FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 32
XA31/19

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the application for leave to appeal late

by

MARGO JEAN NEILLY

Applicant

against

THE NURSING AND MIDWIFERY COUNCIL

Respondents

Act: Party
Alt: P Reid; Nursing and Midwifery Council

29 May 2019

Introduction

[1] The applicant, who was a mental health nurse working for NHS Highlands, was struck off the respondents' register of qualified nurses and midwives by the respondents' Fitness to Practice Committee in terms of article 29(5)(a) of the Nursing and Midwifery Order 2001. The striking-off order came into effect on 25 February 2019. The applicant had attended the hearing on 19 February at which the Committee's decision was made. She now

seeks to appeal the order to this court in terms of article 29(9) of the 2001 Order. Her application to do so is late in terms of article 29(10), which states that:

> " Any such appeal must be brought before the end of the period of 28 days beginning with the date on which notice of the order or decision appealed against is served on the person concerned."

[2] The order was served on the applicant on 26 February; that is on the day after it was sent to her by first class post (Nursing and Midwifery Council (Fitness to Practise) Rules Order 2004, r 34(5)). The appeal was lodged on 2 April; six days after the expiry of the 28 day time limit.

[3] The respondents object to the competency of the appeal because it is late. The procedural judge fixed a hearing on the issue of competency. The court appointed the hearing to take place before three judges.

Precedent

[4] In *Hume* v *Nursing and Midwifery Council* 2007 SC 644, the court held that the statutory time limit was subject to the court's own procedural rules. RCS 41.20(1)(a) (now RCS 41.26(1)(a)) provided that "the appeal shall be lodged … within the period prescribed by the enactment under which it is brought". A failure to bring the appeal timeously could be treated as a failure to comply with the court's own rules and thus within the scope of the general dispensing power in RCS 2.1(1) which states that:

> "(1) The court may relieve a party from the consequences of a failure to comply with a provision in these Rules shown to be due to mistake, oversight or other excusable cause on such conditions, if any, as the court thinks fit."

The Court relieved the applicant in *Hume* of the consequences of his lateness, because it had been caused by his oversight, during a period of poor health which caused him to be

unaware of the charge of misconduct against him, the date of the hearing and the striking-off order.

[5] In *Holmes* v *Nursing and Midwifery Council* 2010 SC 246 the court, under reference to *Mucelli* v *Albania* [2009] 1 WLR 276, found the reasoning in *Hume* unattractive. It expressed regret that the court in *Hume* had not been referred to *Simpson* v *Assessor for Selkirkshire* 1948 SC 270 in which Lord Jamieson had said (at 272):

> "[W]here the Act says that appeals are to be lodged not later than a certain date, … it means just what it says, and that, if an appeal is not lodged by that time, then it is not a competent appeal."

The European Court of Human Rights and England and Wales

[6] In *Miloslavsky* v *United Kingdom* [1995] 20 EHRR 442 the European Court determined that a security for costs order did not violate the applicant's right of access to the court as guaranteed by Article 6(1). The court said:

> "59 … the right of access to the courts secured by Article 6(1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied; firstly (*sic*) that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

This principle was applied to time limits in *Cavanilles* v *Spain* (2000) 29 EHRR 109 in which the European Court said that:

> "45. The rules on the time limits for appeals are undoubtedly designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. Those concerned must expect those rules to be applied. However, the rules in question, or the application of them, should not prevent litigants from making use of an available remedy."

Cavanilles was considered in *Goodall* v *Peak District National Park Authority* [2008] 1 WLR 2705. This concerned an attempt to appeal an enforcement notice out of time. In refusing the appeal, the court (Keane LJ at para 16) said that:

> "The … decision in *Cavanilles*'s case does not render [the] statutory provision incompatible since the court there was dealing with an extremely short time limit of just a few days. And it has no relevance to a provision which stipulates, in effect, a period of at least 28 days after service for the lodging of an appeal. The court in *Cavanilles'*s case was making the point that a domestic law time limit must not, in effect, remove the right of access to the courts altogether in a practical sense."

Similarly, in *Mucelli* v *Albania (supra*), the House of Lords held that two statutory appeal time limits within the extradition process (Extradition Act 2003, ss 26(4) and 103(9)) could not be extended by the court.

[7] In *Pomiechowski* v *District Court of Legnica, Poland* [2012] 1 WLR 1604, the UK Supreme Court applied the principle in *Miloslavsky* to time limits in statutory appeals. Article 6(1) of the European Convention required that any restriction of the right must not impair "the very essence" of that right. It must pursue a legitimate aim and involve a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (Lord Mance at para 33 citing *Miloslavsky* at para 59). The applicable time limit in *Pomiechowski* was deemed not proportionate to the relevant aim; that of achieving finality and certainty in extradition appeals. The court read down the relevant provisions to be consistent with Article 6 on the basis that there was:

> "no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time. … [T]he statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6.1 in … *Miloslavsky*. The High Court must have power in any individual case to

> determine whether the operation of the time limits would have this effect. If and to the extent that it would do so, it must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously." (*ibid* at para 39)

[8] A 28 day limit will probably result in a greater prospect of compliance than one of only three (*Cavanilles*), seven or 14 days (*Pomiechowski*). However, as was also said in *Pomiechowski* (Lord Mance at para 35):

> "... it is not sufficient under article 6.1 if in most or nearly all cases the right of appeal can be or should be capable of being exercised in time. The 'very essence' of the right may be impaired in individual cases and there may still be no 'reasonable relationship of proportionality between the means employed and the aim sought to be achieved'".

Regardless of the length of the time limit, if it cannot be exercised in practical terms there will be a violation of the individual's right of access to a court in article 6(1).

[9] Accordingly, in *Adesina* v *Nursing and Midwifery Council* [2013] 1 WLR 3156, the Court of Appeal held that the 28 day time limit provided by article 29(10) was subject to what was described (Maurice Kay LJ at para 15) as the "discretion" in *Pomiechowski.* The view, that the discretion only arose in "exceptional circumstances" where the appellant "personally has done all he can to bring the appeal timeously", was adopted (*ibid* at para 18), so that:

> "although the absolute approach can no longer be said to be invariable, the scope for departure from the 28-day time limit is extremely narrow."

This approach was applied in *Nursing and Midwifery Council* v *Daniels* [2015] Med LR 255, where the appellant had done nothing about an order until contacting solicitors on the day before the expiry of the 28 days. The Court of Appeal held (Jackson LJ at para 43) that *Pomiechowski* and *Adesina* did not provide a general discretion to excuse non-compliance. That could only occur where the very essence of the statutory right to appeal was impaired (*ibid* at para 39).

Decision

[10] The decisions in *Hume* v *Nursing and Midwifery Council* 2007 SC 644, *Pomiechowski* v *District Court of Legnica, Poland* [2012] 1 WLR 1604, *Adesina* v *Nursing and Midwifery Council* [2013] 1 WLR 3156 and *Nursing and Midwifery Council* v *Daniels* [2015] Med LR 255, are reconcilable. *Hume* remains applicable, to the extent that the general dispensing power in RCS 2.1(1) is the vehicle through which the time limit in art 29(10) may be extended. However, in light of the imperative terms of a statutory provision, which must carry great weight, the power to do so should be exercised not simply where there has been a mistake, oversight or other excusable cause but, as required by article 6(1) of the Convention, only when the applicant has personally done all he or she can to bring the appeal on time, and if not on time, as soon as possible after that. That is the meaning of "exceptional circumstances" in this context. The correct formulation should include "reasonably" before "can", rather than being stated in absolute terms.

[11] This approach is consistent with that in Scotland prior to *Hume*. The relaxation of a statutory time limit had not previously been regarded as an exercise of the court's general dispensing power. In *Simpson* v *Assessor for Selkirkshire* 1948 SC 270, Lord Jamieson (at 274) was "not prepared to say that the Valuation Committee might not have entertained this appeal", and commented (at 272) that, in *Watson, Gow & Co* v *Assessor for Glasgow* 1910 SC 807, it had been said that the relevant time limit "might in certain circumstances be relaxed and not literally complied with". This was derived from the opinion of Lord Dundas in *Watson, Gow & Co* (at 810) that:

> "… no excuse of any kind has been offered … Nor is it said … that the Assessor had other means of information, or other knowledge, or that in fact he suffered no prejudice. … Therefore … while it stands in the statute we must see that it is not reduced to a dead letter".

[12] In *Simpson*, Lord Sorn was of the view (at 276) that *Hugh Symington & Sons* v *Assessor for Coatbridge* (1895) 22 R 588, *Watson, Gow & Co* (*supra*) and *Ayrshire Education Authority* v *Assessor for Irvine* 1922 SC 435 showed that:

> "the Court has not treated the terms of [the] section as strictly imperative, but has been prepared to relax the strictness of the section in special circumstances and where no prejudice has been suffered by the Assessor. These cases also show a strong disfavour towards the upholding of objections to competency which are of a technical nature."

[13] There can therefore be circumstances in which the court will entertain a late statutory appeal. The court will accordingly proceed to determine whether the application to do so should be granted; that is to say whether the dispensing power should be exercised on the basis that the applicant personally has done all that she could reasonably have done to bring the appeal on time and, if not on time, as soon as possible after that.

[14] The applicant accepts that she was aware of the order when it was made at the hearing on 19 February 2019, even if the full reasons were not then given. She states that she did not receive the documentation until 4 March 2019, because she had gone to stay with her father. He was in ill-health, having sustained a fracture at the age of 80. The applicant's central contention was that, as a result of the disciplinary process, she was unable to "read, fully process or respond" to the formal written intimation of the order because of increased anxiety levels associated with a complex PTSD. She could not instruct legal representation because of financial constraints. She had become depressed to such a degree that she found it extremely difficult to talk to anyone, to look for support and generally to seek help. It was not until the end of March that, on making contact with NMC Watch, she was able to discuss the prospects of an appeal. NMC Watch are an organisation which supports nurses

and midwives in situations such as the present. The applicant had been given their contact details at the hearing.

[15] However sympathetic the applicant's case may be in terms of her mental health and the relatively short period of lateness, it does not meet the test set out above whereby it could be said that she did all that she reasonably could have done to bring the appeal on time. On that basis, the court will refuse to exercise the dispensing power in favour of the applicant. It follows that the objection to the competency of the appeal will be sustained.