



## JUDGEMENT

The Applicants in these proceedings seek the following relief:

- 1) An order of certiorari quashing the decision of the Respondents to convene the Special Tribunal on Wednesday 7<sup>th</sup> September 2005 to review the case of the Applicants.
- 2) An injunction restraining the Respondents from reviewing the case of the Applicants until the hearing and determination of this action or until further order.
- 3) An order directing the Respondents to disclose to Attorney-at-Law for the Applicants all the materials to be considered by the Respondents in reviewing the case for the Applicants.
- 4) A declaration that the Applicants and/or his legal advisors are entitled to reasonable and adequate notice of the meeting of the Respondents to review the case of the Applicants.
- 5) An order directing that Respondents to disclose to the Applicants or his legal advisors the names of the members of the Special Tribunal to consider the case of the Applicants and the remit of the Tribunal.
- 6) An order that the Applicants are entitled to make representations to the Special Tribunal in reviewing the case of the Applicants and to adduce evidence on their own behalf.

The basic facts of this case are not in dispute. In 1986 both Applicants were tried for murder. The Jury brought in special verdicts of guilty of murder but insane at the time when the act was done pursuant to section 66 of the **Criminal Procedure Act** Chapter 12:02. Under section 67 of the Act the Court sentenced the Applicants to be detained until the President's pleasure be

known. Under section 68 of the Act the Court is required to report the finding of the Jury to the President, who “shall order the person to be dealt with as a mentally ill person in accordance with the law governing the care and treatment of such persons or in any other manner he may think necessary”

No such order was made by the President under section 68. In 2003, the Applicants filed constitutional motions challenging the legality of their continued detention. These motions were heard by Stollmeyer J. who ordered inter alia, that the Applicant’s mental condition be assessed forthwith, and a review be carried out immediately thereafter. The purpose of the assessment and review was to determine whether the Applicants should be released from prison or further detained. Stollmeyer J. further suggested the setting up of a “New Tribunal” similar to the Psychiatric Hospital Tribunal, or the Mental Health Review Tribunal under the **Mental Health Act** Chapter 28:02.

The members of the New Tribunal were eventually appointed on 2<sup>nd</sup> September 2005. On 5<sup>th</sup> September 2005 the Attorneys for the Applicants were notified that the New Tribunal proposed to meet on 7<sup>th</sup> September 2005. On 6<sup>th</sup> September 2005, the Applicants filed these proceedings and obtained an injunction from Justice Myers restraining the New Tribunal from sitting. Since the filing of these proceedings they have obtained disclosure of materials to be used by the Respondents in reviewing the Applicants’ case, and the names of the members of the New Tribunal.

The only issue which remains to be determined concerns the procedure to be adopted by the New Tribunal in reviewing the Applicants’ case. The Chairman of the New Tribunal (the First Respondent) proposed a review process comprising two stages. The first stage involves a clinical assessment of the Applicants in the absence of Attorneys . At the second stage Attorneys will be allowed to attend and make representations on behalf of the Applicants having been provided with all reports relevant to the review, including the clinical assessment of the New Tribunal made during the first stage.

The reasons advanced by the Chairman of the New Tribunal for this two stage approach are:

- (1) It is important that an adversarial relationship does not arise between the patients and the Tribunal. The Tribunal must be free to ask the patient questions and to observe the responses of the patient free from interruption by third parties.
- (2) The presence of Attorneys, who have no knowledge of psychiatry, is unnecessary and could disrupt what is essentially a medical or clinical procedure.
- (3) The review is inquisitorial, not adversarial in nature. The purpose of the review is to obtain such information as the Tribunal considers necessary to discharge its duty. It should be given latitude to undertake such inquiries and investigations as it considers appropriate, provided that it acts fairly in carrying out its functions.

The Applicants contend:

- (1) That the first stage of the review is in effect the review itself. The review is complete, except for any representations to be made by the Applicants' Attorneys.
- (2) To give the Applicants Attorneys an opportunity to be heard, after the Tribunal has substantially finished the review is in effect to deprive the Applicants of their right to be heard.
- (3) The procedure proposed by the Respondents means that the Tribunal would consider the reports of the examining psychiatrist, and would have questioned the Applicants in the absence of any representative-legal or medical.

- (4) At the end of the first stage, the Tribunal or its individual members would have formed views as to the mental state of the Applicants, and the Tribunal would have held discussions among themselves on the issues as to whether the Applicants pose a risk to the public and whether further detention is necessary.
- (5) The absence of any legal representation at the first stage deprives the Applicants of natural justice and a fair hearing since no one would be present to advise them or ensure that their rights are protected. They would be “at the mercy” of the Tribunal, who would be asking them questions “behind closed doors”.
- (6) The procedure suggested is a disproportionate response to an incident involving the Applicants’ Attorneys, in which the Attorneys had attended a meeting of the Psychiatric Hospital Tribunal in an unrelated matter. The tribunal has taken into account an irrelevant consideration in coming to its decision as to the procedure to be adopted, and has acted in bad faith.

### **THE LAW**

From the authorities cited to me in the written submissions of the Attorneys, I find the following to be of some assistance in this case:

- (1) The New Tribunal is not a court of law. It can determine its own procedure, subject always to the rules of natural justice: **General Medical Council vs Spackman** (1943) AC 627.
- (2) The rules of natural justice are not fixed and inflexible. The requirements of fairness must be viewed in the context of the particular circumstances. In **Lloyd vs Mc Mahon** (1987) AC 625 at 702 H, Lord Bridge opined:

**“My Lords, the so-call rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body,**

**domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.”**

- (3) In **Board of Education vs. Rice** (1911) AC 179, at 182, Lord Loreburn LC gave his views as to the approach to be taken by such a body:

**“I need not add that ...they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view”.**

- (4) There is no absolute right to legal representation in tribunal proceedings. It is a matter of discretion for the tribunal. They are masters of their own procedure. If they decline to allow legal representation, the courts will not interfere, as long as their discretion is properly exercised: **Enderby Town Football Club Ltd vs. Football Association Ltd** (1971) 1 AER 215, per Lord Denning MR at B-E.

- (5) In deciding whether the discretion to allow legal representation has been properly exercised the Court will look at the circumstances of the particular case including the complexity of the case, the gravity of the consequences for the person, whether any points of law are likely to arise, and the capacity of the person to present his own case: See: **R vs. Secretary of State for the Home Department and Ors. Ex parte Tarrant and Or.** (1934) 1 AER 799

(6) The Court will not impose its own views for that of the Tribunal.

The over-riding principle is the requirement of fairness. In **Doodly vs. Secretary of State** (1993) 3 AER 92 at 106D Lord Mustill set out in some detail his views on the duty to act fairly:

**“The only issue is whether the way in which the scheme is administered falls below the minimum standard of fairness.**

**What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following: (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.**

**My Lords, the Secretary of State properly accepts that whatever the position my have been in the past these principles apply in their generality to prisoners, including persons serving life sentences for murder, although their particular situation and the particular statutory regime under which they are detained may require the principles to be applied in a special way. Conversely, the respondents acknowledge that it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision-maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made. (Emphasis added)**

The New Tribunal consists of the First Respondent or one of his alternates (the Fifth or Sixth respondent), three psychiatrists (the Second, Third and Fourth Respondents) and the Chief Magistrate or one of his alternates (the Eighth and Ninth Respondents). It follows that from a Tribunal consisting of five members, four of them are medical practitioners. The Chairman is the Chief Medical Officer, three members are practicing psychiatrists and the fifth member is the Chief Magistrate or his alternate.

The New Tribunal is essentially a specialized panel, consisting largely of experts in the field of psychiatry. The primary objective of the panel is to carry out a professional assessment of the patient. The principal diagnostic tools employed by the psychiatrists are observation and verbal interaction with the patient. The psychiatrists on the panel then form an opinion on the mental state of the patient based on their own clinical observations, the responses of the patient and the patient's records. They then make a recommendation based on their view as to whether the patient's mental condition poses a threat to himself or to other members of the society.

The first stage of the inquiry is essentially a clinical assessment of the patient. Dr. Doon has sought to emphasize in his affidavit, that at this stage it is important that an adversarial relationship does not develop between the patient and the Tribunal. The members of the Tribunal should not feel hesitant or inhibited to ask questions of the patient that they consider to be helpful in their analysis of the patient. The clinical stage must be free from interruption by third parties or from any potentially disruptive influences.

The review to be carried out by the New Tribunal is essentially inquisitorial in character. The New Tribunal must be free to employ such procedures as they deem necessary and appropriate to obtain the information they require, and to carry out the investigations and inquiries they consider to be relevant in carrying out their clinical assessment, provided that they act fairly, and in accordance with the basic principles of natural justice.

At the second stage of the review, it is proposed that the Applicants' legal representatives will be present, and will be given full opportunity to make their representations on behalf of the Applicants, having had full disclosure of all relevant material, and a record of the first stage of the review.

However, the Applicants contend that the first stage is in fact the review itself, and would have been conducted by the Tribunal without any legal representation of the Applicants or input from his medical advisors. Further the Applicants would have been questioned by the Tribunal "behind closed doors". The Applicants would have been "at the mercy of the Tribunal", without having any person present to advise them.

The language used by the Attorneys for the Applicants in their written submissions and in the affidavits filed on their behalf, betrays a certain mindset on their part. Clearly they consider themselves and/or their clients to be in an adversarial position in relation to the Tribunal. The language used conveys a

basic mistrust of the members of the Tribunal, and a suspicion that the Tribunal is actuated by bad faith or ill will towards the Applicants.

I find this position adopted by the Applicants and/or their Attorneys to be without foundation and unfortunate to say the least. The members of the New Tribunal are all highly qualified and experienced professionals, who have agreed to devote their time and their expertise in giving service to the society. They have no personal involvement in these matters. To ascribe bad faith to them without any foundation whatsoever, is to do a disservice to persons who are performing a public service. The function of the Tribunal is inquisitorial in character, not adversarial. They have no axe to grind, and no interest to serve.

The adversarial position adopted by the Applicants' Attorneys towards them, in fact adds support to the two-stage review process proposed by the Respondents. In an adversarial setting, there is likely to be disruption of the clinical process. In such an atmosphere the tribunal will be hampered and inhibited in carrying out their assessment through interaction and observation of the patient.

The Applicants further contend that Dr. Doon has devised the two-stage procedure as a response to an earlier incident (not in relation to this case) in which the Applicants' Attorneys attended a meeting of the Psychiatric Hospital Tribunal to represent another patient. The Applicants submit that this is a disproportionate response to that incident, and further it would be an irrelevant consideration, and shows bad faith on the part of the decision-maker.

I am unable to agree with these contentions. In the first place, there is no evidential basis for the suggestion that the proposed procedure is in response to any incident involving the Applicants' Attorneys. However, even if the proposal is a response to that incident, I do not agree it is disproportionate or an irrelevant consideration, or shows bad faith on the part of the Tribunal.

In summary, I find:

- (1) The New Tribunal is free to determine its own procedure, having regard to its main objectives, which is to carry out a review of the mental state of the patient and to make recommendations having regard to their findings
- (2) It is within the discretion of the New Tribunal to decide whether it will allow legal representation of the patient, and if so, at what stage of the review.
- (3) As long as the discretion is properly exercised, the Court will not interfere in the exercise of the discretion. The Applicants have failed to show that the discretion was not properly exercised.
- (4) It is for the Applicants to show that the procedure is actually unfair, not that another procedure will be more fair.
- (5) On the facts of this case the Applicants have failed to show that the proposed two stage procedure is actually unfair, or in breach of the principles of natural justice.
- (6) The proposed procedure is not a disproportionate response, nor is it based on an irrelevant consideration, nor does it show bad faith on the part of the tribunal.

In the result, the reliefs sought in the statement filed on 6<sup>th</sup> September 2005 are refused.

I consider that the application for the injunction to restrain the Respondents from reviewing the Applicants' case was ill-founded. The concerns of the Applicants, with respect to disclosure and adequate notice, could have been addressed by an adjournment to provide the Applicants' Attorneys with full disclosure of all relevant materials. Even so, the clinical stage of the review could have proceeded, and the Applicants would have had full opportunity to make representations through their Attorneys on an adjourned date.

Unfortunately, the initiation of these proceedings may have in fact delayed the release of the Applicants.

However, I bear in mind that the New Tribunal is of recent invention, and the issue of the right to legal representation before the Tribunal has not yet been subject to judicial attention. In these circumstances, I make no order as to costs.

**Dated this 11<sup>th</sup> day of April, 2006.**

.....  
**RAJENDRA NARINE**  
**Judge**