IN THE UPPER TRIBUNAL **Appeal No.** HM/1073/2009
ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

This decision of the First-tier Tribunal is not set aside. Although the decision involved the making of an error of law, the Upper Tribunal exercises its power NOT to remake the decision, under section 12(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the Rules).

I direct that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify any person who has been involved in the circumstances giving rise to this appeal, pursuant to rule 14 of the Rules.

REASONS FOR DECISION

1 This is an appeal against the decision of the First-tier Tribunal (the Tribunal) heard under reference M/2009/002342 on 5 February 2009. The appellant's application to the Tribunal for permission to appeal to the Upper Tribunal was refused 23 March 2009 and by a judge of the Upper Tribunal (the UT) on 24 July 2009. the appellant renewed his application to the Upper Tribunal orally (by telephone), following which I granted permission to appeal. The oral hearing of the substantive appeal was held on 16 July 2012 at Field House. The appellant represented himself. The respondent declined to participate in any way.

2 The Tribunal's decision was that the appellant was suffering from a mental disorder of a degree which warranted his detention in hospital for assessment (or for assessment followed by medical treatment) for at least a limited period, under section 2 of the Mental Health Act 1983 (the Act); that his detention was justified in the interests of his health or safety or with a view to the protection of other persons, and that it was not appropriate to discharge him under its discretionary powers.

3 By the time the application to appeal against the Tribunal's decision, the appellant had been further detained under section 3 of the Act. He successfully appealed that decision to a Tribunal on 22 and 26 May 2009 and was released on 16 June 2009. He had been detained in hospital for approximately 6 months.

4 The grounds of appeal related to the Tribunal's finding that he suffered from a mental disorder; the insufficiency of the Tribunal's reasons for their decision that the appellant was to continue to be detained under section 2, and to his view that there had been a breach of his right to a fair hearing under Article 6 of the European Convention on Human Rights. He made seven specific submissions on this which I shall address hereafter. At the hearing the appellant also raised a breach of Article 9 of the Convention – his right to freedom of thought, and submitted that the Mental Health Act 1983 was flawed. His Article 9 submissions repeated his disagreement with the mental health practitioners, and he did not make submissions the Mental Health Act 1983.

5 Even though the appeal against detention under section 2 was, by the time I gave permission to appeal, academic, I considered it appropriate for the Upper Tribunal look with care at the decision upon which that detention is based. The appellant was, after all, detained against his will.

6 On a procedural note, I should add that the section 3 bundle contained a great deal more evidence, mainly from a later date than the section 2 hearing. The appellant wished to refer to documents which happened to be in that bundle and agreed that I could do so. Where the later documents in that bundle were capable of casting light on the adequacy of earlier decision and on the appellant's interpretation of, and submissions on, the events in question, I referred to them as evidence. The appellant himself was fully aware of the documents in the bundle. At the hearing, the appellant handed up several documents plus a psychiatric report from Dr Gallo (4/2/09), an exchange of notes with a flatmate and two pages of complaints about his detention.

The background

7 The appellant was detained on 28 January 2009 following concerns reported by his landlord about his behaviour which included a display of persecutory ideas, and sending hundreds of emails to the landlord and to the police saying that his life was in danger. He was heard shouting and laughing to himself into the night when he was on his own. Some of the behaviour appears to have been triggered by a dispute with his flatmates who preferred to turn off the central heating at night. The appellant interpreted this as a deliberate attempt to freeze him. He came to believe that his landlord was a participant in a conspiracy with the British government against him. He believed that the British government was, in turn, involved in a conspiracy with various other governments to persecute him.

8 The appellant, born in 1978, is from the Czech Republic. He has been educated in the Czech Republic, Germany, and the United States. In 2001, he went to study in the US on a Fulbright Scholarship, a mark of high academic achievement. The Fulbright Scholarship was, however, rescinded in or around 2002**.** The appellant believes that this came about because, whilst at university in the US, he criticised the Czech president to fellow Czech students. He believes these criticisms were fed back to the Czech government which thereafter conspired with several other countries including the US, Germany and Great Britain, to ruin his academic career. He also believes that the Czech government intervened to ruin his career with Goldman Sachs when he was employed by them in the UK. He has launched a series of civil suits in the US and in the UK. He believes that his litigation in the US has been blocked through a further conspiracy by reason of which numerous lawyers refused to take on his cases. He believes that another conspiracy resulted in a US lawyer failing to file one of his cases properly with a district Federal court. That case was eventually struck out. The appellant believes that the US court refused to reinstate that appeal because of a further conspiracy against him. In the UK, he took Goldman Sachs before an Employment Tribunal, asserting that he was sacked because he was a whistle blower and because he had criticised the Czech government to several Czech employees. He was not successful. In dismissing his application for permission to appeal its decision, the Employment Appeal Tribunal categorised his grounds as 'so implausible as to be scandalous, unreasonable and vexatious'. The 'section 3' Tribunal refers to this on p 7 of its decision.

9 The Tribunal had before it the appellant's application (presumably under section 66(1)(a), though this is not mentioned by the Tribunal) to review his detention under section 2 and to

discharge him, if that application was successful (section 72). The Tribunal accepted that there was a mental disorder sufficient to detain the appellant, though at that stage, the precise diagnosis was not clear. Subsequently, the psychiatrists came to a diagnosis of delusional disorder.

10 The appellant disagrees with this vehemently, arguing that the diagnosis did not, in his view, conform to DSM-iv and that his response to the situation was purely rational and logical, and therefore not delusional. He firmly believes that there was nothing wrong with his mental health, and that the reports prepared in respect of him were a pack of lies, hearsay, supposition, opinion, cultural misunderstandings and incompetence on the part of the various psychiatrists and mental health workers who dealt with him at the hospital. He believes that he cannot be understood by anyone who earns less money than he does (or did) or who comes from a different cultural background. He rejects on similar grounds the reports from psychiatrists who dealt with him at earlier periods of his life when his behaviour gave cause for concerns over his mental health.

11 The only report which the appellant accepts is one prepared by Dr Gallo dated 19 April 2009 during his section 3 detention. Dr Gallo was from a background he considered to be sufficiently similar to his own. The appellant interprets this report as giving him a clean bill of mental health, and relies heavily upon it, but he has not read it correctly. Dr Gallo concluded that, *at the time of the interview*, the appellant had paranoid, grandiose, and overvalued ideas which did not reach delusional level*, but that he had lost contact with reality at the earlier time of admission under section 2.* At the section 3 hearing, Dr Gallo confirmed in oral evidence that he believed that the appellant had been in a psychotic state earlier. Dr Gallo considers it significant that, at the time of the interview, the appellant was taking medication to stabilize his medical condition though the appellant himself could not accept that this might account for his lucidity.

Mental Disorder and the scope of section 72 appeal

12 The issue at a section 2 hearing is whether the appellant is suffering from a mental disorder which warrants detention in a hospital for assessment. It must therefore decide whether the appellant suffers from a "mental disorder". "Mental disorder" is defined in section 1 of the Mental Health Act 1983 as meaning "any disorder or disability of the mind". A finding of mental disorder involves an evaluation of the patient's mental state, including in some cases the nature of his beliefs. It is a question of clinical judgment by experts.

13 At the section 2 hearing, the Tribunal came to no conclusion as to diagnosis. It was not necessary to do so. It was sufficient if it found that the appellant suffered from a mental disorder. The Tribunal decided that he did suffer from a mental disorder. It involved paranoid and persecutory themes in his beliefs and a preoccupation with them. It was of a longstanding nature leading to psychological distress and impacting on his ability to function both socially and in the workplace. The Tribunal decided that the disorder was of a degree that justified his detention in hospital for further assessment, and that assessment followed by treatment was necessary in the interests of his mental health (top p.18). It further accepted that if not detained the appellant would leave the hospital and would not engage in any follow up in the community. All these findings are supported by the evidence given by Dr Ahmed.

14 The appellant seeks to submit that the Tribunal proceeded on the basis of false assumptions, supposition and incompetent medical evidence. The Tribunal was, however,

entitled to accept the medical evidence of Dr Ahmed and the history presented in those reports, so long as it made sufficient findings of fact supported by the evidence before it and explained how it arrived at that conclusion. In my view, the Tribunal's failing was in giving insufficient reasons for its decision and not because it did not have enough evidence upon which it could come to that conclusion.

The deficiencies in the Tribunal's Statement of Reasons

15 In its Statement of Reasons, the Tribunal recites the reports relating to the appellant's disordered behaviour before his admission. It must have accepted that the behaviour was as stated in the reports. It then examined the medical evidence presented to it, which included a written report from Dr Ahmed, a specialist registrar in psychiatry (4/2/09), a written report from Pamela Mandaza (4 February 2009), medical notes; and oral evidence from Dr Dunn, Mrs Mandaza, Ms Sangowawa and the appellant himself. These reports were, regrettably missing from the bundle though the appellant was able to supply Dr Ahmed's and Pamela Mandaza's report.

16 I understand from the appellant that he and his solicitor objected to the medical evidence, in particular, that there were cultural differences which made the conclusions of a doctor from a different background unsafe, and that the appellant had never met Dr Ahmed. Even if the latter were true, the Tribunal would be entitled to accept a report prepared by a doctor from medical notes, though it would have to be examined with care to justify the Tribunal's conclusions.

17 It is notable that the Tribunal relied on 'the unanimous opinion of the professional witnesses'; without identifying the opinions and how they were justified. It did not discuss the details of any of this evidence, but instead made broad generalisations about the reports. This was problematic since Pamela Mendaza's report, for example, appears simply to have been a recitation of information from other sources. Another problem is that all of the opinions *might* have agreed because they were based on the same source. So the evidence needed to be analysed in greater depth in light of the appellant's criticisms.

18 In the circumstances, I do not consider that the Tribunal's decision provided a sufficient basis for the appellant to understand why the evidence was accepted in light of his criticisms. The Tribunal's decision is, accordingly materially defective in law for inadequacy of reasoning, bearing in mind that this was a matter in which a person's liberty was at stake.

What is the appropriate remedy for the appellant?

19 The appellant wants a rehearing 'to clear his reputation' but I do not consider that this would be appropriate. The new Tribunal would undoubtedly come to the same decision as the last one, not least because it would have access to later reports dealing with the period question which confirm that, at the relevant time, he was suffering from a significant delusional disorder. Some of those reports also refer to psychiatric reports prepared several years earlier which would also lend weight to a conclusion that the appellant, who suffered from episodes of mental disorder in the past, did so at the material time.

20 A new decision in the appellant's favour would not affect the subsequent Tribunal's decision in relation to the section 3 detention which, properly read, confirms that the appellant did, indeed, suffer from a delusional disorder but that he did not meet the criteria for continuing detention.

21 I certainly could not substitute my own decision: the Upper Tribunal does not have psychiatric expertise upon which it could do so.

22 My conclusion is that the only appropriate relief is to say that the Tribunal erred in law but not to set the decision aside. This is a course that is open to the Upper Tribunal under section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007.

Fair hearing

23 Given my decision on ground (i), it is not strictly necessary in law to proceed to this ground. I will, nevertheless deal with this ground since the appellant spent a great deal of time preparing his case on this aspect.

24 He made seven submissions: (i) he was entitled to see the evidence; (ii) entitled to access to court materials in time; (iii) entitled to be judged on facts, not supposition, hearsay or opinions; (iv) entitled to make a response; (v) entitled to be assessed by experienced doctors; (vi) entitled to reasonable time to present his evidence; and (vii) entitled to a second opinion relating to his mental health, as occurred at the section 3 hearing.

25 Items (i) (ii), (iv) and (vi) are plainly elements of a fair hearing and the appellant's disquiet about having to deal with reports tabled soon before a section 2 hearing is understandable. I take items (i) and (ii) raise together as they largely the same point.

26 Paragraph 32 of the Code of Practice Mental Health Act 1983 indicates that reports to the Tribunal (and, it must be implied, the appellant) should be given in good time in accordance with the Tribunal's rules and procedures. But it must be borne in mind that a section 2 hearing must, by law, run to a tight schedule: An individual can only be kept in hospital under a section 2 admission for 28 days before further legal steps are required (section 2(4)) and his application to the Tribunal must be made within 14 days (section 66(2)(a). The hearing must be scheduled within 7 days of receipt of receipt of the application by the Tribunal under rule 37 of the First-tier Procedure Rules (Heath, Education and Social Care).

27 In the appellant's case, he was admitted on 28 January 2009, instructed his solicitors by 29 January and had his hearing on 5 February. These time scales would have made it difficult to provide reports much before the hearing. While that is regrettable, it does not necessarily render a hearing unfair, especially where an appellant is represented, as in this appeal.

28 The appellant's former solicitor answered a number of questions (p120ff) in response to directions I gave on 15 August 2011 (p109 – 11). The solicitor is described by the section 3 Tribunal as experienced in Mental Health Act work. He accepts that in a perfect world, there would be more time to prepare for a section 2 hearing but that he was able to review the appellant's medical notes a day before the hearing and to take instructions on a medical report faxed to them the day before the hearing as well. Only the nursing report (which I note is one page long) was provided on the day of the hearing. I do not consider that the brief report from the nurse would have caused the solicitor any difficulty. In short, I accept the solicitor's interpretation of events. He is an experienced solicitor and an officer of the court. Having seen the evidence and considered the solicitor's replies, I am not persuaded by the appellant's views that he was in dereliction of his duty in any way.

29 The solicitor had access to the appellant's medical notes. He does not suggest that hospital materials were withheld. The appellant's supposition that he was unable to access material is not made out.

30 I am not satisfied that the appellant lacked sufficient time to prepare his case reasonably in the context of a section 2 hearing.

31 I do not accept that the length of the hearing was inadequate. The solicitor's recollection is that the hearing lasted two hours, and not the one hour as the appellant asserts. I prefer his recollection, since lawyers tend to have a better feel for time because of the exigencies of their charging structure, than do laymen. Nor do I accept that the appellant was not permitted to speak. The Tribunal records the gist of his evidence and the solicitor recalls that he gave evidence, though he was asked not to interrupt others.

32 The solicitor says he did not have instructions to request a postponement or adjournment but would have asked for extra time if he felt that was necessary [p120-121]. The appellant accepts that this was so, but says he should have asked for one. That was a matter of tactics to be decided by the lawyer and his client.

33 Despite the appellant's current criticisms of him, I note (as the appellant acknowledged in his reply to the Upper Tribunal of 28 November 2011) that the solicitor made pointed criticisms of, for example, the AMHP's evidence to the Tribunal. Even if the solicitor was mistaken in his attendance note that the appellant did not wish to take his appeal further, it is plain that this error was put right, since the appellant instructed him for the section 3 hearing where his diligence is unquestioned. Indeed, he produced a 50 page submission for the section 3 hearing and responded comprehensively to the directions given by the Tribunal, which expressly described him as an experienced representative. The appellant's response to this - the solicitor 'held back' because he did not want to insult the hospital or lose his job, is not in the least credible that. I conclude that appellant was not impeded in putting his case fully to the Tribunal.

34 Item (iii) raises the question of how evidence is to be weighed. The appellant argued that the evidence presented to the Tribunal was supposition, hearsay or opinion. He disputes that his behaviour leading up to admission was as described, and that it was mere 'supposition' or hearsay. He disagrees with the opinions, which in his view were given by incompetents.

35 The starting point is that it is up to the Tribunal to find facts. Establishing facts may be impeded by shortcomings in the available evidence. A witness's perception of events may be coloured by cultural, intellectual, mental or emotional characteristics. It is a tribunal's job to assess whether what is left after these matters are taken into consideration, is credible and reliable. The tribunal may decide that the evidence is so pervaded by subjectivity, inaccuracy of perception and/or recollection that it cannot be relied upon, or can only be relied upon to a limited extent. That is a matter for the tribunal.

36 There was sufficient evidence on which the Tribunal was entitled to conclude that the appellant's perception of events was flawed, and to reject it.

37 A Tribunal may have to determine more complex types of fact which derive from a deduction or inference from other facts; for example, whether a person suffers from a mental

illness. Mental Health tribunals are well place as expert bodies to make deductions or inferences from facts and to assess the weight and credibility of expert evidence. The Tribunal must also take a view on the other evidence produced in the case, including that of lay witnesses.

38 There is no inherent objection to a Tribunal accepting hearsay evidence. Tribunals are not bound by the strict rules of evidence and may admit evidence which would not otherwise be admissible in civil trials in England and Wales (rule 15(2), The First-tier Procedure Rules (Heath, Education and Social Care) and The Tribunal Procedure (Upper Tribunal) Rules 2008). Hearsay is, in any event, admissible in a civil trial in domestic law, subject to a proper assessment of its weight by a Tribunal. The case law of the European Court of Human Rights does not prevent the admission of hearsay evidence in and of itself

39 Not all of the evidence to which the appellant objects was hearsay. The landlord, for example, did not merely report what others said to him, but reported what had happened to him personally. The appellant's objection to the evidence is, perhaps, no so much that it was hearsay, but that the Tribunal did not subject it to an analytical weighing process: the Tribunal did not discuss in its Statement of Reasons why it accepted the landlord's report, which formed a large part of the evidence upon which the appellant was admitted under section 2, or the reports of others (first hand or second hand) about the appellant's apparently bizarre behaviour. Some of their reports might have been influenced by the continuing battle over the central heating settings. The Tribunal's omission to deal with this aspect of the credibility of the evidence is part of the inadequacy of its reasons.

40 The appellant also objects that the psychiatric evidence was mere opinion. If the appellant's argument were correct, the opinion of Dr Gallo which he urged the Tribunal to accept would be as unacceptable as that of the expert evidence on the other side. The question boils down to whether the Tribunal was entitled to prefer one expert report to another or, indeed, reject them.

41 A Tribunal may accept an expert's opinion, but is under no obligation to do so. It must decide the weight the opinion is to bear, having regard to the strength of the witness's expertise and the clarity of his explanation. That opinion may be accepted as fact. Where there are experts who give conflicting views, it is up to the Tribunal to settle which (if any) of those views are to be preferred.

42 It is well known in psychiatry that different cultures have different perspectives on the range of behaviours which are considered 'normal'. It is not credible that mental health practitioners would be unaware of this. Nor is it credible that a Tribunal in the Heath, Education and Social Care Chamber, which sits as an expert body with a judge, consultant psychiatrist and layman with considerable experience in the field of mental health, would be unaware of multi-cultural issues in mental health assessments. I therefore do accept that the psychiatric practitioners or the Tribunal were not competent to decide whether the appellant's behaviour was culturally based or a manifestation of a mental illness.

43 Item (v) can be added at this point. The appellant's view that the various psychiatrists and health care professionals who dealt with him (excluding Dr Gallo, whom he erroneously thought agreed with him) were stupid, incompetent, or blinded by their own lack of imagination, is no more than a disagreement with their diagnoses of mental illness. This was a matter for the Tribunal and their preference for the opinion of psychiatrists and health

care professionals, rather than the appellant's own self assessment, was a matter for them. The Upper Tribunal cannot interfere.

44 Items (vii) can be answered very briefly: The appellant was entitled to obtain evidence from a doctor of his own choice, if he wished.

Was the Tribunal in breach of Article 9 of the European Convention on Human Rights?

45 Article 9 gives an individual the right the right to freedom of thought, conscience and religion, including the right to manifest one's religion or belief, alone or with others, in public or private, in worship, teaching, practice and observance. Freedom to manifest one's belief may be subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

46. Detention under section 2 of the Mental Health Act 1983 is not aimed at controlling political, religious or other thoughts or beliefs but at ensuring that any underlying mental disorder of the appropriate degree is assessed and (if possible) treated (*inter alia)* for the safety or health of the patient or others. To those ends alone, he may be detained. But that is the subject matter of Article 5 of the ECHR. The jurisprudence of the European Court of Human Rights on art 9 shows that the "Strasbourg institutions have resisted the attempts of applicants to raise issues under article 9 when they may be considered as falling under some other article of the Convention" (Lester & Pannick, *Human Rights Law and Practice* [4.9.2], LexisNexus 2009). It would, therefore, be surprising if Article 9 was engaged in relation to a decision that a patient had a mental disorder which warranted detention for assessment for a limited period justified in the interests of his own health, where such detention is lawful under Article 5.

47. In my view, what the appellant is complaining about in this appeal is not the expression of his thoughts or beliefs but, in essence, his liability to be detained. Article 5, however, permits the lawful detention of those of unsound mind (Art. 5(1)(e)). It does not permit 'the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society" - *Winterwerp v Netherlands* (1979) EHRR 387.

48. The Mental Health Act 1983 is the UK's response to the detention and treatment of those of unsound mind. The individual is protected by a comprehensive legislative scheme laying out the rights of the patient and the duties of the detaining Authorities and those involved in the process The definition of mental disorder in the Act complies with that set out by the European Court of Human Rights in *Winterwerp v Netherlands*, and the Act requires rapid response to a patient's appeal against a section 2 detention, as here, to ensure that detention is tested before an independent Tribunal at an early stage. I do not consider that the Act can be impugned in the generalised way that the appellant submitted.

49 It is plain that the appellant was not detained simply because of his views and behaviour deviated from the norm in society, but because his behaviour was so bizarre as to indicate a mental disorder which an expert Tribunal found to exist and which required assessment and possibly treatment.

50 Even if Article 9 were engaged (which I do not accept), the appellant's challenge would be unsuccessful. Article 9 requires the basic minimum of 'some cogency, seriousness,

cohesion, and importance' (*Campbell and Cosans v UK* (1982) E. H. R. R. 293 [36]). The appellant's beliefs or thoughts do not display these characteristics. They are, instead, an amorphous belief in conspiracies directed personally at him to which he adds, from time to time, to explain various set backs in life. The appellant has made much of losing a Fulbright scholarship, but it would require more evidence than he produced to persuade me, on the balance of probabilities, that this was due to nothing more than an expression of dissatisfaction with the Czech government.

51. Article 9 also requires some connection between the belief and the behaviour said to manifest that belief. The appellant's behaviour, some of which is set out at paragraph 7, had nothing to do with the events around him to which they were a reaction.

The remaining complaints

52. The appellant's other complaints appear largely to be based upon his comparison of the section 2 and the section 3 appeal hearings on 22 and 26th May 2009. He has not taken into account the differences between the criteria for discharge under s72(1))(a) and s72(1)(b) and the differences in the available evidence (as his solicitor refers, at [vi] on p.121) which account for the different results.

53 The appellant is, therefore, right that an error of law has occurred but the Tribunal's decision is not set aside for the reasons I explained earlier.

[Signed on original]

S M Lane
Judge of the Upper Tribunal

[Date]

27 November 2012