THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR OMAR AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL ON 17 SEPTEMBER 2018

Mental Health Review Tribunal

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: **Mr Omar**

TRIBUNAL:	**Richard Cogswell SC**	**President**
	Kristin Kerr	**Psychiatrist**
	Peter Bazzana	**Other Member**

DATE OF HEARING: **24 May 2018**

PLACE: **Forensic Hospital**

APPLICATION: **Special Fixture**

DECISION

In the Tribunal's opinion, in this case the phrase "member of the public" as it appears in s 43(a) and s 74(d) of the *Mental Health (Forensic Provisions) Act 1990* does not extend to the members of the public of a foreign country.

Signed

His Honour Judge Richard Cogswell SC
President

Dated this day: 21 August 2018

REASONS

This is a review of Mr Omar who is currently detained in a mental health facility.

The Tribunal has set a Special Fixture to hear arguments as to whether the expression "*any member of the public*" as it appears in ss 43(a) and 74(d), is capable of extending to members of the public of foreign countries.

ATTENDEES

Mr Omar represented himself. Also in attendance were:

- Michael Sterry, solicitor for Justice Health and Forensic Mental Health Network;
- Chaplain;
- Registered Nurse;
- Rob Rancken, counsel for the Attorney General;
- Lucy Nichols, solicitor from the Crown Solicitor's Office
- Jonathan Vasilliou, senior solicitor from the Crown Solicitor's Office, and
- 1 observer.

Issue

1. Does the expression "member of the public" as it appears in ss 43(a) and 74(d) of the *Mental Health (Forensic Provisions) Act 1990* (Forensic Act) extend to members of the public of a foreign country? This question was reserved for legal argument. That argument took place before the Tribunal on 24 May 2018. The question arises in the following circumstances.

Background

2. After a special hearing, the Supreme Court found Mr Omar not guilty on the ground of mental illness of the offence of manslaughter and other offences.

3. Mr Omar is therefore a forensic patient under the Forensic Act. He has been detained in mental health facilities since then.

4. Mr Omar does not want to be in the current facility. Nor does he want compulsory treatment. He wants to be repatriated to his home country.

5. Being repatriated to his home country is likely to mean that the Tribunal would need to unconditionally release Mr Omar.

6. The Tribunal "must not" order a person's release (with or without conditions) "unless it is satisfied … that … the safety of the patient or any *member of the public* will not be seriously

endangered by the patient's release" (s 43(a) of the Forensic Act). In addition, amongst the matters that the Tribunal "must have regard to" when determining what order to make about a person's release, is a report by an independent psychiatrist on "whether the safety of the person or any *member of the public* will be seriously endangered by the person's release" (s 74(d) of the same Act). (Emphasis added in both instances.)

7. Hence, the question arises whether the expression "member of the public" extends to the public in a foreign country or is it limited to the public in Australia, or even in New South Wales.

The Hearing

8. Mr Omar elected not to be legally represented at the hearing. He appeared in person at the commencement, read out a statement to the Tribunal and then left the hearing room. The hearing proceeded in his absence.

9. The Tribunal received written submissions from Mr Robert Ranken of counsel (dated 23 April 2018) on behalf of the Attorney General. It also received submissions from Mr Gary Forrest (dated 10 May 2018), Chief Executive of Justice Health & Forensic Mental Health Network (JH&FMHN). The Tribunal heard from both Mr Ranken and the solicitor appearing for JH&FMHN, Mr Michael Sterry.

Submissions

10. Mr Ranken argued on behalf of his client that the expression "any member of the public" extended to a citizen of a foreign country. He pointed to the objects of the Forensic Act (in s 40) which particularly included the issue of "the safety of members of the public" and to the fact that s 75(1)(k) of the Act permitted the Tribunal to impose release conditions relating to "overseas or interstate travel". The legislation, he said, contemplated conditions related to a patient who may be overseas. He pointed to the discretionary power invested in the Tribunal by s 47 of the Forensic Act and the requirement for the Tribunal to make a finding as to the safety of members of the public before it could proceed to consider a release application. That requirement is, he argued, a jurisdictional fact. Section 74 of the Forensic Act governs how the Tribunal exercises its discretionary power under s 47 by requiring certain mandatory conditions to be taken into account. It was not a discretion at large; it was a discretion governed by its context which would include the s 40 objects. He pointed out that in *A* [2017] NSWCA 288 Beazely ACJ pointed out that the Tribunal's power is not exercised in a vacuum and the Tribunal makes its s 43(a) finding bearing in mind conditions that it would impose (at [85]). Sections 43 and 47 focus on an outcome: what is the situation going to be with regard to the safety of the public including those in another country? He pointed out that the

correctness of the Tribunal's decision (by Deputy President Sperling QC) in *Ban* could be doubted for a number of reasons and also was decided before *A* and *XY* [2014] NSWCA 466 and that *XY* contained persuasive *obiter dicta* to the contrary by Beazley P and Basten JA. Mr Ranken argued that no order made by the Tribunal has any application in the foreign country, so in a practical way it does not impact on members of the public of a foreign country.

11. Mr Sterry on behalf of JH&FMHN accepted the interpretation of the legislation put forward by Mr Ranken on behalf of the Attorney General. Mr Sterry focused on the evidentiary consequences of such an interpretation. One agency of his client is the Community Forensic Mental Health Service (CFMHS). That agency is usually the one that provides the s 74(d) independent psychiatric report. He said that the CFMHS would be looking for direction from the Tribunal to meet its obligation under s 74(d). He referred to the UN Rights of Persons with Disabilities. He posed the rhetorical question whether the present proposal by Mr Omar's treating psychiatrist, was sufficient for the CFMHS or needed enhancement. He posed the question whether there is a set of indicators to present to the Tribunal and whether the patient needs to get to the point of unconditional release in New South Wales or whether another standard is applicable that may not comply with what is done in New South Wales. He reminded the Tribunal that it has conditionally released patients to another country in other cases. He pointed out the prospect of criticism of the Forensic Mental Health Network from UN agencies and posed the rhetorical question of what sort of mental health service is needed to be available in another country for the Tribunal to be satisfied that a patient could be released to that country. He pointed out that some mental health facilities in New South Wales are reluctant to take on patients such as Mr Omar who is not an Australian Citizen. On the other hand, there is a risk of institutionalisation in Mr Omar remaining where he is. Resources are being used up by the continuing detention of Mr Omar despite his request to be repatriated.

12. In reply, Mr Ranken acknowledged that there needed to be evidence about the facilities and services available in a foreign country so that the Tribunal could determine whether or not any conditions regarding safety of members of its public would be effective. The ameliorating impact of any cultural factors needed also to have an evidentiary basis. Factors such as predictable benefits to Mr Omar of being repatriated can be taken into account by CFMHS but there needed to be evidence for such factors. Questions raised by Mr Sterry such as follow up services in the foreign country and measurement of clinical progress and risk tolerance in the other country would also be matters for enquiry and evidence. He argued that UN criticism was not a relevant consideration and that the availability of resources may not be, except to the extent that the higher resources are being used instead of those of a

different mental health facility. He acknowledged that enforceability of conditions was virtually impossible and the Tribunal was confronted by the fact that Mr Omar himself refused to go into a secure mental health facility in his home country.

13. In his reply, Mr Sterry acknowledged that Mr Omar's level of risk is probably lower than that required for detention in his current placement.

14. Mr Ranken argued that there may be difficulties with Mr Omar obtaining leave from a medium secure facility because of his non-citizen status. (However the Tribunal is aware of at least one other non-citizen forensic patient at a medium secure unit who has access to leave.)

Consideration of Attorney General's Submissions

15. It should be noted at the outset that the Tribunal did not have the benefit of a contradictor in this case. Mr Ranken's submissions on behalf of the Attorney General are cogent and persuasive. On the central legal issue, Mr Sterry agreed with them. However, on a close examination, the Tribunal has concluded that they ought not to be accepted.

16. Mr Ranken pointed to Deputy President Sperling QC's reliance on the presumption of statutory construction "that legislation is not intended to deal with matters occurring beyond the territorial limits of the locality in relation to which the particular legislation is constituted" and its statutory equivalent in s 12 of the *Interpretation Act 1987* (NSW)[a]. Mr Ranken referred to the learned Deputy President's reasons and some of the authorities referred to by his Honour.

17. Mr Ranken argued that the "correctness of the learned Deputy President's reasoning respectfully may be doubted" on three grounds. First he said that a construction of the relevant provisions that requires a Tribunal to have regard to the safety of members of the public in another country "does not involve a trespass upon that other sovereign state's legislative purview." There is no order applying to another person in another country: the provisions "simply recognise … that and order for the release of a forensic patient with a view to repatriation to another country may have an impact on the safety of the members of that other country."

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a Section 12 provides as follows:
"**12 References to New South Wales to be implied**
(1) In any Act or instrument:
(a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for New South Wales, and
(b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales.
(2) In any Act or instrument, a reference to a body constituted by or under an Act or instrument need not include the words "New South Wales" or "of New South Wales" merely because those words form part of the body's name or title."

18. Mr Ranken's point is correct so far as it goes. It is a point more about the common law presumption of legislation not having extraterritorial effect. However, a further question is the statutory one whether the applicability of s 12 to the phrase "member of the public" has been displaced. Mr Omar is not an Australian citizen travelling interstate. He is not even an Australian citizen travelling overseas for a period of time before returning to Australia. Mr Omar is a non-citizen (of Australia) and he is going to return to live in the country where he was born. He is being repatriated, as the learned Deputy President pointed out about Mr Ban. If Mr Omar wanted to return to Australia, he would be regarded as a person with a "substantial criminal record" (s 501 of the *Migration Act 1958* (Cth), subss (6) and (7)(e)). These are circumstances that do not warrant, in the Tribunal's opinion, overriding the presumption contained in s 12 of the *Interpretation Act* that "members of the public" constitute, as a category, a "matter or thing in and of New South Wales." This is to be contrasted with the situation where an Australian patient may travel interstate within Australia. Adopting the explanation used by the learned authors of *Statutory Interpretation in Australia*,[b] the "concept of the federal system, the homogeneity of the population, the frequent movement of people between states and the commonality of problems of meeting a common and cooperative solution point to the presumption being more readily displaced" (at 220, [5.9]). Although those remarks were made in the context of the common law presumption that legislation is presumed not to have an extraterritorial effect, it applies with equal force, in the Tribunal's opinion, to the applicability of s 12 of the *Interpretation Act*. Likewise the presumption would be more readily displaced in a case where a forensic patient was travelling overseas for a period of time with the intention to return to New South Wales.

19. The second reason advanced by Mr Ranken for doubting the correctness of the reasoning in *Ban* points to s 75(1)(k) of the Forensic Act. The Tribunal would make its determination on the assumption that it could impose conditions relating to overseas travel. For example, points out Mr Ranken, the Tribunal would have to take into account people in overseas countries visited by a forensic patient on conditional release. Because it would apply in such an instance, "there is no reason why the phrase should not be so construed when considering the unconditional release of a forensic patient with a view to repatriation to another country."

20. One reason for not so construing the phrase in the case of repatriation is that advanced above regarding Mr Ranken's first point. It is important to appreciate that s 75(1)(k) has an effective operation falling short of the circumstances of this case. The phrase which is the subject of construction is contained in mental health legislation. Unrestricted overseas or

b *Emeritus Professor Pearce and Adjunct Professor Geddes*, 8th Edition, 2014

interstate travel could bring with it a risk that a forensic patient would become unwell while travelling. This could be because the patient is using travel as an escape from restrictions of their conditional release (for example, remaining drug free or taking prescribed medications). The experience of the Tribunal suggests that travelling could be unsettling for people with mental health difficulties with its concomitant sleep deprivation, time changes or new and stressful experiences which could lead them to become unwell. In that context, s 75(1)(k) permits the Tribunal to regulate interstate or overseas travel in a way that protects the safety of the NSW public when a forensic patient returns to the state. Anyone who is an Australian citizen or resident has the right of return. Reading the s 75(1)(k) provision of conditions for "overseas or interstate travel" in that way gives it a good deal of utility without displacing the presumption contained in s 12 of the *Interpretation Act*. On the other hand, the presumption would be more readily displaced in the case of a forensic patient who is conditionally or unconditionally released to live interstate. That is because of Australia's federal system, of which at NSW is part, for the reasons articulated by the learned authors of *Statutory Interpretation in Australia* quoted above.

21. Mr Ranken's third argument was to point to Deputy President Sperling QC's consideration of the safety of members of the public of another country as a discretionary factor in *Ban*. Mr Ranken points out that the opening words of s 74 of the Forensic Act expressly remove any limit to "any other matters the Tribunal may consider" so "there is no good reason why the learned Deputy President's observations concerning the relevance of the safety of members of the public in another country to the Tribunal's exercise of the discretion should not apply with equal force at least to the consideration in s 74(b) and (d), if not s 43(a) as well." But there is a good reason why the discretionary considerations of the learned Deputy President ought not to be applied to s 74 and s 43; that good reason is the statutory presumption contained in s 12 of the *Interpretation Act*. The s 12 presumption is more likely appropriately displaced by the legislature's grant of a broad discretion in the opening words of s 74 than to the specific phrase "member of the public" in a case where a forensic patient is being repatriated to another country.

22. Finally, Mr Ranken refers to the *obiter* remarks by Beazley P in *XY* (at [52]) in the following terms:

> *"The Attorney General submitted that the reference to 'any member of the public' in s 43(a) included the public in both New South Wales and Queensland. The Tribunal accepted this submission, given that, at the time of his arrival in Queensland, XY would still be subject to the New South Wales Order. This was not in dispute on the appeal. It should be said, however, that any member of 'the public' in s 43(a) may extend to any*

member of the public with whom the patient comes or may come into contact with. For example, if the Tribunal was considering conditional release to enable a patient to travel overseas, any member of 'the public' would presumably encompass persons encountered in the course of travelling and whilst overseas."

In the same case, as Mr Ranken points out, Basten JA made observations at [163]-[164] which were set out in his (Mr Ranken's) submissions. In the circumstances of that case, the Tribunal's finding that "any member of the public" included interstate public was not challenged in the Court of Appeal. Mr Ranken pointed out that Basten JA went on to further observe:

"It should not, however, be treated as a restrictive finding. The phrase is apt to cover members of the public anywhere in Australia and, indeed, may well extend to other countries. It is by no means clear that the Tribunal could properly disregard the consequences of the unconditional release of a forensic patient due to depart for a foreign country."

Mr Ranken pointed out that in *A*, Beazley ACJ "cited each of the above passages from *XY* with apparent approval." Mr Ranken acknowledged that while the remarks were "strictly obiter dicta, they support the submissions … above and are persuasive."

23. The Tribunal notes that Beazley P's example was the Tribunal "considering conditional release to enable a patient to travel overseas" encompassing "persons encountered in the course of travelling overseas." That is, with respect to her Honour, consistent with the Tribunal's concern for the public in NSW because her Honour's example was one of conditional release which suggests a return to Australia. That point cannot be taken, of course, regarding Basten JA's example which is one of "the unconditional release of a forensic patient due to depart for a foreign country." The Tribunal takes some comfort from the fact that his Honour acknowledged that the issue in the Court of Appeal had been the subject of a concession and was therefore not fully argued in that Court. The Tribunal accepts, with great respect to Basten JA, that his Honour's observation is, as Mr Ranken points out, "persuasive." But the Tribunal respectfully regards the considerations advanced above to be more persuasive and to point to the non-displacement in this case of the statutory presumption contained in s 12 of the *Interpretation Act*.

Consideration of JH&FMHN submissions

24. Under s 74(d), the CFMHS has to report on three things:-
    - the condition of the patient;
    - whether the safety of the patient will be seriously endangered by the patient's release, and
    - whether the safety of any member of the public will be seriously endangered by the patient's release.

25. The release of course may be conditional or unconditional. The "proposed release" envisaged by s 74(d) is usually recommended by the patient's treating team which will make a case for release in their own reports. It may be sought on behalf of the patient by the patient's lawyer. In the case of such a "proposed release", the CFMHS must provide its report on the three topics. In practical terms, either the patient, the patient's treating team or the patient's lawyer (or any combination) will provide the proposal (conditional or unconditional release) and the kinds of conditions envisaged if it is conditional release that is sought. CFMHS will then undertake its statutory function of reporting on the three topics. In the CFMHS report, the forensic psychiatrist (or other person) may express the opinion that no one's safety will be "seriously endangered" by the patient's release. Or the author may say that if certain conditions are in place, then no one's safety will be seriously endangered. CFMHS reports often recommend conditions. If a patient is being proposed for conditional release within New South Wales, then the report may refer to local services and facilities that the author knows are available within the NSW community. If the proposed conditional release is to a foreign country, then the CFMHS report author may need to express the conditions in more generic terms. For example, supervision (by a health professional or not), the regular administration of medication and the requirement that the patient take that medication or the conduct of tests such as drug screening. In any given case, one would expect it to be in the interests of the person proposing release (patient, treating team or lawyer) to provide information about the services and facilities that are available in the foreign country or, at least, information about how to contact persons in the foreign country who will be responsible for the patient on their release. CFMHS may then make their own enquiries regarding the reliability and security of the supervision regime. The ameliorating effect of family or culture on the risk posed by the patient may be something which it would be in the interests of the patient to source and put before the CFMHS.

Conclusion

26. The Tribunal, for the reasons above, does not accept Mr Ranken's argument, despite its cogency and adoption by Mr Sterry.

Determination

27. Accordingly, in the Tribunal's opinion, in this case the phrase "member of the public" as it appears in s 43(a) and s 74(d) of the Forensic Act does not extend to the members of the public of a foreign country.

Signed

His Honour Judge Richard Cogswell SC
President

Dated this day 21 August 2018