

**THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW  
TRIBUNAL PROCEEDINGS IN RELATION TO UNDERHILL AUTHORISED  
BY THE PRESIDENT OF THE TRIBUNAL ON 23 OCTOBER 2019**



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

**FORENSIC REVIEW: Underhill [2019] NSWMHRT 5**

**Section 45 Mental Health (Forensic Provisions) Act 1990**

**DISTRICT COURT NUMBER 2016/00236627**

**TRIBUNAL:**  
**Mr John Feneley Deputy President**  
**Mr John Basson Psychiatrist**  
**Ms Diana Bell Other Member**

**DATE OF HEARING: 3 October 2019**

**PLACE: [correctional centre]**

**APPLICATION: Variation to order for detention**

## **DETERMINATION**

Mr Underhill is presently unfit and has not become fit to be tried for the offences with which he has been charged within 12 months of the Court's finding of unfitness.

Mr Underhill should be detained at [an aged care facility] to receive care and treatment, as soon as a bed becomes available. In the meantime, Mr Underhill is to be detained at [a correctional centre] for care and treatment.

Signed

John Feneley  
**Deputy President**

Dated 23 October 2019

## REASONS

1. This is the fifth review of Mr Underhill who is currently detained in [an aged care facility in a correctional complex] on an order of the Mental Health Review Tribunal dated [X].
2. Mr Underhill's treating team are applying for Mr Underhill to be transferred to and detained in [an aged care facility] at this review.

## BACKGROUND

3. [Mr Underhill is a forensic patient after he was found guilty on the limited evidence at a special hearing of a series of sexual assaults against a child, who was also a family member. A series of limiting terms were imposed.]

## TRIBUNAL REQUIREMENTS

4. The Tribunal is required under section 45 and 47 of the *Mental Health (Forensic Provisions) Act, 1990* (the Act), 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.
5. As Mr Underhill 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.
6. The Act has special evidentiary requirements in relation to leave or release which must be satisfied before the Tribunal can grant leave or release. In view of this, the Tribunal requires notice of applications for leave or release to ensure that the necessary evidence is available. This process also enables the Tribunal to provide notice of such applications to the Minister for Mental Health, the Attorney General, and any registered victims who are entitled to make submissions concerning any proposed leave or release. No notice of an application for leave or release was provided to the Tribunal prior to this review.
7. 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,*
- (d) ...
- (e) ...

## **DOCUMENTARY EVIDENCE**

8. The Tribunal considered the documents listed in the Forensic Patient Exhibit List.

## **ATTENDEES**

9. Mr Underhill attended the hearing accompanied by his lawyer, Mr Callum Hair of the Mental Health Advocacy Service. Also in attendance were:
  - Dr A, Psychiatrist;
  - Ms B, Clinical Nurse Consultant;
  - Dr C (by phone), Geriatrician;
  - Ms D (by phone), Clinical Nurse Consultant;
  - Mr E, Advocate, [advocacy service];
  - Mr Underhill's wife;
  - Mr Underhill's son;
  - Mr Underhill's son-in-law;
  - Interpreter, and
  - Two observers.

## **PRESENT CIRCUMSTANCES**

10. The Tribunal notes that the treating team's current proposal for Mr Underhill to be detained at the specialist aged care [facility] was raised at the last review hearing. At that time the Tribunal indicated that it would need to receive more information about the arrangements and security at the [aged care facility] to form a view about its appropriateness as a place of detention.
11. A preliminary issue at this hearing was whether Mr Underhill had a view about the treating team's proposal for him to be detained at the [aged care facility]. His lawyer, Mr Hair, advised that although he had been able to communicate in English with Mr Underhill 12 months ago, he was now unable to do so and he had not been able to obtain instructions from Mr Underhill about the proposed move. Dr A expressed the view that, in view of Mr Underhill's condition, he would not have a real understanding of the proposed move. The family advised that they were supportive of the move.
12. The Tribunal made a number of attempts at the beginning of the hearing, through the interpreter, to elicit Mr Underhill's views about the proposed move, but this was unsuccessful. The interpreter told the Tribunal that he was unlikely to be of assistance at the hearing, as Mr Underhill did not respond to his attempts to communicate with him. The interpreter considered that Mr Underhill's family, who

were present in the hearing, might be of more assistance. Whilst the inherent awkwardness of using telephone interpreter services was likely to be a factor, Mr Underhill appeared to have very little understanding of what was happening throughout the hearing and this was broadly consistent with the treating team's reports concerning the recent deterioration in his condition.

## **VICTIMS IMPACT STATEMENT**

13. The Tribunal noted at the hearing that it had read and considered the Victim Impact Statement from [a victim].

## **EVIDENCE**

14. The Tribunal had reports from Dr A, Staff Specialist Psychiatrist and Ms B, Clinical Nurse Consultant (CNC) [mental health service for older people]. There was also a report from Ms D, Clinical Nurse Consultant [aged care facility].
15. Dr A reports that Mr Underhill has a diagnosis of a major neurocognitive disorder most likely secondary to mixed vascular/Alzheimer type and cerebral amyloid angiopathy. He has behavioural and psychological symptoms associated with dementia. He remains unfit due to his severe dementia. Dr A reports that he reviewed Mr Underhill on [date] with consideration of the *Presser* criteria and he could not understand any of the questions.
16. In evidence Dr A reported that Mr Underhill's deterioration both physically and cognitively has been particularly noted in the past two to three weeks. On [date] Mr Underhill had "...walked unaided into the interview room and he sat and smiled and laughed and I think I got an "OK" from him, but 10 days later there is no speech and he requires a lot of physical support." In his report Dr A notes that patients with vascular dementia diagnosed after age 65 have a median survival expectancy of 3 to 5 years and that Mr Underhill has a poor prognosis, as there are no effective treatments for dementia.
17. In relation to treatment, Dr A gave evidence that Mr Underhill had been on a very low dose of anti-psychotic medication for behavioral issues associated with dementia, but in view of the sedation and lack of ongoing behavioral issues this had been recently stopped and there had been no episodes of aggression or untoward behavior. He is being investigated for raised liver tests and they are awaiting the results of a recent ultrasound test. He also has cardiac failure and the liver test results may reflect liver congestion secondary to cardiac failure and they hope to have a better understanding of this with the further testing.
18. Dr A provides a risk assessment and concludes that Mr Underhill falls into a group of persons with a risk of physical endangerment to others that is low in a supervised environment. Dr A considers that the intervention required to manage his care would cover the risks he poses to others. "With treatment and rehabilitation in a secure nursing home environment his current risk management

needs could be met.” Dr A also reports that Mr Underhill will continue to decline physically and this will further reduce his risk to others.

19. Dr A gave evidence that he considers that a dedicated secure nursing home would be a far more appropriate and humane environment appropriate to Mr Underhill's condition, as he would have access to specialist programs such as occupational therapy, diversional therapy and physiotherapy, and more family visits. This contrasts with his current detention in prison, where he is locked in his cell 18 hours per day without access to the specialist programs and with limited family visits.
20. Dr A also noted that from a medical viewpoint [aged care facility] is well serviced by a specialist on-site geriatrician, Dr C, general practitioners and specialist nursing staff experienced in dementia care. His main care need relates to his dementia and this can best be met in a specialist dementia setting like [aged care facility].
21. Ms B gave evidence that she agreed with Dr A's assessment and confirmed that Mr Underhill is deteriorating quickly and that she had had difficulty the day before the hearing getting him into a wheel chair as he could not understand or follow directions. In her report Ms B notes that since the last Tribunal review hearing Mr Underhill has become very lethargic, with little spontaneous interaction with others and that he remains disoriented to place and time. Nursing staff now put him to bed at night and he requires full assistance to shower and dress and requires supervision and help with meals.
22. Ms D's report specifically addresses the conditions identified by Her Honour Justice Schmidt in *R v Wilson* (no 6) [2019] NSWSC 529, relevant to detention in an aged care facility. In particular Ms D reports that [aged care facility] is a NSW Health facility affiliated with [a hospital]. It is a secure environment and residents are not free to leave unless supervised. There are clear escalation measures if a resident were to elude staff including (if necessary) involving local Police and the Police Dog Unit. The unit is covered by high level nursing management and monitoring 24 hours per day.
23. Dr C from the [aged care facility] gave evidence that he had assessed Mr Underhill as suitable for the [aged care facility] as Mr Underhill primarily has a dementia illness. On the issue of security Dr C gave evidence that Mr Underhill would be detained at [aged care facility] which is a secure setting with locked key pad entry doors that only staff have the codes to. There are courtyards surrounded by high fencing which is not scalable. There is also a good ratio of nursing and care support staff and they are assisted by Health and Security Assistance (HASA) staff present 24 hours per day.
24. Dr C also gave evidence that [the aged care facility] has access to a [health service] from [a hospital] with specialist clinicians who can provide hospital-like medical care at [aged care facility] if needed.

25. Having regard to Mr Underhill's particular circumstances, Dr C considers that he could be securely detained at the [aged care facility]. The [aged care facility] has appropriate escalation protocols in place to pursue and detain anyone who might manage to get past security, but this has not happened to date.
26. The Tribunal noted that any proposal for Mr Underhill to have leave from [aged care facility] would need to be specifically considered at a further hearing.
27. Mr E spoke on behalf of the family to thank the treating team and everyone involved in Mr Underhill's care.

## **DETERMINATION**

28. It is clear from the evidence and from Mr Underhill's appearance before the Tribunal that he has a serious deteriorating condition affecting his physical and psychological health. The primary health issues relate to his dementia, which is untreatable and deteriorating, and cardiac failure. The Tribunal accepts the evidence that Mr Underhill has a poor prognosis and a shortened life expectancy. He remains unfit for trial and will not become fit.
29. The Tribunal is satisfied that the current care and detention arrangements within the prison are clearly not appropriate to meet Mr Underhill's current high care needs and that these needs will only increase over time. Mr Underhill has been assessed by Dr A and by Dr C, who are aged care specialists, as being an appropriate candidate for the detention and care arrangements offered by the [aged care facility].
30. In making a determination for Mr Underhill to be detained at the [aged care facility] for care and treatment the Tribunal must be satisfied, having regard to *R v Wilson* (No 6) [2019] NSWSC 529, that the [aged care facility] is capable of detaining him and that it has appropriate security and other protocols in place to both prevent his escape and to take all necessary steps to return him to [aged care facility] in the unlikely event that he were to elude staff and leave [aged care facility]. The Tribunal is satisfied on the evidence that [aged care facility] is an appropriate place of detention for Mr Underhill. He will not be free to leave and it is a locked secure environment with specialist medical and security staff well equipped to deal with the care and behavioural issues associated with dementia patients. The Tribunal accepts that Mr Underhill's risk can be managed within that environment and that his deteriorating condition will further reduce any risk he poses over time.

31. In all the circumstances the Tribunal is satisfied that the [aged care facility] is an appropriate place of detention for Mr Underhill and the Tribunal orders that he be detained there for care and treatment as soon as a place becomes available for him.

Signed

John Feneley  
**Deputy President**

Dated 23 October 2019