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CO/2771/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 23 June 2014

B e f o r e:

MR JUSTICE BURTON

Between:
K
(by his litigation friend, L)

Claimant

v

HOSPITAL MANAGERS OF THE KINGSWOOD CENTRE

Defendant

CENTRAL AND NORTH WEST LONDON NHS FOUNDATION TRUST

Interested Party

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(Official Shorthand Writers to the Court)

Mr M Paget (instructed by DH Law Solicitors) appeared on behalf of the **Claimant**

Mr P Patel (instructed by Radcliffes Solicitors) appeared on behalf of the **Respondent**

J U D G M E N T
(Approved)

MR JUSTICE BURTON:

1. This is the hearing of a case which suffers from the use of the epithet "interesting". It is interesting because it involves a reconsideration, as the Claimant would wish, through Mr Paget, and both counsel have argued the matter very ably before me, of an earlier decision of this court. Before I come to the consideration of that interesting point I must also balance that, of course, by saying that it is a habeas corpus application and therefore has a matter of serious content, namely the fact that if the Claimant is right he should no longer be detained under the Mental Health Act.
2. The fact is that he has been detained under the Mental Health Act for some 6 years. He was originally detained under s.3 in July 2008. He was transferred to the Kingswood Centre on 4 August 2011 and he continues to be treated at that centre until now for a severe form of Asperger's syndrome. His mother and litigation friend has been, clearly, very involved, as is natural, for many years in relation to her son, who is now I think 25, and continues to be concerned. Her view is that he would be better treated at home or at any rate elsewhere than at the Kingswood Centre. The dispute revolves around the service by solicitors assisting her of a discharge notice or order under s.25 of the Mental Health Act 1983.
3. S.23 of the 1983 Act lays down the provision that a patient who is for the time being liable to be detained shall cease to be so liable if an order for discharge is made, and under s.23(2) an order for discharge may be made in respect of a patient at the instance of the nearest relative of the patient, who in this case is the litigation friend. S.25 governs the provision by way of restrictions on a discharge by the nearest relative. It reads as follows:

> "*An order for the discharge of a patient who is liable to be detained in a hospital shall not be made ... by his nearest relative except after giving not less than 72 hours' notice in writing to the managers of*

the hospital."

4. The effect of such a notice is that once the 72 hours have expired the patient must be released, whether or not arrangements have been made for that patient's care thereafter. But within the 72 hours' notice urgent steps can be taken by the hospital and the responsible clinician. What s.25 provides is that:

> "*If, within the 72 hours after such notice has been given, the responsible clinician furnishes to the managers a report certifying that in the opinion of that clinician the patient, if discharged, would be likely to act in a manner dangerous to other persons or to himself—*
> *(a)any order for the discharge of the patient made by that relative in pursuance of the notice shall be of no effect; and*
> *(b)no further order for the discharge of the patient shall be made by that relative during the period of six months beginning with the date of the report.*"

5. There is then provision for an appeal by the nearest relative against what is described as a barring report or a barring order so as to free the patient from that restriction. So, the only thing that could be done in the 72 hours' notice that is given, and it is only a very short period - as can be seen, it is not working days and therefore covers a weekend - is that if the hospital managers are not minded to comply with the discharge order they must check and they will check (i) that the nearest relative has not already made such a discharge order within the previous 6 months, which would prevent the re-making of it; and (ii) whether there is a view of the responsible clinician sufficient to merit the making of a barring report or order.

6. There are in this case three further provisions which I must consider and I am invited to consider by counsel, Mr Patel and Mr Paget, who, as I have said, have both argued the matter very ably in front of me. Most significant are the Mental Health Regulations 2008. By Regulation 3 there are provisions in relation to the giving of notice in respect

of documents. The specific provision which deals with a s.25 notice and its consequences is Regulation 3(3), which reads as follows:

> "*Where a patient is liable to be detained in a hospital under Part 2 of the Act—*
> *(a)any order by the nearest relative of the patient under section 23 for the patient's discharge, and*
> *(b)the notice of such order given under section 25(1), shall be served either by—*
> *(i)delivery of the order or notice at that hospital to an officer of the managers authorised by the managers to receive it, or*
> *(ii)sending it by pre-paid post to those managers at that hospital, or*
> *(iii)delivering it using an internal mail system operated by the managers upon whom it is to be served, if those managers agree.*"

7. In this case there is no relevance to either of subclauses (ii) or (iii). There was no attempted use of any internal mail system, authorised or otherwise, and the discharge order or notice was not sent by prepaid post. If it had been, the provisions of subsection (6) of paragraph 3 would have applied, giving the provisions in respect of deemed service of first-class post on the second business day following the day of posting, and, in the case of second-class post, 4 business days following posting. In both cases it is to be noticed that it is business days and it means that the 72 hours' notice starts at, but does not start until, respectively, 2 or 4 business days after the day of posting. In this case we are concerned with the service of a notice by fax, and it is common ground that the provision in question that I must concentrate on is paragraph 3(3)(b)(i), to which I shall return.
8. The next relevant document is the Reference guide to the Mental Health Act 1983, which, as it says, is guidance only, and at 12.101 to 12.106 provisions are set out relating to discharge of patients by their nearest relatives. At section 12.105 it reads:

> "*12.105. The notice (and the order for discharge itself)* [for the purposes of this case there is no difference between the two because it was just one document that was served, as I will describe] *must be delivered at the hospital to an officer of the managers authorised by them to receive it, be sent by prepaid post to those managers at that hospital or (if the managers agree) be sent using the managers' internal mail system.*

The 72 hour period starts to run from the time when the notice is received by the authorised person, when it is received by post at the hospital to which it is addressed or when it is put into the internal mail system (as the case may be)."

9. The statutory Code of Practice under the 1983 Act reads as follows at 29.19:

"*Before giving a discharge order, nearest relatives must give the hospital managers at least 72 hours' notice in writing of their intention to discharge the patient.*"

and at 29.22:

"*The nearest relative's notice and discharge order must both be given in writing, but do not have to be in any specific form. In practice, hospital managers should treat a discharge order given without prior notice as being both notice of intention to discharge the patient after 72 hours and the actual order to do so.*"

10. Finally, there is an internal system of procedure which has been produced by the Defendant, called Mental Health Act Administration Guidelines for Central and North West London NHS Foundation Trust. Under "Sections 23 and 25, Discharge by the Nearest Relative" it is provided at 7.2.1:

"*The nearest relative may discharge a patient detained under section 2 or 3 of the Act but must give the Hospital Managers seventy two hours written notice of their intention to do so. A [Mental Health Act] Officer who receives written notice of a relative's intention to discharge a detained patient should make sure that that person is entitled to do so. The relative will not be able to discharge the patient if:*

i. They are not nearest relative ...
ii. *They are the nearest relative, but were barred ...* "

Then there is the provision (7.2.3) for the barring report or order, to which I have referred.

11. The facts of this case are that the Claimant had the benefit of advice from solicitors, and the discharge notice or order was in fact served or sent on her behalf by them. A Mr Clegg of the solicitors appears to have, according to a telephone attendance note, spoken on 4 June 2014, although the attendance note is dated 2 days later, when he was given the

numbers for fax and phone for the Kingswood Centre. He records that he spoke to Sylvia, the Mental Health Administrator, but in fact it would appear that he cannot have spoken to her herself, because at the time when he says he called at about 4.50 pm she would not have been there and she has no recollection of speaking to Mr Clegg, and I find that the probability is that the lady to whom he spoke was the receptionist at the centre who duly gave the correct fax number to him, and it appears gave the name of the Mental Health Act Administrator as Sylvia, which is the Christian name of Sylvia Clark, hence he wrote FAO Sylvia, for the attention of Sylvia, on his note.

12. On 6 June, at 3.44 pm according to the fax stamp, the solicitors sent what is accepted to be a valid discharge notice or order under s.23 of the 1983 Act. There was a covering letter which gave the person to contact at the Claimant's solicitors, and then continued: "*Private and confidential to be opened by addressee only*". That, of course, is somewhat of a mischaracterisation, when what is being sent is a letter by fax, which, of course, does not need to be opened, because it is not in an envelope. Having said that, it was then addressed to the Mental Health Act Administrator at the Kingswood Centre, with the address, and then the words: "by fax". It recorded that:

> "*We act for [the litigation friend] in regards to her son [who is identified]... . Please find enclosed an Order for Discharge under s.23 of the Mental Health Act 1983.*"

13. That was the first page of the fax. The second page of the fax is addressed to the Managers of the Kingswood Centre, headed Order for discharge under s.23 of the Mental Health Act 1983 and, in a form which is not disputed to be sufficient to amount to such a notice or order dated 6 June, the litigation friend as nearest relative required the discharge of her son.

14. It appears that that got through to the fax machine, to the fax number which is not only

the number that I am satisfied was given to Mr Clegg, but is also on the notepaper of the Defendant, and in particular, when later Ms Clark wrote a letter which has been exhibited, on her own correspondence, for example a letter dated 10 April 2014, signed by her as Mental Health Law Officer, that fax number is at the top of the letter. It is also, it seems, the only fax used by the Kingswood Centre.

15. Unfortunately, having been received by the Kingswood Centre, the letter was simply put into the in-tray of Ms Clark. Ms Clark works 3 days a week and therefore, given that the 72 hours includes weekends, she was only present as Administrator in the hospital to receive such notices for three-sevenths of the week. This is not, it seems, a job share but she is the only Administrator of the Defendant.

16. There is no detailed evidence as to what there is by way of system, either in terms of training of a receptionist or of checking of the receipt of faxes or of the clearing of in-trays. Mr Paget submits that on the face of what we have the same could arise in relation not just to the 4 days of the 7 day week which Ms Clark is ordinarily absent, but also it would apply if she was away on holiday or even, using an advocate's licence for embellishment, away on a lengthy sabbatical. Leaving aside the extremes of argument, the fact is, as I indicated, that we have no evidence of a system. What we have is a statement by Ms Clark, which says as follows from paragraph 7 of her witness statement:

> "*7. For the last 8 years of my employment at the Kingswood Centre, I have been working on a part-time basis on Tuesdays, Wednesdays and Thursdays only. Issues that require urgent attention in my absence are referred to the Lead Nurse and Operational Manager at the Kingswood centre, Heather Shaw. If Heather is not available and/or unable to resolve the matter it will be referred to the Trust's Mental Health Act Managers, based at Trust Headquarters.*
>
> *8. On my non-working days my direct telephone line is on divert to the Receptionist. There is one fax machine serving the entirety of the Kingswood Centre and that is situated within the Reception area and manned by the Receptionist during office and non-office hours alike.*

If the Receptionist becomes aware of any urgent matters arising during non-office hours, he or she will contact Heather Shaw or the next most senior qualified person on site such as the on shift ward manager both of whom will be qualified to receive and scrutinise section papers and other correspondence such as nearest relative discharge notices.

9. Post is opened each morning by the Receptionist. Post addressed to specific individuals and/or marked Private and Confidential within the Hospital is allocated to that member of staff's postal tray. Post addressed to the Hospital without any specific addressee will as I understand it be opened and escalated to the Operational Manager or next most senior member of staff for allocation."

17. In this case, therefore, whereas, as I shall describe, in an earlier decision of the Administrative Court, **Re GK (Patient: Habeas Corpus** (1999) MHLR 128, to which I shall return, the system was one of pigeonholes, the system here is one of postal trays, but the principle is unaltered, while the Administrator is away documents are placed in her tray or, as in **GK**, his pigeonhole.

18. As it happens in this case, Ms Clark did not return from her time off for 4 days, that is it seems to have hit the period when she was not working, namely Friday through Monday, and she did not open or did not see the discharge notice until no doubt going through her in-tray on the Tuesday morning. She then acted with speed, and the responsible clinician was found, and she then, out of time as the Claimant submits, certainly more than 72 hours after the receipt of the fax on the fax machine, prepared and lodged a barring report, and it is not in doubt that that barring report would be sufficient to prevent release of the Claimant if it was served within 72 hours of receipt of the notice.

19. The "interesting" question then is whether in this case the discharge notice was received by the Administrator within the provisions of the Mental Health Regulations 2008, Regulation 3(3)(b)(i), as supplemented, if supplementation be relevant, by the other documents which I have read, or not. There is no doubt that the barring order was not

served within 72 hours of the receipt of the notice at the fax machine. There is equally no doubt that the barring report was served within 72 hours of the receipt by Ms Clark of the discharge notice first thing on the Tuesday morning when she emptied her tray.

20. The Claimant submits that the 72 hours is a mandatory period, it is a question of the continued detention of an individual, affecting his or her human rights with reference to Article 5 and/or 8 of the Convention and that the absence of a system for dealing with documents while a part-time Administrator is not working is the cause of the failure and should not stand in the way of the Claimant's rights.

21. The Defendant submits that the provisions of the Act and the Regulations are clear, to which I shall return, that the 72 hours of course is important but must give the proper opportunity to a hospital authority to deal appropriately with what can be a very difficult situation, and certainly in this case, if the barring report is right, one in which this Claimant ought not to be, at any rate at this stage, released to his mother after 6 years in mental health detention.

22. Mr Patel relies in particular on the authority to which I have referred of **Re GK**. There is no authority on the question to which I have to address myself other than **Re GK**. Both parties have drawn my attention to a case in which, as it happens, I was partially involved, called **Re TTM**. So far as that is concerned, I have been shown a decision of Collins J in 2010, [2010] EWHC 1349 (Admin), which followed up on an earlier decision of mine in relation to the same case, and a decision of the Court of Appeal [2001] EWCA Civ 4. The only relevance of the case of **TTM** is one of factual similarity. It is not, for reasons that I will explain, in any way of assistance with regard to construing what I have to decide. That was a case where the nearest relative sent by fax a relevant discharge notice. There was no dispute about its receipt within the 72 hour period, and the problem

arose because the responsible clinician did not put his barring report in in time. The only factual similarity which one can draw is the fact that the notice was given in that case by fax. There is no dispute between the parties that a notice can be given by fax. The issue is when is the fax received for the purposes of the operation of the statute and the Regulation, and in that case, **TTM**, there was no dispute that the fax was actually received, not just on the machine but also by the Managers, within the 72 hour period, so the particular problem with which I am wrestling did not fall for decision.

23. The case to which I have referred, **Re GK**, is however of very substantial similarity both as to fact and law. The decision on 21 June 1999 was a decision of what appears to have been a two-man Administrative Court, not a Divisional Court but, although strictly not a Divisional Court, in those days the Administrative Court did relatively frequently sit in a two-man tribunal and the two men who sat on this were, and certainly have subsequently become, very experienced and well-known judges, Sedley LJ, already then in the Court of Appeal, sitting with Collins J, now the most senior judge of the Administrative Court but already then extremely experienced in the field and, as it happens, the judge who gave the directions for the speedy hearing by me today.

24. The facts of the case in **GK** were that the nearest relative took a letter to the receptionist at the relevant hospital. It appears to me clear by inference from the facts, although neither of these two points are spelt out, that the letter was contained in an envelope and that the envelope was addressed to the Mental Health Act Administrator. There is a degree of dispute about those facts between counsel before me, which is inevitable given that, as is so often the case, not every jot and tittle of fact is set out in the judgment being given by the court, and neither of those inferences that I draw are spelt out in terms in the judgment. The reason why I conclude in support of the proposition of

Mr Paget that the letter was in an envelope is that, in paragraph 13 of the judgment, Sedley LJ recites that Mr Davis, the relevant Administrator, "*had opened Mrs B's letter in his pigeonhole on the very day that Mrs B arrived to take her son home*". The indication thus is that by opening a letter he was opening something that was sealed, although I suppose it is possible that it was stuck with sellotape but it does appear to me that the learned Judge would have said "had read the letter" if it had simply been an open letter. On that aspect, I conclude, the inferences are more likely to be with Mr Paget.

25. As for the question as to who the addressee of the envelope was, here I prefer the suggestion of Mr Patel. Again it is not spelt out, but what is said in Sedley LJ's judgment is that Mrs B, the claimant in that case, says that the receptionist "*told her that she would see that the letter got to the right person and put it in the pigeonhole of Mike Davis, who is a Mental Health Act Administrator at the hospital*". If the letter or the envelope had been addressed to Mr Davis then it seems to be much more likely that the learned Judge in reciting the facts would have said that the receptionist told her that she would see that the letter got to Mr Davis.

26. So, those facts are slightly different to this case, where the letter was not handed over at the reception desk in an envelope addressed to the Administrator, but was sent to the fax machine, to which the solicitor had been informed a communication should be sent, and was thus not in an envelope, was thus open for reading or being read by a receptionist but was, rather similar to the envelope, as I conclude it to have been, in the **GK** case, addressed to the Administrator.

27. There are some background matters which I should address before going further. Mr Patel submits that the letter in this case and the discharge order should have incorporated the word "urgent" and that it should not have said, if it was intended to bring it to the

attention of the relevant person quickly, “private and confidential, to be opened by addressee only”. I do not conclude that that is a sustainable proposition. It obviously has in mind, so far as the reason why it is put forward is concerned, the evidence of Ms Clark, which I have read, that the arrangement was in her absence that issues that required urgent attention would be referred to Ms Shaw; and it certainly seems more likely that if the document had said urgent on it someone might have thought that it was appropriate to send it to Ms Shaw, but I certainly do not conclude in any way that there was some requirement on the Claimant to put the word urgent on the letter, and equally I do not conclude that it makes any sense for any practicable system to depend upon whether the communication itself says it is urgent if, in fact, on any reasonable reading of it it is urgent; and I gave the example of a fax which had said, if it had, that she, the mother, had just left her son, and he was unconscious or having a seizure or something of that kind, then there would not need to be the word urgent written at the top of such letter for it to require urgent attention, and it seems to me that the system was inadequate if the receptionist was not taught, at least where the contents were open and available to be seen, to deal with something which is plainly urgent, namely that there are only 72 hours for the hospital to deal the matter.

28. Mr Patel also criticises the fact that the solicitor did not say, when he asked for the fax number, why he was wanting the fax number or to indicate the urgency of the communication that was to be sent. For similar reasons, it seems to me that that is not an appropriate criticism. This was the fax number that was indicated to him, and the contents, because they were not sealed, would have been entirely apparent to anyone looking at the document. On the other hand, I see the force of Mr Patel's point, that Mr Paget makes too much of the notification of the fax number to the proposed sender as

some special place to send a document which is intended for the sight of the Administrator. That was not a dedicated fax number, it was the only fax number at the hospital and indeed it was openly on correspondence, as I have indicated.

29. So, leaving aside those background matters, I return to the consideration of the case of **Re GK**. I have already referred to paragraph 8 of the judgment of Sedley LJ, wherein it is recorded that the claimant said that the receptionist had told her that "*she would see that the letter got to the right person*". That was confirmed by the receptionist, who added that "*at no time did Mrs B give any indication of the content of the letter. Mrs B for her part does not say otherwise*". So the fact is that it was, it seems to me, as I have already said, sealed, the content was unknown to the receptionist and yet the receptionist specifically said that she would see that the letter got to the right person. Paragraph 9 records that Mr Davis was absent on leave: "*In his absence from work, his duties are undertaken by another nominated officer, Barry Butcher*". As I have indicated, the barring order was put in more than 72 hours after the date when the letter was put in Mr Davis' pigeonhole. The learned Judge then continues as follows:

> "*14. The way the Regulations are configured is cautious, in the sense that each document or class of document has a different variety of permitted modes of service. Taking para (2) of Reg 3, an admission application has to be made by delivery to an officer of the hospital managers who has authority to receive it with no option of posting. That is perfectly understandable. The interesting contrast is the difference between the modes of service prescribed in para (3), which is the one we are concerned with [and, I interpose, that which this court is also concerned with], and those prescribed in para (1), the general paragraph which applies where a specific paragraph does not. The difference is in essence that delivery to the authority upon whom the notice is to be served is not possible in relation to a discharge order: more precise forms of delivery are required.*"

30. The second of these is then addressed, namely so far as delivery by post is concerned,

in paragraph 15. As Sedley LJ points out:

> "*If, therefore, a document is received by post addressed to the managers, it is at the managers' own risk that they fail to have somebody on hand to open the letter and deal with it, if not promptly, at least within 3 days.*"

Then he continued:

> "*If that course is not adopted, then the nearest relative has the single other option of delivery of the order at the hospital to an officer of the managers authorised by them to receive it.*"

He ignores the internal mail option, which I also ignore.

> "*16. The question, therefore, boils down to this: was the handing of the letter to the receptionist and its placing to Mrs B's knowledge in Mr Davis' pigeonhole the delivery of the order to Mr Davis? If it was, then the notice was well served on 27 May.*
>
> *17. I have considered the rival submissions on this with care and have concluded that it was not good delivery within the meaning of the Regulation. It seems to me that the purpose of the Regulation is to ensure that by one prescribed means or another an order for discharge comes to the notice of a properly authorised person without delay and most certainly without allowing as much as 3 days to elapse. If the 3 days are allowed to elapse, then it will be the hospital's own fault for not having a proper mechanism in place for receiving and responding to such a notice. The policy is intelligible and sensible.*
>
> *18. If it were possible by simply, for example, leaving a letter at the desk or addressing it by post to Mr Mike Davis to comply with Reg 3(3), then the very personalisation of the addressee of the notice would mean that if he happened to be away, as he might well be, nobody else deputed to respond to it would be likely to receive it and the 3 days would elapse by accident. If on the other hand the Regulation is construed, as I would construe it, as meaning that if the notice is not sent by post and the ball thereby passed into the managers' court, it has to be delivered personally to an officer authorised to receive it, then the manifest purpose of the Regulation is met. It means that, for example, if somebody in Mrs B's position does leave a letter addressed to Mr Davis in his pigeonhole and he is subsequently demonstrated to have received it at any particular time, then from that particular time without doubt the hospital's 3 days will run. But the balance of risk that he will not receive it is shifted by delivery to the nearest relative, just as by posting it the nearest*

> *relative can shift the balance of risk to the hospital managers. This scheme seems to me to make good sense. The contrary scheme, which Mr Daniel has to depend on, seems to me to introduce an unnecessary and unintended element of hazard into the process.*"

Collins J delivered a concurring judgment.

31. It could be said that the facts in **Re GK** are a fortiori to this case, where Mrs B handed over the letter to the receptionist and the receptionist undertook that it would come to the attention of the right person, she would see that the letter got to the right person. It does not appear to have been argued specifically in that case that the receptionist could be said in those circumstances to have been constituted as an agent of the Administrator for the purpose of receipt. But the fact is that Sedley LJ and Collins J, carrying out the balancing act, concluded that a handing over to a receptionist at the reception desk of a letter addressed to the Administrator was not receipt by the Administrator.

32. I am asked to say that the sending of a fax received at the same reception desk or at a similar reception by a receptionist in the form of a letter which could have been read, but was not, by the receptionist, and its then being placed into the in-tray of the Administrator is good service upon the Administrator. Of course, the former is a hand delivery to a receptionist and the latter is an electronic delivery to the receptionist but both seem to me to be indistinguishable. Mr Paget has submitted that the fax was sent to the Administrator rather than to Ms Clark, and that is right, and therefore he says that it was effectively sent to her in her office and not personally such that one of the difficulties referred to by Sedley LJ of something being sent to Mr Davis personally would not arise.

33. But I am satisfied that on the facts of the case the same can be said of the letter in **Re GK**, namely that it was sent to the Administrator. In the case of **Re GK** it was not possible for the receptionist to read the letter without opening it, given that I have concluded it was sealed in some way, whereas in this case the receptionist could have

read the letter, but there is no suggestion that she did or, if she did, that she would have understood that it was urgent. The issue seems to me not to depend on the facts, but to depend upon whether the receipt by the receptionist on the one hand and the receipt by the fax machine and then by the receptionist on the other can be distinguished.

34. Mr Paget draws my attention to the various wordings in the documents that I have read, the Code of Practice and the Reference guide, but none of those appear to me to assist as compared with the clear words of the Regulation, which had been interpreted by Sedley LJ and Collins J in the way which I have described. This was not a sending by prepaid post and it is not suggested that a fax is to be somehow treated as so similar to prepaid post as to fall within the words of 3(3)(b)(ii) in some way. Clearly, that could not be, not least given the corresponding provision for deeming the receipt, which I have referred to. The question simply must be whether, when the discharge order or notice was sent to the fax machine and addressed to the Administrator and was received by the fax machine, that was a delivery of the order or notice to an officer of the Managers authorised by the managers to receive it.

35. I find it, as I have indicated, difficult, if not impossible, to distinguish the facts from the case of **GK**, where the document was handed to a receptionist, who, although no doubt no better regulated, so far as in the giving of training is concerned, than was the receptionist in this case, did specifically undertake to ensure that it reached the right person, and therefore it could be said, as I have said earlier, to have at least represented that she was the agent of that person for its receipt. I find it very unfortunate indeed that since the case of **Re GK** 15 years ago, and notwithstanding it, there is not, at any rate in this Defendant hospital, a proper system operating to deal with the duties of the Administrator, particularly an Administrator who is not simply taking, as one would

understand, 2 days a week off but 4 days a week and yet has no second person, as it seems at least there was in the case of Mr Davis, to perform her functions when she is away, but simply leaves it in the way she has described in paragraph 9. There plainly ought to be a proper system in place for receipt of these documents, which could come at any time of day, or night for that matter, and must be capable of being dealt with within 72 days, a time for which no extension is available or can be given and which is not suggested to be a flexible time period.

36. However, I have to deal with the clear words of the Regulation as interpreted in the case of **GK**, to which I have referred. Mr Paget submits if he cannot distinguish the case, that I should be persuaded by his proposition that the case of **Re GK**, decided as it was in 1999, ante-dated the coming into force of the Human Rights Act, and consequently the fuller recognition of the need to protect people's rights, and in particular in this case the Claimant's right under Articles 5 and 8. In those circumstances he submits that I can and should not follow **Re GK** and interpret or re-interpret the words of paragraph 3(3)(b)(i) of the Regulation so that delivery to an officer of the managers should be satisfied by delivery to a fax machine at the hospital and/or, in the case of **Re GK**, delivery to a receptionist recognised as capable of receiving documents on behalf of the Administrator.

37. I find that a very tempting proposition, but I am faced with a decision which is not perhaps strictly binding on me, although as a decision of a two-judge court, particularly of a two-judge court of the composition to which I have referred, which is extremely persuasive.

38. I have come to the conclusion, notwithstanding that this is a habeas corpus application, although a habeas corpus application by a claimant who has been in detention for many years, that I should not at first instance differ from the decision of **Re GK**. I should

conclude that in this case the delivery to the fax machine in question was not a delivery to an officer of the Managers authorised by the Managers to receive it. I conclude, as I have done already, that there must be in future at all hospitals such as this a proper system, and I am dissatisfied that there was not a system, but nevertheless I conclude that, as Sedley LJ said, the risk of non-receipt of the order here remained upon the Claimant until it was read on the return by Ms Clark to work on the following Tuesday, when and whereafter she and the hospital both acted with substantial expedition.

39. In those circumstances I refuse the application.

40. MR PATEL: My Lord, I would ask, obviously, for an order that the application is dismissed and an order that the Claimant pay the costs of the Defendant of the application.

41. MR JUSTICE BURTON: Is there legal aid?

42. MR PAGET: My Lord, yes.

43. MR JUSTICE BURTON: It is subject to the usual order then.

44. MR PAGET: Yes.

45. MR JUSTICE BURTON: I am going to say no order as to costs.

46. MR PAGET: My Lord, I am obliged for that.

47. MR PAGET: My Lord, you encapsulated this argument as an interesting argument, it is a legal argument, the law has not moved on since 1999, you felt bound by GK but can I have permission to appeal to see if the Court of Appeal is also so minded?

48. MR JUSTICE BURTON: Thank you very much.

49. MR PATEL: My Lord, in terms of permission to appeal, my submission is that you have interpreted the Regulations in the way in which the Scheme and the Regulations work and the only possible argument would be whether in fact the coming into force of

the Human Rights Act means that one should reinterpret the Regulations in a different way. I think, given that you have said that in fact you were not tempted by that argument although it was attractive, it is a matter really for the Court of Appeal to decide whether in fact that is an arguable point and whether that should be granted permission.

50. MR JUSTICE BURTON: Thank you very much. I shall grant permission to appeal. It seems to me that there are two points, the second point being the Human Rights Act and the first point being the question as to whether in fact the decision in GK was correct.

51. MR PAGET: My Lord, I am obliged for that. I do not know if you have got power to give guidance in relation to expedition in the light of this being a habeas corpus.

52. MR JUSTICE BURTON: He has been in detention since July 2008. It is a habeas corpus case and therefore it will be taken speedily but should I say anything which is going to jump the queue even more?

53. MR PAGET: No. It is a habeas corpus case, albeit it has got that factual matrix.

54. MR JUSTICE BURTON: No, I shall not say anything more but it is a habeas corpus appeal.