DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Save for the cover sheet, this decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698)). That sheet is not formally part of the decision and identifies the patient by name.

As the decision of the First-tier Tribunal (made on 4 April 2012 under reference MP/2011/21463) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

1. This is one of two appeals that raise the same issue. The other appeal is *HM/3532/2012*. I held a joint oral hearing of these appeals on 14 February 2013. Stephen Simblet of counsel appeared for the patient in this case; Roger Pezzani of counsel appeared for counsel in the other case. I am grateful to them both for their arguments on the appeals. Neither Trust appeared.

A. The issue and how it arises

2. The patient in this case is Mr M. His connection with the mental health services dates from 2003. His present detention dates to 12 October 2011, when police were called to his flat because of his behaviour. He was detained under section 4 of the Mental Health Act 1983 and is currently detained under section 3.

3. On 10 February 2012, he applied to the First-tier Tribunal and his application was heard on 4 April 2012. The tribunal decided that he should not be discharged. As part of its reasons, the presiding judge wrote:

> 9. The medical evidence comprised a report, dated 12 March 2012 prepared by Dr M ..., a nursing report dated 15 March 2012. There was also oral evidence from the medical team. All the evidence is to the effect that the patient suffers from a mental disorder of a nature and degree that warrants his treatment in hospital. The diagnosis is schizoaffective paranoia.
>
> 10. The tribunal finds that detention is justified in the interest of the patient's health. ...
>
> 11. We are satisfied that appropriate medical treatment is available. ...

4. Mr M applied for permission to appeal on the ground that the tribunal had applied the test appropriate to detention under section 2 rather than, as it should have, detention under section 3. The First-tier Tribunal gave him permission to appeal to the Upper Tribunal. The judge, who had not presided at the hearing, identified the point of law as 'whether there is a qualitative difference between the criteria in section 72(a) and (b).' That is a reference to section 72(1)(a) and (b).

B. The legislation – what is says and what it means

5. Section 2 applies if a patient is admitted to hospital for assessment.

> **2 Admission for assessment**
>
> ...
>
> (2) An application for admission for assessment may be made in respect of a patient on the grounds that—
>
> (a) he is suffering from mental disorder of a nature or degree which *warrants* the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and
>
> (b) he *ought to be* so detained in the interests of his own health or safety or with a view to the protection of other persons.

6. Section 3 applies if a patient is admitted to hospital for treatment. The patient may, or (as in this case) may not have been first detained under section 2:

> **3 Admission for treatment**
>
> ...
>
> (2) An application for admission for treatment may be made in respect of a patient on the grounds that—
>
> (a) he is suffering from mental disorder of a nature or degree which makes it *appropriate* for him to receive medical treatment in a hospital; ...
>
> (c) it is *necessary* for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; ...

7. The differences between sections 2 and 3 are reflected in the language of section 72(1)(a) and (b). The former applies to cases of detention under section 2; the latter to cases of detention under section 3:

> **72 Powers of tribunals**
>
> (1) Where application is made to the appropriate tribunal by or in respect of a patient who is liable to be detained under this Act or is a community patient, the tribunal may in any case direct that the patient be discharged, and—
>
> (a) the tribunal shall direct the discharge of a patient liable to be detained under section 2 above if it is not satisfied—
>
> (i) that he is then suffering from mental disorder or from mental disorder of a nature or degree which warrants his detention in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; or
>
> (ii) that his detention as aforesaid is justified in the interests of his own health or safety or with a view to the protection of other persons;

(b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if it is not satisfied—

(i) that he is then suffering from mental disorder or from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or

(ii) that it is necessary for the health of safety of the patient or for the protection of other persons that he should receive such treatment; or

(iia) that appropriate medical treatment is available for him; or

(iii) in the case of an application by virtue of paragraph (g) of section 66(1) above, that the patient, if released, would be likely to act in a manner dangerous to other persons or to himself.

8. I accept the arguments of both counsel that there is a difference between the criteria in section 2 and section 3 and that this difference is reflected in the criteria under section 72(1)(a) and (b).

9. The most significant factor pointing to this conclusion is the purpose of sections 2 and 3. Detention, for whatever purpose, involves a deprivation of liberty. As such, it must be strictly justified. Once it is known that a patient requires treatment for the effects of a mental disorder, the criteria can be, and are, appropriately exacting. But detention for assessment must, of necessity, be less exacting, since the need for treatment is not then known. Assessment under section 2 may, as an essential preliminary to establishing the need for treatment, be necessary in order to render section 3 effective for some patients. To that extent, it plays an important role in protecting the health and safety of those patients and the protection of others. This does, of course, reduce the protection for the patient, but that is balanced by the fact that, unlike section 3, detention under section 2 is limited by the need for an assessment and for a period of 28 days.

10. The difference in the language of the sections reflects the difference in purpose. For the purposes of this case, the key difference is that under section 2 the mental disorder must *warrant* detention and the patient *ought to be* detained for health, safety or protection, whereas under section 3 the mental disorder must make detention *appropriate* and *necessary* for health, safety or protection. The terms relevant to section 2 are less exactly on their own and in their context. The context is related to their purpose.

11. The caselaw supports a difference. Mr Pezzani cited *R v South Thames Mental Health Review Tribunal, ex parte M* [1998] COD 38. Collins J there decided that if a patient had been detained under section 2 at the time of the application to the tribunal but was detained under section 3 at the time of the hearing, the tribunal had to apply the criteria relevant to the latter rather than the former. As Mr Pezzani argued, that would not be necessary if the criteria were the same.

12. The history of the mental health legislation also supports this analysis. As Mr Pezzani pointed out, the difference in language between section 72(1)(a) and

(b) was new to the 1983 Act. The equivalent provisions of the Mental Health Act 1959 – sections 25(2) and 26(2) – did not draw the distinction. It may be that the change of language was brought about by the decision of the European Court of Human Rights in *Winterwerp v The Netherlands* (1979) 2 EHRR 387.

13. This is not to say that the conditions for detention under section 2 are not demanding. Just that they are less demanding than for section 3. It would not be appropriate for me to try to define the differences between those sections. The language used is everyday language that merely has to be applied. But it has to be applied in a context that requires detention to be strictly justified.

C. Why the tribunal's reasons are inadequate

14. I do not accept that the tribunal misdirected itself by applying section 72(1)(a) instead of 72(1)(b). The First-tier Tribunal in its mental health jurisdiction deals with a limited number of legal issues. That does not diminish their importance, but it does mean that the members of the tribunal quickly become familiar with the legal tests appropriate to different cases. And that makes it more likely that the judge made a slip in writing the reasons than that the panel as a whole made a slip in making a decision. Surely one of them would have noticed that they were applying the wrong criteria, especially as Mr M had not been detained under section 2. Moreover, the reasons deal with the availability of appropriate medical treatment, which is only relevant under section 72(1)(b). It is even less likely that the tribunal combined the criteria under section 72(1)(a) and (b) than that they simply applied paragraph (a) by mistake for paragraph (b). Nevertheless, the only evidence I have of the detail of the tribunal's reasoning is what the presiding judge recorded and those reasons are inadequate, as I now explain.

15. The tribunal's written reasons should show that its decision was justified in law. They should:

- state what facts the tribunal found;
- explain how and why the tribunal made them;
- show how the tribunal applied the law to those facts.

16. The judge recorded the tribunal's findings of fact largely by reference to the evidence. In paragraph 9, she wrote that 'All the evidence is to the effect that' Mr M's mental disorder 'warrants his treatment in hospital.' The judge was correct that Dr M's report was in part expressed in that way. But the doctor later referred expressly to section 3, to which the word *warrants* is not appropriate. The social circumstances report, which the judge did not mention, merely said that Mr M's 'needs would be best met by remaining in hospital under section if necessary until his mental health has improved'. That suggests section 3 rather than the time-limited section 2. And the nursing report concluded that 'He is likely not to continue with his medication willingly in the community.' Again, that is more consistent with section 3 than section 2. The judge was, then, wrong to say that all the evidence had been expressed in terms of 'warrants'. The position was that it was only in Dr M's report that there was confusion as to which criteria he had applied in respect of Mr M's mental disorder.

17. The judge went on to record more specific findings of fact: Mr M's condition was chronic and relapsing, his admissions to hospital related to non-compliance with medication and misuse of drugs, and he had grandiose delusions and paranoid beliefs. None of that was, I understand, in dispute. But those facts, individually or in combination, do not show that Mr M's mental disorder warranted detention, still less that it made it appropriate.

18. The result is that the only finding that could support the tribunal's decision under section 72(1)(b) was its adoption of the opinions in the medical evidence. And the evidence of Dr M, which was a significant part of that evidence, was affected by the reference to the wrong legal test. In those circumstances, it was particularly important for the tribunal's reasons to do things. First, it was important for them to show that it had applied the correct criteria and not made the same mistake, or slip, as Dr M. Second, it was important for the reasons to show by precise findings of fact that the conditions for detention were satisfied by reference to those criteria. A blanket reference to a possibly contaminated report did not suffice. It did not do either of those things. Indeed, it made things worse by expressing its legal conclusions in the same confused terms as Dr M's evidence. In those circumstances, the tribunal's reasons are inadequate. That is why I have set the decision aside.

Signed on original
on 18 February 2013

Edward Jacobs
Upper Tribunal Judge