

**THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH
REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR
BAN AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL
ON 21 NOVEMBER 2013**



This is an edited version of the Tribunal's decision. The forensic patient has been allocated a pseudonym for the purposes of this Official Report

FORENSIC REVIEW: Mr Ban

s46(1) Review of forensic patients
Mental Health (Forensic Provisions) Act 1990

TRIBUNAL: Harold Sperling QC Deputy President
John Spencer Psychiatrist
Ronald Witton Other Member

DATE OF HEARING: 30 May 2013

PLACE: Forensic Hospital

APPLICATION: Conditional Release

DECISION

Having determined pursuant to section 43 of the *Mental Health (Forensic Provisions) Act 1990* that neither the safety of Mr Ban nor that of any member of the public in Australia would be seriously endangered thereby, and that an independent forensic psychiatric report is also of that opinion, and having considered, in relation to matters occurring within Australia, the other matters to which sections 43 and 74 refer, the Tribunal orders under section 47(1) that Mr Ban be released subject to the following conditions:

1. The following conditions have effect until midnight on 12 November 2013 (the unconditional release time).
2. On 12 November 2013, Mr Ban is to travel by car from The Forensic Hospital to Sydney International Airport with an escort team appointed in writing by the Medical Superintendent or the Acting Medical Superintendent of The Forensic Hospital (the escort team), the escort team to consist of a psychiatry registrar, a registered nurse and a further registered nurse or an enrolled nurse, all being members of the staff of The Forensic Hospital.
3. Thereafter, Mr Ban is to remain continuously in the company of at least one member of the escort team, except as a member of the escort team may permit, and is to comply with the directions of any member of the escort team in all respects and in particular in respect of his actions, conduct and medication.

4. On 12 November 2013, Mr Ban is to board a plane, as directed by a member of the escort team, for a flight to the People's Republic of China.
5. Mr Ban is to abstain from alcohol and illegal drugs and substances.
6. The unconditional release time may be extended by the President or a Deputy President of the Tribunal in the event of a delay in Mr Ban's departure as provided for in these conditions.

Signed

Harold Sperling QC
Deputy President

Dated this day 12 September 2013

REASONS

This is the 9th review of Mr Ban who is currently detained in the Forensic Hospital on an order of the Tribunal, dated 9 June 2010. Mr Ban's treating team applies for an order for conditional release of Mr Ban with a view to the repatriation of Mr Ban to his native country, the People's Republic of China.

BACKGROUND

In 2009 Mr Ban was found not guilty by reason of mental illness on a charge of murder and was ordered to be detained. [The Tribunal referred to Mr Ban's history as a forensic patient.]

STATUTORY CONSIDERATIONS

The Tribunal is required by section 46(1) of the *Mental Health (Forensic Provisions) Act 1990* ("the Act") to review the case of each forensic patient every six months (unless that period has been extended) and may, under section 47, make orders as to:

- (a) the patient's continued detention, care or treatment in a mental health facility, correctional centre or other place, or
- (b) the patient's release (either unconditionally or subject to conditions).

Before making any order for release, the Tribunal must be satisfied, pursuant to section 43 of the Act, that:

- (a) the safety of the patient or any member of the public will not be seriously endangered by the patient's release, and
- (b) other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care.

The Tribunal is required to consider the principles of care and treatment specified in section 68 of the *Mental Health Act 2007* and the further matters specified in section 74 of the Act. The latter section provides as follows:

Section 74 Matters for consideration

Without limiting any other matters the Tribunal may consider, the Tribunal must have regard to the following matters when determining what order to make about a person under this Part:

- (a) whether the person is suffering from a mental illness or other mental condition,
- (b) whether 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,
- (c) the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration,
- (d) in the case of a proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or any member of the public will be seriously endangered by the person's release.

EXTRA-TERRITORIAL APPLICATION OF STATUTORY PROVISIONS

In a determination made in a similar matter, the Tribunal, as then constituted, said, on 23 August 2012:

“The Tribunal has determined the matters required to be determined by the legislation before an order for release can be made and has considered the matters required to be considered by the legislation. The Tribunal has done so on the basis, without deciding, that the provisions of the legislation in those respects are to be read as including things that may occur beyond this State in a case involving the repatriation of a person to another country.”

On this occasion, closer consideration has been given to the operation of the legislation and, in particular, of section 43 of the *Mental Health (Forensic Provisions) Act 1990* in relation to matters occurring outside the territorial borders of Australia. A question arises as to whether that section operates, in a case such as this, so as to preclude an order for release unless the Tribunal is satisfied that, following repatriation to China,

- (a) the safety of the patient or any member of the public in China would not be seriously endangered, and

- (b) care of a less restrictive kind than the current regime of care in Australia, that is consistent with safe and effective care, is reasonably available to the patient in China or that the patient does not require care.

A similar question arises in relation to paragraphs (a), (c) and (d) of section 74 of the *Mental Health (Forensic Provisions) Act 1990* (quoted above), in particular whether the Tribunal is required by that section to have regard (adopting the designations of the relevant paragraphs in the section) to the following matters.

- (b) whether 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 in China,
- (c) the continuing condition of the person in China, including any likely deterioration in the person's condition in that country, and the likely effects of any such deterioration in that country,
- (d) in the case of a proposed release, a report by a forensic psychiatrist or other person of the kind specified in s 74, as to whether the safety of the person in China or any member of the public in China will be seriously endangered by the person's release.

A similar question concerning extra-territorial application also arises in relation to s 68 of the *Mental Health Act 2007* concerning the care and treatment of persons with mental illness.

Mr Wheeler, who represented the patient at this hearing, referred the Tribunal to the *Interpretation Act 1987* (NSW) and to the text book *Statutory Interpretation in Australia* by DC Pearce and RS Geddes, 7th ed, 2011. In submissions, he provided the Tribunal with a carefully prepared review of these materials.

Section 5(2) of the *Interpretation Act 1987* provides as follows, so far as is material.

5 Application of Act

- (2) This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned.

Section 12(1) of the Act provides as follows, so far as is material.

12 References to New South Wales to be implied

(1) In any Act or instrument ... a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales.

The legislation accords with the presumption at common law that legislation is not intended to deal with matters occurring beyond the territorial limits of the locality in relation to which the particular legislature is constituted. The following is an extract from *Statutory Interpretation in Australia* (supra):

“Isaacs J in *FCT v Munro; British Imperial Oil Co Ltd v FCT* (1926) 38 CLR 153 at 180 said:

There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail.

.....

One of the clearest statements of this presumption is provided by O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Assoc* (1908) 6 CLR 309 at 363:

In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most Statutes, if their general words were taken literally in their widest sense, would apply to the whole world, but they are always read as being *prima facie* restricted in their operation within territorial limits.

The thinking underlying this general approach is based on the ‘comity of nations’ – the legislature of one country is presumed not to deal with persons or matters the jurisdiction over which properly belongs to some other sovereign state: see the discussion by Dixon J in *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 423. However, this principle carries less weight when considering the intended effect of the legislation of one Australian state in its operation in relation to another state. The concept of the federal system, the homogeneity of

the population, the frequent movement of people between states and the commonality of problems needing a common and cooperative solution point to the presumption being more readily displaced: see the full consideration of these issues by Malcolm CJ in *Dempster v National Companies and Securities Commn* (1993) 10 ACSR 297 at 320.”

Accordingly, there being no apparent intention to the contrary, s 46(1) of the Act does not operate to require the Tribunal to be satisfied, before making an order for release of a patient with a view to repatriation to another country, that the safety of the patient in that other country or any member of the public in that other country would not be seriously endangered by the patient’s release.

By the same token, s 74 of the Act does not, in a case such as this, require the Tribunal to have regard to whether care, treatment or control of the patient would be necessary for the patient’s own protection from serious harm in another country or for the protection of others from serious harm in such other country. Nor is the Tribunal required by the statute to consider the continuing condition of the patient in such other country, including any likely deterioration of the patient’s condition in that other country and the likely effect in that other country of any such deterioration. Nor is the Tribunal required by the section to have regard to an independent forensic report of the kind specified in s 74 addressing the question as to whether the safety of the patient in such other country or any member of the public in such other country would be seriously endangered by the patient’s release with a view to repatriation to that other country.

Similarly, the principles relating to care and treatment in s 68 of the *Mental Health Act 2007* do not have to be taken into account by the Tribunal in relation to the provision of care and treatment in another country.

The same is to be said concerning these statutory provisions while a patient is in transit to another country once the patient has left Australian territory.

On the other hand, the relevant provisions of the legislation operate with full force and effect in relation to the period during which the patient is in transit to an airport for the purpose of boarding a plane to such other country, the period during which the patient is

present at an airport pending departure and while the patient is in the air space over the State of New South Wales.

What effect should be given to the legislation while the patient is in the air over any other state or territory of Australia en route to such other country is less obvious. The relevant sections of the NSW statute could be construed as applying to things which would or might occur in another state or territory of Australia. For the purpose of this decision, we make that assumption without deciding the point definitively.

Making an order for release conditional upon compliance with a regime of care, treatment and conduct in another country involves the same and greater difficulties. First, by force of section 12 of the *Interpretation Act 1987*, this Tribunal's statutory power to impose conditions does not extend to imposing conditions which require things to be done in another country. Secondly, it cannot have been intended by the legislature that this Tribunal have the power to impose conditions which could not be enforced. That would be futile.

DISCRETIONARY CONSIDERATIONS

An order for release is discretionary. The Tribunal is required to take all relevant considerations into account, irrespective of whether such considerations are made mandatory by the statute. In exercising its discretion, the Tribunal would recognise that it has a responsibility for the likely effect of its orders, not limited to the welfare of persons within this state or within Australia. In the case of an application for release with a view to repatriation to another country, the safety of the person and of others in that other country is accordingly a relevant consideration. For example, the Tribunal might well decline to release a patient with a view to repatriation if the patient would be dangerous without ongoing detention and treatment and if there were no facilities for such care and treatment in the country concerned. On the other hand, one might expect an order for release to be made with a view to repatriation if there is a system similar to our own in the other country, providing for the detention and treatment of individuals who, due to mental illness, would otherwise pose a threat to themselves or others, and if arrangements have been made to bring that system of care and treatment into operation on the patient's arrival in the other country. Between these extremes, difficult cases might arise which would turn on their own facts.

EVIDENCE AT THE REVIEW HEARING ON 30 MAY 2013

Documentary evidence

The Tribunal had the documents listed in the Forensic Patient Exhibit List dated annexed to these reasons.

Attendees

Mr Ban attended the hearing accompanied by his lawyer, Mr Robert Wheeler of the Mental Health Advocacy Service. Also in attendance were:

- Psychiatrist
- Psychiatry Registrar
- Registered Nurse
- Social Worker
- Occupational Therapist
- Rehabilitation Coordinator
- Psychiatrist, CFMHS
- forensic psychologist, CFMHS
- IOM
- Immigration Case Manager (by phone)
- registered victim (by videolink)
- mother of registered victim (by videolink)
- HSVG (by videolink)
- Chinese interpreter

Written evidence

There had been correspondence between the treating psychiatrist at the Forensic Hospital and the consultant specialist of the Psychiatric Hospital in the People's Republic of China ("the Chinese psychiatrist").

On 10 March 2011, the Chinese psychiatrist wrote to the consultant psychiatrist as follows:

"Our hospital is a health institution directly under the Provincial Department of Civil Affairs, and is one of the early established psychiatric specialist hospitals nationwide. Especially in recent years, the hospital has rapid development in the

fields of medical treatment, teaching, scientific research as well as in the aspects of scale, function, and facilities. These have laid a solid foundation for our hospital to further enhance and strengthen the scientific works in the psychiatric and psychological departments.

Based on the presentation by the family members of Mr Ban, our hospital is willing to accept Mr Ban's return to China for continued treatment. Upon the arrival of the patient, we will carry out a detailed and thorough examination on him, have a face-to-face chat and communication with him, and make a careful analysis of his condition with reference to the treatment records of your hospital to formulate treatment plans basing on the symptoms. In order that we can formulate the treatment plans accurately and effectively, we would require your hospital to provide the treatment records of Mr Ban, including the symptoms at time of admittance to your hospital, course of treatment, medication used, and the current diagnosis condition. Thanks!"

Following further communication with the Chinese psychiatrist, the consultant psychiatrist, on 13 December 2012, provided the Chinese psychiatrist with a detailed account of the patient's medical and forensic history. The letter included the following summary:

"Mr Ban is a 28 year old man who suffers from schizoaffective disorder which is in near-complete remission. He committed his index offence of murder in 2007 when psychiatrically unwell and was found not guilty by reason of mental illness for this in 2009. His illness largely resolved with treatment by olanzapine. After the stress of the trial and (sic) was over, his mental state improved to the point where it was possible to take him off medications. He has been recommenced on quetiapine in 2012 largely to manage the potential for relapse. There has been a subtle improvement in his mental state since then. He has underlying narcissistic personality traits arising in the context of high parental expectations and a poor childhood attachment with his parents. He has good ongoing support from his parents, particularly from his mother. He is culturally isolated in Australia. There are no acute risks of aggression in his current environment. We are concerned about the risk of relapse in his transition home. As Mr Ban has spent a

considerable time (over five years) in prison and in a secure hospital, he has become somewhat institutionalised.”

The letter also included the following treatment recommendations:

- We recommend that Mr Ban remain on quetiapine 200mg at night indefinitely to manage the risk of relapse. This medication will also have a mood stabilising and antidepressant effect.
- We suggest that Mr Ban be admitted to an inpatient ward of a psychiatric hospital on his arrival to China. A thorough psychiatric assessment should be undertaken there. We suggest a period of observation after his initial admission.
- If Mr Ban remains well, and free of psychotic symptoms, we suggest a period graduated leave, progressing from escorted day leave, to leave with family, overnight leave and then more extended periods of leave. His mental state should continue to be monitored during this time.
- There should be ongoing education provided to Mr Ban’s family about his mental illness. We suggest a family meeting to monitor family dynamics.
- A relapse prevention plan should be developed, identifying early warning signs, strategies to manage these signs and actions to be taken in the event of relapse.
- If Mr Ban remains well through the period of graduated leave, he could be discharged.
- After discharge from hospital, we would suggest that Mr Ban continues to see a psychiatrist regularly to monitor for any signs of relapse.

On 26 February 2013 the Chinese psychiatrist provided the following treatment plan:

“About the history of Mr Ban read detailed knowledge (sic) the proposed treatment plan are (sic) as follows:

Before admission once a disease assessment to determine the need for maintenance therapy taking olanzapine.

Hospital for observation year.

Third, the monitoring of the patient's physical condition.

Fourth, as their parents reach an agreement, a week one visit to the hospital, the establishment of family therapy, to improve the relationship between their parents, in order to provide more family support, help personality development.

Fifth, group psychotherapy, regular meetings, psychological education, recognize their own symptoms of the disease, the risk of recurrence, self-knowledge, improve interpersonal relationships.”

A very full review of the patient's history and present condition was provided in a report dated 30 April 2013 by the consultant psychiatrist and psychiatry registrar, including a thoroughly documented diagnosis.

The risk assessment of the patient was summarised in the report as follows:

“In summary Mr Ban historically has had one incident of serious violence resulting in death. He has a moderate loading of historical risk factors for violence. His dynamic risk is well managed in the current environment, and we anticipate that it could be well managed in the context of a psychiatric hospital in China. The stresses involved in the international transfer could destabilise Mr Ban and care will need to be taken at this time. The resumption of a contact with his father is a factor that may have an adverse effect on Mr Ban's mental state in the medium to long term. It is unknown how they will respond to each other at this stage.”

The following medicolegal opinion was provided in the report:

“In regard to s74 of the *NSW Mental Health (Forensic Provisions) Act 1990*, it is our opinion that Mr Ban suffers from a mental illness as defined by the *NSW Mental Health Act 2007*, namely schizoaffective disorder. His illness has been characterized by delusions, hallucinations, serious thought disorder and severe disturbance of mood. It is a continuing condition that has a potential to relapse, particularly at times of stress or change. It is our opinion that there are reasonable grounds for believing that care, treatment and control of Mr Ban is necessary for his own protection from serious harm and the protection of others from serious harm.

In regard to s 43(a) of the Act, in our opinion on the balance of probabilities, the safety of Mr Ban and/or the public is likely to be seriously endangered by his unsupervised release. In regard to s 74(b) of the Act, in our opinion the least restrictive placement option available would be conditional release under s 47 (1) (b) of the Act and leave of absence under s49 of the Act in order for Mr Ban to be transferred to Province Psychiatric Hospital in China where his psychiatric treatment can be continued.”

The consultant psychiatrist recommended repatriation to China and transfer of the patient to the nominated psychiatric hospital in China.

The report also included a risk management plan for transit to China. We will refer to that subject later in these reasons.

We refer to the observations, made earlier in these reasons, in relation to the limited operation, in this case, of the statutory provisions to which he refers. The treating psychiatrists’ observations in those respects are material to the statutory constraints and considerations which apply in relation to the proposed transit of Mr Ban from the Forensic Hospital to Kingsford Smith Airport, to the proposed flight over the state on NSW and, we have assumed, to flight over other Australian territory, en route to China. They are also relevant to the exercise of the Tribunal’s discretion in deciding whether to make the order for release which is sought insofar as the treating psychiatrist’s observations relate to matters occurring overseas.

The Tribunal was provided with a report dated 30 April 2013 by a consultant forensic psychiatrist, and forensic psychologist, both of the NSW Community Forensic Mental Health Service. They have not treated this patient. Accordingly, the report meets the requirements of section 74(d) of the *Mental Health (Forensic Provisions) Act 1990*. The following are extracts from that report.

“Synthesis of Risk

Mr Ban manifests a moderate loading of static risk factors and a low to moderate loading of dynamic risk factors associated with increased risk of reactive

aggression. At present his risk is well managed in the structured and secure environment of the Forensic Hospital. His proposed transfer is to an inpatient facility. Careful monitoring of his clinical presentation and risk factors is imperative due to the possibility of fluctuations in his mental state given the overwhelming nature of such a move, should the transfer be enacted”.

Medicolegal status

In regard to Section 74 of the *NSW Mental Health (Forensic Provisions) Act 1990*, the CFMHS find the following: Mr Ban suffers from a mental illness (Schizoaffective Disorder) as defined by the *NSW Mental Health Act 2007* in that he has a condition that seriously impairs, either temporarily or permanently, his mental functioning and has been characterised by delusions, hallucinations and severe disturbance of mood. There are reasonable grounds for believing that care, treatment and control of Mr Ban is necessary for his own protection from serious harm and the protection of others from serious harm. If such care, treatment and control were inadequate, Mr Ban’s condition would be likely to deteriorate and he would thus remain a risk to himself and others.

In regard to s 43(a) of the Act, the opinion, on the balance of probabilities, is the safety of Mr Ban and/or the public is unlikely to be seriously endangered by his conditional release in the specific transfer circumstances outlined below.

In regard to s 43(b) of the Act, Mr Ban’s proposed transfer of placement provides care of the least restrictive kind, that is consistent with safe and effective care and he requires such care.”

We make the same observations concerning extra-territorial considerations as are made above in relation to the treating psychiatrist’s contribution.

The following are further extracts from the report by the CFMHS.

“Placement

We support the current treating team’s plan that Mr Ban become an involuntary patient at the Psychiatric Hospital in China, under the care of the Chinese

psychiatrist Consultant Psychiatrist. He will have a trial of graduated leave when his mental state has been assessed as stable. This would allow him to receive culturally aligned treatment and for him to re-establish contact with his immediate family members. This would also allow for gradual reintegration into the community in which he is likely to reside”.

Travel Recommendations

Any release should take place only under the very specific circumstance of supervised transfer to the proposed Chinese psychiatric facility. Any release should be under the condition of escorted travel to Kingsford Smith Airport with the judicious use of oral or intramuscular benzodiazepine sedatives if needed. The release should be into the custody of escorting Justice Health staff. We understand that this has been negotiated with the relevant authorities, and that during any transfer within NSW, the orders of the MHRT will have force. In the air, orders of the captain of the aircraft take precedence. With this escort in place it is unlikely that any aggressive incidents would occur, and should there be any concerns, the escorting staff would intervene accordingly.

In China, relevant mental health legislation will guide management, and staff will meet Mr Ban at the airport in China.”

Mr Wheeler referred the Tribunal to the Mental Health Law of the People’s Republic of China, which was adopted in October 2012 and commenced in May 2013. Article 30 provides as follows.

Article 30

Inpatient treatment of mental disorders shall generally be voluntary.

If the result of the psychiatric evaluation indicates that a person has a severe mental disorder, the medical facility may impose inpatient treatment if the individual meets one of the following conditions:

- 1) Self-harm in the immediate past or current risk of self-harm
- 2) Behaviour that harmed others or endangered the safety of others in the immediate past or current risk to the safety of others.

Article 31 qualifies Article 30. In the case of self-harm or the risk of self-harm, involuntary care cannot be imposed if the patient's guardian objects, in which case the guardian is to supervise and manage the care of the patient at home. However, in the case of risk of harm to others, any objection by the patient's guardian becomes the subject of a process of independent review which need not be specified here in detail.

The daughter of the person killed by the patient had written to the Tribunal expressing a number of concerns, principally in relation to the prospective detention and treatment of the patient in China. It appeared to the Tribunal that these concerns were substantially answered by the information before the Tribunal concerning Chinese domestic law and the correspondence between the consultant psychiatrist and the Chinese psychiatrist.

Oral evidence

The International Organisation for Migration (IOM) had been closely involved in planning the patient's repatriation to China. It was anticipated that this organisation would contribute the cost of the patient's airfare from Sydney to Nanjing and would assist with obtaining travel documents, with booking flights and with the handover of the patient on arrival in China. It was intended that a memorandum of understanding would be settled to formalise these arrangements.

The Tribunal was informed that the Chinese consulate had already sent someone to the Forensic Hospital to photograph the patient for the purpose of issuing travel documents.

The patient's immigration case manager at the Department of Immigration and Citizenship, said that she had been in close contact with IOM in relation to this case and that the department supported the patient's repatriation.

The prospect of Mr Ban returning to Australia while mentally ill was covered in discussion. Mr Wheeler pointed out that section 501 of the *Migration Act 1958* provides for a character test in relation to the grant of a visa. A substantial criminal record disqualified a person from satisfying the character test, and "a substantial criminal record" was defined to include a person having been acquitted on the ground of insanity and, in consequence, detained. It was apparent that, as a practical matter, once Mr Ban

left Australia, there would be no serious prospect that he would ever be granted a visa to return.

This obviated any need to include conditions to provide for possible return to Australia by Mr Ban.

The registered victim sought a restriction on contact with the victim's family and a geographic restriction. However, for the reasons mentioned above, the Tribunal has no power to impose a condition prohibiting contact with the victim's family by Mr Ban once overseas and there was no serious prospect of him being permitted to return to Australia. For the same reasons, a condition prohibiting Mr Ban from being in specified places in Australia was not apposite.

DECISION ON 30 MAY 2013

The Tribunal was satisfied on the evidence before it on that occasion that the grant of conditional release as proposed would not seriously endanger Mr Ban or any other member of the public in Australia. The Tribunal took into account the considerations mentioned in section 68 of the *Mental Health Act 2007* and the further matters specified in section 74 of the *Mental Health (Forensic Provisions) Act 1990* insofar as they related to matters occurring in Australia.

In the exercise of its discretion the Tribunal gave consideration to the possibility of self-harm and of harm to others in China if Mr Ban were repatriated as planned. In view of the arrangements that had been made for Mr Ban's reception and treatment on arrival in China, it appeared to the Tribunal that these risks were minimal.

In these circumstances, the Tribunal announced that it was minded to grant conditional release as proposed, that it would reserve its decision in the expectation that the arrangements for the patient's repatriation would be finalised as planned, that it would then send a copy of proposed order (including conditions of release) and its reasons for decision to Mr Ban's legal representative and to the Minister for Health and Attorney General, and would accept any written submissions concerning the proposed order, including conditions, within the period of 28 days thereafter.

FURTHER DEVELOPMENTS

Unfortunately, IOM was unable to provide the expected funding within the anticipated time frame. Justice Health accordingly took the initiative of obtaining from the New South Wales Government the funding which had been expected from IOM. Justice Health also now took the leading role in finalising the arrangements for Mr Ban's repatriation.

EVIDENCE OBTAINED ON 5 SEPTEMBER 2013

On this date, two members of the panel conducting this review, Mr Sperling and Dr Spencer, received further evidence for consideration by the panel as a whole.

Mr Wheeler, Mr Ban's solicitor, was linked in by telephone.

Written evidence

The consultant psychiatrist had submitted a report dated 21 August 2013 which indicated that Mr Ban's mental state and associated risk considerations remained unchanged.

The consultant psychiatrist had also produced a fresh repatriation plan which responded to the changed situation in relation to IOM involvement. The plan is quoted here in full.

"Mr Ban – Risk Management Plan for escorted return travel from Forensic Hospital to Psychiatric Hospital following unconditional release

Mr Ban was found Not Guilty by Reason of Mental Illness in 2009 for an index offence of murder that was committed in 2007. He was psychiatrically unwell at the time of the index offence, and was psychotic for a period of about two years after. His mental illness is currently in remission, and he has been compliant with a regular dose of anti-psychotic medication. There have been no further episodes of physical aggression since the index offence. It is our opinion that the risk of aggression during transport to China is low; however given the forensic issues present in this case, Mr Ban should be accompanied on his return to China by an escort team of Justice Health staff who are familiar with Mr Ban and with his care plan, comprising one doctor and two nurses.

Psychiatric diagnosis: Schizoaffective disorder (currently stable, in remission)

Current Medication: Quetiapine 300mg daily.

Treatment Plan: Mr Ban to remain on quetiapine 300mg daily, oral, indefinitely pending regular psychiatrist review upon transfer to psychiatric hospital in China. Transition care of Mr Ban to the Chinese psychiatrist at Province Psychiatric Hospital.

The Chinese psychiatrist has confirmed that there would be a bed available at Province Psychiatric Hospital if given one week's notice.

Background context

- The suggested transfer date is 12 November 2013 as [Justice Health] JH has been advised to allow for two months after a tribunal hearing on 5 September at which it is anticipated that an order will be made for his release. This date is set back to allow time for the [Mental Health Review Tribunal] MHRT to release their written decision and for the NSW Attorney General to appeal.
- Although it is considered that the risk of aggressive behaviour is low in this transfer, it is noted that Mr Ban has not had any extended leave from an institution since the index offence was committed in 2007 and this travel may have the potential to destabilise his mental state. It is essential to provide sufficient staff to manage the contingency of deterioration in his mental state leading to agitated or aggressive behaviour during the escort to Sydney Airport or during the flight.
- It is recommended that Mr Ban be escorted in his travel to China by two nurses and one psychiatric registrar who are familiar with Mr Ban and are experienced in Forensic Mental Health. Given these requirements, it is necessary that staff from the Forensic Hospital should be chosen as the escort.

Risk management plan for escorted leave to China

- The flight should be direct from Sydney to Nanjing to minimise any potential for difficulties to occur during transfers or stopovers.

- The suggested flight for travel to China is China Eastern flight MU728 from Sydney to Nanjing, departure 1130 on 12/11/13, arrival 1925. The suggested return flight is China Eastern flight MU727 from Nanjing to Sydney, departure 1930 on 13/11/13, arrival 0930 on 14/11/13.
- Mr Ban will be escorted by nominated JH staff members (psychiatry registrar) and (registered nurse) and (enrolled nurse) from the Forensic Hospital to Nanjing Airport via Sydney Airport. All 3 staff members are known to Mr Ban, and are familiar with his clinical presentation as well as variations in his mental state. The two nurses both speak the local Chinese language, Mandarin.
- On the morning of the flight the psychiatry registrar will perform an assessment of Mr Ban's mental state. If there are any concerns, the treating consultant will be called. Mild agitation or anxiety may be managed by as required diazepam 2.5-5mg.
- If Mr Ban is deemed unfit to travel due to following the mental state assessment then the plan for repatriation will be cancelled and the MHRT notified.
- If there are no major concerns about Mr Ban's mental state and he is considered fit to travel then the planned repatriating will proceed.
- At 0745 Mr Ban and escorting clinicians should be transported to the airport on a vehicle operated by G4S staff.
- Mr Ban and escorting clinicians should arrive at Sydney Airport by 0830.
- Mr Ban and the escorting clinicians should then board the flight at 1130 arriving in Nanjing, China at 1925.
- Mr Ban and escorting clinicians should board a China Eastern Airlines flight, leaving at 1130 local time, and arriving in Nanjing, China at 1925, local time.
- Mr Ban will be escorted with two staff members in proximity to him at all times.
- The airline special handling department will be contacted prior to his travel to facilitate Mr Ban's transit through the airport and the flight.
- The staff accompanying Mr Ban will carry with them any regular medications that Mr Ban will be expected to take during his transfer. They will also carry medications that can be used if necessary to reduce any

agitation or distress experienced by Mr Ban. These will include oral medications (diazepam 5mg tablets, 1 to 2 tablets as required; haloperidol tablets, 5mg, 1 tablet as required; benztropine, 2mg, 1 tablet as required) and intramuscular injections (10mg IM haloperidol, 10mg IM midazolam, 2mg IM benztropine). As per the airline policy the medicines will be in their original packets with labels placed in a secure plastic container with accompanying medical letter.

- If Mr Ban was to become agitated on the flight, then escorting staff will alert the cabin crew to inform the pilot or chief of the cabin crew. The captain of the flight and the chief of the cabin crew have authority to order restraint of passengers on the flight. The captain would then contact an advisory agency (Medair) if medicine were to be administered. The psychiatry registrar can direct the administration any medication that is required.
- The Justice Health staff will be relieved of their duties after handover of Mr Ban at Nanjing Airport and can then proceed to the hotel in Nanjing for one night. They will return to Sydney on an overnight flight leaving Nanjing at 1930 the following day.
- One nurse is a Chinese citizen. The other Justice Health staff members will require a visa.
- Justice Health will book and pay for all flights and accommodation including:
 - One way flight to Nanjing for Mr Ban.
 - Return flights for Justice Health staff
 - 1 night accommodation in Nanjing for Justice Health staff.
- The International Organisation for Migration (IOM) will provide communication assistance.
- We are to provide a detailed management plan to the Mental Health Review Tribunal regarding the proposed travel.
- After the MHRT receive this management plan, they will make an order conditionally releasing Mr Ban on the day of the flight, with conditions expiring at midnight. After that he will be unconditionally released and in China.

- The Attorney General of NSW will have one month to appeal the decision of the MHRT – the timing of Mr Ban’s conditional and unconditional release, and hence the flight, must allow time for this to occur.
- The Chinese Consulate will provide travel documents for Mr Ban to return to China.
- Flights and accommodation will be arranged via [named travel agency].
- Mr Ban will be met at Nanjing Airport by staff of the Province Psychiatric Hospital who will accept clinical handover at the airport and then escort Mr Ban to the Province Psychiatric Hospital.
- Mr Ban will be delivered into the care of staff from the Province Psychiatric Hospital at Nanjing Airport after the party has travelled through customs in China. The Chinese psychiatrist from the Province Psychiatric Hospital has confirmed that this will occur.
- Staff from the Province Psychiatric Hospital will be responsible for transporting Mr Ban from the airport to their hospital. The journey will take about 1 hour.
- Mr Ban will then be admitted to the Province Psychiatric Hospital.

Proposed clinical risk management plan for Mr Ban following admission to the Province Psychiatric Hospital

- On arrival at Mr Ban is to submit himself to examination by the Chinese psychiatrist or delegate and to accept such care, treatment and detention as the Chinese psychiatrist shall determine is appropriate.
- We suggest that Mr Ban be admitted to an inpatient ward of the Province Psychiatric Hospital on his arrival to China. We understand that this is a locked ward, and for at least an initial period of at least one month Mr Ban will be detained there.
- Mr Ban will be subject to any mental health legislation that applies within the Province in relation to detention and involuntary treatment.
- The following recommendations listed below are comparable to those that would have applied had Mr Ban been transferred to a medium secure forensic facility in NSW.
- The implementation of these recommendations is the responsibility of the Chinese psychiatrist and the staff of the Psychiatric Hospital.

- Mr Ban is to accept and carry out any reasonable directions given by the Chinese psychiatrist as to leave or absence from that accommodation.
- Mr Ban is to accept such medication as is prescribed by his treating psychiatrist at the Province Psychiatric Hospital.
- Mr Ban is to remain abstinent from illegal drugs and alcohol.
- Mr Ban is to not to take any medications or non-prescriptions drugs without the knowledge and approval of his medical practitioner.
- Mr Ban is to submit urine or blood samples for the detection of consumption of drugs or alcohol as directed by his treating psychiatrist at the Province Psychiatric Hospital.
- If for any reason Mr Ban's treating psychiatrist at the Province Psychiatric Hospital shall determine that it would be in his best interests to be transferred to another psychiatric facility or institution, then Mr Ban shall immediately comply with any such direction and transfer to such facility or institution.
- We suggest that prior to any leave being granted there be an initial period of close observation to monitor for emerging or underlying psychotic symptoms.
- There should be ongoing education provided to Mr Ban's family about his mental illness.
- We suggest a family meeting to assess family dynamics and provide family therapy as appropriate.
- There should be further development of a relapse prevention plan in collaboration with Mr Ban, identifying likely stressors or destabilisers, early warning signs, strategies to manage these signs and actions to be taken if early warning signs occur.
- If Mr Ban remains well through the period of graduated leave, he could be discharged.
- After discharge from hospital, we would suggest that Mr Ban continues to see a psychiatrist regularly to maintain awareness of his condition and monitor signs of relapse.
- We have discussed this management plan with the Chinese psychiatrist, who indicated to us that he was willing to implement it."

The last dot point is to be noted. The plan, including Mr Ban's admission as an inpatient, has been discussed with the Chinese psychiatrist and the Chinese psychiatrist has said he will implement it.

For the reasons given above, things to occur outside of Australian territory cannot be made the subject of conditions of release under the legislation and would not be enforceable in any event. However, the plan and the agreement to its implementation constitute an important consideration in the exercise of the Tribunal's discretion in deciding whether to make the proposed order for release.

Oral evidence

The consultant psychiatrist confirmed that Justice Health would now assume responsibility for completing arrangements for the issue of travel documents by the Chinese consulate and for the purchase of airline tickets for Mr Ban and the proposed escort team.

It was noted that the plan included a handover of the patient at the Nanjing airport. The treating psychiatrist was asked whether it would be of benefit if, at least, one of the escort team were to accompany Mr Ban on the short road trip from the airport to the hospital. The treating psychiatrist said that this course was not favoured because of possible uncertainty as to who was responsible for the patient's welfare during the trip.

On this topic, Mr Wheeler said his instructions from Mr Ban were that Mr Ban preferred to be taken to the hospital by hospital staff, without involvement of the Australian escort team. One can understand why Mr Ban would wish to put his association with Australia behind him at the earliest possible time. Relevantly, it appears that transport to the hospital would be less stressful rather than more stressful for the patient if he were accompanied solely by Chinese hospital staff on the trip to the hospital.

DETERMINATION

On the whole of the evidence, the Tribunal continues to be minded to make an order granting Mr Ban release subject to conditions relating to Mr Ban's transit from the Forensic Hospital to Sydney Airport and operative until he leaves Australian territory en

route to China. For the sake of certainty, we will specify midnight on the date of departure as the time for expiry of the conditions.

The Tribunal has addressed the matters mentioned in section 43 of the *Mental Health (Forensic Provisions) Act 1990*. In that regard, the Tribunal is satisfied, on the evidence available to it, that the safety of the patient in Australia and of any member of the public in Australia will not be seriously endangered by the patient's release as outlined above. In exercising its discretion whether to make the proposed order, the Tribunal has had regard to the proposed scheme of care in China and is satisfied that there is no serious prospect of harm to Mr Ban or to members of the public in China following his repatriation.

The Tribunal is further satisfied, as required by section 43 of the *Mental Health (Forensic Provisions) Act 1990*, that, in relation to the proposed transit to Sydney Airport and flight over Australian territory en route to China, care by the proposed escort team, being care of a less restrictive kind than detention at the Forensic Hospital, is consistent with safe and effective care, is appropriate and is, demonstrably, available to the patient.

The Tribunal has considered the matters specified in section 68 of the *Mental Health Act 2007* and in section 74 of the *Mental Health (Forensic Provisions) Act 1990* as mandatory considerations in relation to the transit to Sydney Airport and flight over Australian territory en route to China. Additionally, the Tribunal has had regard to those matters insofar as they apply to Mr Ban's care and treatment in China as considerations relevant to the exercise of the Tribunal's discretion in deciding whether to make an order for conditional release in this case.

The intended conditions are as follows.

1. The following conditions have effect until midnight on 12 November 2013 (the unconditional release time).
2. On 12 November 2013, Mr Ban is to travel by car from the Forensic Hospital to Sydney International Airport with an escort team appointed in writing by Medical Superintendent or the Acting Medical Superintendent of the Forensic Hospital (the escort team), the escort team to consist of a psychiatry registrar, a registered

nurse and a further registered nurse or an enrolled nurse, all being members of the staff of the Forensic Hospital.

3. Thereafter, Mr Ban is to remain continuously in the company of at least one member of the escort team, except as a member of the escort team may permit, and is to comply with the directions of any member of the escort team in all respects and in particular in respect of his actions, conduct and medication.
4. On 12 November 2013, Mr Ban is to board a plane, as directed by a member of the escort team, for a flight to Nanjing, People's Republic of China.
5. Mr Ban is to abstain from alcohol and illegal drugs and substances.
6. The unconditional release time may be extended by the President or a Deputy President of the Tribunal in the event of a delay in Mr Ban's departure as provided for in these conditions.

The last of these conditions is included to cover the possibility of delay in the flight to Nanjing.

The result would then be conditional release on 12 November until midnight on that date (or as extended) and unconditional release thereafter.

We have mentioned that there is no reasonable prospect of Mr Ban being able to obtain a visa for return to Australia. However, for more abundant caution, the Tribunal will advise the Department of Immigration and Citizenship of what is to occur. It will be a matter for that department to decide what, if anything, should be done by way of a stop on any application by Mr Ban for a visa to re-enter Australia, or by way of an alert which would be triggered by his arrival, or both.

A copy of these reasons together with the proposed order will be forwarded to Mr Ban's legal representative and to the Minister for Health and Attorney General. The Tribunal will accept written submissions regarding the proposed order during the period of 28 days from the date of these reasons.

If no further submissions are received, the Tribunal will make the order as proposed. If further submissions are received, the Tribunal will consider the substance of that material and may hold a further hearing before a final order is issued.

The parties will be notified of any further hearing as soon as practicable or of the making of a final order following the expiry of the 28 day period.

This is the unanimous decision of the Tribunal constituted, on this occasion, by Harold Sperling QC, Deputy President, John Spencer, psychiatrist, and John Witton, other member.

Signed

Harold Sperling QC
Deputy President

Dated this day 12 September 2013