Neutral Citation Number: [2019] EWCA Civ 54

Case No: C1/2016/3929

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
HER HONOUR JUDGE ALICE ROBINSON
(sitting as a deputy judge of the High Court)
[2016] EWHC 2484 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 February 2019

Before:

Lord Justice Lindblom
Lord Justice Irwin
and
Lord Justice Baker

- -

Between:

John Noel Croke	**Appellant**
- and -	
(1) Secretary of State for Communities and Local Government **(2) Aylesbury Vale District Council**	**Respondents**

The Appellant was not represented and appeared in person.
Mr Zack Simons and Mr Alistair Mills (instructed by **the Government Legal Department**) for the **First Respondent**
The Second Respondent did not appear and was not represented.

Hearing date: 4 October 2018

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

Lord Justice Lindblom:

Introduction

1. Is the six-week time limit for bringing a challenge to a decision on a planning appeal under section 288 of the Town and Country Planning Act 1990 absolute, even when the applicant may not himself be entirely responsible for the late filing of the application? That is the central question in this appeal. It is not a question on which there is any lack of relevant authority.

2. With permission granted by Hickinbottom L.J., the appellant, Mr John Croke, appeals against the order of H.H.J. Alice Robinson, sitting as a deputy judge of the High Court, dated 11 October 2016, by which she refused leave under section 288(4A) of the 1990 Act for his application challenging the decision of an inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, to dismiss his appeal under section 78 against the failure by the second respondent, Aylesbury Vale District Council, to determine an application for planning permission for development at "The Grange Barns", Church Road, Ickford, near Aylesbury. The proposed development involved the alteration and extension of existing buildings to create two dwellings, with parking and a swimming pool. The inspector's decision letter is dated 10 February 2016. The six-week time limit for challenging his decision, under section 288(4B), ended on 23 March 2016. Mr Croke's application under section 288 was lodged with the court on 29 March 2016. The judge refused leave because the application was made too late, and the court therefore had no jurisdiction to hear it.

3. Two unsuccessful attempts were made by Mr Croke to lodge the application with the court – the first on 23 March 2016, the second on 24 March 2016 – after the six-week period had expired. The Secretary of State applied to strike it out on the grounds that the court had no jurisdiction. The strike-out application was resisted by Mr Croke, but granted by Ouseley J. on the papers. The matter came before H.H.J. Robinson at an oral hearing on 28 September 2016. The effect of her order was to confirm Ouseley J.'s decision to strike out.

The issues in the appeal

4. The appeal is on two grounds. It must succeed on both. To allow it, the court would have to extend the six-week time limit in section 288(4B) twice: first, from 23 to 24 March 2016, and, secondly, from 24 to 29 March 2016. Two issues therefore arise:

    (1) whether the statutory period for challenging the Secretary of State's decision can be extended by a single day from 23 to 24 March 2016; and
    (2) if so, but only if so, whether time can be further extended to 29 March 2016.

The statutory time limit

5. The relevant provisions in section 288 of the 1990 Act are these:

> "(1) If any person –
>
> …

(b) is aggrieved by any action on the part of the Secretary of State … to which this section applies and wishes to question the validity of that action on the grounds –

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section.

…

(4A) An application under this section may not be made without the leave of the High Court.

(4B) An application for leave for the purposes of subsection (4A) must be made before the end of the period of six weeks beginning with the day after –

…

(c) in the case of an application relating to an action to which this section applies, the date on which the action is taken;

…

… ."

6. There is ample case law on the effect of time limit provisions such as subsection (4B). Statutory time limits have traditionally been regarded by the courts as immutable. Even if the order or action under challenge is said to be a nullity, and even if the applicant was unaware of the action that might be challenged and could not reasonably have been expected to be aware of it, the six-week time limit has been held to be absolute (see *Smith v East Elloe Rural District Council* [1956] A.C. 736, *Routh v Reading Corporation* (1970) 217 E.G. 1337, *Hamilton v Secretary of State for Scotland* 1972 S.L.T. 233, *R. v Secretary of State for the Environment, ex p. Ostler* [1977] Q.B. 122, *R. v Cornwall County Council, ex p. Huntingdon* [1992] 3 All E.R. 566, *Eco-Energy (GB) Ltd. v First Secretary of State* [2004] EWCA Civ 1566, and *R. v Secretary of State for the Environment, ex p. Kent* [1990] J.P.L. 124). As Parker L.J. said in *Kent* (on p.127), "… Parliament has specifically provided for action" but "has limited that entitlement by a time limit of six weeks".

7. Time starts to run on the day after the date of the decision letter itself, not the day on which it is received by the applicant (see *Griffiths v Secretary of State for the Environment* [1983] 1 All E.R. 439). It expires at midnight on the 42nd day (see *Okolo v Secretary of State for the Environment* [1997] 4 All E.R. 242, *R. (on the application of Blue Green London Plan) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWCA Civ 876, and the note at P288.05 in the Encyclopedia of Planning Law and Practice). It continues to run over a weekend or Bank Holiday (see *Stainer v Secretary of State for the Environment* (1993) 65 P. & C.R. 310). But if the last day falls on a weekend or Bank Holiday, time is extended to the next day on which the court office is open (see *Calverton Parish Council v Nottingham City Council* [2015] EWHC 503 (Admin)).

8. Since 26 October 2015 the procedure for filing and serving applications under section 288 has been governed by Practice Direction 8C, "Alternative Procedure for Statutory Review of Certain Planning Matters", which supplements CPR Part 8. CPR r.8.2 sets out the requirements for the "Contents of the claim form". The note in paragraph 8.2.1 in the White Book Service 2018 says that "[if], in error, a claimant uses an incorrect claim form the Court will not strike out the claim but will make an order rectifying the position: *Hannigan v Hannigan* [2000] 2 F.C.R. 650". The requirements of CPR r.8.2 are amplified in paragraphs 2.1 to 2.4 of the Practice Direction. The claim form – which is stated as being "(in practice

form N208)", whereas Annex A to Practice Direction 4 indicates that the form for "Planning Statutory Review" is form N208PC – must be filed at the Administrative Court within the statutory time limit (paragraph 2.1). In addition to the matters set out in rule 8.2, it must state, among other things, that permission is being sought to proceed with "a claim for planning statutory review" (paragraph 2.2(b)). It must include "a detailed statement of the claimant's grounds for bringing the claim for planning statutory review" (paragraph 2.2(c)), and "a statement of the facts relied on" (paragraph 2.2(d)); be accompanied by the specified documents, including "any written evidence in support of the claim" (paragraph 2.3(a)); and be served on "the appropriate Minister or government department" and on "[the] authority directly concerned with the decision …" (paragraph 4.1). Practice Direction 54E applies to "Planning Court claims". Under the heading "How to start a Planning Court claim", paragraph 2.1 states that "Planning Court claims must be issued or lodged in the Administrative Court Office of the High Court in accordance with Practice Direction 54D". Paragraph 2.2 states that the form "must be marked the "Planning Court"". Under the heading "Venue – general provisions", paragraph 2.1 of Practice Direction 54D states that the claim form in proceedings in the Administrative Court may be issued at the Administrative Court Office of the High Court at "(1) the Royal Courts of Justice in London …" (see the notes in the Encyclopedia of Planning Law and Practice, at P288.04, P288.09 to P288.10).

9. That the court has a discretion to permit the correction of defects in, or the making of amendments to, a claim form is not in doubt. In *Cala Homes (South) Ltd. v Chichester District Council* (2000) 79 P. & C.R. 430, it was held that the filing of the claim on the wrong claim form and in the wrong court office would not automatically render the proceedings invalid. A similar approach was taken by the Court of Appeal in *Thurrock Borough Council v Secretary of State for Environment, Transport and the Regions* [2001] 1 P.L.R. 94, where the proceedings had been issued under section 289 of the 1990 Act, rather than section 288. In that case Brooke L.J., with whom Robert Walker L.J. and Sir Ronald Waterhouse agreed, accepted that the borough council should be given the right "to straighten out the formalities of [its] claim", having launched it under the wrong section of the 1990 Act. To hold otherwise, he said, "would greatly inhibit the power of the court to deal with [its] case justly" and in accordance with the overriding objective in CPR r.1.1(1) (paragraph 27 of the judgment).

10. In *San Vicente v Secretary of State for Communities and Local Government* [2014] 1 W.L.R. 966, the applicants, having made their application under section 288 one day before the expiry of the six-week time limit, applied more than two months later for permission to substitute new grounds. The judge's decision to permit that amendment was upheld on appeal. Beatson L.J., with whom Lloyd and Jackson L.JJ. agreed, said (in paragraph 35 of his judgment) that "[the] six-week period in section 288(3) of the 1990 Act is clearly a limitation period", but "[it] would be intolerably inflexible and inconsistent with the overriding objective in CPR Pt 1 and with previous authority for there to be no jurisdiction whatsoever to amend or substitute grounds after the end of that period". He went on to say (in paragraph 52):

> "52. The need for promptness in planning challenges and for speedy finality so that those who wish to rely on a planning decision can do so is well known … . [*R. v Secretary of State for Trade and Industry, ex p. Greenpeace Ltd.* [1998] Env. L.R. 415 and *Finn-Kelcey v Milton Keynes Borough Council* [2009] Env. L.R. 299] were cases in which there was a lack of promptness in issuing proceedings. [*Cala*

> *Homes*] is an illustration of how, despite the recognition of the importance of speedy finality, there is also flexibility. In that case Mr Robin Purchas QC held that, notwithstanding possible prejudice to third parties because of the delay caused by the filing of the proceedings in the wrong office, the need to ensure justice pursuant to the overriding purpose prevailed."

The events of 23 and 24 March 2016

11. The essential facts are not in dispute. Indeed, the Secretary of State has expressly accepted the account of events on 23 and 24 March 2016 set out in Mr Croke's letter to the court dated 26 April 2016 and in the witness statement of Mr James Miller dated 8 June 2016. Both the letter and the witness statement contain a statement of truth.

12. Mr Croke was aware that the six-week period under section 288 expired on 23 March 2016, which was the Wednesday before the Easter Bank Holiday. He was also aware that on each working day – that is, on every day from Monday to Friday – the doors of the Administrative Court Office in the Royal Courts of Justice are closed at 4.30 p.m. He intended to go to the court office himself on 23 March. But he missed his train at Haddenham and Thame Parkway railway station, and knowing he would not be able to get to the court office before it closed, he sent an email to Mr Miller asking him to lodge the application on his behalf. In his letter to the court dated 26 April 2016 Mr Croke said he "returned home and emailed the Application, signed Statement of Facts and Grounds and a copy of the Decision being challenged, to Mr … Miller, who was located just a few minutes from the Court and who agreed to act for [him] in submitting the application on his behalf". However, his attempt to get the Statement of Facts and Grounds to Mr Miller by email at 3.59 p.m. failed, because he mistyped Mr Miller's email address. He eventually succeeded in sending the document to Mr Miller at 4.06 p.m. Mr Miller said in his witness statement (in paragraph 1):

> "1. … I did … at 16.25 hrs attended [sic] at Royal Courts of Justice … on behalf of the claimant, in an attempt to seal the section 288 on behalf of the claimant; I was refused entry by security. The adult male security guard stated the counters were closed."

In his letter of 26 April 2016 Mr Croke added this:

> "… Despite [Mr Miller's] pleading with them to allow him to proceed to the counter he was refused entry. …".

At 5.09 p.m. Mr Miller sent an email to Mr Croke to tell him what had happened.

13. On 24 March, Maundy Thursday, Mr Croke himself went to the Administrative Court Office, arriving there at about 3.25 p.m. There was a queue. Mr Croke reached the front of the queue at about 5 p.m. and attempted to file his application using a standard Part 8 claim form (form N208). A member of the court staff told him he had used the wrong form and would have to file a Planning Court claim form (form N208PC) instead. He gave Mr Croke form N208PC but refused his request that he be allowed to complete it and file it straight away. He told him to return with the completed form N208PC on the next working day. Mr

Croke did so on 29 March 2016, the Tuesday after the Easter Bank Holiday weekend, filing his application on the correct form.

Can the statutory time limit be extended from 23 to 24 March 2016?

14. In *Pritam Kaur v S. Russell & Sons Ltd.* [1973] 1 Q.B. 336 the Court of Appeal considered the consequences of a statutory time limit ending on a "dies non juridicus" – a day on which the court is not sitting. It held that a claim lodged on the Monday following the expiry of a limitation period on the preceding Saturday was brought in time. Lord Denning M.R. stressed the need to ensure certainty and consistency. He said (at p.349C-E):

> "… The important thing is to lay down a rule for the future so that people can know where they stand. In laying down a rule, we can look to parallel fields of law to see the rule there. The nearest parallel is the case where a time is prescribed by the Rules of Court for doing any act. The rule prescribed in both the county court and the High Court is this: If the time expires on a Sunday or any other day on which the court office is closed, the act is done in time if it is done on the next day on which the court office is open. I think we should apply a similar rule when time is prescribed by statute. By doing so, we make the law consistent in itself: and we avoid confusion to practitioners. So I am prepared to hold that 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 the time expires, then, if it turns out in any particular case 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".

Karminski L.J. agreed, but added (at p.350B-C) that he wanted to say "nothing to encourage parties or their solicitors to leave the issue of the writ to the very last day". Megarry J. gave a judgment concurring in the result.

15. The House of Lords endorsed the approach indicated in *Kaur v Russell* in *Mucelli v Government of Albania* [2009] 1 W.L.R. 276. Lord Neuberger – with whom Lord Phillips of Worth Matravers, Lord Carswell, and Lord Brown of Eaton-under-Heywood agreed – said (in paragraph 82 of his speech) that "the seven-day period laid down by section 26(4) [of the Extradition Act 2003] is short, and it does not seem very fair to cut it down, even if only by a few hours". He went on to say (in paragraph 84):

> "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). …"

(see also the judgment of Baroness Hale of Richmond in *R. (on the application of Modaresi) v Secretary of State for Health* [2013] UKSC 53, at paragraph 33).

16. The principle has also been applied in a statutory challenge to a planning decision. In *Calverton Parish Council* an application was made to strike out the parish council's application under section 113 of the Planning and Compulsory Purchase Act 2004 for an order to quash an "aligned strategies" document, the basis for the strike-out application being that the relevant statutory six-week period had expired on Sunday, 19 October 2014

and the section 113 application had not been made until the next day. Lewis J. dismissed the application to strike out. He said (in paragraph 33 of his judgment) that "… [in] general terms … , where a statutory provision provides that proceedings must be brought no later than the end of a specified period, and the bringing of proceedings requires that the court office be functioning, and the last day of the prescribed period falls on a day when the court office is closed, then the statutory provision is to be interpreted as permitting the proceedings to be brought on the next day when the court office is open". He went on to say (in paragraph 37):

> "37. … The effect of the application of the *Kaur* principle to section 113(4) of the 2004 Act will mean that persons will know that if the six-week period ends on a weekend, or a Bank Holiday when the court office is closed, the claim may be brought on the next working day. There will still be certainty about the application of the limitation period in section 113(4) of the 2004 Act. Further, the prescribed time limit for bringing proceedings will not be unduly lengthened beyond what Parliament must have intended when enacting section 113(4) of the 2004 Act. The *Kaur* principle will only have the effect, in practical terms, of lengthening the period by one or two days (if the six-week period ends on a weekend) or possibly three or four days (if it ends on the first day of a period when there are two Bank Holidays and a weekend). The time limit will still be short. It will have to be adhered to strictly as there is no provision for any discretionary extension of time."

He also emphasized that "[the] application of the *Kaur* principle depends on the fact that the application cannot be made unilaterally and that the court office is closed on the day when the period for bringing the claim expires" (paragraph 38). As he explained (in paragraph 39):

> "39. … [Applications] made under section 113 of the 2004 Act cannot be made unilaterally and do require the co-operation of the court office. First, section 113(3) provides that a person aggrieved "may make an application to the High Court". Secondly, that necessitates a procedure for making an application. That is contained in the CPR. …"

and (in paragraph 41):

> "41. Part 8 claims are started when they are issued: see paragraph 5.1 of Practice Direction 7A. Issuing requires the claim form to be sealed by the court, which, in this context, means an officer of the court … [It] is clear that the making of an application under section 113 of the 2004 Act does require the co-operation of the court. The court must issue the claim. … The issuing, or the receipt, of the claim … each require actions on the part of a court officer. The days of business in the High Court are regulated by paragraph 2 of Practice Direction 2A – Court Offices. That paragraph provides that the offices of the Senior Courts (which include the High Court) will not be open on Saturdays, Sundays, Good Friday, Christmas Day and other prescribed days and Bank Holidays."

17. In *Kaur v Russell* it was also accepted, and in *Mucelli* it has been confirmed, that a claimant is not denied the full statutory period for challenge by the fact that the court office does not remain open until midnight. In *Kaur v Russell*, Megarry J. said (at p. 353E-F) that "… the legislature may be safely assumed to have contemplated that the offices [of the court] will

not remain open until midnight each day, and that a litigant will get the full period intended if the offices are open during the prescribed hours on his last day". In *Mucelli* Lord Neuberger said (in paragraph 85):

> "85. … While there is no reason to deprive an appellant of his full statutory seven or 14 days … it does not follow that he should have cause for complaint if he cannot file the notice at the court office … outside normal office hours. I believe that this conclusion is consistent with the law as it is understood in relation to time limits for filing and service, when it comes to the operation of the Limitation Act 1980."

18. There was some discussion in *Kaur v Russell* of whether the principle should be extended to a case in which the court office was closed for only part of a day, rather than the whole of it. Megarry J. said (at p.356D-F):

> "… There are a number of cases which support the general rule that a statutory period of time, whether general or special, will, in the absence of any contrary provision, normally be construed as ending at the expiration of the last day of the period. The rule remains: but there is limited but important exception or qualification to it, which may be derived from a line of authorities which include [*Hughes v Griffiths* (1862) 13 C.B.N.S. 324, *Mumford v Hitchcocks* (1863) 14 C.B.N.S. 361, the judgement of Sellers L.J. in *Hodgson v Armstrong* [1967] 2 Q.B. 299] and the Scottish cases. If the act to be done by the person concerned is one for which some action by the court is requisite, such as issuing a writ, and it is impossible to do that act on the last day of the period because the offices of the court are closed for the whole of that day, the period will prima facie be construed as ending not on that day but at the expiration of the next day upon which the offices of the court are open and it becomes possible to do the act. …"

(see also the Scottish case, *M'Niven v Glasgow Corporation* 1920 2 S.L.T. 57, where the Lord President said (on p.60) that the principle was "confined to the case where the final day is a full *dies non*"; cf. *Craig-Na-Barro Sales v Munro Furniture Ltd.* [1974] S.L.T. (Sh. Ct. 107).

19. In *Yadly Marketing Co. Ltd. v Secretary of State for the Home Department* [2017] 1 W.L.R. 1041 the Court of Appeal had to consider whether an appellant had been denied his right to a fair trial under article 6 of the European Convention on Human Rights when staff in a County Court office twice wrongly refused to accept a notice of appeal under section 17(4) of the Immigration, Asylum and Nationality Act 2006 in the mistaken belief that the appeal ought to have been lodged with the First-tier Tribunal. The first attempt at filing was on the last day of the 28-day period, which was held to be the Tuesday following a Bank Holiday Monday. The second attempt was on the Wednesday of that week. The appellant then posted its notice of appeal to another County Court, and the appeal was eventually lodged on the Friday. In spite of what Jonathan Parker L.J. had said in *Van Aken v Camden London Borough Council* [2003] 1 W.L.R. 684, Beatson L.J. – with whom Arden and Henderson L.JJ. agreed – accepted there was "a sensible distinction between the court office itself, which is referred to in CPR r 2.3(1), and the court building" (paragraph 34 of his judgment). He went on to say (in paragraph 35):

> "35 It is clear both from what Lord Neuberger said at paras 83-85 of *Mucelli's* case … and from *Pritam Kaur's* case … and [*Aadan v Brent London Borough Council*

> (1999) 32 H.L.R. 848] themselves that the *Pritam Kaur* approach only applies where the recipient's office is *closed during the whole of the last day*. The approach would in any event not have been applicable in *Van Aken's* case … where the solicitor arrived on a day where the office had been open but after it closed for business. … Lord Neuberger said [in *Mucelli*] that the proposition that there is no reason to deprive a person of his full statutory seven or 14 days does not mean that, on a day where the office in question is open during normal hours, a person has cause for complaint if he cannot file the document at the court office outside normal office hours. See also *Croke v Secretary of State for Communities and Local Government* [2016] EWHC 2484 (Admin), albeit in respect of the filing of a claim form rather than a notice of appeal. It was stated that the approach in *Pritam Kaur's* case did not apply where a person was not permitted access to the building after the counters had closed for the day, and it was suggested that would also be the position where a court was busy and staff were not able to attend to an individual before the end of any working day."

He concluded (in paragraph 36) that "what is required is delivery of the document to the court office itself, which is not possible where the office is closed for the entire last day of the statutory limitation period", that the approach in *Kaur v Russell* was applicable on the facts, and that the judge in the court below had been wrong to find that the period in which the notice of appeal could be filed had expired on the Bank Holiday Monday.

20. In *Pomiechowski v District Court of Legnica, Poland* [2012] 1 W.L.R. 1604, a case concerning the provision in section 26(4) of the Extradition Act 2003 requiring notice of an appeal against an order for extradition order to be given "before the end of the permitted period, which is seven days starting with the day on which the order is made", Lord Mance – with whom Lord Phillips of Worth Matravers, Lord Kerr of Tonaghmore and Lord Wilson agreed – said (in paragraph 21 of his judgment):

> "21 … Lord Neuberger's approach [in *Mucelli*] allows for the human propensity to think about things at the last moment, but I do not think that it should be extended to situations where the last moment is a business day on which the intended appellant could have filed and served a notice of appeal. … ."

Having referred to the decision of the European Court of Human Rights in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 E.H.R.R. 442 and other relevant authority, Lord Mance concluded that the statutory time limit in section 26(4) of the 2003 Act "may in individual cases impair "the very essence of the right" of appeal", contrary to article 6.1 of the Convention. He was "not persuaded that the interests of finality and certainty outweigh the interests of ensuring proper access to justice by appeal in the limited number of extradition cases where this would otherwise be denied". There would not be, he said, "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (paragraph 37). He went on to say (in paragraph 39):

> "39 In the present case, there is 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. In these circumstances, I consider that, in the case of a citizen of the United Kingdom like Mr Halligen, the 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 *Tolstoy 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."

In *Tolstoy Miloslavsky* the European Court of Human Rights had said (in paragraph 59 of its judgment):

> "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, 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. … [A] Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in Article 6. However, the manner of application of Article 6 to proceedings before such courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein."

21. The Court of Appeal applied the same approach in *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818 to the time limit in article 29(10) of the Nursing and Midwifery Order 2001, which requires any appeal against an order made by the Fitness to Practice Committee "must be brought before the end of 28 days beginning with the date on which notice of the order or decision appealed against is served on the person concerned". Maurice Kay L.J., with whom Patten and Floyd L.JJ. agreed, referred (in paragraph 13 of his judgment) to the obvious differences between appeals in disciplinary or regulatory cases and extradition cases such as *Pomiechowski*: the gravity of the consequences of the decision being appealed in *Pomiechowski*, given "the prospect of loss of liberty and involuntary removal to a different country", the length of the time limit itself, the difficulties of "custody, where communications with advisers and access to information and facilities are more difficult", and the "widespread recognition of the problems created by the short time limits in extradition". He went on to say (in paragraph 15):

> "15. … A discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously". I do not believe that the discretion would arise save in a very small number of cases. Courts are experienced in exercising discretion on a basis of exceptionality. …".

He did not consider that the appellants met the strict threshold; they had "simply left it too late". In the case of the first appellant time had begun to run on 31 January 2012. A copy of the decision had been sent to her barrister on 2 February 2012. Her notice of appeal was not lodged until 9 March 2012. It was, said Maurice Kay L.J., "utterly impossible to see her

case as exceptional or her delay as blameless" (paragraph 16). The second appellant's, however, was "more of a paradigm case". Time had begun to run on 18 February 2012. The appellant actually received the decision letter on 20 February 2012. Her notice of appeal was lodged on 19 March 2012, two days out of time. On these facts, Maurice Kay L.J. concluded (in paragraph 17):

> "17. … Although that may be described as marginal, it is unexceptional and there was no good reason why it could not have been lodged in time. There is no evidence of any exceptional difficulties encountered by her or her advisers. We were simply told by [her counsel] that it had taken some time for her to find a specialist solicitor and to obtain legal aid. In these circumstances, I am not disposed to remit her case to the Administrative Court for further consideration as [counsel] requests. She gains no assistance from the *Pomiechowski* approach. The strict time limit defeats her."

He emphasized 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", and it did not extend to the cases of either of these appellants (paragraph 18).

22. In *Yadly Marketing* Beatson L.J. referred to the example given by Maurice Kay L.J. in *Adesina* of a situation in which, because of illness, a person had been in blameless ignorance of the fact that time was running for the whole of the 28-day period, and those given by Lord Mance in *Pomiechowski*, in the context of the significantly shorter time limits in the Extradition Act 2003, of a negligent solicitor failing to file a notice of appeal in the permitted period, a prison riot, or a litigant's illness following an extradition decision preventing him from giving instructions to lodge a notice of appeal. Beatson L.J. did "not accept the proposition that it is only where a person is shut out for the entire period that there can be exceptional circumstances …" (paragraph 38). The appellant, he said, had done "all it could to appeal within the time limit", and "[the] reason for its failure to do so was clearly the error of the court official at the County Court at Edmonton and not any failing on its part" (paragraph 39). He therefore concluded (in paragraph 41):

> "41. … [In] the particular circumstances of this case, where it had attempted to file the notice personally before the expiry of the period and was rebuffed by the court, and then made a second attempt only to be rebuffed again, the decision of the solicitors to use the post on the following day does not take this case outwith the "extremely narrow" scope for departure from the statutory limit pursuant to the general approach in *Pritam Kaur's* case and the other decisions to which I have referred. … [The] appellant did all it could to issue the appeal in time, and that the court's error constituted exceptional circumstances justifying an extension of time."

23. Both before H.H.J. Robinson and in this court, Mr Croke contended, in clear and succinct submissions, for an enlargement of the principle in *Kaur v Russell*. He submitted that the court should extend the statutory time limit at least by one working day from 23 to 24 March 2016, because it was the action of the court, in the person of one of the security officers employed by it, that had deprived him of the full six-week period to lodge an application under section 288. He proposed that the "*Kaur* principle" be adjusted so that if a prospective litigant had been inside the court building within normal court working hours but had then been prevented from lodging his or her claim on that day by some action or inaction on the part of staff employed within the building, or by some other unforeseen

event within the responsibility of the court over which he or she had no control, that day should be treated as being a "dies non". This would also apply, for example, to a failure of the court's IT system that had the same effect. Certainty for all parties involved in the proceedings could be safeguarded by ensuring that a time limit would never be extended by more than a single day, and by requiring a litigant in this situation to put all parties with standing on notice, so that they would not rely on the decision under challenge – as Mr Croke had done in a letter to the council dated 23 March 2016. Mr Croke did not seek to support his argument with a submission that the court would in any event have a discretion to extend the statutory time limit on human rights grounds.

24. For the Secretary of State, Mr Zack Simons submitted that the meaning of section 288(4B) is clear. Its effect, as the authorities show, is that once the statutory six-week period for challenging a decision has expired, the court no longer has jurisdiction to entertain and determine an application. Mr Simons acknowledged, however, that there are two accepted grounds for extending time beyond the six-week period. The first, under the principle in *Kaur v Russell*, is that a "dies non", on which the court is closed for business for the whole day, is to be discounted. The second is that there has been an unjustifiable violation of human rights under the Convention.

25. Mr Simons argued that neither of those two grounds for extending the six-week period arises in this case. The principle in *Kaur v Russell* cannot possibly apply, he submitted, because the Administrative Court Office was functioning normally for the whole of that period, including the full working day on 23 March 2016. That day was not a "dies non" in any sense recognized in the case law. It was a normal working day for the court, and for the court office. In these circumstances the court has no power to extend time to overcome Mr Croke's misfortune in missing his train on that day, his first, failed attempt to send his claim form by email to Mr Miller, and, at about 4.25 p.m., Mr Miller being prevented by a security officer employed in the Royal Courts of Justice from making his way to the court office to lodge the application on his behalf. The reality here, Mr Simons submitted, was that Mr Croke had left the launching of his challenge to the last day, and very nearly to the last minute, of the six-week period. He had thus exposed himself to the risk of being unable to file his application with the court because of some event or accident he had not foreseen. Whether his failure to lodge the application in time was largely, if not entirely, his own fault is a question on which views might differ. But if the principle in *Kaur v Russell* were extended to accommodate the circumstances here, the inevitable result would be uncertainty, unpredictability and unfairness to other parties, contrary to Parliament's intention in creating the statutory time limit, and contrary to the court's consistent approach in upholding it.

26. Mr Simons also submitted that there was no basis for extending time on human rights grounds. Mr Croke had not been denied the substance of his right of access to a court under article 6 of the Convention to bring a challenge to the inspector's decision. The six weeks allowed by section 288(4B) of the 1990 Act is an ample period for even an unrepresented applicant to launch a challenge. At worst, and largely as a consequence of his own conduct, Mr Croke had lost no more than some five minutes of that six-week period. And it cannot be said that it would have been impossible or difficult for him to lodge his application within the time allowed.

27. Mr Croke's submissions to us largely repeated his argument in the court below. The judge did not accept that argument. She agreed with, and adopted, the reasoning in Lewis J.'s

judgment in *Calverton Parish Council* (paragraph 22 of her judgment). There was, she said, "persuasive authority" – in Lord Neuberger's speech in *Mucelli* – for the proposition that "if the act cannot be done because the [court office is] closed for the last few hours on the last day, the litigant cannot complain and time is not extended until the next day, so long as the office is operating normal hours" (paragraph 29). She rejected Mr Croke's submission that "where a court office is inaccessible then the due date is extended until it becomes accessible". This, in her view, raised several questions. What did "inaccessible" mean in this context? How near did a litigant have to get to the court office before an "obstacle" could be regarded as having made it "inaccessible"? What kind of "obstacle" might be relevant – for example, a temporary road closure half a mile from the court building because of a bomb scare? Did it matter what had caused the obstacle – for example, a lift in the court building breaking down with the litigant in it? Would it matter how far the court office was from the entrance to the court building? (paragraph 30).

28. The judge also rejected Mr Simons' submission that if, for example, the Administrative Court Office was closed for part of the final day of the six-week period under section 288(4B) because of some emergency such as an evacuation caused by a fire alarm, an applicant who had arrived there before the office was due to close would be entitled to an extension of time to the next day (paragraph 31). Similar problems of uncertainty would arise – including the fact that other parties would be unaware of what had happened and might act to their detriment (paragraphs 32 and 33). The court had no discretion under the 1990 Act, or in the Civil Procedure Rules, to extend time. It was "a matter of statutory interpretation when time expires and that time limit cannot be extended" (paragraph 34).

29. This was not a case, said the judge, in which the court office had been closed. In her view, "[where] it is necessary to issue a claim in a court office, litigants must anticipate security procedures and the need to obey the directions of security staff". The position would have been "just the same if there had been a queue to go through security and by the time Mr Miller got to the security screening it was 4.30 pm and he had been turned away" (paragraph 35). The position contended for by Mr Croke provided "no certainty at all, as to the nature of the event which is sufficient to bring the principle into play, or to third parties who may be affected". It was "without precedent and … likely to cause confusion to litigants and others". There was "no reasonable basis on which it could be said that Parliament intended a litigant in these circumstances to be able to file their claim the next working day". Mr Croke's argument failed to meet either the objective of "legal certainty" or the objective of "consistency" to which the court had referred in *Kaur v Russell*. As the judge put it, "[litigants] whose claims are subject to strict time limits must make arrangements to ensure that they attend the court office in good time so that they are not thwarted by unexpected problems" (paragraph 36).

30. In my view, the judge's analysis was basically correct, and consistent with the relevant authorities, including the subsequent decision of this court in *Yadly Marketing*.

31. Leaving aside the so-called "*Kaur* principle", and subject to any limited scope there may be on human rights grounds for the court, in exceptional circumstances, to countenance proceedings being brought after a statutory time limit has passed, there is no room here for the exercise of judicial discretion. Parliament has provided a strict time limit of six weeks for the making of an application under section 288. Subsection (4B) does not, in its own terms, admit any exception to the absolute time limit it lays down. As a matter of straightforward statutory interpretation, the time limit is precise, unambiguous and

unqualified. The statutory language is mandatory. It requires an applicant to make his application within the specified period. The application for leave to bring such a challenge "must be made before the end of the period of six weeks beginning with the day after … the date on which the action is taken" (my emphasis). There is no reference to considerations such as a requirement to act "promptly" or to make the application without "undue delay". It seems clear therefore, as has been repeatedly recognized in the case law, that Parliament intended to avoid the uncertainty and inconsistency likely to occur if the time for making an application under section 288 was subject to the court's discretion.

32. The principle in *Kaur v Russell* was not conceived as a principle to guide the exercise of judicial discretion in the various circumstances in which a litigant might fail to begin proceedings within a statutory limitation period. It was a narrow principle, founded on the certainty and predictability of the calendar, and the particular days on which court offices would not be open for business. Inherent in it was that all parties to potential litigation would know, or easily be able to find out, when court offices would be open, when and where a relevant claim could be issued, and whether the limitation period would be extended so that it did not end on a "dies non". It conceded nothing to uncertainty and inconsistency. It was simple. A statutory limitation period would not be shortened if the final day of that period occurred on a "dies non". That "dies non" would always be clear in advance. The principle was not subject to the vicissitudes that might prevent a claimant from filing a claim on a day when the court office is open.

33. In my view, the alteration of that principle urged on us by Mr Croke would go against the approach taken in the relevant authorities. It would stretch the principle beyond calendar events, which are fixed and certain, to circumstances that are unexpected and unpredictable, including not only the acts of third parties but also the actions or inaction of the litigant himself over which the court has no control. And it would include parts of days, as well as full days, when a litigant finds himself unable to get to the court office in time.

34. There are obvious difficulties with such an approach. And this is perhaps especially so in proceedings affecting the interests of several parties – sometimes a large number – which is not unusual when a legal challenge is made to a planning decision. Such decisions, no matter how large or small or how controversial the development may be, will always engage the public interest. Challenges to the decisions of the Secretary of State or an inspector on an appeal will often affect the interests not only of the developer and landowner and the local planning authority but also of third parties who have objected to or supported the proposal. In proceedings of this kind, certainty and consistency in the operation of fixed statutory time limits are particularly important. Such time limits enable all potential parties to the proceedings, including those who have objected to a proposed development as well as the applicant for planning permission and the local planning authority whose decision has been upheld or overturned**,** to know where they stand, and to act – or refrain from acting – accordingly. They ensure that any challenge to the decision will be brought within a finite period. They treat all parties equally from the outset. In this sense they are conducive, not inimical, to "access to justice", and thus consistent with the general principles in the Aarhus Convention.

35. The uncertainty and inconsistency entailed in Mr Croke's suggested approach are not overcome by his proposed safeguards – limiting any extension of time to a single day, and leaving the initiative for alerting other parties to the late filing of an application in the hands of the applicant himself. Those safeguards would be likely only to compound uncertainty

and inconsistency, and to act against access to justice for all parties to a planning dispute. They could not be relied upon to prevent other parties acting in reliance on the decision – for example, a landowner letting a contract for works to implement a project for which planning permission had been granted by an inspector, or a neighbour who had successfully opposed an appeal committing himself to the sale of his property in the belief that the decision had not been challenged.

36. There are many circumstances in which, for one reason or another, a litigant might fail to lodge a claim with the court on the last day of a statutory limitation period, even though the court office is open and functioning normally on that day. The judge referred to some of them, and others can be imagined – such as unforeseen delays in a litigant's or his solicitor's journey to the court building, because a road is unexpectedly closed or traffic is unusually heavy or a train is missed or cancelled; or delays at or within the court building itself – because of a demonstration outside, or an unusually long queue for the security checks on entering the building, or an evacuation for a fire alarm or some other emergency, or wrong directions to the court office being given by a security officer or a member of the court staff or by somebody else, or such directions being misunderstood, and so forth.

37. The circumstances of every case in which an intending applicant under section 288 fails to make his application within the period specified in section 288(4B) will be unique. They may differ widely from one case to the next. This case shows what can happen when a series of unlucky events occurs on the last day of the six-week period in section 288(4B). Like the judge, however, I cannot accept that those events engage the principle in *Kaur v Russell*, or that they demonstrate any need for it to be enlarged. I think they fall well outside its scope.

38. The Administrative Court Office was open and functioning normally for the whole of the six-week period, including the final day of that period. That day was not a "dies non". It was a normal working day for the court, and for the court office. It happened to be the Wednesday of the week ending in the Easter Bank Holiday. That Wednesday was not itself a Bank Holiday. The court office should have been operating for the full working day, and there is no evidence to suggest it was not. An application under section 288 – or any other application or claim normally issued in the court office – could have been filed there at any time within normal working hours. In these circumstances the principle in *Kaur v Russell* cannot avail Mr Croke. He did not attempt to lodge his application with the court until the last day of the six-week period. Had he – or his agent, Mr Miller – arrived at the court office by 4.30 p.m. that afternoon, he could have joined the queue, if there was one, and he would have been able to lodge his application on that day. He was unable to do that, not because the court office was closed for the whole or even part of that day, but because of the sequence of events leading up to and including what happened when Mr Miller encountered the security officer at or about 4.25 p.m.

39. It is clear, therefore, that Mr Croke's failure to lodge his application on the last day of the six-week period was not the result of any event falling within the principle in *Kaur v Russell*. Nor is there any justification for extending that principle to embrace the circumstances here. To extend it to accommodate the unfortunate facts of a particular case such as this would be to undermine it.

40. So the only basis upon which time could be extended beyond the six-week period, to 24 March 2016, would be that this is a case in which the court can and should exercise a discretion to do so, in exceptional circumstances, on human rights grounds. As I have said,

Mr Croke did not suggest that this was such a case, even when we invited the parties' further submissions on the point after the hearing. And I think he was right not to do so.

41. Under section 3 of the Human Rights Act 1998 the court must read and give effect to the provisions of the 1990 Act in a way that is compatible with Convention rights. The Convention right with which we are concerned is the right under article 6(1) – the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

42. One must have in mind here the considerations identified by the European Court of Human Rights in *Tolstoy Miloslavsky* as relevant to the question of whether there has been a breach of the right of access to a court under article 6(1), while recognizing a Member State's "margin of appreciation". The first consideration is whether "the limitations applied … 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". The second is whether a restriction "[pursues] a legitimate aim" and whether there is "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved". The court emphasized the need to take account of "the entirety of the proceedings" (paragraph 59 of the judgment).

43. It is not suggested that the right to a fair trial under article 6 is impaired by the statutory provisions themselves, including the provision for the making of an application under section 288 within the specified time limit. The statutory context here is very different from that in *Mucelli*, or in *Pomiechowski*, or in *Adesina*. In each context, Parliament has provided the requisite time limit for issuing proceedings, having regard to the need for fairness, finality and certainty. In some statutory schemes the time limit is necessarily short, in others much longer. It is not, I think, a useful exercise to compare one with another. Even where statutory time limits are very short, it may generally be assumed, as Lord Mance said in *Pomiechowski* (at paragraph 39), that Parliament has intended that the period allowed "would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time".

44. The context here is the statutory scheme for planning, which includes arrangements for challenging the validity of certain planning decisions. The provisions now contained in section 288 of the 1990 Act, with some adaptation from their predecessors in previous statutes, permit proceedings by any "person … aggrieved" by a decision of the Secretary of State or his inspector. The grounds on which such a challenge may be made do not extend to the planning merits. They are confined to the principles of public law (see *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 W.L.R. 1389). A "person … aggrieved" may be an unsuccessful appellant, as in this case, or a local planning authority whose decision to refuse an application for planning permission has been overturned on appeal, or a third party – whether an individual objector or an NGO, or some other participant in the process, with standing. That "person … aggrieved" will often have the benefit of legal representation and advice, though in many cases – such as this – that will not be so.

45. The six-week time limit for making an application, now provided in section 288(4B), does not distinguish between one "person … aggrieved" and another. It applies to them all. Parliament might have provided a longer time limit, but it did not. It imposed a relatively generous but finite period within which a challenge can be brought. The six-week period allows an intending applicant, even an applicant without the help of a professional lawyer,

to prepare his application, in accordance with the requirements of the Civil Procedure Rules and the relevant Practice Directions (see paragraph 8 above). It has been held, rightly in my view, that the time limit is compatible with article 6 (see the judgment of Sullivan J., as he then was, in *Matthews v Secretary of State for the Environment, Transport and the Regions* [2002] J.P.L. 716; cf. *Perez de Rada Cavanilles v Spain* (2000) 29 E.H.R.R. 109). To adopt the words used by the European Court of Human Rights in *Tolstoy Miroslavsky*, it does not "restrict or reduce" the applicant's access to the court "in such a way or to such an extent that the very essence of the right is impaired". It respects and protects that right. The provisions of section 288 pursue the "legitimate aim" of providing access to the court for those who are aggrieved by decisions on planning appeals and seek to test the lawfulness of such decisions. The scope they allow for such challenges, including the six-week time limit they impose, embodies a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved". They do not offend "the fundamental guarantees in Article 6".

46. Nor can it be said that in the particular circumstances of this case there was any violation of Mr Croke's right to access to a court under article 6 that could justify an extension of the time limit in section 288(4B). The circumstances in which he failed to file his application on 23 March 2016 may be unusual. But they are not, in my opinion, "exceptional" in the sense referred to by Lord Mance in *Pomiechowski*.

47. At worst, and leaving aside for the moment his own share of responsibility for the events of 23 March 2016, Mr Croke might complain that he was denied, by an event beyond his own control, of the last five minutes of the six-week period for making an application to the court. But in my view this did not generate a conflict with his right of access to court under article 6(1) of the kind referred to by the Supreme Court in *Pomiechowski* – as Lord Mance put it, "where [the] statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process …". Taking the factors to which Maurice Kay L.J. referred in *Adesina*, one starts with the consequences of the decision itself. Here, the consequence is the possible loss of a landowner's ability to build two dwellings on his land, after planning permission had been refused by the local planning authority, and, on appeal, an inspector. I say "possible loss" because it would be open to Mr Croke to make another application for planning permission, which might overcome the shortcomings of the proposal rejected by the inspector. This is a much less serious jeopardy than the possibility of the appellant's extradition – as in *Pomiechowski*, or his exclusion from a profession – as in *Adesina*. Another factor is the period within which proceedings may be begun, which is not unduly short. Another is the availability of advice and relevant information. The relevant documents here would have not been hard to assemble; they should all have been in Mr Croke's possession. And the drafting of the grounds would not have been an onerous task, even for an applicant who had not instructed a lawyer to do it. This is in stark contrast to the situation of the appellant in *Pomiechowski* who was in custody, facing extradition, and had only seven days to make his appeal.

48. In *Pomiechowski* Lord Mance said (in paragraph 39 of his judgment) that for a court to exercise its "discretion in exceptional circumstances to extend time for both filing and service", a litigant must "personally [have] done all he can to bring and notify [his proceedings] timeously". In this case, in my view, that was not so. It was not until the last day of the six-week period, and very late on that day, that Mr Croke attempted to file his application with the court, leaving himself no opportunity to deal with contingencies that might arise and in fact did. The Administrative Court Office was open, and operating

normally, for the whole of that day. But Mr Croke failed to get to the court office himself, and so did his agent, Mr Miller. He may of course say – and did – that he was no less entitled to lodge his application on the last day of the six-week period than he was on the first. That is true. He also said that he was unable to prepare his application sooner than he did, to have it ready to be filed before the last day. This seems hard to accept. But in any event it cannot be said – and Mr Croke did not – that he would have been unable to lodge the application in time had he acted more expeditiously than he did on the last day. He was himself largely responsible for his failure to make an application within the time that section 288(4B) allows. It seems quite clear that if he had not missed his train, or even if, having missed the train, he had typed Mr Miller's email address correctly when he first tried to send him the Statement of Facts and Grounds, the application could and would have been lodged in the court office before it closed at 4.30 p.m. To isolate what the security officer did at or about 4.25 p.m. as if it were the sole or critical event is wrong. It was merely the last in a chain of events for which Mr Croke himself was at least partly responsible. The fact that it happened at the very end of the six-week period for challenge does not change that. It cannot be singled out as the sole cause of Mr Croke's failure to lodge his application before the statutory time limit expired.

49. In this case therefore, the court is not faced with a question of the kind that arose in *Yadly Marketing*, where the appellant's failure to lodge its notice of appeal was the direct result of an event squarely within the responsibility of the court itself and for which the appellant bore no responsibility of its own – the refusal of the staff in the court office to receive a validly filed notice of appeal. As in *Adesina*, though the facts are different, the circumstances here cannot be seen as "exceptional". There is no good reason why Mr Croke's application could not have been lodged in time. So, in my view, the court cannot exercise a discretion on human rights grounds to extend the six-week time limit under section 288(4B).

50. I would therefore dismiss the appeal on this ground. Mr Croke's argument is not sound. Nor could he have succeeded on human rights grounds. And these conclusions, if my Lords accept them, must be fatal to the appeal itself.

Can the time limit be extended from 24 March to 29 March 2016?

51. If the conclusions I have reached on the first issue are correct, this issue is academic. I shall therefore deal with it shortly, and the views I express on it will be merely obiter.

52. The judge saw no need to deal with the issue at all. Having concluded as she did on the first issue, she added only that it was not necessary for her to decide "whether the court office was right to reject the claim form used by [Mr Croke] on 24th March", because "[even] if he had been permitted to issue the application that day, it would still have been out of time" (paragraph 37 of the judgment). I agree.

53. Assuming he had succeeded on the first issue, Mr Croke submitted that the court should extend the statutory time limit by a further working day, from 24 March to 29 March. When he attempted to lodge his application on 24 March, the staff in the Administrative Court Office wrongly refused to issue it because it was, they said, on the wrong claim form, namely the Part 8 claim form – form N208 – even though this was the one referred to as appropriate for proceedings such as these in the guidance published at the time on the

HMCTS website – and also, though Mr Croke may not have been aware of this at the time, in paragraph 2.1 of Practice Direction 8C. The refusal of the court office staff to issue the application was, Mr Croke submitted, tantamount to the court office itself being closed for business. The court office had no jurisdiction of its own to reject the application as invalid. This was a question for a judge to decide, not a merely administrative matter for the staff in the court office. Mr Croke relied on observations made by Tuckey L.J. in *Barnes v St Helens Metropolitan Borough Council* [2006] EWCA Civ 1372, a case concerning the provision in section 11 of the Limitation Act 1980 that "[an] action [for personal injuries] shall not be brought after the expiration of … three years from … the date on which the cause of action accrued". Tuckey L.J. said (in paragraph 14 of his judgment):

> "14. … Provided the claimant takes any necessary step required to enable the proceedings to be started he does not take the risk that, for example, the court may be closed or will not process his claim properly. …".

Tuckey L.J. recognized the distinction between the concepts of "unilateral" and "transactional" acts in issuing a claim. He acknowledged that an action "done by the court … is something over which [the potential litigant] has no real control". He went on to say (in paragraph 19):

> "19. I do not see that receipt of the claim form by the court office involves any transactional act. The court staff who receive the documents are not performing any judicial function and have no power to reject them. …".

(see also *Page v Hewetts Solicitors* [2012] EWCA Civ 805 and *Riniker v University College London* ("The Times", 17 April 1999)).

54. After the hearing, though this had not been mentioned to us by either party, we noticed the discrepancy in the White Book Service 2018 between Practice Direction 4 and Practice Direction 8C. As I have said (in paragraph 8 above), Annex A to Practice Direction 4 indicates, under the heading "Planning Court", that the appropriate form for a "Planning Statutory Review" is form "N208PC", while Practice Direction 8C states, in paragraph 2.1, under the heading "Claim form":

> "2.1 A Part 8 claim form (in practice form N208) must be used and must be filed at the Administrative Court within the time limited by the statutory provisions set out in paragraph 1.1."

Having noticed this discrepancy, we invited the parties' further submissions in writing, and awaited those submissions before giving judgment.

55. We have been assisted by the witness statement of Mr Martyn Cowlin, a casework lawyer in the Administrative Court Office at the Royal Courts of Justice, dated 21 January 2019, in which he has clarified for the court the provenance of form N208PC. He said (in paragraphs 3 to 6 of his witness statement):

> "…
>
> 3. With effect from 26 October 2015 a permission filter was introduced for a number of planning statutory review claims, bringing them in line with the procedure

applicable to judicial review. Practice Direction 8C was introduced to the Civil Procedure Rules to reflect this change and to provide a revised procedure for claims. In consequence, a former colleague, Christopher Carter, then Delivery Manager in the Administrative Court [Office], devised a claim form, numbered N208PC, for use in connection with planning statutory review claims, reflecting the introduction of the permission filter. The form draws very heavily on the judicial review claim form, N461. Mr Carter circulated the draft form to staff from various offices within the Royal Courts of Justice and to a large number of practitioners by email on 21 October 2015. This email … indicated that the form was being uploaded to the Form Finder section of the HMCTS website so that it would be available from Monday 26 October 2015. I regret that I can provide no independent confirmation that this was done.

4. Practice Direction 8C was inserted into the Civil Procedure Rules by the Civil Procedure (Amendment No.4) Rules 2015 (81st Update) which remains on the Civil Procedure Rules section of the Justice website. It is apparent that, notwithstanding the creation of Form N208 PC, Paragraph 2.1 of Practice Direction 8C referred to the prescribed form as "[in] practice form N208", i.e. the standard Part 8 claim form. As the Court will be aware, this remains the case today. I am aware that, despite the indication given in the Rules, persons seeking to issue statutory review claims to which the permission filter applied in the weeks following 26 October 2015, were instructed to complete the new form N208PC. A stock of the forms was kept in the Administrative Court Office for that purpose.

5. Notes for Guidance for court users seeking to make application for planning statutory review were, according to email evidence I have seen subsequently, added to the Justice.gov.uk website on 25 January 2016. This document explained the introduction of the permission filter, but it, too, refers to the prescribed form as N208. I am not aware of, nor have I been able to find, any other guidance issued by the Administrative Court Office at that time. Form N208PC therefore appears to have become "operative" in October 2015 by reason of being available from the HMCTS website and in hard copy from the Administrative Court Office.

6. It is apparent that notwithstanding the introduction of a permission filter for certain statutory review claims from 26 October 2015 and the court office's introduction of a new form to reflect that change, the Practice Direction 8C of the Civil Procedure Rules continues to name Form N208 as the prescribed form for such applications (i.e. those where the permission filter is applicable). This provision, however, appears to conflict with the amended Part 4 and Practice Direction 4 of the Rules. Para 4(1) of Part 4 provides, "The forms set out in a Practice Direction shall be used in the cases to which they apply". In Practice Direction 4, under the heading "Planning Court", there is clear reference to N208PC as being the form to be used for Planning Statutory Review. The amendment was effective from 6 April 2016. In my experience, applications for planning statutory review are now invariably commenced by lodging a claim form in Form N208PC.

…".

56. As Mr Simons conceded in the light of Mr Cowlin's evidence, it is now plain that "even into 2016", form N208, and not merely form N208PC, was available to those wishing to lodge

applications under section 288 of the 1990 Act; that no publicly available guidance appears to have been produced explaining to members of the public that "HMCTS intended there to be a change from one to the other" (paragraph 4 of Mr Simons' written submissions dated 22 January 2019); and that, even now, there remains an "inconsistency" between paragraph 2.1 of Practice Direction 8C and Annex A of Practice Direction 4 (paragraph 5). Mr Simons therefore made it plain that "[the Secretary of State] does not seek to defend the conduct of the HMCTS official who refused to issue [Mr Croke's] claim form on [24 March 2016] on the basis that Mr Croke had used the N208 form and not the N208PC form". He acknowledged that Mr Croke was "still entitled to use the N208 form, even if it was no longer the HMCTS's "preferred" form for claims under s.288" (paragraph 6). Thus the Secretary of State now accepts Mr Croke "should have been entitled to have his claim issued at the Royal Courts of Justice when he attended and joined the … queue on [24 March 2016]"; and "[if 24 March 2016] had been the last day in the relevant 6 week period, Mr Croke would have been in a comparable position to the [appellant] in [*Yadly Marketing*]" because "[the] court office's erroneous refusal to accept [Mr Croke's] claim before the time limit [had] expired could have constituted the exceptional [circumstances] required to justify extending time" (paragraph 7). As Mr Simons confirmed, however, the Secretary of State still maintains that Mr Croke's attempt to lodge his application on 24 March 2016 was, in any event, "simply too late" – because the statutory six-week period had expired on the previous day (paragraph 8).

57. In his further submissions Mr Croke did not doubt the evidence of Mr Cowlin on the history and status of form N208PC. He referred to the case law relating to the seriousness and significance of breaches of procedural rules and relief from sanctions (in particular, *Denton v T.H. White Ltd.* [2014] EWCA Civ 906 and *Mitchell v News Group Newspapers Ltd.* [2013] EWCA Civ 1537). He submitted that, at the relevant time, even if an applicant had been aware of both form N208 and form N208PC, he would have been faced with a choice, but would have had to use form N208 if he was to avoid being in breach of the Civil Procedure Rules. Form N208 would have been "a valid claim form". But even if it were not, an application for relief from sanctions would almost certainly succeed. Either form would have been "equally acceptable" or, if not, the use of the incorrect form would be no more than a "minor infringement" of the Civil Procedure Rules. Mr Croke made several further submissions, which in the circumstances I do not think we need to address. He made it clear, however, that he "welcomes" the Secretary of State's concession on this ground of the appeal.

58. Without reaching a concluded view on the issue here – which we need not do if the appeal fails on the first issue, as I think it must – it seems clear that there is, as Mr Simons has accepted, some similarity between what happened when Mr Croke went to the Administrative Court Office on the afternoon of 24 March 2016 and the facts in *Yadly Marketing*. In *Yadly Marketing* the would-be appellant was twice wrongly rebuffed by the staff in a court office when it sought to lodge an appeal on the last day of the relevant period. The circumstances here are similar, though not precisely the same. It has not been suggested that the claim form Mr Croke had first attempted to file lacked the essential content, including the grounds on which the challenge was made. And it is also clear, and conceded, that he used a form – form N208 – that he was entitled to use. Therefore, if Thursday, 24 March 2016 had been the last day of the statutory six-week period – which I do not accept – there would have been force in the submission that the refusal of the court office staff to permit Mr Croke to lodge his application on form N208 amounted to "exceptional circumstances" justifying an extension of time. A similar submission

succeeded on the facts in *Yadly Marketing*. It might also be said that the validity of the application, had it in fact been issued on the wrong claim form, would have been for a judge to decide, not a matter for the staff in the Administrative Court Office.

59. These thoughts might turn out to be useful in a case where the facts are sufficiently similar, and the issue has to be decided. Here, however, it does not. I would therefore prefer to say nothing more, bearing in mind that the facts of every case will be different.

Conclusion

60. For the reasons I have given, I would dismiss the appeal.

Lord Justice Irwin

61. I agree.

Lord Justice Baker

62. I also agree.