IN THE UPPER TRIBUNAL **Appeal No. HM/1334/2015**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

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

The decision of the Upper Tribunal **is to allow the appeal**.

The decision of the First-tier Tribunal made on 5 December 2014 under number MP/2014/18862 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I **set that decision aside** and **remit the case for rehearing** by a differently constituted tribunal which will consider the appeal afresh.

REASONS FOR DECISION

1. The Appellant (AM) is and was at the relevant time a patient in a hospital owned by the Respondent. He was detained under the Mental Health Act 1983 (MHA) pursuant to a hospital order with restrictions after being found unfit to plead. The index offences were robbery and occurred in 2002 and 2003.
2. On 22 December 2014 the First-tier Tribunal decided not to discharge AM from detention. The tribunal gave AM permission to appeal. I directed an oral hearing of the appeal which took place before me on 3 November 2015 in London. The Appellant was represented by Ms K. Round of counsel and the First Respondent by Ms L. Davidson of counsel, both of whom had appeared in the First-tier Tribunal. I am grateful to them for their helpful written and oral submissions. The Secretary of State for Justice was notified of the appeal and the hearing but has not participated.

The decision of the First-tier Tribunal

3. There was no issue before the First-tier Tribunal that AM had a personality disorder whose components were “antisocial/dissocial” and “borderline”. In addition, although this had not been closely examined or challenged at the hearing, his Responsible Clinician (RC) believed he fulfilled the clinical criteria for psychopathy.
4. The First-tier Tribunal noted that AM had taken some positive steps since the previous tribunal hearing. He had engaged effectively with all areas where engagement was essential, save for psychosexual work. I explain below how the issue of psychosexual work arose. As a result of the progress AM had made, his multi-disciplinary team (MDT) agreed that he could step down from his current placement to a low secure unit. The doctors at the proposed low secure unit declined to accept him because they felt that he first needed to complete a psychosexual assessment and the further therapeutic intervention resulting from it, so as to reduce the risk of sexual violence in the future. Therefore he remained

where he was and in general sustained continued improvement. However in April 2014 he was found collapsed and unconscious in the toilet at night, and physicians suspected an opiate overdose. AM claimed that a fellow patient had spiked his drink, though his explanation was thought to be incoherent. In July 2014 AM commenced a friendship with a female patient but there were concerns as to her vulnerability and unwillingness to be in a relationship with him.

5. The RC had prepared a detailed report for the First-tier Tribunal and gave evidence which was summarised by the tribunal in its reasons. The RC explained that he had placed AM on depot medication in order to reduce his paranoid traits, that this appeared to have been effective and so his depot medication continued. One of the RC's principal concerns was regarding assessment of and treatment relating to sexual behaviour. Members of the MDT were unclear about AM's sexual behaviour and consequent risk factors. There was no sexual element to his index offence but allegations against AM while in detention had raised concerns. These were:

    a. 2001: rape of a young adult male peer with whom he shared a cell at HMP Woodhill.

    b. April 2006: rape and sexual assault of a male peer at Beech House (a secure hospital unit).

    c. Between November 2006 and January 2007: rape on a young adult male peer, allegedly in the shower room and involving penetrative and oral sexual assault.

6. As a result of the allegations, none of which had resulted in a criminal conviction, the RC said that the nature and extent of AM's risk to others arising from his sexuality was unclear. AM declined to undergo assessment for this. Initially he had told the RC that he could not remember any of the incidents but he later said that he accepted that they may have taken place and was willing to have one to one discussions about them but not group discussions. In his evidence to the First-tier Tribunal he again said he was prepared to engage in one to one discussions, but then said that he would only do so if he was conditionally discharged. The RC also emphasised AM's lack of credibility and his tendency to manipulate others, which he illustrated by reference to a particular incident in March 2014 but which I do not need to explain further for present purposes.

7. The First-tier Tribunal concluded its summary of the RC's evidence as follows:

> "9(e) In summary the view of the RC was that the statutory criteria for detention of [AM] in hospital for treatment were satisfied in his case; what drove him to this conclusion, despite the progress and improvement which has occurred recently, was his failure so far to engage with the proposed sexual investigations and treatment, which remain un-assessed; all that remained to be completed, in his view, was firstly his engagement in that treatment and, secondly, his being tested in the community with gradually increasing unescorted community leave. Once these are completed he would be more likely to be accepted into a low secure unit, ... and the risks arising from other aspects of his continuing mental disorder will have been tested extensively on unescorted community leave."

8. The tribunal heard from the independent psychiatrist instructed on behalf of AM, Dr K. He said that it was not appropriate to prescribe depot medication for AM. He said that the sexual allegations were uncertain and had been followed by eight years "without a whiff of sexual behaviour", so that they should not prevent him

being discharged. If it was established that they did take place, then Dr K accepted that there was important work to do to address that risk. He said that a patient could not be required to address sexual risk and get him to own up to what he says never happened. He thought that AM should be conditionally discharged.

9. The tribunal recorded evidence by AM's social worker who doubted AM's account of his drink having been spiked, and also thought that he should not be discharged until sexual risk had been assessed and addressed.

10. The tribunal recorded AM's oral evidence. He was prepared to take depot medication if required. He repeated his claim that his drink had been spiked. As for the rape allegations and assessment and treatment, he said he had previously attempted sexual treatment in hospital, and the last one was only half completed because the therapist left. The tribunal's record of his evidence includes the following at paragraph 13 of its reasons:

> "(e) ... He is not prepared to have sexual treatments, because he has not been guilty of any sexual offences. The first he heard of any such allegations was after he came to this hospital, and the reason was because one of the patients who had been with him at Linden House, Rampton, came here and maliciously spread rumours around the hospital that [AM] was a "rapist and a nonce". Therefore "*all wards know I am a rapist and a nonce".* If he were on a conditional discharge with a condition to do sexual treatment "*I would not do it; I am not a sex offender".* But then he added "*If I have to I would"*.…
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> (i) … he would be prepared to do the proposed sex course, but only on a one to one basis, because he does not like groups. In re-examination he said that he would not agree to do the sexual one to one work in hospital, but only if he had been given a discharge. He had also agreed to do so to the medical member during their pre-hearing assessment ..."

11. The First-tier Tribunal concluded as follows:

    a. AM's diagnosed personality disorder was treatable and treatment has clearly caused or contributed to his improvement.

    b. The risk of taking illicit substances remained potentially important because if he used them it would be likely to have a significant impact on his behaviour. Both index offences were probably caused by the need to fund his admitted drug habit, but both were over 10 years ago. However the tribunal did not believe AM's claim that the collapse in April 2014 was caused by his drink having been spiked and said at paragraph 19

    > "(b) ...This incident supports our concerns arising from his continuing impulsivity, his reduced credibility, and the risks involved in a conditional discharge without adequate testing in the community first.
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    > (c) Against this, however, is the fact that he has, to his credit, completed illicit substance courses and so, if this were the only factor, we would not have thought that it was sufficient to prevent a conditional discharge. ... The collapse is eloquent evidence, however, of his major problem of impulsivity – a symptom of his agreed Personality Disorder."

    c. His paranoia was not a separate 'Paranoid' Personality Disorder rather than an aspect or symptom of his agreed Anti-Social Personality Disorder. "It is a relevant, but not determinative, feature in the case". The tribunal was not satisfied that it required anti-psychotic medication.

12. I have left the tribunal's conclusions as to sexual behaviour and investigations/treatment to last, as this is the issue in this appeal. It concluded:

> "17(a) As already noted, the treating team consider that this is the only outstanding treatment which remains to be completed in addition to testing in the community with unescorted leave in order to ensure that the level of risk to himself and the public is now reduced below that required by the statutory criteria.
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> [The tribunal then recorded that he had not engaged in any psychosexual assessment or treatment since November 2012, and his changing position as to whether he would be prepared to do so.]
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> 18. The driving factor behind the treatment team's concern in respect of the sexual risk is the suggestion that [AM] has raped three men in the past:-
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> (a) [The tribunal summarised the three allegations] There are, therefore, three separate allegations, made within three separate institutions, but three separate individuals. Because of the passage of time only limited details are available in respect of the first; but the second resulted in police contact, interview and referral to the CPS prosecution authority. Documents before the tribunal suggest that the reasons why this case was not ultimately pursued to trial was a combination of reasons including the potential and negative impact of the court case on the mental state of the alleged victim, and his reliability as a patient with learning disability, and therefore likely to have been vulnerable witness; so the case was not pursued.
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> (b) The third alleged rape is dealt with in the letter from the consultant psychiatrist at Rampton Hospital (16.03.07) which states that [AM] was transferred to Rampton during the time the criminal proceedings were being progressed against him in respect of the Beech House sexual assault. The letter says that the case was subsequently dropped because, despite the forensic evidence, the vulnerability of his victim impaired the likelihood of a successful conviction, and the victim's RC asked that no further stress be placed upon his patient, whose mental state was suffering as a result of the potential litigation.
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> (c) In February 2012 a "*Specialist Sexuality Service Tribunal Report"* was provided by Mr [W], a specialist therapist, psychological services...The conclusion of the report was that [AM] should undertake work on relationship skills, followed by work focused on the allegations comprising elements including victim harm, behaviour cycles and planning for a sexual assault allegation free future....
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> (d) The conclusion of the tribunal on this central sexual assessment and treatment issue is that, firstly, on a balance of probability, the two later rapes did indeed occur although the evidence relating to the first is limited and insufficient to establish it to the requisite standard. Secondly, the acts of two rapes, on separate occasions, on probably vulnerable patients at units providing for individuals with complex needs, justified fully the conclusion of the RC that the proposed sexual understanding and treatment work had to be undertaken before a conditional discharge could be allowed.
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> (e) [AM] has objected strongly to doing any such treatment because, he says, he did not commit those rapes. The tribunal is satisfied that he did commit at least two of them, however, and that therefore this objection is invalid. Dr [K] makes the point that it would be a sterile procedure to persuade [AM] to admit to, and be treated for, sexual assaults which he never committed. If that were the case, we agree. We do not accept that it is the case, however, and we agree with the conclusions of previous tribunals that until he is prepared to undergo a psychosexual assessment, and does so, it would be very difficult accurately to assess his risks. That risk, in our view, is certainly there as a risk, and it is so grave as to require assessment at least, and if positive, appropriate treatment to be undertaken."

13. It is apparent from the above that the First-tier Tribunal's decision not to direct the discharge of AM turned on its conclusion that there was a grave risk of sexual violence which required assessment and treatment, if appropriate. That conclusion was based on the tribunal's finding of fact, on the balance of probability, that AM had committed two rapes.

Discussion

14. Ms Round's first submission was that the First-tier Tribunal had acted unfairly in making findings of fact as to the rapes, because it had not been appreciated that it would do so. I am not inclined to agree with this submission but I do not need to determine it because I have decided to allow the appeal on other grounds as below. Determining this ground will not assist the parties or the next tribunal.

Mistake of fact

15. Ms Round submits that the First-tier Tribunal made a fundamental mistake of fact which undermines its conclusion as to the rapes. At paragraph 18(a) the tribunal referred to the police investigations and referral to the CPS of the second alleged rape. At paragraph 18(b), cited above, the tribunal referred to the third alleged rape and the consultant's letter explaining the circumstances of the case being dropped despite there being forensic evidence. In fact, as the First Respondent accepts, that letter dealt with the second alleged rape. Thus it appears that the tribunal was under the impression that both the second and third alleged rapes had been the subject of criminal proceedings with forensic evidence to support them. This was a significant error. First, the mistaken belief appears to have been a factor in the tribunal deciding that the third alleged rape took place. Second, there is a risk that the tribunal thought that the fact of two independent allegations, both of which had been taken seriously by police and prosecutors and had been supported by forensic evidence, increased the probability of each of them having occurred.

16. Ms Davidson suggests that the reference to the third rape at paragraph 18(b) may have been a typographical error. I do not agree. Paragraph 18(a) deals sequentially with the first and second allegations. It is plain that paragraph 18(b) then goes on to the next in the sequence. If it was a typographical error, that would mean that the First-tier Tribunal had failed to address the evidence in relation to the third alleged rape. I do not consider that to be a realistic possibility.

17. I have taken into account that there was other evidence before the tribunal which might have supported the third allegation. Two psychologists, each writing in 2012, said that records suggested that at the time the clinical team viewed this as a credible allegation (pages 342 and 349). Ms Davidson has pointed to a number of other reports in the bundle which referred to the third alleged rape. The problem is that these reports do no more than reproduce allegations found in AM's records. Repetition of the content of the records does not add weight to the allegations. The tribunal was of course entitled to take into account that the clinical team was recorded as having viewed the allegations as credible. But one cannot know what conclusion the tribunal would have reached if it had properly understood the evidence.

18. The tribunal's finding that two rapes occurred was central to its decision that that AM needed to undergo sexual understanding and treatment work (paragraph 18(d)). In these circumstances, there is a risk that the error of fact was critical to the outcome of the appeal. It was a fundamental error in the light of which the tribunal's decision cannot stand.

Reasons/ irrationality

19. Ms Round submits that the tribunal's reasons are inadequate for failing to give an explanation why it found the two rapes had occurred. Ms Davidson accepts that the tribunal's bare statement at paragraph 18(d) is not an adequate explanation for that finding. It had recited relevant evidence in the earlier sub-paragraphs, but it did not explain why it found the allegations proved.

20. Ms Davidson relies on the judgment of the Court of Appeal in English v Emery Reinbold and Strick Ltd [2002] 1 WLR 249 at [19]:

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

21. Ms Davidson submits that, when one reads the First-tier Tribunal's reasons as a whole, the reasons are adequate to explain why the tribunal decided that AM had committed the two rapes. The tribunal recorded the RC's evidence as to AM's change of position as to whether he committed the rapes; in relation to the "collapse" incident, it rejected his claim that his drink had been spiked and found that this claim supported their concerns about his "reduced credibility"; and it recited some specific evidence as to the alleged rapes at paragraph 18.

22. The thrust of the challenge, however, is that the reasons are inadequate to support the tribunal's conclusion. This ground of appeal merges with Ms Round's submission that the tribunal failed to address the evidence with sufficient care and that its decision was irrational.

23. The First-tier Tribunal's reasons give the impression that, having found that AM lacked credibility, the tribunal simply accepted that the rape allegations were true because they were viewed as credible at the time. But it did not follow from AM's lack of credibility that the allegations were true. I bear in mind the following observations by Munby J in R(AN) v Mental Health Review Tribunal [2005] EWHC 587 (Admin):

> "129. If the Tribunal is relying upon hearsay evidence it must take into account the fact that it is hearsay and must have regard to the particular dangers involved in relying upon second, third or fourth hand hearsay. The Tribunal must be appropriately cautious of relying upon assertions as to past events which are not securely recorded in contemporaneous notes, particularly if the only evidence is hearsay. The Tribunal must be alert to the well-known problem that constant repetition in 'official' reports or

> statements may, in the 'official' mind, turn into established fact something which rigorous forensic investigation shows is in truth nothing more than 'institutional folk-lore' with no secure foundation in either recorded or provable fact. The Tribunal must guard against too quickly jumping to conclusions adverse to the patient in relation to past events where the only direct evidence is that of the patient himself, particularly where there is no clear account in contemporaneous notes of what is alleged to have happened. In relation to past incidents which are centrally important to the decision it has to take the Tribunal must bear in mind the need for proof to the civil standard of proof; it must bear in mind the potential difficulties of relying upon second or third hand hearsay; and, if the incident is really fundamental to its decision, it must bear in mind that fairness may require the patient to be given the opportunity to cross-examine the relevant witness(es) if their evidence is to be relied on at all."[1]

24. It was incumbent on the tribunal to scrutinise the evidence carefully as above and to address features of the evidence which may cast doubt on the allegations. In my judgment the tribunal failed to do that. Although the reports stated that the second and third allegations were, at the time, viewed as credible, there were no contemporaneous records available either of the allegations or the view of the clinical team as to them. By 2012, when Mr W (psychologist) wrote his report, the relevant records were not available and so it was not possible to make any independent assessment of the credibility of those reports. Mr W seemed to have some doubts as to the veracity of the allegations (see paragraph 5.4.vii at page 350). The tribunal did not acknowledge the difficulties arising from the lack of contemporaneous records, that the only evidence of the alleged incidents was multiple hearsay, and the consequent circumspection of Mr W.

25. In addition, the reports stated that the second allegation was not proceeded with because of a concern as to reliability of the victim, as well as other reasons unrelated to his reliability. I do not agree with Ms Davidson that the concerns were limited to the impact of a trial on the victim's reliability. That is one way of reading that sentence of Mr W's report ("the potential negative impact of the court case on the mental state of the alleged victim and his reliability), but it is not the only way. The tribunal noted the issue of reliability (paragraph 18(a)) but it is not clear how it understood that syntactically unclear phrase and gave no indication as to how it weighed the issue in the context of the evidence as a whole. If there had been an issue as to the reliability of the alleged victim's account, then that was material to the decision whether the allegation was true.

26. The tribunal's decision was made in error of law because of the tribunal's failure to take into account the above very relevant considerations, or to explain how it reached its conclusion in the light of those matters.

Necessity for finding of fact

27. The parties have addressed me on whether the First-tier Tribunal is required to make findings of fact in order to support its conclusion that AM required assessment and appropriate treatment as to sexual violence. This is relevant to the approach of the next tribunal to which this appeal is remitted.

28. The issue whether AM required assessment and treatment relating to sexual violence was relevant to the resolution of two issues under section 72 Mental

[1] This passage was not disapproved by the Court of Appeal: [2006] QB 468

Health Act 1983: appropriateness of being liable to be detained in hospital for medical treatment, and necessity for the protection of other persons that he should receive such treatment. The tribunal must be satisfied of both those matters on balance of probabilities. See the decision of the Court of Appeal in AN (fn 1 above). In essence the detaining authority's position was that, without assessment and appropriate treatment, AM would present an unacceptable risk to the public if discharged. It relied upon the alleged rapes to establish the risk.

29. The parties are agreed that where an assessment of risk relies on past acts, those acts must be proved to the civil standard. But that is not the same as saying that a decision as to risk must involve findings of fact. Ms Davidson submits that a tribunal can find such risk on the basis of unproven allegations.

30. I do not accept Ms Davidson's submissions. Evidence of suspicion that AM did something which, if he did it, is indicative of risk is insufficient. If he did not do it, there is no risk.

31. In Re (H)(Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 the House of Lords held that the question whether a child was "likely to suffer significant harm" if a care order was not made required a finding that there was a real possibility or risk of significant harm occurring. Lord Nicholls, who was in the majority, said that unresolved judicial doubts and suspicions cannot form the basis of a conclusion that the child was likely to suffer significant harm. He said "A decision by a court on the likelihood of a future happening must be founded on a basis of present facts and the inferences fairly to be drawn therefrom" (pg 590). As Lord Nicholls went on to say, such a decision is to be distinguished from one as to whether there is reasonable cause to suspect that something has happened or may happen.

32. The conditions under section 72 MHA of which a tribunal has to be satisfied involve mixed questions of fact and judgment or evaluation (AN at [101]). But the judgment or evaluation of what is likely to occur must be based on fact.

33. This does not mean that, in AM's case, a tribunal can only be satisfied of the risk of sexual violence if it is satisfied that the rapes occurred. As Lord Nicholls went on to observe at page 591E, "The range of facts which may properly be taken into account is infinite." In the present case relevant facts might involve aspects of AM's sexual or other history, his behaviour towards others, things that he said, and his attitudes. There may be other relevant facts.

Conclusions

34. For the above reasons, I conclude that the First-tier Tribunal erred in law in deciding that the appellant should not be discharged from liability to be detained. Its decision must be set aside and there will need to be a fresh hearing before a different First-tier Tribunal. This decision should be placed before the tribunal so that it can take into account the guidance which I have given.

Signed on the original
on 8 December 2015
(corrected on 3 February 2016)

Kate Markus QC
Judge of the Upper Tribunal