences are greater than the negative, then surely it is their right to use the name publicly.

Intention of the legislation

Also of importance in this case is Section 33 of the Interpretation Act 1987 which states, 'In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object'. This Act gives a reasonable degree of liberty in relation to determining whom s.162 is intended to protect despite there being no clear indication in the Act itself.

Although there is no explicit expression in s.162 of whom the Act is intended to protect, in the 'Principles and Objectives' of the NSW Mental Health Act 2007 it is clearly outlined that the intent of the Act itself in its entirety is to protect and benefit the consumer. These are some of those principles and objectives:

- (a) To provide for the care, treatment and control of persons who are mentally ill or mentally disordered; and
- (b) To facilitate the care, treatment and control of those persons through community care facilities; and
- (c) To facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis; and
- (d) While protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care; and
- (e) To facilitate the involvement of those persons, and persons caring for them, in decisions involving appropriate care, treatment and control.

Police in practice take the rational approach rather than applying the strict letter of the law. On the 6 September 2010 Justice Action received from an inspector with the NSW State Crime Command. He said that there had been a complaint that we had breached section 162 of the Mental Health Act by naming a Mr Saeed Dezfouli without permission of the Mental Health Review Tribunal. He said that the Health Department had raised the matter and said that the Tribunal had not given permission. He said: "We don't think there is an issue anyway and we have decided that no action will be taken on it as long as the patient consents". This arguably demonstrates that the police interpret the law as existing to protect the consumer and not the MHRT.

Name and Identity

A name is a label given to a person, place or thing. This label assists in producing an image in our mind of the object that this label represents. A personal name identifies a *specific* unique and identifiable individual person. In this regard the name is a referent. It triggers images in the mind of the person that is exposed to it of the person to which it refers. It is therefore, in a social context, a crucial part of the whole identity and our concept of self. Surely losing control of your own name has a destabilising effect and does not create a positive therapeutic environment.

In a structuralist sense our name is our sign, a written or spoken representation of ourself. The sign itself consists of two parts the signifier (the word), and the signified (the object, concept or person). This dyadic relationship is how the sign is given meaning, removing one of these parts leads to confusion or meaninglessness¹.

Generally speaking, anything that does not possess a name to make itself known by does not exist, or exists but as yet has not been discovered by human beings. To be without a name is to be completely excluded.

Few people are put in a position where they have to fight to use their own name. Similarly few people could imagine a situation where this may be an issue. For reasons, which remain unclear, for mental health consumers, being held on forensic wards in New South Wales, trying to make the public aware of your name is an ongoing struggle.

A person's name is deeply tied up in the concept of identity. The ownership of and use of the individual's own name should be an inalienable right. Legislation created to protect the identities of mental health consumers within the forensic system is being used to systematically strip human beings of any identity outside of the facilities they are being kept in.

'Personal identity plays an indispensable role in human life. It guides one's choices and actions, and makes them coherent and consistent. It enables one to plan and structure one's life, give it a direction, and to ensure one is not a reflex of others' expectations or a playing of internal and external sources. It provides the norms by which one judges oneself, and is the basis of one's integrity' (Parekh, 2009, p.270)².

¹ Joseph, J. E. (2004) The Linguistic Sign. In C. Sanders (Ed.), *The Cambridge companion to Saussure* (59-75). London: Cambridge University Press.

² Parekh, B. (2009) Logic of identity, *Politics, Philosophy Economics*. 8, 267-284.

Given the importance of identity to basic humanity it defies belief that we as a society allow some of society's most vulnerable people to be stripped of the right to freely use their own name. By interfering with the way in which a person chooses to use their own name we impose on their very identity.

Annex 1

Sec 162 of the Mental Health Act 2007

(1) A person must not, except with the consent of the Tribunal, publish or broadcast the name of any person:

- (a) to whom a matter before the Tribunal relates, or
- (b) who appears as a witness before the Tribunal in any proceedings, or
- (c) who is mentioned or otherwise involved in any proceedings under this Act or the *Mental Health (Forensic Provisions) Act 1990*, whether before or after the hearing is completed.

Maximum penalty:

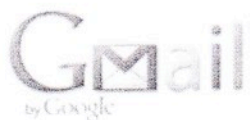
- (a) in the case of an individual—50 penalty units or imprisonment for 12 months, or both, or
 - (b) in the case of a corporation—100 penalty units.
- (2) This section does not prohibit the publication or broadcasting of an official report of the proceedings of the Tribunal that includes the name of any person the publication or broadcasting of which would otherwise be prohibited by this section.
- (3) For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or material that identifies the person or is likely to lead to the identification of the person.

Transcript from Ferguson Example

Magistrate Paula Russell: Formulating the wording of such a direction in view of the way the sections worked but it would appear that the prohibition in s 18(1)(a), that is that a person must not publish in relation to any proceedings relating to an order under this Act, any information that identifies or is reasonably likely to enable the identification of a person as the person against whom the order is sought or any such order is made. That section will not apply with respect to the application sought in this matter, is that the appropriate way to deal with it?

POLDEN: Yes your Honour. If your Honour wanted to formalise it, I could draft it out but if I might suggest that your Honour could formalise it if it's necessary or desirable simply in terms of the court making an order pursuant to s 18(2) of the Child Protection (Offenders Prohibition Orders) Act 2004 that there be authority for publication in relation to the instant proceedings of information that identifies or is reasonably likely - I'm reading from subsection (1)(a) your Honour - enable the identification of the person namely the respondent, the person against whom the order in the instant proceedings is sought or against whom any such order is made. I wouldn't ask for it to go any wider than that your Honour.

Magistrate Paula Russell: All right, I'll adopt that formula Mr Polden doing the best I can and that is pursuant to s 18.2 of the Act, section 1A which prohibits information or is reasonably likely to enable the identification of a person as the person against whom the order is sought or any such order is made does not apply in respect of these proceedings, that is proceedings for an Interim Apprehended Violence Order - I'll withdraw that - proceedings for an interim order under the Child Protection (Offenders Prohibition Orders) Act 2004.



peter obrien <obriensolicitors@gmail.com>

Re Submission from Justice Health Re s162 MHA application for Mr Dezfouli

Brett Collins <brett@justiceaction.org.au>

Thu, Mar 10, 2011 at 6:59 PM

To: Fiona - O'Brien Solicitors <info@obriensolicitors.com.au>

From: Michael Sterry <Michael.Sterry@justicehealth.nsw.gov.au>

Date: Fri, 15 Oct 2010 10:51:21 +1100

To: Greg James <gjame@doh.health.nsw.gov.au>

Cc: "rbrab@doh.health.nsw.gov.au" <rbrab@doh.health.nsw.gov.au>, Adrian Keller <adrian.keller@justicehealth.nsw.gov.au>, Trevor Perry <Trevor.Perry@justicehealth.nsw.gov.au>, Brett Collins <brett@justiceaction.org.au>, Andrew Dikha <adikha@citylegalsolicitors.com.au>

Subject: Re Submission from Justice Health Re s162 MHA application for Mr Dezfouli

Dear Mr James,

In regards to the further submission requested at the hearing of 30/9/10 in this matter, Justice Health has, after further reflection following the hearing, determined that it does not wish to continue as a party in these proceedings. However should Mr Dezfouli's further submission make an application to the Tribunal for a specific proposal, Justice Health may make an application to the Tribunal to provide a further submission.

Michael Sterry
Forensic Legal Advisor

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michael.sterry@justicehealth.nsw.gov.au

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peter obrien <obriensolicitors@gmail.com>

Submission from Justice Health Re s162 MHA application for Mr Dezfouli letter for Return of Name

Brett Collins <brett@justiceaction.org.au>

Thu, Mar 10, 2011 at 6:58 PM

To: Fiona - O'Brien Solicitors <info@obriensolicitors.com.au>

From: Brett Collins <brett@justiceaction.org.au>**Date:** Wed, 24 Nov 2010 17:27:03 +1100**To:** Greg James <gjame@doh.health.nsw.gov.au>, MHRT
<mhrt@doh.health.nsw.gov.au>**Cc:** Anina Johnson <Anina.Johnson@agd.nsw.gov.au>, Michael Sterry
<Michael.Sterry@justicehealth.nsw.gov.au>, "rbrab@doh.health.nsw.gov.au"
<rbrab@doh.health.nsw.gov.au>, Trevor Perry <Trevor.Perry@justicehealth.
nsw.gov.au>**Conversation:** Submission from Justice Health Re s162 MHA application for Mr
Dezfouli letter for Return of Name**Subject:** Submission from Justice Health Re s162 MHA application for Mr Dezfouli
letter for Return of Name

Dear Mr James,

We write to inform you that Mr Dezfouli is no longer represented by Mr Dikha, Mr Bodisco and Ms Nash. This has also been conveyed to the Supreme Court yesterday at which your Deputy President John Feneley was present.

Mr Dezfouli has requested me to notify you that we have no further submissions regarding his s.162 MHA Application for the return of his name and a further hearing would be unnecessary as we have already made our submissions and presented our arguments.

As Justice Health has withdrawn as a party in the email below, we put it to the Tribunal that it should now agree to Mr. Dezfouli's application and make an order accordingly.

We ask you to make and publish your decision as soon as possible. This is a matter of urgency because a decision will be made by the Supreme Court this Friday 26th November in relation to the leave to appeal, on which Mr. Dezfouli wishes to make comment. Several members of the media have asked in advance for his response, and we have a duty to inform the general public on the issues that are being considered.

We look forward to your swift reply.

Regards,

Brett Collins

Coordinator

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From: Michael Sterry <Michael.Sterry@justicehealth.nsw.gov.au>

Date: Fri, 15 Oct 2010 10:51:21 +1100

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Review Tribunal

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Mr Brett Collins
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25 November 2010

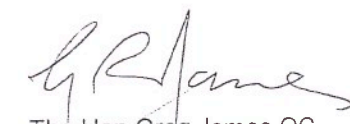
Dear Mr Collins

I refer to your email dated 24 November 2010 requesting notification of the Tribunal's decision in relation to Mr Dezfouli's application pursuant to s162 of the *Mental Health Act 2007*. You will recall that following receipt of Mr Dezfouli's application, I informed you by email on 20 September 2010 that the Tribunal would require the detail of what publication you wished to have approved.

At the hearing held on 30 September 2010 the Tribunal pointed out to you that your submission did not include the details of the publication for which approval was sought and that it could not make an order unless it was informed of what it was sought to approve. The matter was adjourned not only to allow Justice Health to consider any further submissions in relation to s162 and s151 of the *Mental Health Act 2007*, but also for Mr Dezfouli's representatives to provide the Tribunal with details of the nature and content of the publication for which approval was sought.

The Tribunal has still not been provided with the required information. Consequently, the matter was struck out on 24 November 2010. Any further applications pursuant to s162 of the *Mental Health Act 2007* will need to be accompanied by the specific details of the context, content, and mode of the relevant publication or broadcast for which permission is being sought.

Regards


The Hon Greg James QC
PRESIDENT