**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**HM/0084/2010**

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| **Appellant:** | **Albert HAINES** |
| **First Respondent:** | **West London Mental Health Trust** |
| **Second Respondent:** | **Secretary of State (Justice)** |

**DECISION OF THE UPPER TRIBUNAL**

**Lord Justice Carnwath, Senior President of Tribunals**
**Upper Tribunal Judge H. Levenson**
**Upper Tribunal Judge J. Cooper**

**ON APPEAL FROM:**

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| **Tribunal:** | The First-tier Tribunal (HESC Chamber) |
| **Tribunal Case No:** | MP 2009/07732 |
| **Decision Dates:** | 15th October 2009 (Directions Hearing) |

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## Order

1. Having, on 29th July 2010, in exercise of its power under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 set aside the decision of the First-tier Tribunal dated 15th October 2010 not to grant AH ("the appellant" or "the patient") a public hearing, the Upper Tribunal now re-makes the decision in exercise of its powers under section 12(2)(b)(ii).

2. The Upper Tribunal directs as follows:

- the First-tier Tribunal is to hold a public hearing of AH's appeal
- the press and public, as well as AH and his representatives, are to be enabled to attend in person in the same hearing room as the hearing takes place
- the First-tier Tribunal is to liaise with the parties to arrange appropriately secure facilities for the hearing, it being agreed that the hearing will not take place in Broadmoor Hospital, where AH is currently detained
- the matter is to be referred to the President of the Health, Education and Social Care Chamber of the First-tier Tribunal to arrange for any further case management directions to be given, including directions as to public notification of the listing of the appeal.

## Hearing

3. We held a further oral hearing of this appeal on 31st January 2011. The appellant AH was represented by Ms Aswini Weereratne of counsel instructed by Duncan Lewis and Co, Solicitors. The respondent West London Mental Health Trust ("WLMHT") was represented by Mr Vikram Sachdeva of counsel, instructed by Capsticks, Solicitors. Both counsel also appeared at our earlier hearing and we are grateful to them for their assistance. The Secretary of State for Justice was not represented and on 21st September 2010 his Department indicated that it had no further comment to make. The Secretary of State for Health's Department indicated that it did not wish to become a party to the appeal, but supplied some helpful information to which we refer in more detail below.

4. AH attended the hearing of 31st January 2011 by way of video-link from Broadmoor Hospital, having attended the earlier hearing in the same fashion. He had expressed dissatisfaction with certain technical aspects of the quality and utility of the link on the previous occasion, but at this later hearing he told us that the system had worked satisfactorily from his point of view.

**Background**

5. Further details are set out in our decision of 29th July 2010. In brief, the appellant AH is detained in Broadmoor Hospital, a high security hospital, pursuant to sections 37 and 41 of the Mental Health Act 1983. He was convicted on two counts of attempted wounding in September 1986 and has been detained in hospital since then, having most recently been transferred back to Broadmoor in January 2008. His mental disorder had been classified as mental illness and psychopathic disorder but in September 2008 it was reclassified as psychopathic disorder alone. On 9th April 2009 he applied to the First-tier Tribunal for discharge and for his appeal to be heard in public, so that the public could be aware of what he sees as failings in the system, especially in relation to his diagnosis.

6. On 15th October 2009 a judge of the First-tier Tribunal refused the application for the appeal to be heard in public and on 25th February 2010 the Upper Tribunal gave the appellant permission to appeal to the Upper Tribunal against that decision of the First-tier Tribunal.

7. On 29th July 2010 we allowed the appeal, set aside the decision of the First-tier Tribunal and directed that there be a further hearing before us (at which the Department of Health was invited to appear) to consider further evidence as to:

(a) the practicalities and potential cost of providing a public hearing (including by use of video facilities)
(b) how often public hearings have been applied for in the last five years, the number of occasions on which they have in practice been held and how they have been managed, and
(c) (so far as readily available) practices elsewhere in the United Kingdom, in Europe and in other common law countries.

**The Law**

8. Rule 38(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 provides that all hearings must be held in private unless the Tribunal considers that it is in the interests of justice for the hearing to be held in public. In our decision of 29th July 2010 we held that the rule 38 presumption is not of itself incompatible with article 6 of the European Convention on Human Rights but that the following factors must be considered in any application for a public hearing:

(a) whether it is consistent with the subjective and informed wishes of the patient (assuming that he is competent to make an informed choice;
(b) whether it will have an adverse effect on his mental health in the sort or long term, taking account of the views of those treating him and any other expert views;
(c) whether there are any other special factors for or against a public hearing;
(d) whether practical arrangements can be made for an open hearing without disproportionate burden on the hospital or relevant authority.

9. We considered factor (c) to have been satisfied in the present case because (paragraph 48):

> " ... this case is out of the ordinary and for that reason merits special consideration. The patient has been kept in detention at public expense over 23 years, often in conditions of high security, and it is only recently that there has been a change in his diagnosis ... this potentially gives the case some heightened public significance ...".

**The Further Information**

10. Judge Cooper, who had been a regional chairman of the Mental Health Review Tribunal before it was subsumed into the First-tier Tribunal, explained that having consulted colleagues and from his own knowledge it appeared that over the last 7 years there had been 10 applications for tribunal hearings to be in public (out of perhaps 100,000 hearings), only one had been granted and that application was subsequently withdrawn.

11. We are aware that as a result of our decision there might be more such applications, but the factors referred to in paragraph 8 above would still have to be taken into account in deciding whether to grant any particular application and it is unlikely that a public hearing will be ordered other than in a relatively few cases.

12. Richard Rook is the Head of Mental Health Act Policy in the Mental Health and Disability Division of the Department of Health. He informed us by letter that in Scotland, Northern Ireland and Wales the rules do in principle permit public hearings. Enquiries showed that public hearings could not be recalled to have taken place in any of the jurisdictions, but that there had been occasional requests in Wales which had been refused on the ground that it would not be in the patient's best interests.
In the Republic of Ireland, there is no provision for the tribunal to sit in public and the compatibility of that provision with the European Convention on Human Rights has been questioned, but there has been no legal challenge to date.

13. Dr Kevin Murray is the Clinical Director of Broadmoor Hospital. On 8th November 2010 he signed his second witness statement in this case. He provides estimated additional costs per day for the different formats of public hearing as follows: (a) public hearing within Broadmoor: £792; (b) public hearing outside Broadmoor at a court building or tribunal office (with the court or tribunal providing its usual services): £1,739; (c) patient remaining within Broadmoor giving video link evidence with the public elsewhere (and the court or tribunal service meeting the costs of the public venue): £400. He states that the cost of a usual half-day review hearing in private is £967. He expresses concern that such a public hearing would set a precedent for other patients, and estimates that the additional costs to Broadmoor could be in the region of £150,000 per year (based on 170 tribunals per year). He is also concerned that the costs to the NHS would be significant. He gives the preferences of the WLMHT in order as: a hearing in private, alternatively a Court or video link. He states that a live public tribunal at Broadmoor would be disruptive, incurring significant risk and cost to the hospital, and would be an example other patients would seek to follow.

13A. AH himself made three written statements for our consideration. He stated that many of those detained with him accepted the need to receive treatment in hospital or would not wish to waive confidentiality or would not have the capacity to do so and the concern that a decision to direct a public hearing in this case would set a precedent for other patients is overstated, He agreed that a public hearing within the secure perimeter of Broadmoor Hospital would be impractical, hugely disruptive for other patients and a logistical night mare for those seeking to enter the hospital or the hearing. He did not accept that there would be an increased risk from any additional psychological or emotional impact on him of a public hearing and said that he would be unlikely to sabotage his own hearing. He would willingly be conveyed to an external location with staff and police escort and be held in the cells if required. He had no links with organised crime or terrorism and did not have a very high public profile, so did not consider that there would be significant security issues.

**The International Dimension**

14. We received a helpful report from the Mental Disability Advocacy Centre, an international human rights organisation based in Budapest. This report provided information on the attitude towards public hearings for mental patients in a number of jurisdictions, together with information on the Convention on the Rights of Persons with Disabilities ("CRPD"). From this report we learnt that there is a real diversity of approach in the provisions for public or private hearings across various jurisdictions, although we did not receive evidence on actual practice in these jurisdictions. It nevertheless appears to be the case that hearings are presumptively held in public in the Czech Republic, Russia and Bulgaria, and in private in Hungary and in the Republic of Ireland. Other jurisdictions including Scotland, Spain and Canada have a variety of methods whereby an application for a public hearing can me made and considered.

15. The CRPD prohibits discrimination against people with disabilities and promotes the enjoyment of fundamental rights for people with disabilities on an equal basis with others. The United Kingdom ratified the CRPD on 8 June 2009, and its Optional Protocol on 7 August 2009 allowing for a right of individual petition to the UN Committee on the Rights of Persons with Disabilities. The European Union ratified the Convention in its own right on 23 December 2010.

16. The CRPD provides the framework for Member States to address the rights of persons with disabilities. It is a legally-binding international treaty that comprehensively clarifies the human rights of persons with disabilities as well as the corresponding obligations on state parties. By ratifying a Convention a state undertakes that wherever possible its laws will conform to the norms and values that the Convention enshrines.

17. Article 1 of the Convention states as follows:

> The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental,

intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

18. Under Article 13(1) of the Convention a ratifying state agrees to ensure "effective access to justice for persons with disabilities on an equal basis with others". Under Article 14 a ratifying state also agrees to ensure that if persons with disabilities are deprived of liberty through any process "they shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation".

**The Arguments**

19. It was common ground that given the high security nature of Broadmoor Hospital, holding a public hearing at the hospital itself would be both impractical and undesirable. There is no suggestion that the tribunal, the witnesses, AH and his advisers should not all physically be in the same hearing room. The two practical remaining options are therefore holding a hearing at a suitable location off-site, or relaying the on-site hearing to the public located elsewhere by means of a live video link to the hearing. The only outstanding question for determination is: Which of these two means of establishing the public nature of the hearing is most appropriate for the hearing of this particular appeal by this particular patient in respect of this particular hospital?

20. Ms Weereratne argued that there must be a presumption that AH is entitled to the full protection of article 6 of the European Convention on Human Rights, that it would be unjustifiably stigmatising and discriminatory to insist that the public only be able to observe by video-link and would increase the social isolation of AH, and that it had not really been suggested and certainly not established that costs of a proper public hearing in the present case would be disproportionate.

21. Mr Sachdeva referred to the decision of the European Court of Human Rights in Campell and Fell v UK (1984) 7 EHRR 165 which held that holding prison disciplinary hearings in public (of which there are about 8500 annually – see R (Bannatyne) v Secretary of State and another [2004] EWHC 921 (Admin) at para 56) would impose a disproportionate burden on the state. He suggested that because such hearings could result in more time spent in prison and that there was an even greater case for exposing such hearings to public scrutiny to prevent abuse than in mental health appeals, the proportionate burden of addressing security and resources should weigh more heavily in mental health appeals. We do not find this argument persuasive. From the perspective of the detained person it cannot necessarily be said that prison disciplinary proceedings have more severe consequences. Mental Health appeals also involve the liberty of the subject. The combination of the presumption in rule 38 and the threshold considerations we have identified in paragraph 8 above makes it unlikely that there will be a disproportionate burden, and we agree with Ms Weereratne that considerations of cost must reach a high threshold before they can be regarded as sufficiently disproportionate to permit a restriction of a public hearing.

22. It seems to us that once the threshold tests in paragraph 8 above for establishing a right to a public hearing have been satisfied, article 6 of the European Convention on

Human Rights (re-enforced by article 13 of the CRPD) requires that a patient should have the same or substantially equivalent right of access to a public hearing as a non-disabled person who has been deprived of his or her liberty, if this article 6 right to a public hearing is to be given proper effect. Such a right can only be denied a patient if enabling that right imposes a truly disproportionate burden on the state. The European Court of Human Rights has emphasised the need for special consideration to be given to the rights of particularly vulnerable groups such as the mentally disabled (see eg Kiss v Hungary [Application no. 38832/06, Judgment 20 May 2010 para 42]).

23. How the right to a public hearing can practically and proportionately be achieved will depend on the facts of each individual case, including the facilities available in the hospital in question. On the evidence provided to us by the Broadmoor Hospital Clinical Director, it seems likely that if similar cases arise in the future, it should be possible for arrangements to be made between the hospital and the Tribunals Service for a hearing at the hospital with a video-link to suitable premises off-site where any interested members of the press or public can view the proceedings. As things stand, however, we have not seen detailed evidence of how such arrangements would work in practice, including arrangements for notifying the public. In those circumstances, and in order to avoid further delay, we do not consider that the additional cost is sufficient to justify us refusing a hearing at a suitable location off-site, at which attendance for press and public will be possible. On the evidence before us this will achieve the outcome sought by AH and ordered by us in paragraph 2 above without causing the hospital or the appropriate authorities a disproportionate burden.

**Signed:**

**Lord Justice Carnwath**
**Senior President of Tribunals**

**Upper Tribunal Judge Levenson**

**Upper Tribunal Judge Cooper**

**Dated 17 February 2011**