

**THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH
REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR
EDWARD UNDERWOOD AUTHORISED BY THE PRESIDENT OF
THE TRIBUNAL ON 9 SEPTEMBER 2016**



This is an edited version of the Tribunal's decision. The forensic patient has been allocated a pseudonym for the purposes of this Official Report

FORENSIC REVIEW: Underwood, Edward

Mental Health (Forensic Provisions) Act 1990

DISTRICT COURT NUMBER zzzzzzzzzz

TRIBUNAL:

Anina Johnson	Deputy President
John Basson	Psychiatrist
Stephen Woods	Other Member

DATE OF HEARING: April 2014 (Adjourned)
July 2014

PLACE: Metropolitan Remand and Reception Centre

DETERMINATION

The Tribunal determines that Edward Underwood, on the balance of probabilities, will not, during the period of 12 months after the finding of unfitness, become fit to be tried for the offence included within the indictment in relation to which this person has been found unfit to be tried.

RECOMMENDATION

The Tribunal recommends that when considering the question of bail, the court have regard to the likely improvement in Mr Underwood's ability to participate effectively in his special hearing, if his back pain is able to be alleviated by access to physiotherapy and physical treatments which are not available to him in a correctional environment.

Signed

Anina Johnson
Deputy President
Dated this day
26th August 2014.

REASONS

This is the first review of Edward Underwood who is currently detained in the Metropolitan Remand and Reception Centre (MRRRC) on an order of the District Court, in 2014. A review pursuant to section 16 of the Mental Health (Forensic Provisions) Act 1990 was adjourned.

BACKGROUND

In 2014 Mr Underwood was found unfit to be tried by the District Court on a variety of different charges. He was ordered to be detained. Further background information concerning Mr Underwood's history is described in Annexure A to these reasons. In reaching its decision in this matter, the Tribunal has had regard to, and accepts as accurate, this background information which is maintained by the Tribunal's registry.

TRIBUNAL REQUIREMENTS

Under section 16 of the *Mental Health (Forensic Provisions) Act, 1990* ('the Act') the Tribunal must, as soon as practicable after the person is so referred, determine whether, on the balance of probabilities, the person will, during the period of 12 months after the finding of unfitness, become fit to be tried for the offence. If the Tribunal determines that the person will become fit, the Tribunal must also determine whether or not the person suffers from: (a) a mental illness; or (b) a mental condition for which treatment is available in a mental health facility, and, if the latter, whether the person objects to being detained in a mental health facility. Under section 16 (3A) the Tribunal may also make recommendations to the Court as to the care of the person.

As Mr Underwood is detained, the Tribunal is also required to conduct a review under section 46 of the Act and may make orders as to the patient's continued detention, care or treatment or the patient's release. On review of a patient under section 46, the Tribunal is required under section 47, where the patient has been found unfit to be tried, to consider the fitness of the patient to be tried. Where the Tribunal is of the opinion that the patient has become fit to be tried or has not become fit to be tried, and will not, during the period of 12 months after the finding of unfitness by the Court, become fit to be tried, the Tribunal must notify the Court and the Director of Public Prosecutions.

Without limiting any other matters the Tribunal may consider, the Tribunal must consider the principles of care and treatment under section 68 of the *Mental Health Act 2007* as well as the following matters under section 74 of the Act when determining what order to make:

- (a) whether the person is suffering from a mental illness or other mental condition,
- (b) whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm,
- (c) the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration...

DOCUMENTARY EVIDENCE

The Tribunal considered the documents listed in the Forensic Patient Exhibit List annexed to these reasons.

ATTENDEES

Edward Underwood attended the hearing accompanied by his lawyer, Barrister Mr B and Solicitor Ms S.

Also in attendance were:

- Dr A, Psychiatrist;
- Ms G, A/Clinical Nurse Consultant; and
- 1 Student nurse observing.

PRESENT CIRCUMSTANCES

The Tribunal first reviewed Mr Underwood, in order to assess his fitness under section 16 of the Act in April 2014. At that point in time, the Tribunal had before it a report from Dr W, which noted that Mr Underwood had some evidence of a psycho-motor retardation, slow speech, depressed mood and restricted affect. Dr W concluded Mr Underwood suffered from a true major depressive illness, rather than an adjustment disorder with depressed mood and was also likely to fulfil the criteria for Post-Traumatic Stress Disorder following an explosion at his workplace in 2009. At the time, Dr W considered that given Mr Underwood's depressed mood, his concentration and ability to follow a trial would be impaired and he was unfit to be tried. However Dr W opined that it would only require a small improvement in Mr Underwood's mental condition for him to be able to attend the trial and understand the evidence. Dr W was of the view that Mr Underwood would become fit to be tried within the relevant 12 month period.

The Tribunal also noted at that hearing that Mr Underwood presented as being in quite a lot of physical pain from a back condition. Dr W advised that Mr Underwood had received an injection at the Pain Management Clinic at the Prince of Wales Hospital, but it did not appear to have been very effective.

Mr Underwood's counsel submitted that his client was unlikely to become fit to be tried in the relevant 12 month period.

In the circumstances the Tribunal determined that it was appropriate that consideration of Mr Underwood's fitness should be adjourned for a further period of time to see whether his mental condition improved sufficiently to allow him to become fit to be tried.

The Tribunal reviewed Mr Underwood again in 2014. At that point in time the Tribunal had before it a report from Dr A. Dr A noted the contents of the two reports prepared by Dr N and Dr C for the Court. He noted that since the Tribunal's last review Mr Underwood experienced ongoing symptoms of depression. His mood appeared to deteriorate in the evening, although there was some reactivity in his mood. Mr Underwood reported some reduced concentration in relation to his reading but denied significant memory

impairment. Dr A said that Mr Underwood maintained some hope and optimism in regards to his legal case. He attributes his depression to the stress of his legal case and being in custody.

In relation to his back pain, Mr Underwood reported to Dr A that this contributes to his depression in that it impairs his sleep. At home Mr Underwood said that he would have weekly physiotherapy with regular use of physiotherapy implements and foam mats and the daily use of a tens machine, fortnightly hydrotherapy and regular exercise to manage his back pain. These treatments are unavailable to Mr Underwood whilst he is in custody. Mr Underwood reports his back pain has significantly deteriorated during his time in custody and the treating team had prescribed regular paracetamol with the addition of non-steroidal anti-inflammatory. However the anti-inflammatory had caused bowel bleeding and therefore had to be ceased.

It is worth noting that from the Tribunal's observations of Mr Underwood during the hearing, he appeared to be suffering considerable back pain. Although he remained mostly seated, he did move regularly in his seat in order to adjust his position. Mr Underwood sat with his head in his hands for most of the Tribunal hearing and appeared to grimace when moving.

Dr A in his report said that Mr Underwood was able to give a detailed and coherent account of events leading up to his arrest. He was aware that there were a large number of charges. He was aware of what a plea meant and was able to discuss what he intended to plead. He understood the roles of the officers of the court, including those of his own legal representatives and the prosecutor. Dr A said that Mr Underwood was vulnerable to cognitive and physical fatigue as a result of his depression, Post Traumatic Stress Disorder and physical pain. However Mr Underwood was able to co-operate with an extensive psychiatric history and did not demonstrate any significant impairment in his attention and concentrational memory of the time, although Dr A considered that during an extensive court case he may demonstrate some mild impairment. Mr Underwood discussed with Dr A the strategies that he could employ should he feel fatigued during the court case and said that he would be reliant on regular summaries from his legal team as well as regular breaks. If possible, he would like to be granted bail so that he would be able to improve his physical rehabilitation, back pain management and thus reduce that source of ongoing impairment.

Dr A said that Mr Underwood's depressive condition had moderately improved since the last Tribunal hearing. He considered that although there were residual symptoms of depression that might have an impact on his concentration and leave him vulnerable to fatigue, with the support of his legal team he thought that Mr Underwood would be able to follow the court proceedings, challenge and respond appropriately to cross examination and was fit to be tried.

At the hearing, Mr Underwood's legal team vigorously argued that their client was not fit to be tried and would not become fit within 12 months.

Mr B noted that his client has a background of a number of interactions with psychiatric services going back to 2009, following an incident at work. His client also had an extensive history of migraine and

physical pain. Both Mr B and Mr S acknowledged that their client appeared superficially a lot better than he had been earlier in his time on remand. However, they argued that they had been unable to take coherent instructions. They were regularly obliged to repeat explanations that they had previously given and Mr Underwood was unable to answer basic questions or understand basic concepts. He had difficulty remembering conversations including conversations that he had had only several days before hand.

Mr S and Mr B emphasised that the case that Mr Underwood was facing was a very complex one. The brief was more than 16,000 pages with several volumes of subpoenaed material to be considered. The trial would last weeks and potentially months. The factual matters to be traversed covered a considerable period of time. In addition the legal issues that would need to be canvassed included complicated legal concepts. Mr Underwood's legal representatives emphasised that Mr Underwood had to be able to grasp these concepts in order to provide instructions to his legal team.

Mr Underwood's legal representatives emphasised that although there had been some improvement in his mental state, it was not the level of improvement that they had hoped for. They had not yet seen him well enough to be able to assist them in the preparation of his case or instruct them competently. He can no longer remember how long he has been in custody and has said that he no longer cares about the outcome of the trial.

Dr A said at the hearing, that Mr Underwood was able to participate in an extensive one and a half hour interview. He had never repeatedly asked the same question. There was certainly ongoing depression and ongoing issues with pain. Dr A thought that these matters would improve further with time. Dr A did say that Mr Underwood did have an obsessive personality style. He was very good at giving factual accounts of matters, but was very black and white in his thinking. He may have more difficulties with issues of nuance.

The Tribunal reserved its decision.

After the Tribunal's hearing concluded, Dr A sought leave to seek a second opinion from his colleague, psychiatrist Dr E, and to provide the Tribunal with a further supplementary report. Mr Underwood's legal representatives agreed to this course of action. A further report was provided by Dr A. In that report, Dr A revisited the opinion that he expressed previously and said that in his view, Mr Underwood would now be unfit to stand trial for the foreseeable future. Dr A based this view, in part, on the fact that after the Tribunal's review Mr Underwood had received distressing information in relation to the breakdown of his relationship with his wife. This stress appears to have destabilised Mr Underwood's already fragile mental state and had triggered a relapse of his depressive disorder. Dr A said that Mr Underwood currently reports feelings of hopelessness and expressed a nihilistic outlook with a host of depressive cognitions. He feels that he will be destitute, never see his children again and he has ceased to see any point in getting out of gaol. He is very focused on the discomfort relating to his chronic pain syndrome and increasingly ambivalent about accepting treatment. His insomnia has worsened and he is experiencing

persistent daytime fatigue. On interview, Mr Underwood was agitated and restless. He finds it difficult to sit down and find a position without being in significant pain. Dr A reported that Mr Underwood now holds his face in his hands and rarely makes eye contact (this is consistent with the Tribunal's observations during the hearing). Dr A considered Mr Underwood has experienced a significant relapse of his depressive disorder which is having a significant impact on his fitness to stand trial. Dr A notes that Dr E has also reviewed Mr Underwood's situation and both are of the opinion that Mr Underwood would not have the ability to actively maintain his participation in a complex court case that is likely to extend over a significant period of time. For this reason, given the instability of Mr Underwood's mental state, Dr A was now of the view that Mr Underwood was unfit for trial and would likely to remain so for the foreseeable future.

CONCLUSION

The High Court in *Kesavarajah* emphasised that there was simply no point in embarking on a lengthy trial with all the expense and inconvenience it may entail if it is to be interrupted by reason of some manifestation or exacerbation of a debilitating condition which could affect the accused's fitness to be tried. In *Kesavarajah*, the Court noted that the stress of a trial alone may be such as to make a pre-existing condition flare up. The evidence before the Tribunal in this case is that Mr Underwood does have such a pre-existing condition and that it has flared up under the stress of personal and legal pressures. The weight of evidence from both Mr Underwood's treating clinicians and his legal team is that Mr Underwood is currently unfit to stand trial. Although there have been periodic improvements, his mental state is sufficiently fragile that it is unlikely to be able to withstand the rigours of what is likely to be a long and complicated hearing. In those circumstances, the Tribunal is satisfied that Mr Underwood remains unfit to stand trial and will not become fit within 12 months of the court's order.

Pursuant to section 16(3A) the Tribunal has the power to make recommendations to the Court in relation to Mr Underwood. A consistent theme through the evidence presented to the Tribunal is the impact that Mr Underwood's chronic back condition has on his fitness generally and his depression in particular. It is apparent that this condition makes it difficult for Mr Underwood to sit still and concentrate. It interferes with his ability to sleep and taken as a whole it contributes to a worsening of his depressive illness. Dr A's clear evidence was that the kind of physiotherapy treatment that have assisted Mr Underwood in the past is simply not available in a custodial environment.

The Tribunal recommends to the court that when considering the question of bail, the court consider the likely improvement in Mr Underwood's ability to participate effectively in his special hearing, if his back pain is able to be alleviated by access to physiotherapy and physical treatments. In making this recommendation, the Tribunal is not suggesting that Mr Underwood will become fit to be tried if released on bail and able to access physiotherapy treatments. However it may ameliorate his condition enough to allow him to participate more fully than he would otherwise.

Having regard to:

- the expert oral and written evidence presented by Dr A, Dr W and Dr E; and
- the fitness criteria referred to in the decisions of Smith J in R v Presser [1958] VR 45 at 48, and Mason CJ, Toohey and Gaudron JJ in Kesavarajah v The Queen (1994) 181 CLR 230 at 245, 246:

Section 16

For the purposes of section 16 of the Act, the Tribunal determined that:

- because of Mr Underwood's mental illness, namely depression, he does not meet the criteria for fitness to be tried for an offence; and that
- on the balance of probabilities, this situation will continue, and Mr Underwood will not become fit during the period of twelve months after the finding of unfitness.

As is required by the Act, the Tribunal has taken steps to notify both the Court and the Director of Public Prosecutions of this opinion and determination.

This is the unanimous determination of the Tribunal which was constituted by the Deputy President, Psychiatrist and Other Member.

ANNEXURE A

BACKGROUND

Index Event

An investigation by Police revealed that Mr Underwood was in possession of firearms and ammunition for which he was not authorised. He was arrested and charged with a variety of different charges. In 2014 he was found unfit to be tried and ordered to be detained.

Prior History

According to Dr C's report Mr Underwood reported that he saw a psychologist on one occasion in 2005 following a workplace incident. Mr Underwood also reported that in 2008/09 he saw a psychologist on six occasions and received counselling while he was on stress leave during another workplace incident. He was diagnosed with adjustment disorder with anxiety in response to the conditions of his employment.

Reports indicate that Mr Underwood used sleeping pills in the past.

Mr Underwood reported that he is a mild social drinker and that he does not use illicit substances.

Mr Underwood reports that he was diagnosed by Dr D in Melbourne, as suffering with migraines for the past 10 years. He claims to have injured his back in 2007/8 and was prescribed anti-inflammatory medication. He had lodged a worker's compensation claim for psychological injury in 2009, an ankle injury and a back injury.

This is Mr Underwood's first time in custody. There have been no prior infringements noted.

Forensic Patient History

Mr Underwood was received into custody at the MRRC in 2013. Dr N conducted a mental state examination in 2013. He noted that there were no obvious signs of neurological disorder but that Mr Underwood was agitated and slow to respond to questioning. He appeared to be severely depressed and he wept during the interview with Dr N. He did not report symptoms of psychosis. He told Dr N that he feared for his life and the safety of his family and that he may have been the victim of a widespread conspiracy.

Dr N noted that Mr Underwood's account of the events leading to the charges did not have the quality of a delusional belief arising from a psychotic illness. Dr N diagnosed Mr Underwood with major depressive illness. Dr N concluded that Mr Underwood was unfit to enter a plea but he expected that Mr Underwood would become fit for trial within 12 months as Mr Underwood's condition is amenable to treatment provided that he has access to appropriate and adequate treatment.

A report by Dr N noted that Dr Z had made a provisional diagnosis of severe adjustment disorder, or a state of anxiety and depression triggered by a life event of being arrested and imprisoned. Dr N noted

that Dr Z had initiated treatment for Mr Underwood with antidepressant medication (Zoloft) and two antipsychotic medications Seroquel and Zyprexa. Dr Z believed that Mr Underwood required treatment in a mental health facility.

Dr N diagnosed Mr Underwood with major depressive illness, possibly with psychotic features following a mental state examination. Dr N concurred with the opinion that Mr Underwood is a mentally ill person who requires treatment in a psychiatric hospital.

Dr C's report provided a diagnosis of major depressive disorder precipitated by current legal and personal psychosocial stresses. Dr C queried post-traumatic stress disorder symptoms as a provisional diagnosis that may require further evaluation and also diagnosed chronic backache and chronic headaches/migraines. Dr C noted that Mr Underwood reported that since his arrest and detention, he had been suffering from insomnia, loss of appetite and weight loss, poor concentration and low energy levels which qualifies Mr Underwood for the diagnosis of major depressive disorder. He formed the opinion that Mr Underwood was unfit to be tried, with his fitness to stand trial likely to be restored within the next 12 months if given psychiatric treatment and psychological counselling.

PREVIOUS REVIEW

A Tribunal hearing listed pursuant to section 16 of the Act was adjourned. That was the first hearing following the Court's finding.