

## **SUBMISSION BY JUSTICE HEALTH IN RELATION TO THE APPLICATION UNDER SECTION 162 OF THE MENTAL HEALTH ACT 2007 TO OBTAIN THE CONSENT OF THE TRIBUNAL TO PUBLISH MR DEZFOULI'S NAME.**

It is the submission of Justice Health, on behalf of the clinical staff of the Forensic hospital treating Mr Dezfouli, that the application to obtain consent from the Tribunal, in accordance with section 162 of the Mental Health Act 2007 (MHA), should not be granted by the Tribunal for various reasons contained in this submission and particularly as it would not serve the best interests of Mr Dezfouli.

On 20 September the President of the Mental Health Review Tribunal (Tribunal) requested Mr Brett Collins, the primary carer of Mr Dezfouli, to provide amongst other things "the detail of what publication you wish approved". It is submitted that this request has not been complied with and it is presumed from the submission provided in response that a general Tribunal consent is sought for the publication of Mr Dezfouli's name. This is opposed by Justice Health for the following reasons:

- It is too broad an approval which could allow for the publication of material that may be seen as inappropriate when looked at specifically;
- It is unclear as to whether the application sought is broad enough to allow any person to so publish eg Sydney Morning Herald;
- It removes the power of the Tribunal to make a considered opinion about a specific publication;
- The approval sought would not be in the best interests of Mr Dezfouli;
- It is considered by Justice Health that if the Tribunal are to consider giving consent in accordance with s162 MHA, that section should be used in its narrowest of interpretations ie for an article submitted to the Tribunal for a particular publication.

It is submitted by Justice Health that in accordance with long standing legal principles the publication of matters that are before the courts should not be debated in the press as this may prejudice those that are empowered to decide the matter. When coupled with the fact that special protection is given by the law to those that are considered to generally be disadvantaged by an impediment whether due to age (Children and Young Persons (Care and Protection) Act 1998 s105), intellectual capacity (Guardianship Act 1987, s57) or mental illness (s162 MHA), it is submitted that the exception empowering the Tribunal to consent to publication should be used with extreme caution lest the very abuse these principles are trying to protect should occur.

On 1 May 2003, Mr D was found unfit to be tried. Pursuant to section 14 of the then Mental Health (Criminal Procedures) Act 1999. On 8 July 2003, the Attorney General directed that a special hearing be conducted and on 19

March 2004, Mr D was found not guilty by reason of mental illness in relation to the charges brought against him.

The Tribunal is referred to an English case decided in the High Court of Justice Family Division, *E v Channel Four and others* 2005 EWHC 1144 (Fam) 1/6/05 (E case). In this case an interim injunction was sought to restrain the broadcasting by Channel Four Television Corporation of a film and the publication by the Sunday Times of an article about E. She was a woman of 32, who had a learning disability and a disorder of personality where she manifested on occasions four different personalities. As a result it was asserted that she lacked the capacity to consent to what Channel Four and the Sunday Times were proposing. The inherent jurisdiction of the court was requested to be invoked. Although the case revolved around the balancing of provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms one which protected a person's privacy (Article 8) and another that protected the right to publish material (Article 10), the court considered its inherent jurisdiction in relation to mentally incapacitated adults for the purposes of the decision. Also taken into account in the case was consideration of the questions as to whether the person had capacity and was the best interests of E taken into account. It was emphasised in the judgement that the individual circumstances of the case needed to be taken into account.

The facts in respect of E's situation as outlined in the case were quite different from the matter with Mr Dezfouli in several respects. Firstly the judge was able to view the intended publications before they were published and arrive at a considered judgement. Several of the witnesses actually viewed the film with E watching and made positive assessments as a result of her reaction to the film. Because of the particular material examined it was considered that it was unlikely that a case could be made out that it would be deleterious to E and the interim injunction was refused.

The judgement in the E case distinguished cases where the person consented and where the person did not consent. The court considered that in cases such as the one under consideration there are three principles which have to be considered;

- "i) Does Pamela lack capacity? If yes, then
  - ii) Is it in Pamela's best interests that the film not be broadcast? If yes, then..."
- (at para 53). [The third ground related to the balancing of Article 8 and Article 10 of the Convention.]

When looking at capacity, the Court stated that "As an adult, Pamela is presumed to have capacity unless the contrary is established" (at para 59). The Court also emphasised that the issue of capacity was always "issue specific" (at para 76).

In relation to the assessment of an incapable patient's best interests, the Court considered that it involves taking into account not just medical but a

wide range of ethical, social, moral, emotional and welfare considerations (para 62).

It is submitted that s162 MHA was drafted to disallow the publication of the name of a person who had a matter before the Tribunal as the general rule to encompass the inherent power of the Court to protect amongst other things, the right of privacy for a mentally incapacitated person. The power to provide for exceptions is given to the Tribunal in its judicial capacity. It is submitted that the Tribunal, in making its determination, can follow the criteria set out in the E case by determining firstly whether or not Mr Dezfouli has capacity to consent and if not what is in his best interests.

In relation to capacity it is submitted that Mr D does not have the capacity to consent for the following reasons:

- Mr D was found by the Supreme Court to be unfit to plead and was found at a special hearing to be not guilty by reason of mental illness;
- The current psychiatric reports indicate that the underlying mental illness ie “ his paranoid psychosis has yet to have come under adequate control”;
- An independent assessment by psychiatric staff from Morisset Hospital on 31 March 2010 confirmed that Mr D has “ongoing psychotic symptoms”;
- The Bunya unit at Cumberland Hospital has also recently reviewed Mr D and have also considered he still is not well enough to be considered for transfer to their unit.
- .Mr D is reported to be agreeing to an undisclosed general consent to material being released in his name which he may not have yet seen, and this could be seen as an indication that he has not properly considered the matter;
- The material already published appears to relate to Mr Dezfouli’s previous complaints which have been associated with his paranoid psychosis so that the specific area to which he is giving consent is directly associated with his mental illness.

In relation to the best interests of Mr Dezfouli it is considered that it is not in his best interests to allow the s162 MHA application to be granted for the following reasons:

- Mr D is apparently agreeing to an undisclosed general consent to material being released with his name which he may or may not have seen and which cannot be accurately assessed on its merits;
- In the E case the issue of what was in the subjects best interest was looked at in regards to a particular article and film whereas in this case no specific material is referred to;
- It is hard to envisage all situations that can arise with a general approval to publish and puts the Tribunal in a very difficult position to judge what the best interests would be in all situations;
- The current publication on the Justice Action website is based around areas that relate directly to the manifestations of Mr Dezfouli’s psychotic symptoms;

- If the current material published on the web in relation to Mr Dezfouli is the example of material Mr Dezfouli is being encouraged to follow rather than pursuing his grievances through the legal avenues he is currently following ie through the Administrative Decisions Tribunal, Supreme Court and the Ombudsman, it is submitted that it is at least inappropriate to encourage this course.
- Publication may have social ramifications for Mr Dezfouli's integration back into the community as public knowledge of a person who has been charged with setting fire to a building with people in it which led to the death of one person may meet with opposition from potential neighbours.
- Other less secure mental health units may consider Mr Dezfouli's pursuit of the types of publicity currently in evidence as a continuation of his psychotic symptoms and as a result consider that he is not suitable for that accommodation therefore harming his prospects of rehabilitation;
- Should the publication lead Mr Dezfouli to consider that this will mean public vindication of his beliefs and this does not occur, then Mr Dezfouli's emotional wellbeing may be affected?

Justice Health would also like to submit more generally that publication should not be agreed to on the current submission as:

1. Justice Health has a wider interest in protecting the safety of all patients in the Forensic Hospital and, if a precedent was set, the publication of the names of other patients in the hospital may lead to the security of the Hospital being compromised;
2. It is not necessary for Justice Action to publish Mr Dezfouli's name in order to advocate publicly on his behalf;
3. It is in Mr Dezfouli's best interest to take his grievances through the appropriate legal channels ie the Tribunal, Administrative Decisions Tribunal, Official Visitors, Health Care Complaints Commission and the Ombudsman;
4. As Justice Action have already published Mr Dezfouli's name on their website with certain material without any apparent benefit to Mr Dezfouli, it is submitted that official approval for such action would not create a new benefit for Mr Dezfouli;
5. The approval of a general publishing right without the benefit of the Tribunal considering the specific instance to judge the benefit or harm is not, it is submitted, in the spirit of the legislation which provides the Tribunal with the power to review forensic patients in relation to current specific material before them. It is submitted that the section does not provide for the Tribunal giving another person or body the power to determine the best interests of the person in relation to a particular publication.