



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: HALLAM [2014] NSWMHRT 1

s 46(1) Review of forensic patient

*Mental Health (Forensic
Provisions) Act 1990*

TRIBUNAL: Ms Anina Johnson Deputy President
Dr Peter Klug Psychiatrist
Mr Stephen Woods Other member

DATE OF HEARING: 23 January 2014

PLACE: Forensic Hospital

APPLICATION: Variation to condition of Leave
Escorted Day Leave

DECISION

1. Mr Hallam be transferred to and detained at the Bunya Unit, Cumberland Hospital for care and treatment, as soon as a bed becomes available, but in any event no later than 1 August 2014. In the meantime, Mr Hallam is to be detained for care and treatment at the Forensic Hospital.
2. Mr Hallam be granted escorted outside day leave from the Forensic Hospital at the discretion of the medical superintendent and subject to any conditions and restrictions imposed by the Medical Superintendent.

[non-association and geographical restrictions imposed]

Signed

Ms Anina Johnson
Deputy President

Dated this day 7 February 2014

REASONS

1. This is the 18th review of Mr Hallam who is currently detained in the Forensic Hospital. At its hearing on 14 March 2013, the Tribunal ordered that Mr Hallam be transferred to and detained in Cumberland Hospital upon a bed becoming available and for Mr Hallam to be allowed escorted day leave restricted to the grounds of Cumberland Hospital. The formal order of the Mental Health Review Tribunal giving effect to that transfer is dated 10 May 2013.
2. Mr David Norman, solicitor for Mr Hallam gave verbal notice to the Tribunal that at the hearing on 23 January 2014 he intended to seek an order that Mr Hallam be transferred to the Bunya Unit within a particular time frame, together with an application for Mr Hallam to have Escorted Day Leave from the Forensic Hospital.

BACKGROUND

3. In 2006, the Supreme Court found Mr Hallam not guilty by reason of mental illness of a charge of murder. [Index event described]

TRIBUNAL REQUIREMENTS

4. This is a review pursuant to section 46(1) of the *Mental Health (Forensic Provisions) Act 1990* ("the Act"). Under section 46 the Tribunal is required to review the case of each forensic patient every six months. On such a review the Tribunal may make orders as to the patient's continued detention, care or treatment or the patient's release.
5. 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 Health, the Attorney General, and any registered victims who are entitled to make submissions concerning any proposed leave or release. The Tribunal received an application for variation to order for leave. The Tribunal must be satisfied pursuant to section 49 of the Act:

'that the safety of the patient or any member of the public will not be seriously endangered if the leave of absence is granted.'

6. 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

7. The Tribunal considered the documents listed in the Forensic Patient Exhibit List dated 23 January 2014. [Further background information concerning Mr Hallam's history and care and treatment as a forensic patient was contained in an Annexure to the Tribunal's reasons.]

ATTENDEES

8. Mr Hallam attended the hearing accompanied by his lawyer, Mr David Norman of the Mental Health Advocacy Service. Also in attendance were:
- Consultant Psychiatrist (Forensic Hospital).;
 - Psychiatric Registrar (Forensic Hospital).;
 - The Clinical Director of the Bunya Unit; and,
 - Psychologist (Forensic Hospital).

PRESENT CIRCUMSTANCES

9. This review hearing was listed earlier than the usual 6 month review, because Mr Hallam's solicitor, David Norman of the Mental Health Advocacy Service had requested that the Tribunal make a time limited order for his transfer to the Bunya Unit, Cumberland Hospital.
10. At this hearing, as at all of the Tribunal hearings in the last two years, the treating team's evidence was that Mr Hallam's mental state remained very stable, with no evidence of positive symptoms, psychosis or mood disturbance. The negative symptoms of his schizophrenia and his cognitive symptoms have continued to improve.
11. Mr Hallam has been working on a plan for developing his own business when he returns to live in the community. He wished to try to identify (as best he could without internet access) the training and documentation he would need for this business, so that he can enrol in the appropriate courses, whilst at the Forensic Hospital, if possible, or whilst at the Bunya Unit. He remains committed to his physical health and has developed his own exercise regime, using the resources of the Forensic Hospital to improve his physical fitness. He continues to lose weight.

12. The treating team's evidence is that Mr Hallam is ready for transfer to Bunya. He needs the opportunities and freedoms available in a medium secure unit to take the next steps in his rehabilitation.
13. At the Tribunal hearing in October 2013, the Tribunal was told that Mr Hallam was first on the list for Bunya and would be transferred before Christmas. He was told in November 2013 that he would be transferred within a week. Mr Hallam and his family were understandably very excited about the move. The transport arrangements were made, but at the last minute, Mr Hallam and his treating team were told that another patient would be transferred to Bunya in his place.
14. Commendably, Mr Hallam took the news well. He was disappointed, but remained confident that he would move forward at some time in the future and continue his recovery.

TIME LIMITED ORDER FOR TRANSFER

15. Historically, the Tribunal's orders that a person be transferred to a particular mental health facility were implemented only when a bed became available, regardless of whether those words were included in the actual order. However, the decision of ***State of New South Wales v TD*** [2013] NSWCA 32, made it clear that it was unlawful to detain a forensic patient except in accordance with the Court's order for detention. By implication, the Tribunal's orders as to the proper place of detention are also required to be obeyed in accordance with their terms.
16. The Tribunal is well aware that there is a shortage of available beds in medium secure forensic units. It is aware of the difficulties faced by the Justice Health and Forensic Mental Health Network in juggling the competing clinical needs of other forensic patients who are ready for transfer to a medium secure unit. However, when reviewing a forensic patient, the Tribunal must comply with its legislative obligations.
17. In making a decision about a forensic patient, section 76B of the Act requires the Tribunal to have regard to the principles in section 68 of the *Mental Health Act*. That section provides:

"It is the intention of Parliament that the following principles are, as far as practicable, to be given effect to with respect to the care and treatment of people with a mental illness or mental disorder ..."
18. There follow a number of important statements about the treatment of people with mental illness. They relevantly include:

- people with a mental illness or mental disorder should receive the best possible care and treatment and in the least restrictive environment enabling that care and treatment (section 68(a));
- the provision of care and treatment should be designed to assist people with a mental illness or mental disorder, wherever possible, to live, work and participate in the community(section 68(c));
- any restriction on the liberty of patients and other people with a mental illness or mental disorder and any interference with their rights, dignity and self-respect is to be kept to the minimum necessary in the circumstances(section 68(f)).

19. The principles are not framed in absolute terms. Section 68 specifically provides that they are to be implemented “as far as practicable”. The principles themselves also contain their own limitations, so that a person’s liberty might be restricted, but the restrictions must be the minimum necessary in the circumstances.

20. The principles in section 68 provide important guidance to Tribunal when deciding the appropriate place for the detention of a forensic patient under sections 46, 47 and 48 of the Act. Transfer to a medium secure unit offers the least restrictive care, fewer restrictions on liberty and increases the opportunities for a person to live, work and participate in the community. The use of the phrase “as far as practicable” recognises that mental health facilities (and in this instance, the Justice Health and Forensic Mental Health Network) face resource pressures. But, that phrase cannot be read so broadly as to avoid compliance with the principles in section 68 all together. At some point during a patient’s treatment, the principles must be given precedence. When that line is drawn is for the Tribunal to determine on a case by case basis.

21. These issues are recognised in the Tribunal’s Forensic Guidelines (at p 18 - available on the Tribunal’s website - www.mhrt.nsw.gov.au). The Guidelines provide that the Tribunal’s first order for transfer will usually require the transfer to take place only “when a bed becomes available”. However, the Guidelines also say

If the patient has been ordered for transfer with the move to take place “when a bed becomes available” and has not been moved by the time of the next review, it is more likely that the Tribunal will make a time limited order.

22. In Mr Hallam's case, the clinical director of the Bunya Unit, gave forceful evidence that despite a Tribunal order, he could not admit Mr Hallam if there were no bed for him to be admitted into. He expected that another patient would be conditionally released from Bunya in about 6 months time, but the timing of discharge depended on the clinical progress of that patient, and the Tribunal being satisfied that conditional release was appropriate. If there were no bed in Bunya and a time limited order required an urgent transfer, then Mr Hallam would need to be admitted to the acute ward of the Cumberland Hospital, which was not at all suitable for someone who was as well as Mr Hallam. The Clinical Director urged the Tribunal not to make a time limited order, saying that it would create an impossible situation and would not get Mr Hallam to the Bunya Unit any sooner. He asked Mr Hallam and the Tribunal to accept his personal assurance that he and his team would do everything possible to ensure that Mr Hallam was the next patient admitted to Bunya.
23. The Tribunal accepts that the Clinical Director is doing his best to accommodate Mr Hallam in Bunya as soon as possible. However, as the Clinical Director said, he can offer no guarantees.
24. Mr Hallam has been working hard at his recovery, along with his treating team. He persists with clozapine, despite its potential complications, because of the benefits it brings him. He has lost a substantial amount of weight through his own efforts. He is taking positive steps to develop plans for his future back in the community. His ability to pursue these recovery goals is limited because of the restrictive environment in which he is detained.
25. Mr Hallam was accepted as suitable for Bunya on 29 October 2012, a few days after the Tribunal's 6 monthly review on 6 October 2012. An order for transfer was made at the next review, in March 2013. He has been waiting patiently and with good grace since then for an opportunity to continue his recovery in a less restrictive setting. If he is still at the Forensic Hospital at his next Tribunal hearing (scheduled for July 2014), he will have waited nearly 2 years since the clinical teams at the Forensic Hospital and Bunya Unit agreed that a transfer to a medium secure unit was appropriate. That is a long time in the life of a man who is only 31 years old.
26. There are tensions inherent in making a time limited order for transfer. However, the Tribunal considers that Mr Hallam has waited long enough to receive care and treatment in the least restrictive environment. The Tribunal considers that an order for transfer in 6 months time will give Mr Hallam the certainty and hope that he deserves, whilst allowing the Bunya Unit and the Justice Health and Forensic Mental Health Network time to ensure that arrangements can be made for him to be admitted.

ESCORTED DAY LEAVE

27. Mr Hallam's treating team also gave their support for escorted day leave from the Forensic Hospital. The team noted that the Forensic Hospital is not set up (nor staffed) to allow for much escorted day leave. However, they hoped that if Mr Hallam were given escorted day leave, it would offer him some hope while he waits for a transfer to Bunya and a chance to reconnect with the community outside the Forensic Hospital. The team had envisaged that Mr Hallam might be able to attend an appointment with TAFE or a careers counsellor himself, to discuss his plans for further study. At present, he has to ask the team to make enquiries on his behalf, which are then relayed back to him. The Tribunal noted that at an earlier hearing, another patient had been granted escorted day leave, on the basis that it would allow her to participate in programs at Bunya prior to her transfer. The team agreed that this may also be useful for Mr Hallam and that they would investigate this possibility further.
28. The Consultant Psychiatrist and Psychiatry Registrar's evidence was that Mr Hallam's risk to himself or the public if given escorted day leave would be the same if exercised from the Bunya Unit (where he is already entitled to escorted day leave) or from the Forensic Hospital. Their evidence was that the safety of Mr Hallam and the public would not be seriously endangered by leave of that kind.
29. The Tribunal has published two Official Reports of proceedings which have considered the question of access to escorted day leave from the Forensic Hospital: **Croker** [2013] NSWMHRT 2 and **Farnham** [2013] NSWMHRT 3]. In the decision in **Farnham**, the Tribunal concluded:
- Both the Forensic Hospital psychiatrist and the psychiatrist at Morisset have both given evidence that Mr Farnham does not present a significant risk to himself or others if he were to have escorted leave.
 - The Forensic Hospital's policy provides for the use of escorted leave for rehabilitative purposes.
 - Ordinarily, given the security arrangements at the Forensic Hospital, a person who is clinically ready to access escorted leave would be transferred to a medium secure unit and have access leave from that unit.
 - However, in circumstances where a patient has been clinically assessed as ready for transfer, but that transfer is likely to be delayed, the Tribunal considers it would be appropriate to bring forward that entitlement to access escorted leave.

- This approach is supported by the Ministry of Health's Forensic Directive which provides that leave which was available to a patient at one hospital will continue to be available to the patient if transferred to another hospital. Thus, once a grant of escorted day leave is made for Morisset Hospital, it is logical to extend that entitlement to the intervening period pending transfer.
- Although a formal risk management plan was not presented to the Tribunal at this hearing (unlike in **Croker**) the Tribunal notes that the preparation of a risk management plan is a policy prerequisite to the exercise of any leave. A risk assessment is to be conducted on the day of the proposed leave, and if the clinician is not satisfied that it is safe to proceed on leave, then the leave does not go ahead.

30. The same reasoning applies here. Mr Hallam has been assessed as suitable for a transfer to the Bunya Unit with escorted day leave, and has been waiting a significant period of time for that transfer to take place. The evidence remains that he is safe to access escorted day leave. Ideally, leave from the Forensic Hospital would be unnecessary, as he would have been transferred to Bunya as soon as he was clinically ready. However, bed availability issues mean that he is now held in a more restrictive environment than is necessary for his safe and effective care: section 68(a) of the *Mental Health Act 2007*. In those circumstances, escorted leave from the Forensic Hospital is appropriate.

DETERMINATION

31. Being satisfied on the evidence currently before the Tribunal that the grant of leave would not seriously endanger Mr Hallam or any other member of the public and having regard to the other matters to which sections 49 and 74 of the Act refer, the Tribunal orders that Mr Hallam be granted escorted leave from the Forensic Hospital. This leave will be at the discretion of the Medical Superintendent.
32. For the reasons outlined above, the Tribunal will also make a time limited order for the transfer of Mr Hallam to the Bunya Unit at Cumberland Hospital. At the hearing, the Tribunal indicated that it would make the order for a transfer within 6 months. In its final orders, the Tribunal has nominated the date of 1 August 2014, to allow time for these reasons to be prepared and distributed. Mr Hallam is therefore to be transferred to the Bunya Unit, Cumberland Hospital as soon as a bed becomes available but by no later than 1 August 2014, and in the meanwhile to receive care and treatment at the Forensic Hospital.

Signed

Ms Anina Johnson
Deputy President

Dated this day