CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41658/98
by Lilian GREEN
against the United Kingdom

The European Court of Human Rights, sitting on 3 July 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 30 January 1997 and registered on 11 June 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is a United Kingdom national, born in 1930 and living in Harrogate.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 17 October 1988, after a marriage of thirty-four years, the applicant's husband, Mr G., petitioned for divorce. A decree nisi was granted on 6 February 1989. The applicant meanwhile had been seeking legal advice from solicitors concerning *inter alia* whether to contest the divorce and ancillary matters.

Legal aid was granted to the applicant on a limited basis on 29 March 1989 concerning ancillary relief. On the same date the decree absolute of divorce was granted.

On 11 April 1989, Mr G. swore an affidavit as to his financial circumstances. On 28 April 1989, the applicant swore an affidavit in support of her application for ancillary relief and in reply to Mr G.'s affidavit.

Directions for the conduct of the dispute on ancillary matters were given by the County Court on 10 May 1989. Lists of documents were provided in late May-early June 1989. There was correspondence between the applicant's solicitors and Mr G. about a possible settlement. Her solicitors stated that they were willing to settle for a capital sum and 400 pounds sterling (GBP) per month as maintenance. Mr G.'s counter offer was GBP 60,000 out of the sale of the matrimonial home and GBP 275 per month. The applicant rejected the counter offer.

The hearing date was set for 3 August 1989. The applicant was requested by the solicitor to attend to meet counsel before the hearing began. Her solicitor took attendance notes of this meeting which took place shortly before the hearing was due to begin. According to this note, a decision was reached that it be more advantageous for the applicant to effect a clean break and obtain an enhanced interest in the proceeds of sale of the matrimonial home than pursue future periodic payments. After negotiation with Mr G., a figure of GBP 72,000 was agreed upon (some 68% of the valuation of the property) and that Mr G would pay the costs. A consent order was made by the court reflecting these terms under section 33A(1) of the Matrimonial Causes Act 1973.

Shortly afterwards, the applicant expressed dissatisfaction with the terms of the settlement. She sought legal advice concerning the possibility of appealing the consent order and was advised by counsel that there were no grounds of appeal. The applicant wrote letters of complaint to the County Court about the order and was informed that she had agreed to the Consent

Order. She made complaint to the Solicitor's Complaints Bureau in or about 1990. On 25 February 1991, after inviting her solicitors comments, the SCB concluded that the applicant had been "properly represented" and had reached her decision with the benefit of full legal advice. On 16 April 1991, the applicant complained to the Legal Services Ombudsman, who in March 1992 concluded that no further action was justified.

In or about July 1992, the applicant instructed new solicitors IM, with a view to commencing proceedings against her former solicitors for negligence in advising her to accept the settlement, which had caused her significant loss, *inter alia*, of pension and inheritance entitlements which had not been taken properly into account. Legal aid was granted in or about July 1992. Counsel advised at this stage that she had good prospects of success in establishing negligence and would probably recover some GBP 27,500 to 34,000 damages.

A writ was issued against the former solicitors in the High Court on 3 August 1994. In their defence, served in February 1995, the former solicitors claimed *inter alia* that they had relied on and been entitled to rely upon advice of competent and properly instructed counsel, Ms A.

In February 1996, the former solicitors made a payment into court of GBP 10,000. The applicant was informed that if the court later awarded a smaller sum, she would liable in costs for the intervening period. Counsel advised that her prospects of securing more in court were good and the payment into court was not accepted. A further offer of settlement of GBP 20,000 plus costs was also rejected. Counsel advised the applicant at that stage that she should not settle for less than GBP 30,000.

On 19 May 1997, the former solicitors increased the payment into court to GBP 25,000.

On 10 July 1997, the Court of Appeal decided, in the case of *Kelley v. Corston*, that, for public policy reasons, a barrister was immune from suit for negligence in the conduct of a case where a settlement had been reached and a consent order made under the 1973 Act, which by law required the approval of the court.

On 15 August 1997, the former solicitors sent a copy of the decision to the applicant's solicitors IM. On 28 August 1997, counsel advised the applicant to accept the payment into court of GBP 25,000. He noted that the Court of Appeal's judgment "has, to put it mildly, flaws in its reasoning". However despite his strong doubts that it had been correctly decided, it had to be accepted that on one view of the Court of Appeal judgment, and if it was not overturned on appeal to the House of Lords, the applicant would not be entitled to any compensation at all. Having regard to the new element of uncertainty introduced by *Kelley v. Corston*, he considered that it was in her best interests to accept the payment into court.

On 29 August 1997, IM solicitors sent the applicant a copy of the advice and informed her that a refusal to accept the advice was likely to lead to a discharge of the legal aid certificate.

Reluctantly, the applicant accepted the payment-in and the claim against her former solicitors was struck off.

B. Relevant domestic law and practice

Advocates' immunities from suit and abuse of process

For more than two centuries, barristers enjoyed an immunity from actions in negligence. In the case of *Rondel v. Worsley* ([1969] 1 A.C. 191) the House of Lords unanimously upheld the immunity for alleged negligent conduct of a case in court on considerations of public policy on the basis inter alia that "it would be a retrograde development if an advocate were under pressure unwarrantably to subordinate his duty to the court to his duty to his client" and also due to the undesirability of relitigating issues already decided. Though their Lordships were not unanimous about the exact scope of the immunity, they agreed that it should in general terms be confined to acts concerned with the conduct of litigation and should not apply to non-contentious work.

The immunity was again considered by the House of Lords in the case of *Saif Ali v. Sydney Smith Mitchell & Co*. ([1980] A.C. 198), where the majority, applying the test from the *Rees v. Sinclair* case in New Zealand, found that the immunity only applied to work so intimately connected with the conduct of the case in court so as to amount to a decision as to how it would be conducted at the hearing. A failure by a barrister to advise parties about the expiry of a limitation period therefore was found to fall outside the immunity. Doubts were further expressed as to the various rationales given for the immunity.

Another line of authority applied the doctrine of abuse of process to avoid relitigating between different parties issues already decided by a court of competent jurisdiction or, as sometimes described, to avoid a collateral challenge to an earlier judgment or order of the court (see e.g. *Hunter v. Chief Constable of the West Midlands* [1982] A.C.529). This had been applied in a number of cases brought against lawyers, for example, in *Somasundaram v. Julius Melchior* ([1988] 1 WLR 1394), where the plaintiff's claim against solicitors for wrongly pressurising him to plead guilty in a criminal case was an abuse of process as the action necessarily involved an attack on the conviction and sentence imposed on him by the trial judge and upheld by the Court of Appeal.

In the case of *Kelley v. Corston* ([1998] QB 686, judgment given on 10 July 1997), on the day of a hearing of a matrimonial ancillary application, the plaintiff's barrister had advised her to reach a settlement

agreement and this was embodied in a consent order by the court. The plaintiff brought proceedings in negligence against the barrister for negotiating and advising her to accept a settlement which left her unable to finance the mortgage repayments on the matrimonial home after it had been transferred into her name. The Court of Appeal upheld the decisions striking out the action on the basis of forensic immunity of advocates. Though Judge LJ considered that the settlement of litigation was not normally encompassed within the principles on which the immunity of the advocate was based, and that there were no public policy considerations justifying a blanket immunity from suit for negligent advice which results in the settlement of a claim, he considered that, where the court had given approval of the settlement and assumed responsibility for the merits of the consent order, the advocate could claim immunity from suit for his role. Pill LJ and Butler Sloss LJ appeared to consider, though with different reasoning, that a consent order made and approved under the Act of 1973 had such an intimate connection with the conduct of the case in court that it came within the *Rees v. Sinclair* test.

The *Kelley v. Corston* judgment was distinguished shortly afterwards in the case of *Frazer-Harris v. Scholfield Roberts and Hill* (QBD, 13 May 1998) where the plaintiff was suing her solicitors for their advice to settle her ancillary application against her husband at the court door. Toulson J had held that public policy did not require protection of solicitors for negligence in relation to their conduct before a case reached court. Although the court had approved the consent order, the wife had alleged that, due to the solicitors' negligence, the court had given its approval without all the relevant facts. If through the negligence of a party's legal adviser a judge was not properly informed, and therefore exercised his discretion on a flawed basis, it was not contrary to public policy to allow the wife to sue the legal adviser for negligence.

Both the barristers' immunity and issues concerning abusive challenge of previous court decisions and orders were considered in the case of *Arthur J.S. Hall and Co. v. Simons and Others.* This concerned three cases in which clients raised claims in negligence against firms of solicitors in respect of settlements of claims resulting in consent orders by the court and where the solicitors relied on the immunity of advocates from suit.

On 14 December 1998, the Court of Appeal found that the immunity did not apply in these cases. It held that there was no general rule that counsel was, or was not, immune from liability in settling a case or in advising a client to settle. The existence of the immunity depended on the facts of the particular case and whether public policy required it in those circumstances. It found that the *Kelley v. Corston* case was a very difficult case to follow and apply, or to derive any clear principle from. On 20 July 2000, by a majority, the House of Lords held that the solicitors were not entitled to rely on an immunity in these civil actions and that there were no longer any

public policy considerations requiring that such an immunity be retained. Several of their Lordships commented that they would be in favour of some form of the immunity remaining for advocates in criminal cases.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention of a denial of access to court.

THE LAW

The applicant complains that she has been denied access to court contrary to Article 6 § 1 of the Convention, which provides as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

The Government submit that the applicant's case was not struck out as was the case with the applicants in the Osman case (Osman v. the United Kingdom judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) and that no judicial decision closed the applicant's access to court before a full determination of the merits had occurred. Even if there had been an application to strike out, it is unlikely that this would have been successful, as shown by the decisions taken by the courts in *Frazer Harris* and *Arthur J.S. Hall* (see above), where not long after the applicant's case it was found that forensic immunity did not apply in such cases. In those circumstances, it was also unlikely that the applicant's claim would have failed, even following a full hearing on the merits, on the basis of any claim by the solicitors of abuse of process or forensic immunity.

The Government also submit that there was no question of there being a blanket rule of forensic immunity and that the case-law indicated that each claim for immunity had to be judged on the facts of the particular case. The applicant's case was concluded, however, following a decision by her to accept the GBP 25,000 paid into court, which was only GBP 5,000 below what her counsel had advised her to settle for before the Court of Appeal decision in *Kelley v. Corston*. She had not been advised that her case was doomed to fail because of that case but that settlement at this level, given the inevitable uncertainties of litigation, was reasonably advantageous to her, realistic and economically justifiable. She cannot therefore claim to be a victim of any violation of Article 6 § 1 of the Convention.

The applicant submits that she was prevented from suing her former solicitors by the Court of Appeal's decision in *Kelley v. Corston*, which led her legal advisers to insist, without giving her ample time or explanation, that she settle the case or lose her legal aid. In her view the *Kelley v. Corston* judgment purported to determine that all legal advisers were immune from suit and thus blocked access to court. She never obtained a hearing in front of a judge of her claims that her former solicitors had acted with gross negligence and deception causing her severe financial loss. She also complained strongly about the conduct of the barrister, Ms A., who advised settlement, without advising the applicant of her rights, misleading her and ignoring her protests.

The applicant submits that there was no justification for any immunity for her former solicitors in this case. It was against public interest to block all negligence actions against advocates or legal representatives. She also expressed strong criticisms of the way in which the *Kelley v. Corston* case was decided, as the facts were very weak and not at all related to her own. She considers that no convincing explanation has been given for why she was prevented from obtaining a hearing of her own case, noting that her counsel originally had no doubts about the success of her claims and that the former solicitors made a series of payments into court. The courts in her opinion had been instrumental to a policy of expropriation of her assets and had acted arbitrarily and oppressively.

The Court recalls that Article 6 § 1 of the Convention guarantees the right of access to court to an applicant who has, at least on arguable grounds, claims concerning a civil right or obligation (see amongst many authorities, the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, § 44, the Tre Traktörer v. Sweden judgment of 27 July 1989, Series A no. 159, p. 18, § 40, and *Z. and Others v. the United Kingdom*, no. 29392/95, [GC], to be published in ECHR 2001, §§ 91-92). In this case, the applicant had brought an action in negligence against her former solicitors for the financial damage which she alleged had flowed from their careless advice and conduct of her case concerning her claims to financial relief on divorce. It is not disputed that the "civil rights" of the applicant were in issue and that therefore Article 6 § 1 is applicable. The question remains whether the applicant has been, in any practical or legal sense, barred from access to court to obtain a determination of those civil rights.

The Court notes that the applicant's claims did not come before the High Court for hearing because she agreed to settle her claims for GBP 25,000 plus costs. Where an applicant accepts a sum of compensation in settlement of claims in court, it is generally the case that she will no longer be able to claim to be a victim in respect of those matters (*mutatis mutandis*, nos. 5577-5583/72, Donnelly and others v. the United Kingdom, decision of

15 December 1975, DR 4, p. 4, at pp. 86-87, and no. 24520/94, Caraher v. the United Kingdom, decision of 11 January 2000, to be published).

The applicant in this case argues that she had no choice but to settle, due to the effect of the Court of Appeal decision in *Kelley v. Corston* and the advice given to her by her solicitors in the light of that decision. It appears however that the *Kelley v. Corston* judgment, while it held that an immunity applied to advice given by the barrister in that case, did not lay down any general or blanket immunity for advocates or solicitors in advising settlements of court cases. That this was an area of law in development is apparent from the series of cases following from *Rondel v. Worsley* (see the Relevant Domestic Law and Practice above), and it is significant that, shortly after the applicant settled her own case, the courts were distinguishing the Court of Appeal judgment in *Kelley v. Corston*, and cases were sent up to the House of Lords for it to rule authoritatively on the application of forensic immunity in such circumstances.

It was not therefore the case that the applicant's claim had been barred by any blanket immunity being imposed by the Court of Appeal. The judgment in *Kelley v. Corston* was a decision which sat uneasily with the trend of case-law and the applicant's counsel criticised it strongly in his advice. It was nonetheless a factor, militating against the prospects of success of the applicant's own claims, which had to be taken into account in assessing whether or not she accept the payment into court and avoid the uncertainties of continued litigation. As the Government pointed out, the sum of GBP 25,000 which she accepted was not far below the sum of GBP 30,000 which counsel had previously advised would be worth settling for even before the *Kelley v. Corston* case.

The applicant also argued that she had no choice whether to accept the payment into court as her lawyers advised her that she should and, in the light of that advice, it was probable that her legal aid would have been withdrawn. The Court observes however that there is no right as such to obtain legal aid in civil cases. The applicant was awarded legal aid for the purposes of instituting her action and cannot claim an absolute right to have it continued, whatever the changing circumstances of the case. In any event, it would have been open to her to make submissions to the Legal Aid Board that it should have been continued or to continue as a litigant in person. Insofar as the applicant appears to blame her lawyers for taking this stance on accepting the payment into court, this is a complaint directed against her legal representatives. There is no indication in the circumstances of the case that their conduct in weighing the economic benefit of the action and the risks inherent in pursuing the claims further (if the court had awarded less than the payment into the court the applicant would have been liable in costs, while an adverse decision following the recent precedent of *Kelley v. Corston* might have required prolonged litigation on appeal, with further

uncertainty and increased costs) could be regarded as attracting the responsibility of the Contracting State.

The Court concludes that the acceptance by the applicant of the payment into court was a tactical step in the litigation which cannot be regarded as imposed by the Court of Appeal decision in *Kelley v. Corston* or the existence of any absolute bar to actions in negligence against legal advisers. The facts of the case do not disclose any restriction on the applicant's access to court and the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President