



Neutral Citation Number: [2011] EWCA Civ 1359

Case No: C1/2011/0748

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE EDWARDS-STUART
CO4162011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2011

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE RICHARDS

and

LADY JUSTICE BLACK

Between :

THE QUEEN ON THE APPLICATION OF MODARESI **Appellant**

- and -

SECRETARY OF STATE FOR HEALTH & ORS **Respondent**

Mr Richard Gordon QC & Mr Matthew Stockwell (instructed by Peter Edwards Law) for the Appellant
Mr Paul Greateorex (instructed by DWP/DH Legal Services) for the 1st Respondent
Mr Owain Thomas (instructed by Capsticks Solicitors LLP) for the 3rd Respondent
Hearing dates : 15th November 2011

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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Black LJ :

1. This is an appeal against orders made by Edwards Stuart J on 3 March 2011 in judicial review proceedings. The central question with which it is concerned is the time for service of an application to a tribunal by a detained mental patient under section 66 of the Mental Health Act 1983 (the Act).
2. The Appellant, who suffers from schizophrenia, was admitted to hospital on 20 December 2010 for assessment under section 2 of the Act.
3. Section 66(1) of the Act provides that where a patient is admitted to hospital in this way, “an application may be made to [the appropriate tribunal] within the relevant period” by the patient. Section 66(2)(a) provides that “the relevant period” in subsection (1) means “14 days beginning with the day on which the patient is admitted”.
4. The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the Rules) apply to the application. Paragraph 32(1) of the Rules (as relevant to this case) provides that

“An applicationmust be –

....

(c) sent or delivered to the Tribunal so that it is received within the time specified in the Mental Health Act 1983”.
5. Paragraph 12 of the Rules deals with calculating time. Sub-paragraph (2) provides:

“If the time specified by these Rules, a practice direction or a direction for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day.”
6. On the afternoon of 31 December 2010, the Appellant gave a completed application form for the Mental Health Review Tribunal to a member of staff on her ward. At 16.41 that day, he faxed the form to the Mental Health Administration Office of the West London Mental Health NHS Trust (the Third Respondent to this appeal, which I will call simply “the Trust”). The Administrator who would normally forward such a form to the Tribunal was not present on that day and the form was not seen by those who were on duty. After that day, the office was closed until 4 January 2011 when the form was found and faxed immediately to the Tribunal.
7. Staff at the Tribunal (which is the Second Respondent to this appeal) considered that the application was outside the 14 day time limit and therefore invalid. They wrote to the Appellant’s solicitors on 5 January 2011 to that effect.

Case against the Tribunal

8. It is not necessary to recite what happened next at this point in the judgment and, in the interests of clarity, I do not propose to do so, although I shall return to it later

when I come to deal with the appeal as it concerns the First Respondent (the Secretary of State for Health) and the Trust.

9. What it is important to record immediately, however, is that Edwards Stuart J dismissed the Appellant's claim against all three Respondents. The starting point of his decision was that the Appellant's application to the Tribunal had indeed been out of time.
10. The argument presented to the judge by the Appellant was that the time limit for making the application was to be calculated in accordance with paragraph 12(2) of the Rules. As the 14 days allowed expired on a non-working day, the application was therefore made in time if it reached the Tribunal on the next working day. The next working day after time expired in this case was 4 January 2011 which was the day on which the application form arrived with the Tribunal and so, on this argument, the application was duly made.
11. The judge held that paragraph 12 did not apply. In his view, the time limit was not one "specified by these Rules" but by s 66(1) of the Act. He pointed out that paragraph 32 said that an application must be sent or delivered so that it was received "within the time specified by the Act" which was 14 days beginning with the day on which the patient was admitted and he said that unless compelled by authority to decide otherwise, he considered that those words meant what they said.
12. He was referred to the case of *Pritam Kaur v S Russell and Sons Ltd* [1973] QB 336 which he recorded was cited in *Barnes v St Helens Metropolitan Borough Council* [2007] 1 WLR 879. In *Pritam Kaur*, it was held that if the limitation period for an action expired on a day when the court offices were not open, the plaintiff should be allowed to commence his action on the next day when the offices were open. Edwards Stuart J did not consider that that assisted the Appellant because a patient can send an application to the Tribunal by fax so that it is received almost instantaneously whether the office is open or closed. He was influenced by the fact that the delivery of a notice (or in this case an application) to the court is a unilateral action on the part of the applicant which requires nothing of the court office as was pointed out in *Van Aken v Camden LBC* [2003] 1 WLR 684.
13. The judge's attention was unfortunately not invited to the House of Lords authority of *Mucelli v Govt of Albania* [2009] UKHL 2 [2009] 1 WLR 276. Indeed, that authority was not cited to us in the parties' skeleton arguments either and it was the court that caused it to be brought to counsels' attention in advance of the appeal hearing. Although an extradition case, it is of considerable importance for the present appeal. One point at issue in it was the calculation of the time allowed for the giving of a notice of appeal to the High Court against a District Judge's order permitting extradition and, in particular, what happens if the office of the recipient of the notice is closed at the end of the period of service. The House of Lords was there considering two time limits, namely a seven day period laid down by section 26(4) of the Extradition Act 2003 and a fourteen day period laid down by section 103(9) of the same Act. At paragraphs 83 and 84, Lord Neuberger said:

"83. Another point which arises is what happens if it is impossible to give notice on, or during the final part of, the last day. For instance, in relation to filing, the Court Office may be

closed on the last day because it is Christmas Day or another Bank Holiday, and the Court office will be closed at some point in the late afternoon on the last day. Equally, the respondent's office may be closed for the same reasons.

84. Where the requisite recipient's office is closed during the whole of the last day, I consider that the notice will be validly filed or served if it is given at any time during the first succeeding day on which the office is open (i.e. the next business day). So if the final day for giving a notice of appeal would otherwise be Christmas Day, filing or service can validly be effected on the 27th December (unless it is a weekend, in which case it would be the following Monday). This conclusion accords with that reached in *Pritam Kaur v S Russell & Sons Ltd* [1973] 1 QB 336. As Lord Denning MR said at 349E, "when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when time expires, then, if it turns out ... that the day is a Sunday or other *dies non*, the time is extended until the next day on which the court office is open". I agree, and I can see no reason not to apply the same principle to service on a respondent in relation to the respondent's office. The fact that fax transmission can be effected at any time does not cause me to reconsider that conclusion."

14. The majority of the House agreed with both Lord Neuberger's conclusion and his reasoning.
15. I see no reason why Lord Neuberger's approach should not be equally applicable to the calculation of time in relation to an application such as this one in relation to detention under section 2 Mental Health Act and, in fact, every reason why it should be. As is apparent from *Mucelli*, the regime in extradition cases imposes rigorous time limits. There is no reason to take an even more rigorous approach to time limits set out in the Mental Health Act. Indeed, if anything, a less strict approach might be contemplated given that the applicant is a patient undergoing assessment for mental health difficulties. However, I need not pursue that further as I am satisfied that Lord Neuberger's considered view should be applied to the calculation of time for the Appellant's application to the tribunal.
16. Lord Neuberger dealt expressly with the specific point that Edwards Stuart J found persuasive, that is to say the possibility of delivering the notice (or, here, making the application) by fax without the need for the court office to contribute anything to the process. Lord Neuberger was clear that that did not affect his conclusion and the availability of transmission by fax should not, in my view, make any difference in our case either.
17. None of the Respondents argued against the application of *Mucelli* to determine the timing issue here.
18. Accordingly, the answer to the present appeal in relation to Edwards Stuart J's decision concerning the Tribunal is, in my judgment, that by the same process of

reasoning as that adopted in paragraph 84 of *Mucelli*, the Appellant's time for making her application to the Tribunal was extended to include 4 January 2011, that being the working day after time would otherwise have expired, and her application should have been accepted by the Tribunal. It follows that I would allow her appeal against Edwards Stuart J's dismissal of her judicial review claim against the Tribunal.

Case in relation to Secretary of State and Trust

19. That leaves the question of the Appellant's appeals in relation to the dismissal of her claims against the Secretary of State and the Trust with which the Appellant wished to proceed notwithstanding that it was apparent that her claim against the Tribunal would succeed.
20. In order to deal with this aspect of the matter, I need to return to the chronology.
21. When the Appellant's solicitors received the Tribunal's letter on 7 January 2011 refusing to entertain the application, they wrote immediately, that day, to the Secretary of State asking for the Appellant's case to be referred to the Tribunal in accordance with section 67 of the Act. Section 67 provides that the Secretary of State may if he thinks fit at any time refer to the appropriate tribunal the case of a patient who is liable to be detained under Part II of the Act.
22. The Appellant's solicitors' letter said:

“Please find attached a completed (but unsigned and undated) referral form for a First Tier Tribunal.

Our above-named client was detained under s.2 MHA 1983 on 20.12.10. We understand that our client completed an application form for a First Tier Tribunal in relation to her s.2 detention within the 14 day time limit. Unfortunately, due to this form being completed over a bank holiday weekend, the form was not faxed over to the Tribunals Service until 4.1.11 when the Mental Health Act Administrator returned to work which was then outside the 14 day time limit.

We have received notification from the Tribunals Service that the application is, therefore, considered invalid and that they have closed the file and will be taking no further action.

We are writing to ask that the Secretary of State refer to our client's case for a Tribunal in accordance with s.67 MHA 1983.

We make this application on the basis that, through absolutely no fault of our client, the application was not sent to the Tribunals Service in time. Although our client completed the form in time, due to no procedures being in place at the hospital for applications to be submitted when no Mental Health Act administrator is on duty, she was not facilitated in ensuring that the application was sent immediately to the Tribunals Service.

While our client is now detained under s.3 and therefore is eligible to submit a new application for a First Tier Tribunal, to do this would deprive our client of her hearing to which she was entitled as a s.2 patient. Should the Secretary of State agree to make the requested referral, this will ensure that our client will retain her right of application under s.3 in due course.

We would be obliged this request could be considered as a matter of urgency.”

23. The Secretary of State replied the same day. He declined to exercise his power under section 67. He took into account that by now the Appellant was detained under section 3 of the Act for treatment which meant that she had a fresh opportunity to make an application to the Tribunal (see section 66(1)). He said that should the Appellant make an application to the Tribunal and the panel uphold her detention, he would be prepared to consider any further request for a section 67 reference submitted during her current period of detention. Given the way in which Mr Gordon QC (who appeared with Mr Stockwell for the Appellant) developed his argument, I will set out the substance of the letter here:

“The Secretary of State does not take the view that a reference must invariably be made where a patient has failed to exercise the right provided in the Act to apply for a hearing within 14 days of being admitted under section 2 of the Act. The 14 day limit exists for a purpose. The Act makes no special provision for Public or Bank Holidays or other non-working days.

The Secretary of State has noted that Ms Modaresi was originally detained under section 2 of the Act on Monday, 20 December 2010. Accordingly, Ms Modaresi had until Sunday, 2 January 2011 in which to apply to the First Tier Tribunal for a hearing against her detention under the Act. You have advised that although Ms Modaresi duly completed an application form during that weekend, there were no arrangements in place for applications to be dealt with in the absence of the mental health act administrator. For this reason, the application form was not faxed to the Tribunals Office until 4 January 2011 when the mental health act administrator returned to work. Ms Modaresi was subsequently detained under section 3 of the Act on Thursday, 6 January 2011.

The Secretary of State has considered all the information before him and has decided on this occasion not to exercise his discretionary powers under section 67 of the Act to refer the case of Ms Elham Modaresi aka. Elham Chogani to the First Tier Tribunal. In reaching his decision, he took into account that as Ms Modaresi is now detained under section 3 of the Act, she can make her own application to the First Tier Tribunal. In the event that Ms Modaresi did not make an application, the hospital managers would have to make a reference under section 68 of the Act as of 20 June 2011, when Ms Modaresi

would have been detained under the MHA for more than 6 months.

However, should Ms Modaresi make an application to the First Tier Tribunal and the tribunal panel were to uphold her detention under the Act, the Secretary of State would consider any further request for a section 67 reference submitted during her current period of detention.”

24. The Appellant did not make an application to the Tribunal in the context of her detention under section 3. Instead, on 17 January 2011, she issued proceedings for judicial review against all three bodies who are now respondents to this appeal and permission was granted for the judicial review to proceed.
25. Thereafter, on 1 February 2011, the Secretary of State made a referral to the Tribunal under section 67. However, on 18 February 2011, just before the judicial review proceedings came on for hearing before Edwards Stuart J, a Community Treatment Order was made in relation to the Appellant and she was released from detention thus obviating the need for any application at all to the Tribunal.
26. The Secretary of State and the Trust both submitted to Edwards Stuart J that in the circumstances the judicial review application was academic. However, the judge did consider the substance of both claims which he rejected.
27. He accepted the argument of counsel for the Secretary of State that the Appellant had an extant right to apply to the Tribunal following being admitted and detained for treatment pursuant to section 3 of the Act and that she would not have even an arguable claim for breach of her rights under Article 5(4) unless and until she had made an unsuccessful claim to the Tribunal and thereafter had her renewed request to the Secretary of State for a reference under section 67 refused. The judge found that the Secretary of State’s response in his letter, including the indication that he would consider a section 67 request if an application were to be made unsuccessfully, was a reasonable one.
28. As far as the Trust was concerned, the judge found that there was no evidence to suggest that the failure on the part of the Trust to forward the Appellant’s application more speedily to the Tribunal was the result of anything other than an isolated failure by members of the Trust’s staff by oversight or, possibly, by virtue of having made an unauthorised early departure on New Year’s Eve. He was not persuaded that the system that the Trust had for dealing with such applications fell below the standard that was to be expected of a reasonable Mental Health Trust in its position. He was under the impression (recorded at paragraph 87 of the judgment) that the Appellant had accepted that mere oversight or neglect of Trust employees on the afternoon of 31 December 2010 did not constitute a breach by the Trust of its obligations to the Appellant under Article 5(4) but the Appellant told us that that was not the case although counsel for the Secretary of State’s recollection appeared to differ on that. The judge dismissed the claim against the Trust.
29. The judge dealt with the claims against the three Respondents sequentially, starting with the claim against the Tribunal. If he had had the advantage of being referred to the case of *Mucelli* and, instead of finding that the Appellant’s application had not

been made within the requisite 14 days, he had found in accordance with that authority that it was in time, I have no doubt that his approach to the claims against the other Respondents would have been quite different. He indicated at the start of his judgment that he considered the claims against the Trust and the Secretary of State and the claim against the Tribunal were mutually exclusive and he set out in paragraphs 36 to 39 how he had approached the three claims in order. In the light of those views, having found that the application to the Tribunal was in time, I have little doubt that he would have declined to consider the case further.

30. Whether we should continue to hear the appeal in relation to the Trust and/or the Secretary of State now that everyone was clear about the Tribunal's error was the subject of argument at the outset of the hearing before us.
31. The Trust submitted that the proceedings had become academic in so far as it was concerned. The Appellant had validly exercised her right to apply to the Tribunal so there could be no practical utility in considering in the abstract what duty the Trust had with regard to forwarding patients' applications to the Tribunal and whether its systems/actions to deal with that were appropriate.
32. It was inevitable that the appeal against the Trust would have to be dismissed because the Trust had not, in fact, failed to forward the Appellant's application to the Tribunal in time but Mr Gordon submitted that it was nevertheless important that this court should address the reasoning of Edwards Stuart J in relation to the Trust because, it was said, it would be relied on by the Trust and others and was already causing problems in the Tribunal.
33. We indicated that we would not entertain further argument in relation to the Trust and that we would provide our reasons for that decision in this judgment. For my part, I do not consider that it would be of assistance to consider the question of the Trust's duty on a hypothetical basis. The problem in this case was created by the Tribunal not the Trust which in fact forwarded the Appellant's application to it in time. I record that the Appellant would have wished to argue (1) that in order to comply with ECHR Article 5(4)¹ the Trust had a duty to have in operation a system that enabled patients such as the Appellant to make applications in time to the Tribunal (2) that the judge was wrong to consider that the fact that a failure to achieve the transmission of an application to the Tribunal on time was the result of "oversight or neglect" by a Trust employee could excuse the Trust from responsibility (3) that the judge was wrong to view the system actually operated by the Trust as reasonable and/or the best that could realistically be devised and therefore lawful. If those arguments are to be deployed, however, it will be better that that is done in a case in which they have the potential to affect the outcome of the proceedings.

¹ Article 5(4) provides that:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

34. We took a different view in relation to the appeal as it related to the Secretary of State and proceeded to hear full argument in relation to that. I could see that in theory it would be possible for there to be a valid claim both against the Tribunal and against the Secretary of State and to the extent that the judge proceeded on the basis that those two claims were necessarily mutually exclusive, I cannot agree with him. I say that because the Secretary of State's power to refer matters to the Tribunal under section 67 is a very general one, not confined to cases in which the Tribunal has no original jurisdiction to consider a person's detention, and there seems to be no reason in principle why it should not be exercised to ensure that where something has gone wrong in the processing of an application as it did here, the applicant's case can still be placed speedily before a court as required by Article 5(4).
35. The Appellant sought a declaration against the Secretary of State. Mr Gordon did not feel able to articulate the precise terms of the declaration but the thrust of it was that the decision not to refer the matter under section 67 was unlawful and that the Secretary of State failed in his duty as a public authority to secure for the Appellant her rights under Article 5(4).
36. During the hearing, Mr Gordon's argument in relation to the Secretary of State focussed particularly on the fact that the Secretary of State proceeded on the mistaken basis that the Appellant's application to the Tribunal was out of time. This was an error of law and Mr Gordon argued that it necessarily vitiated the Secretary of State's decision.
37. He invited our attention to the case of *Regina (M) v Hackney LBC* [2011] EWCA Civ 4 at paragraph 41, in order to stress that the liberty of the subject is at stake in cases such as the present and that that liberty may be violated only to the extent permitted by law and not otherwise. He cited particularly the closing words, at paragraph 100, of Toulson LJ who gave the leading judgment:

“Our system of law is rightly scrupulous to ensure that in matters affecting individual liberty the law is strictly applied. It is a hallmark of a constitutional democracy.”
38. It is plainly right that we should keep that firmly in mind in considering this case and I do so.
39. Apart from this simple and forceful submission, Mr Gordon relied also on the fact that the decision of the Secretary of State required the Appellant to exercise her right to make an immediate application for her release from section 3 detention, he submitted to her disadvantage.
40. In terms of the way in which the Tribunal would approach her application, a reference by the Secretary of State offered the Appellant nothing better than a section 3 application offered. The character of her detention having changed from section 2 detention to section 3 detention, it is common ground that nothing that the Secretary of State could have done could have returned her to the position she would have been in had her section 2 application been processed properly. Whether the matter came to the Tribunal via the Appellant or via the Secretary of State, the criteria relevant to a section 3 application would apply rather than those relevant to a section 2 application. Furthermore, neither a reference under section 67 nor an application in relation to

section 3 detention is subject to the requirement of paragraph 37(1) of the Rules that there should be a hearing within seven days so the application would, in either case, be processed according to the rather slower procedure characteristic of a section 3 application. With one exception, there was therefore no advantage to the Appellant in the Secretary of State bringing the matter before the Tribunal as opposed to her making her own section 3 application.

41. The one exception is that section 66 permits a patient to apply to the Tribunal only once in six months in relation to detention under section 3. If the Tribunal considered the Appellant's case either pursuant to her own application under section 2 or pursuant to a reference by the Secretary of State under section 67, she would retain her right to apply by virtue of her section 3 detention which she could deploy later on in her detention at a time when her mental condition gave her the best chance of success. If forced to use her section 3 application immediately, that would not be possible. Mr Gordon submitted that it is a breach of Article 5(4) for an Appellant to be forced to use up her section 3 application in this way.
42. The Secretary of State's letter of 7 January 2011 makes clear that he appreciated the point being made in this respect and his answer to it was that he would consider any further request for a section 67 reference should the need arise but for now, the Appellant had the requisite means to bring her case before the Tribunal and should proceed in that way.
43. I am not persuaded that it amounted to a breach of Article 5(4) for the Appellant to have to use her section 3 application in this way. What Article 5(4) requires is that a patient should have the entitlement to take proceedings to have the lawfulness of his or her detention decided speedily by a court; the Appellant had that entitlement under section 66(1) in association with her detention under section 3. Article 5(4) does not prescribe further than that. If there came a time when having unsuccessfully used up her section 3 application at an early stage, the Appellant wished to make a further application to the Tribunal, she was entitled to ask the Secretary of State again to refer her case to the Tribunal under section 67 and he had indicated that he would consider so doing. Of course, that was not a guarantee that he would refer it and to that extent the Appellant's position was less favourable than it would have been had she not had to use her section 3 application in the first place. But the Secretary of State is bound to exercise his discretion under section 67 in accordance with normal public law principles and judicial review would be available to the Appellant should he fail to do so, thus ensuring that there would be no breach of Article 5(4). Accordingly, I do not consider that the disadvantage to the Appellant of having to use up her section 3 application at an early stage was such as to make it unlawful for the Secretary of State to decline to exercise his section 67 power in the expectation that she would do so.
44. Equally, I do not consider that the fact that the Secretary of State proceeded on the basis that the Appellant's application to the Tribunal had been out of time vitiates his decision. As the argument unfolded, it seemed that Mr Gordon was seeking to persuade us that, faced with a decision such as this by a Tribunal, there was a duty on the Secretary of State to check for himself whether the claim was indeed out of time. That was a difficult argument to run (although I accept not impossible) in the light of the fact that the Appellant's own solicitors had presented the matter to the Secretary of State with an apparent acceptance that the application was out of time and also of the fact that it was not until the hearing of this appeal that the authority of *Mucelli*

which resolved the time question in the Appellant's favour came to light. Whilst I accept, of course, that there is a duty on public authorities to ensure that there is no breach of rights arising under the ECHR and I am also prepared to accept that the fact that the person concerned is a patient may be relevant to how that duty is fulfilled, I cannot accept that on the facts of this case, where the Secretary of State was not alerted by the patient's own legal advisors to even the possibility that the Tribunal was in error, his decision is automatically vitiated by the fact that he proceeded by accepting its decision.

45. Without the Tribunal's refusal to accept the application on the basis that it was out of time, the Secretary of State would not, of course, have been considering the matter at all. But his decision is clearly by no means *dictated* by the fact that he considered the application to be out of time. The Secretary of State moved on from the out of time application to consider the reality of the Appellant's position which was that she could make her own application to the Tribunal under section 3. The disadvantage of making such an early application under section 3 was addressed by the indication that the Secretary of State would consider a subsequent request for a section 67 reference. Reading the decision letter as a whole, therefore, I do not accept that the Secretary of State's acceptance of the Tribunal's erroneous decision vitiated his decision. On the contrary, the decision was, in my view, a decision to which he was entitled to come as a proper exercise of his discretion. It was not unlawful in itself and it did not provoke a breach of the Appellant's Article 5(4) rights.
46. I would therefore dismiss the appeal against Edwards Stuart J's dismissal of the claim against the Secretary of State.

Richards LJ:

47. I agree.

Mummery LJ:

48. I also agree.