THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MS YOUNG AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL ON [DATE]

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

APPLICATION FOR: s37(1)(b) Review of Involuntary Patient

DATE AND PLACE OF HEARING: [Date], Mental Health Review Tribunal

ATTENDEES:

Ms Young did not attend the hearing. She was represented by her lawyer, Mr Callum Hair of MHAS. Also in attendance were:

- Ms Georgina Wright, Barrister (representing Ms Young);
- Ms Rosalind Acland, Crown Solicitors Office;
- Ms Amber Richards, Crown Solicitors Office;
- Ms Sophie Callan on behalf of Secretary of Health, and
- Two observers.

1. This is an adjourned hearing of the Tribunal (from [date]) of a review of Ms Young, pursuant to section 37 (1) (b) of *the Mental Health Act 2007 [the Act]* relating to a civil patient's ongoing care, treatment and detention. At the hearing in [date], the Tribunal foreshadowed an order that Ms Young would be transferred to another metropolitan mental health facility and that if the order was not complied with by [date], the matter should be relisted before the President.

BACKGROUND

2. On [date], Ms Young was sentenced to a term of imprisonment in relation to an offence of damage property by fire or explosives. The sentence and the non-parole period have now expired.

3. Ms Young went into custody on [date] and 2 days later, she was transferred to Facility A. On [date], Ms Young was admitted to Facility B and has remained in that facility since then.

4. On [date], the State Parole Authority revoked her parole order because Ms Young posed a serious and immediate risk to her own safety. On [date], the Tribunal determined that Ms Young is a mentally ill person and should be detained in a mental health facility. Between [date] and [date], Ms Young was treated with the administration of ECT (with the authorisation of the Tribunal) and with clozapine, which was commenced, ceased due to side-effects and recommenced.

5. Ms Young has a diagnosis of schizoaffective disorder and polysubstance abuse, which is currently contained in a controlled environment.

6. Between [date] and about [date], multiple enquiries were made by the treating team at Facility B to the following eight mental health facilities regarding Ms Young's placement. The position as at [date] is summarised in the minutes from the Committee Meeting as involving "challenges progressing Ms Young to a less secure mental health facility" and having exhausted a number of possibilities, liaison was to take place with [X] Local Health District Clinical Director and "if unsuccessful consider referral to the Complex Care Review and Access Committee."

7. I should observe that at this hearing, the Tribunal requested Ms Callan, counsel for the Secretary, to pass on to her client the request that all endeavours to expedite Ms Young's transition should be undertaken. Following that request, the Registrar of this Tribunal received a letter dated [date] which updated the efforts being made and indicated that there appeared to be two options remaining: a potential suitable placement within the [X] Local Health District and failing that, a reference to the Complex Care Review Committee.

8. Subsequent to the hearing on [date] (in respect of which reasons were delivered on [date]), the panel was made aware of the official report of ***Vigo*** [2020] NSWMHRT 1 and of legal issues concerning the extent of power in section 38(4). Consequently this matter was relisted before a panel including the President.

9. To provide sufficient context, it is instructive to note that at an earlier hearing on [date], Deputy President Johnson observed at paragraph [9] that "staff at the Facility B accept that Ms Young does not need to be detained in the high secure environment of the Facility B, but says she does need involuntary inpatient treatment in a mental health unit".

10. The Deputy President referred to the views of Dr [E], the Treating Psychiatrist, that Ms Young had a long history of "revolving door" admissions, that she does not currently have housing available if she were to leave Facility B and finally, that her mental state was very fragile and she was liable to quickly decompensate if the arrangements for her discharge were not carefully planned and supported – paragraph [17].

11. On that basis, the Tribunal was satisfied that "if discharged from a mental health facility without housing, appropriate supports and assertive mental health follow-up, Ms Young is at a high risk of a relapse and a mental illness" – paragraph [23] and accordingly, there was no other safe and effective care of a less restrictive kind that is appropriate and reasonably available – paragraph [25].

12. As was referred to earlier, the Official Report of the Tribunal in ***Vigo*** was published after the initial hearing of this matter. That decision related to the second limb of section 35 (5) (c) of *the Act*, that is, whether the patient's ongoing detention at Facility B provided less restrictive care that was safe and effective, and "appropriate and reasonably available". The issue particularly focused upon the

appropriateness and the reasonable availability of the proposed facility, particularly the notion of reasonableness.

13. Deputy President Bisogni concluded at paragraph [53] that the term:

    (a) … would include care that was "likely" or "probably" available. … a "mere possibility" of availability will (not) suffice. In addition, … a very significant factor in determining "reasonably available" is that medium secure units have their own powers and discretions in determining the availability of placements depending on factors such as their assessments of the suitability and needs of individual patients, the unit's resources and their priority of placement.

14. I accept that the formulation in section 35 (5) (c) is not dissimilar to that in section 38 (4), but they are not identical either. More particularly, the focus of the hearing in ***Vigo*** was not on any power of transfer but on the matter of reasonable availability of safe and effective care and treatment.

15. This case raised two major issues: firstly, whether the Secretary of Health should be permitted leave to appear and make submissions and, secondly, whether section 38 (4) permitted the Tribunal to make an order of the kind foreshadowed, i.e. an order for detention and transfer to another metropolitan mental health facility.

LEAVE TO APPEAR

Young

16. Ms Wright, counsel for Ms Young argued that the Secretary had no sufficient interest warranting leave to appear and make submissions on the interpretation of section 38 (4) and any interest grounded on arguing for the "coherency of the statutory scheme" was too general – paragraph [4]. It was further submitted that the decision of ***Re Resinovic*** [2015] NSWMHRT 4 states the correct approach in cases of this kind that is, by the appointment of counsel assisting to make such submissions. It was contended that merely claiming there was a public interest alone was insufficient – paragraphs [5] and [7].

17. It was argued that the rationale for this restrictive approach was the risk that "the involvement of lawyers" results in hearings of more formal, technical and adversarial nature – paragraph [8]. However no issue was taken with the Secretary providing factual assistance relating to the options for transfer of Ms Young to a less secure facility.

Secretary of Health

18. Ms Callan, counsel on behalf of the Secretary, accepted that she has no express right to appear but the Tribunal has broad powers in relation to the conduct of his hearings.

19. Reference was made to ***Resinovic***, in which Deputy President Johnson determined that the Tribunal has power to allow a person (in the case, the Attorney General) to participate in a review

hearing but only in "highly unusual cases" – paragraph [5]. Ms Johnson pointed to the intended flexibility of the proceedings and the capacity of the Tribunal to obtain information from whomever it considers appropriate.

20. At paragraphs [25] and [26], the Deputy President determined that given the experience that the general involvement of lawyers leads to a more formal technical and adversarial proceeding, leave ought not to be granted unless it is to enhance the Tribunal's "proper consideration of the matters before it". Where there is only a general "public interest" in the proceedings, rather than a personal or professional interest then "it will be vanishingly rare" to allow a person to intervene in the proceedings.

21. The Secretary submits that she should have leave in order to give proper consideration to the issue of whether the Tribunal has power pursuant to section 38 (4) of *the Act* to order the transfer of Ms Young to any civil mental health facility within the Sydney metropolitan area within six weeks of the hearing. The Secretary points to her particular interest as to the construction of that provision, given her role in administering the health system including managing capacity to accommodate patients at mental health facilities and her power pursuant to section 80 of *the Act* to order the transfer of patients.

22. It is submitted that the Secretary's role and responsibilities in relation to the administration and coherency of the scheme means she should be heard on this legal issue. In short her interest is more than a general "public interest" in the proceedings.

23. In the present case, fortuitously perhaps (for this purpose), Ms Young was not present at the hearing due to medical concerns. The argument raised on her behalf that involvement of lawyers would lead to a more formal proceeding, therefore was not a significant consideration in the present context.

24. Counsel for Ms Young supports her argument on the onus on the treating team to adduce evidence, on the objects provisions in section 68 (a) and (e) of *the Act*. Those objects refer to the fact that mentally ill people should receive the best possible and less restrictive effective care and treatment (a) and that such persons should be provided with appropriate information about treatment, alternatives and effects (e). (The relevance of sub-section (e) is not immediately obvious.) Section 68 sets out the intention of Parliament that the principles should apply "as far as practicable". Section 195 confirms that section 68, inter-alia, is intended "to give guidance" as to the administration of *the Act* and does not "create, or confer on any person, any right or entitlement enforceable at law".

25. As section 151 (2) of *the Act* makes clear, the Tribunal is not bound by the rules of evidence but may inform itself of any matter in such manner as it thinks appropriate and as the proper

consideration of the matter permits. The High Court in ***MIMA v Jia Legeng*** (2001) 205 CLR 507; [2001] HCA 17 considered arguments as to actual and reasonable apprehension of bias in relation to a decision of the Administrative Appeals Tribunal. In dealing with that issue, Hayne J at paragraph [180] made the following observations (which are pertinent to the proceedings before this Tribunal):

(a) *… Reference need only be made to a body like the Refugee Review Tribunal … The procedures for decision-making by that body are much less formal than those of a court … There is no provision for any contradictor and the procedures are, therefore, not adversarial. The decision-maker, in a body like the Refugee Review Tribunal, will bring to the task of deciding an individual's application a great deal of information and ideas which have been accumulated or formed in the course of deciding other applications. A body like the Refugee Review Tribunal, unlike a court, is expected to build up "expertise" in matters such as country information. Often information of that kind is critical in deciding the fate of an individual's application …*

26. Kirby P in ***Harry v Mental Health Review Tribunal*** (1994) 33 NSWLR 315 at 329 echoed those of views describing this Tribunal as "*an expert body with specialist membership and other forensic advantages".*

27. It follows in my opinion, the objects provision read in conjunction with the section 195, gives no support for the argument as to onus and I reject that argument.

28. I conclude that the Secretary does have a sufficient interest to make submissions and be heard, for essentially two reasons: firstly, given she has a co-extensive power to order the transfer of patients, the interaction of the power of the Tribunal (if indeed, section 38 (4) is so construed) and the power of the Secretary (section 80) is a relevant consideration in determining the issue of construction of the former provision; and secondly, on a more practical logistical level, any order of the Tribunal can only be made by consideration of what is appropriate and reasonably available, an issue squarely within the care and responsibility of the Secretary.

POWER OF THE TRIBUNAL TO ORDER TRANSFER OF INVOLUNTARY PATIENT FROM ONE MENTAL HEALTH FACILITY TO ANOTHER – SECTION 38 (4)
Young

29. Counsel for Ms Young submits that there is a real question whether the Tribunal can make the determination required under section 38 (4) to enable an involuntary detention order to be made in the circumstances of this case. It is submitted that there is "an onus on those who care for Ms Young" to demonstrate to the Tribunal that no less restrictive kind of care is reasonably available (to enable the Tribunal to make a determination).

30. Further, counsel submits that the power of Tribunal to make a determination is not enlivened in the circumstances of this case, because on the evidence available no determination about the

reasonable availability of other care has been adduced and the onus to do so is upon "those who care for Ms Young" – paragraphs [30] and [32]. For reasons which are explained above, I reject the submission that in hearings before the Tribunal, any of the participants bears an "onus" as understood in the context of legal proceedings.

31. It is submitted that the Tribunal is required to compare the present circumstances and other forms of care, which are reasonably available – paragraph [33]. Consequently so it is contended, where the current care is not appropriate, there is no such obligation on the Tribunal to make order – paragraph [34]. I understand this submission to be consequent upon the earlier contention that the onus is upon the treating team and if not discharged, the Tribunal has no information upon which to make a determination.

32. The result of this interpretation, it appears, is that in the present circumstances, the Tribunal would be obliged to make no order for detention and hence, Ms Young would be at liberty. For reasons expressed below, I consider that such a result would abdicate the responsibility of the Tribunal and contravene other provisions of *the Act*, which are protective of the safety of Ms Young and others. In these circumstances, the Tribunal would inform itself in any manner it thinks fit (cf section 151 (2)) and use its expertise and experience to determine the appropriate course.

33. Counsel submits that the descriptor "restrictive" readily applies to Facility B and involuntary detention at a civil mental health facility would be less restrictive – paragraph [37] and therefore the Tribunal should consider whether other forms of involuntary detention in alternative facilities would be less restrictive and appropriate – paragraph [38].

Secretary

34. The Secretary argues in summary, that the Tribunal does not have the power (either express or implied) to order the transfer of an involuntary patient from one mental health facility to another mental health facility. She submits that *the Act* does not expressly provide the Tribunal with such a power and contrasts that position with the Secretary's power of transfer in section 80.

35. In addition, the submissions point to section 48 of *the Mental Health (Forensic Provisions) Act 2009* and its predecessors, which show that prior to 2008, the Tribunal had no such express power, a matter which is remedied by section 48. That there is no express power in the Tribunal to transfer a patient, is unarguably correct.

36. The Secretary further argues that there is no implied power for such a transfer, given her express power in section 80. Furthermore, it is submitted that it is unnecessary for the Tribunal to have such a power in order to appropriately carry out its functions. It is argued that section 38 is focused upon whether a person ought to be detained or not, "rather than the circumstances of detention". Undoubtedly, the primary focus is upon the question of detention but for reasons expressed below,

a proper implication from the language of that section is that the Tribunal does indeed have an obligation and a right to examine the circumstances of the care and treatment and consequently to make an order, consistent with the result of such an examination.

37. It is further submitted that the phrase "no other care of a less restrictive kind" appears in the context of an assessment as to whether a person should be detained or not "rather than to provide a basis for delineating the intensity or form of care once it is determined the person should be detained."

38. Finally, the Secretary submits that a construction inconsistent with that for which she argues, would be unworkable because it would require the Tribunal to examine features of the care and treatment being delivered, including levels of restriction of liberty. The Tribunal would need to descend into matters such as the capacity and willingness of facilities to receive involuntary patients. Accepting this to be so, it is not readily obvious why this would be unworkable. In the normal course, the Tribunal would expect to be informed of matters such as this by the treating team and/or by the legal representative of the patient. By way of example, these matters are commonly raised without problems, when the Tribunal makes orders pursuant to section 35 (5) (c).

CONSIDERATION

39. Any examination of *the Act* must appropriately commence with a consideration of the objects and principles applicable to it. Section 3 sets out the objects as follows:

    (a) to provide for the care and treatment of, and to promote the recovery of, persons who are mentally ill or mentally disordered, and

    (b) …, and

    (c) to facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and

    (d) while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care and, where necessary, to provide for treatment for their own protection or the protection of others, and

    (e) …

40. Section 68 sets out the principles for care and treatment:

    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--

    (a) people with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given,

    …

(e) people with a mental illness or mental disorder should be provided with appropriate information about treatment, treatment alternatives and the effects of treatment and be supported to pursue their own recovery,

(f) 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,

41. *The Act* sets out the following statutory regime for the admission, detention and treatment of involuntary patients. Chapter 3 regulates the circumstances under which persons may be subjected to an involuntary admission into a mental health facility and the treatment they are to receive. Part 1 (sections 12 to 16) sets out the restrictions on and criteria for the admission of involuntary patients. Part 2 (sections 17 to 49) deals with the involuntary detention of persons in a mental health facility and their treatment. It is this Part of *the Act* upon which there is particular focus in relation to the case at hand. Chapter 4 (sections 68 to 104) deals with the care and treatment of patients or detained persons generally. Chapter 5 focuses upon the New South Wales public health system particularly in relation to mental health facilities and Chapter 6 provides for the constitution and procedures of the Tribunal. The remaining Chapters are not relevant for present purposes.

42. Turning to the most relevant provisions of *the Act*, section 12 sets out the necessary prerequisites before a person is involuntarily detained:

(1) a patient or other person must not be involuntarily admitted to, or detained in or continue to be detained in, a mental health facility unless an authorised medical officer is of the opinion that--

(a) the person is a mentally ill person or a mentally disordered person, and

(b) no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person.

(2) If an authorised medical officer is not of that opinion about a patient or other person at a mental health facility, the officer must refuse to detain, and must not continue to detain, the person.

43. An authorised medical officer is defined in section 4 (1) as the medical superintendent of a mental health facility or in effect, his or her delegate.

44. Section 13 provides that a mentally ill person is only to be admitted as an involuntary patient or detained (or continue to be detained) in a mental health facility "*if, and only if*" the person satisfies the relevant criteria set out in Part 1 of *the Act*. Those criteria are set out in sections 14 and 15 and relevantly are: that the person is suffering from a mental illness and owing to that illness, 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 – section 14 (1).

45. Part 2, Division 3 sets out the prerequisites for continued detention of involuntary patients in mental health facilities and prescribes the nature of the reviews to be conducted by the Tribunal.

46. Section 34 directs the Tribunal to hold an inquiry "as soon as practicable after admission" (section 27 (1) (d)) in relation to a person detained in a declared mental health facility for whom an inquiry is required (an "assessable person"). Section 35 directs the Tribunal to determine whether or not on the balance of probabilities that person is a mentally ill person and if so, to discharge to the person into the care of a carer, make a community treatment order or:

(5)

(a) …,

(b) …,

(c) *an order that the person be detained in or admitted to and detained in a specified mental health facility for further observation or treatment, or both, as an involuntary patient, for a specified period of up to 3 months, if the Tribunal is of the opinion that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available or that for any other reason it is not appropriate to make any other order under this subsection.*

47. The language of subsection (5) (c) makes it plain that the Tribunal is given the specific power to order the detention and admission of the person to "a specified mental health facility".

48. Section 37 provides for the reviews of involuntary patients by the Tribunal, including the regularity of such reviews and the procedure to be adopted in them. Section 38 sets out the matters to be considered by the Tribunal in conducting the review, and relevantly, the findings it may make and the consequential orders which follow.

49. Section 38 relevantly provides are as follows:

(1) The Tribunal is, on a review of an in voluntary patient, to determine whether the patient is a mentally ill person for whom no other care (other than care in a mental health facility) is appropriate and reasonably available.

(2) …

(3) If the Tribunal determines that the patient is not a mentally ill person, the patient must be discharged from the mental health facility in which the patient is detained.

(4) If the Tribunal determines that the patient is a mentally ill person and that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient, the Tribunal must make an order that the patient continue

to be detained as an involuntary patient in a mental health facility for further observation or treatment, or both.

(5) In any other case that the Tribunal determines that a patient is a mentally ill person, it must make an order that the patient be discharged from the mental health facility in which the patient is detained and may make any of the following orders-- …

50. *The Act* therefore deals sequentially with the usual process by which a person may come in contact with a mental health facility: initial presentation and admission; detention and continued detention, including the appropriate care and treatment; review by the Tribunal subsequent to initial admission and thereafter regularly on a statutorily mandated timeframe.

51. It is self-evident from the structure of *the Act* that the responsibility for determining and administering appropriate care and treatment lies with the treating teams at the mental health facilities. Accordingly, those matters are not usually within the purview of the Tribunal, the situation which in any event is borne out by common sense and practicalities: notwithstanding the expertise of the psychiatrist and allied health members of the Tribunal, decisions as to the appropriate treatment can only properly be made by those fully informed of the patient's circumstances and with the continuous experience of contact with the patient. Notwithstanding the expertise of members of the Tribunal, it is neither correct nor appropriate that a reviewing panel without the above knowledge and experience, should dictate the precise care and treatment which should be administered to the patient.

52. It is clear from a review of the relevant provisions, that the tests or criteria to be applied at each stage, are relatively standard and the Tribunal in exercising its functions, must examine the level of care, the degree of its restrictive nature and whether a better level of care is reasonably available. The two relevant questions are whether the person is mentally ill and secondly, whether alternative safe and effective care, which is less restrictive and appropriate, is reasonably available to the person.

53. As a matter of principle and practicality, the judgments as to the appropriate mental health facility and the availability of places (i.e. whether places are reasonably available) are best made by the Secretary of Health or by her delegated authorised medical officers. So much is confirmed by the terms of section 84 which reposes in the authorised medical officer, the authority to give any treatment (including any medication) that the officer thinks fit to an involuntary patient – see also MHRT Guideline: The role of the Mental Health Tribunal in relation to treatment. Guideline 7 reinforces the statutory mandate of the Tribunal to ensure that "*a consumer receives safe and effective treatment, given all the circumstances*" and Guideline 8 states that the Tribunal should not "*try to direct or dictate treatment*."

54. However, the Tribunal in its role, is obliged to review such decisions and if in its opinion, the decision is found wanting (on reasonable grounds), the Tribunal may make a different order. As Mahoney JA said in ***Harry v Mental Health Review Tribunal*** (1994) 33 NSWLR 315 at 335:

(a) … It is proper to refer to the procedures which safeguard the exercise of power over mentally ill persons. This Act, as did earlier Acts, establishes procedures whereby the condition of those to whom the statutory powers are to be applied can be monitored to ensure that they are continue to be in need of the statutory constraints. It is proper that these things be monitored and that the courts and tribunals ensure that the statutory requirements are satisfied.

55. There is no bright line between directing treatment and reviewing treatment in all cases. If for example, the reasonable alternatives for care or treatment involve a binary question i.e. that administered by the treating team and only one other alternative, the determination of the Tribunal that the current care and treatment did not meet the statutory test, would by definition dictate that the treating team is obliged to take the only other alternative. In that sense, the functions of the Tribunal would have the effect of dictating what the appropriate treatment was.

56. In many respects, that example defines the issue in the present case. The entire and overwhelming medical opinion in relation to the circumstances of Ms Young is that her "detention" at Facility B is not the least restrictive form of care and treatment. It appears that there is no serious contest by any of the participants in Ms Young's review that this is the position. The only feasible alternative if this is the case, is that Ms Young's care and treatment be conducted in an appropriate facility other than Facility B. In terms of practical alternatives, it would be an abdication of the Tribunal's statutory responsibilities to the welfare of Ms Young, to decline to make any order as to her detention (an alternative suggested argument by her counsel), because either her own safety or less likely, the safety of others would be endangered by the course of action cf section 3 (d).

57. Returning to the provisions of section 38 (4), what then are the matters which the Tribunal must determine if a person is to be continue to be detained? They are as follows:

(1) is the person mentally ill?

(2) what is the nature of the care, in relation to the restrictions it imposes, its safety, effectiveness and/or appropriateness that the person is currently receiving?

(3) if the nature of the current care (in the way identified above) of the person is not appropriate, what is the nature of the care in those respects, that is reasonably available? And

(4) if the care under consideration meets the statutory criteria, the Tribunal is obliged to make an order that patient "continue to be detained in a mental health facility"

58. Relevantly, this exercise requires a consideration of the restrictions imposed by the person's current placement in the mental health facility and whether that placement constitutes the least restrictive kind of care. If the evidence before the Tribunal discloses that the current placement is

not the least restrictive appropriate care, the Tribunal should receive and must consider alternative placements and make an adjudication about the appropriateness of the restrictions in the alternative placements.

59. It is fair to say that in the real world context applicable in New South Wales, the Tribunal has an understanding by the nature of its work, of many of the mental health facilities and more particularly, of the categories of mental health facilities in terms of their being high security or medium security. Therefore, often evidence is not essential to inform the Tribunal of these matters in relation to specified health facilities cf ***Jia Legeng***. Undoubtedly, the Tribunal cannot without evidence know what particular limitations any given mental health facility has, in terms of its available services, resources or bed availability.

60. As is obvious, these reviews take place against the uniform backdrop that a person has been detained on the authority of the authorised medical officer. So much is apparent from the references in subsections (3) and (5) to "***the*** mental health facility in which the patient is detained". The reference to the definite article "***the*** mental health facility" has significance in my view. By contrast, the operative subsection, section 38 (4) makes reference to an order for the continued detention of the patient in "***a*** mental health facility for further observation or treatment, or both." It is noteworthy therefore that the subsection refers to continued detention in "a" rather than "the" mental health facility presumably where he or she is currently being detained. If the focus of that subsection is upon "the critical question of liberty: whether a patient or to be detained or not" (paragraph [37] of the Secretary's submissions), then that result could have been more clearly achieved by the use of the definite article i.e. "the mental health facility in which the patient is detained".

61. Furthermore, the subject matter of the order for detention is broadened by the language "for further observation or treatment, or both". Those words clearly import that the Tribunal can properly have some input into the issue of "observation or treatment, or both" cf the submissions of the Secretary (paragraph [37]: "Questions of care and treatment - including questions of transfer of an involuntary patient from one facility to another are matters for the [authorised medical officer]".)

62. In my opinion, these references recognise that the Tribunal has by implication, the power to direct the continued detention of a mentally ill person at an appropriate mental health facility which conforms with the requirement that is the least restrictive option. That is not to say that such an order may direct that a mentally ill person necessarily be taken to a specific mental health facility, but it does in my view, authorise the continued detention but in an available facility which is least restrictive to the person.

63. I do not accept the argument that because the Secretary has an express power of transfer in section 80, this militates against any power in the Tribunal pursuant to section 38 (4). Ultimately, it is the words of the section which need to be construed and in any event, I am unable to see why

the system constructed by *the Act* cannot work coherently with a power that can be exercised by two rather than one repository. Nor does such a power in the Tribunal infringe the responsibility on the treating team to dictate the nature of the care and treatment appropriate to a patient. An order of the kind in contemplation here, deals with only one aspect of the patient's care and treatment namely, the degree of restriction which affects that person's placement. Otherwise, issues as to whether the patient must be detained in a high security part of that facility, whether seclusion or given types of medication are best for the safe and effective care of that person and matters of that kind, are still the exclusive province of the treating team, as they should be. That must be so because events pertaining to the degree and seriousness of the symptoms exhibited by a patient, can vary from day to day and are best dealt with by those who are directly administering the care and treatment.

64. In my opinion, this construction conforms with the language of section 38 (4) and furthers the objects of (section 3 (c)) and principles guiding *the Act* (section 68 (a) and (f)) and provides a workable combined approach which facilitates the patient's optimal care and treatment.

65. References to other provisions of *the Act* and to section 48 of *the Forensic Provisions Act*, are of limited assistance in construing the precise words of section 38 (4). As the above analysis demonstrates, a reading of that subsection in the context of the other subsections in section 38, demonstrates that the Tribunal does have an implied power to order the transfer of a patient from one level of security facility to a lesser level of security facility, the precise facility being a matter for the treating team and the facility in consideration. In short, I do not accept the argument that the only work for section 38 (4) is as to whether there should be detention or not. The order can encompass according to its terms: the level of restriction and in broad terms, whether the detention is for observation or treatment or both.

SIGNED BY THE PRESIDENT ON BEHALF OF THE MEMBERS OF THE TRIBUNAL ON 20 JULY 2020.

……..
Judge P I Lakatos SC