**Trinity Term**
**[2013] UKSC 53**
*On appeal from: [2011] EWCA Civ 1359*

# JUDGMENT

# R (on the application of Modaresi) (FC) (Appellant) *v* Secretary of State for Health (Respondent)

**before**

**Lord Neuberger, President**
**Lady Hale**
**Lord Wilson**
**Lord Sumption**
**Lord Carnwath**

## JUDGMENT GIVEN ON

## 24 July 2013

**Heard on 19 June 2013**

| *Appellant* | *Respondent* |
| --- | --- |
| Richard Gordon QC<br>Matthew Stockwell<br>(Instructed by Peter Edwards Law) | James Eadie QC<br>Paul Greatorex<br>(Instructed by Treasury Solicitors) |

**LORD CARNWATH (with whom Lord Neuberger, Lord Wilson and Lord Sumption agree)**

*Background*

1. This appeal arises out of an unfortunate but isolated oversight in the offices of the West London Mental Health NHS Trust. It occurred over the New Year period at the end of 2010. The consequences have long since ceased to have any practical significance for any of the parties. No relief, financial or otherwise, is now sought in these proceedings against the trust itself. The appeal has been pursued to this court solely against the Secretary of State, on the basis that it raises a question of general importance.

2. That question is formulated by Mr Gordon QC, in his printed case as follows:

> "As: (i) a public body with obligations in public law and (ii) a public authority under the Human Rights Act 1998 'HRA' can the Secretary of State for Health 'the S/S' lawfully refuse to refer a patient's case to the First-tier Mental Health Review Tribunal 'MHRT' under section 67(1) of the Mental Health Act 1983 'MHA' in circumstances where the MHRT has unlawfully declined to hear that patient's application to it under section 66(1)-(2) and where the patient requests that there be a section 67(1) referral?"

*Factual and procedural background*

3. The facts can be shortly stated. Mrs Modaresi, who suffers from schizophrenia, was admitted to hospital on 20 December 2010 for assessment under section 2 of the Mental Health Act 1983, which permits detention for a limited period not exceeding 28 days. By section 66(1)(a) she had a right to apply to the First-tier Tribunal within 14 days to review her detention and if appropriate obtain an order for her discharge. Under the rules applying to an application under section 66(1)(a), the tribunal would have been obliged to arrange a hearing within seven days of receiving the application (SI 2008/2699, rule 37(1)).

4. On the afternoon of 31 December 2010 she gave a completed application form to a member of staff on her ward, who faxed it to the appropriate office of the

trust. Unfortunately, the relevant administrator was out of the office that day and the form was not seen by others in the office. The office was closed over the New Year holiday until 4 January 2011, when the form was found and faxed immediately to the tribunal. Officials in the tribunal's office determined that it was out of time, and they wrote to her solicitors to that effect on 5 January. That letter was received by the solicitors on 7 January 2011. On the preceding day Mrs Modaresi's status had changed. She had ceased to be detained for assessment under section 2, but instead became detained for treatment under section 3. As such she was entitled to make a separate application to the tribunal under section 66(1)(b). Under that provision there is no specific time limit for holding the hearing.

5. Her solicitors wrote immediately to the Secretary of State asking him to exercise his discretion to refer the case to the tribunal under section 67. They referred to her detention under section 2. They explained that she had completed the application form to the tribunal within the 14 day time limit, but that as a result of the bank holiday weekend it had not been faxed to the tribunal until 4 January, "which was then outside the 14 day time limit", and that it had been rejected by the tribunal as invalid. The application to the Secretary of State was made on the basis that this had come about "through absolutely no fault of our client", and "due to no procedures being in place at the hospital for applications to be submitted when no Mental Health Act administrator is on duty". Of her change of status the letter said:

> "While our client is now detained under section 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 section 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 section 3 in due course."

6. The Secretary of State replied on 10 January, declining to make a reference under section 67. This is the decision now under review. According to the letter, it was not thought that a reference must "invariably" be made where a patient has failed to exercise her right to apply for a hearing within 14 days:

> "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 letter noted, without disagreement, the claim that the time limit had been missed due to the lack of appropriate arrangements within the trust. However the

Secretary of State "having considered all the information before him" had decided not to exercise his power to refer:

> "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 six 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."

7. Mrs Modaresi did not take up that suggestion. Instead, on 17 January 2011, she began proceedings for judicial review against the three agencies concerned: against the tribunal for unlawfully declining to entertain her application as out of time; against the Secretary of State for unlawfully declining to refer her case to the tribunal under section 67; and against the trust for its failure to have in place "lawful arrangements... so as to comply with the requirements of article 5(4) European Convention on Human Rights".

8. On 26 January 2011 Cox J granted permission to apply for judicial review, following which, on 1 February 2011, the Secretary of State reconsidered his position and made a referral under section 67 as requested. Before the application was heard by the tribunal, on 18 February 2011 she became the subject of a Community Treatment Order, with the result that her detention came to an end.

9. She nonetheless pursued her claim for judicial review. It was heard by Edwards-Stuart J on 22 February 2011 and dismissed for reasons given in a judgment dated 3 March 2011. He held in summary that the tribunal had been correct to treat the original application as out of time; that the Secretary of State's decision was neither unreasonable nor in breach of her rights under the Convention; and that an isolated failure by the trust did not give rise to a breach of article 5(4).

10. Her appeal to the Court of Appeal was dismissed on 23 November 2011, for reasons given by Black LJ, with whom the other members of the court agreed. By

that time attention had been drawn by the court itself to the decision of the House of Lords in *Mucelli v Government of Albania* [2009] 1 WLR 276, dealing with the latitude to be allowed where time for service expires on a bank holiday. Following that authority, the court held that the application to the tribunal should have been treated by it as in time (as indeed is now common ground). The claim against the trust accordingly failed, as its oversight had not resulted in the deadline being missed. The claim against the Secretary of State was also dismissed. Black LJ held that he had been under no separate duty to check the time limit for himself, no doubt having been raised on that point in the solicitors' letter. In relation to article 5(4) the only suggested disadvantage of her right to apply under section 3, as compared to section 2, was the potential loss of the right to make a further application within six months, which had been properly addressed in the Secretary of State's offer to reconsider the use of section 67 in the future.

*Statutory provisions*

11. Sections 2 and 3 come within Part II of the Act, headed "Compulsory admission to hospital and guardianship". Section 66(1)(a) and (b) provide, respectively, for applications to the First-tier Tribunal on admission to hospital for either assessment (under section 2) or treatment (under section 3). Section 72 requires the tribunal to direct the discharge of the patient if not satisfied that the detention is justified under the criteria there set out. Procedure is governed by rules made under the Tribunals, Courts and Enforcement Act 2007. By section 11 of that Act, a decision of the First-tier Tribunal is subject to a right of appeal, with permission, to the Upper Tribunal. Alternatively, the tribunal may review its own decision, if for example a clear error has been made (section 9; for the practice see *R (RB) v First-tier Tribunal* [2010] UKUT 160 (AAC)).

12. It is unnecessary to set out the relevant provisions in detail, since there is no issue about their effect in this case. In particular it is not in dispute (i) that, even if the Secretary of State had agreed to refer the application on 10 January, the seven day limit would have had no direct application, and the timing of the hearing would have been in the discretion of the tribunal; (ii) that the application would have been heard in accordance with the criteria applicable under section 3, not section 2; but (iii) that these would have been no less favourable from her point of view.

13. Section 67(1) which is central to the appeal provides:

> "The Secretary of State may, if he thinks fit, at any time refer to the appropriate tribunal the case of any patient who is liable to be detained… under Part II of this Act…"

*The appellant's submissions*

14. As Mr Gordon rightly submits, the apparently unrestricted terms in which section 67 is expressed must be read subject to the ordinary constraints which apply to statutory discretions. It must be exercised in accordance with the purposes of the statute (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997), and not in such a way as adversely affects "the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based…" (*R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 575D per Lord Browne-Wilkinson).

15. It must also (under the Human Rights Act 1998) be exercised consistently with the relevant provisions of the European Convention on Human Rights. Mr Gordon relies in particular on article 5(4) of the Convention, by which:

> "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."

Further, Strasbourg case-law emphasises the importance of this protection for vulnerable people such as mental health patients. Thus it has been held that article 5 lays down a positive obligation on the state to protect the liberty of its citizens, and to provide effective protection for vulnerable persons (*Storck v Germany* (2005) 43 EHRR 96, para 102); and that "special procedural safeguards" may be needed to protect the interests of those who "on account of their mental disabilities, are not fully capable of acting for themselves" (*Winterwerp v The Netherlands* (1979) 2 EHRR 387, para 60).

16. Although he puts his submissions in a number of different ways, his central point as I understand it is a short one. It is that, where as here, through no fault of her own, the appellant has been deprived of her fundamental right, under the statute and the Convention, of speedy access to a court or tribunal to review her detention, the discretion under section 67 becomes in effect a duty. Failure to exercise it in the circumstances of this case was a breach of that duty, whether viewed by reference to the Human Rights Act, to constitutional norms, or to ordinary public law principles.

*Discussion*

17. So far as the appellant's case relies on fundamental principles of access to the court, under article 5(4) or otherwise, there is in my view a short answer. She was not deprived of her right of access to a court or tribunal to review her detention. She had such a right under section 3. The issue was not the existence of the right, but how speedily it might be exercised and whether it was as advantageous as might have been the case if her original application had been accepted.

18. It is notable that speed of access was not an issue raised by the letter to the Secretary of State. Nor is it one which can, in my view, arise on the case as it stands. It is common ground that section 67 did not enable the Secretary of State to insist on a hearing in seven days, as would have been required on an application under section 2. The timing would have been in the discretion of the tribunal, as it would under section 3 and section 66(1)(b). Mr Gordon hinted that the intervention of the Secretary of the State might have been more persuasive in that respect. There is, however, no evidence to support such a submission. An application could have been made to the tribunal under section 3 with a request for an urgent hearing, supported by explanation of the circumstances in which she had lost her right under the rules through no fault of her own. I see no reason to think that the tribunal would not have viewed it sympathetically, but in any event it is not clear what additional weight could have been given to such a request by the Secretary of State. On the face of it, a direct approach to the tribunal would have offered the prospect of a much speedier resolution than the roundabout procedure actually adopted.

19. So far as appeared from the solicitor's letter, the only practical reason for inviting an application under section 67 was to avoid the loss of her right to make a second reference, if needed, at a time chosen by her. On that point I cannot do better than repeat Black LJ's words, with which I agree:

> "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." (para 43)

20. I would emphasise, as Black LJ recognised, that section 67 may in certain circumstances have a significant role in ensuring compliance with the Convention. That is well illustrated by the decision of the House of Lords in *R (H) v Secretary of State for Health* [2006] 1 AC 441, on which Mr Gordon also relied. In that case, the appellant, who had been detained for assessment under section 2, was too disabled to make an application to the court on her own behalf. There was a dispute between her mother, as her nearest relative, and the responsible medical officer over her treatment, following which an application was made to the county court under section 29 for the functions of the nearest relative to be exercised by an approved social worker rather than the mother. This had the effect (under section 29(4)) of extending the period of detention until that application was disposed of. At the mother's request, the Secretary of State then exercised his power under section 67 to refer the case to the tribunal, which heard the case but declined to discharge her.

21. She brought judicial review proceedings challenging the compatibility of section 29(4) with article 5(4). In rejecting that contention, Lady Hale commented on the nature of the Secretary of State's role under section 67, and the advantages of section 67 over the alternative route through the county court:

> "This is preferable because mental health review tribunals are much better suited to determining the merits of a patient's detention and doing so in a way which is convenient to the patient, readily accessible, and comparatively speedy. As already seen, a reference is treated as if the patient had made an application, so that the patient has the same rights within it as she would if she herself had initiated the proceedings. It can, of course, be objected that this solution depends upon the Secretary of State being willing to exercise her discretion to refer. But the Secretary of State is under a duty to act compatibly with the patient's Convention rights and would be well advised to make such a reference as soon as the position is drawn to her attention. In this case this happened at the request of the patient's

> own lawyers. Should the Secretary of State decline to exercise this power, judicial review would be swiftly available to oblige her to do so....” (para 30)

I would only add that the advantages of convenience and accessibility to which she referred have been reinforced by the changes in the legal and administrative structures of the tribunal following the 2007 Act.

22. That passage provides additional support for Black LJ’s approach. Given the appellant’s right to apply under section 3, there was no present conflict with article 5(4). The Secretary of State was entitled to proceed on that basis. The position might well have been different, as Mr Eadie QC seemed inclined to accept, if she had continued to be detained under section 2, and had not acquired a separate right under section 3. In circumstances where she had lost her right of immediate access to the tribunal wholly through the fault of the trust, itself an agent of the state for these purposes, it could well be said that the Secretary of State had a positive duty to remedy the position. It is however unnecessary to decide that point, which does not arise on the facts before us.

23. As things were, given the existence of her section 3 right, the risk of a breach would only arise if and when her first application had failed, and her circumstances had changed sufficiently to make a second application realistic. It is true that the Secretary of State had not promised to make a reference at that stage. Section 67 gave him no power to commit himself in that way. All he could do was to agree to consider the use of that power if and when it became necessary. But that discretion would, as Black LJ said, be underpinned by his duty to avoid a breach of article 5(4).

24. Finally, I should briefly address Mr Gordon’s alternative submission, not so fully developed, that the Secretary of State’s decision was vitiated in any event by his error over the applicable time limit, even if that error was shared at the time with everyone else, including the appellant’s solicitor. Nonetheless, it is said, that was an error of law, and as such was sufficient in itself to render the decision liable to be set aside.

25. I find this a surprising argument. A competent tribunal had made a decision on a procedural matter, and the claimant had both a right of appeal and access to solicitor’s advice on its merits. The Secretary of State was under no duty to do the solicitor’s work for him, even if it would have been appropriate for him to second-guess the decision of the tribunal on this point. It had been open to the appellant to ask the tribunal to review its decision, if thought wrong, or to appeal. Failing such a challenge, it is hard to see why the Secretary of State was not entitled to proceed

on the basis of that decision of a competent tribunal. In any event the argument does not lead anywhere. If the Secretary of State's decision were to be set aside solely on the basis that the original application was in fact made in time, it would not help the appellant. Rather it would further undermine her case against the Secretary of State under article 5(4) or analogous common law principles, since it would show that there had been a right of access to the tribunal all along, and therefore no breach by the Secretary of State of any implied duty to provide one under section 67.

*Conclusion*

26. Notwithstanding Mr Gordon's forceful submissions, in my view, this case turns on its own facts and raises no point of general principle. In the particular circumstances, the Secretary of State's response to the solicitors' letter of 7 January 2011 was both lawful and reasonable. Accordingly, in agreement with the reasoning of the Court of Appeal, I would dismiss the appeal.

**LADY HALE**

27. I entirely agree that this appeal should be dismissed for the reasons which Lord Carnwath gives. However, the appellant has undoubtedly been let down by the system through no fault of her own and there are some important lessons to be learnt.

28. Under article 5(4) of the European Convention on Human Rights, she had the right "to take proceedings by which the lawfulness of [her] detention shall be decided speedily by a court and [her] release ordered if the detention is not lawful". Under article 5(1), her detention was only lawful if it was "in accordance with a procedure prescribed by law". The Mental Health Act 1983 gave her the right to apply to the First-tier Tribunal within 14 days of her detention on 20 December 2010. Had her application of 31 December 2010 been processed as it should have been, her case would have been heard by the tribunal within seven days after its receipt, that is no later than 11 January (as required by rule 37(1) of the tribunal rules). The tribunal would have had a duty to discharge her if it was not satisfied that the criteria for detention were satisfied and the power to discharge her even if they were (section 72(1)). As by that date her detention under section 2 had been replaced by detention under section 3, it is common ground that the more exacting criteria for section 3 detention would have applied to her case.

29. The system let her down in a number of ways. First, the hospital failed to transmit her application to the tribunal on the day that it was made. The judge held

that, if the hospital trust had a reasonable system in place for transmitting these applications, an isolated failure would not give rise to a remedy by way of judicial review (para 65). He also held that, if the trust believed that the tribunal would calculate time from the date when the application was signed, as opposed to the date when it was received, then it was not unreasonable for it to have a system which did not provide for applications made outside normal hours to be transmitted without delay to the tribunal (para 81). Once it became aware that the tribunal would calculate time from the date on which an application was received, such a system would not be reasonable (para 82). Further, even if it had no reasonable grounds for its belief that the tribunal would calculate time from when the form was signed, it would not have been unreasonable to have the system that it did, provided that it explained, in the information given to patients, that applications would have to be made during normal working hours (para 83).

30. On appeal, as is recorded by Black LJ, the appellant wished to argue (1) that in order to comply with article 5(4), the hospital trust had a duty to have in operation a system that enabled patients to make applications to the tribunal in time; (2) that the judge was wrong to consider that failing to transmit an application in time because of an oversight or neglect could excuse the hospital from responsibility; and (3) that the judge was wrong to consider that the system actually in place was reasonable. The Court of Appeal held that it was the tribunal, and not the hospital, which had created the problem, by wrongly refusing to accept an application which it had, in fact, received in time. Hence the court declined to entertain further argument on these points, on the ground that, if these arguments were to be deployed, it would be "better that this is done in a case in which they would have the potential to affect the outcome of the proceedings" (para 33).

31. There has been no appeal to this court against the dismissal of the proceedings against the hospital trust. We have therefore heard no argument on these issues. But in my view it would be unwise for hospitals to conduct themselves on the basis that the judge was correct in his approach. These proceedings were brought by way of judicial review, but it was alleged that the patient had been unlawfully deprived of her liberty, in other words that her Convention rights had been violated. It is the hospital which deprives the patient of her liberty. It is incumbent upon the hospital to do this in accordance both with the domestic law and with the patient's Convention rights. A failure which deprives the patient of the right of access to a tribunal which the law provides may well (I put it no higher) be a breach of the patient's Convention rights. The only safe course is to have a system which ensures that this does not happen.

32. The Mental Health Act 1983 Code of Practice (Department of Health, 2008) reminds hospitals that patients must be told, both orally and in writing, of their right to apply to the tribunal and how to do so (para 2.17). This is a statutory duty under section 132(1) of the Act. The Code also advises that hospital managers

should ensure that patients are offered assistance to make an application to the tribunal (para 2.18). It would be helpful if the Code were also to advise that the hospital should ensure that tribunal applications which are given to hospital staff are transmitted to the tribunal without delay. A detained patient is in no position to ensure that her application reaches the tribunal unless the hospital affords her the facilities for it to do so.

33. Secondly, the tribunal let her down by failing to accept her application when it arrived. This may be understandable, given that her lawyers and the judge both made the same mistake (see [2011] EWHC 417 (Admin), para 45). But it is a little surprising. As Mr Gordon pointed out, the House of Lords did not make new law in *Mucelli v Government of Albania* [2009] 1 WLR 276. At para 84, they adopted what had already been decided 40 years ago by the Court of Appeal in *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336: that when an Act of Parliament prescribes a period for doing an act which can only be done if the court office is open on the day when time expires then, if it expires on a day when the court office is not open, the time is extended to the next day on which it is open. No doubt that message has now been heard loud and clear in the tribunal offices and the same mistake will not be made again. That is another good thing to have come out of these proceedings.

34. Had either of those two mistakes not been made, the patient should have had her tribunal hearing on or before 11 January 2011 (the tribunal has a more than 90 per cent record in achieving this). We cannot know what the result would have been. Given that she was in fact placed on a community treatment order on 18 February 2011, it is not impossible that it would have been successful.

35. Instead of bringing these proceedings, however, she might have made an application immediately following the replacement of her admission for assessment under section 2 with an admission for treatment under section 3 on 6 January 2011. No deadline for hearing section 3 applications is laid down in the tribunal rules, and the normal target time is six to eight weeks. But it is always possible to ask for an early or urgent hearing. In a case where a patient has, for whatever reason, just missed the deadline for a section 2 application, the tribunal might well be sympathetic to such a request. In any event, the patient would be more likely to obtain the speedy hearing of her case before a tribunal with power to discharge her than by the roundabout route of applying to the Secretary of State for a reference under section 67 and bringing judicial review proceedings if he refused.

36. Thirdly, therefore, the Secretary of State did not let her down. He dealt promptly and sensibly with the request for a reference. As with a section 3 application, there is no deadline within which the tribunal must hear such

references. The Secretary of State might request expedition but one hopes that if there is a good case for expedition (as in this case) the tribunal would be as likely to grant it at the request of the patient or her representatives as it would be at the request of the Secretary of State. Furthermore, a reference inevitably involves additional procedures as there are more parties involved, so it is likely to take longer to be heard than an ordinary application.

37. For all those reasons, although these proceedings have been unsuccessful, and the patient would have been better served by a different route, they have not been entirely in vain.