CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38199/97
by Mohammed PATEL
against the United Kingdom

The European Court of Human Rights, sitting on 19 February 2002 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Sir Nicolas BRATZA,
Mr GAUKUR JÖRUNDSSON,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 16 May 1997 and registered on 14 October 1997,

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, Mohammed Patel, is a United Kingdom national, who was born in 1955 and lives in London. He was represented before the Court by Mr D. Machover, a solicitor practising in London.

A. The circumstances of the case

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

The applicant was employed as an accountant in the Muslim Commercial Bank in London. On 4 February 1987, he was arrested on suspicion of prejudicing a drug trafficking investigation, contrary to section 37(1) of the Drug Trafficking Act 1986, by disclosing to customers the existence of such an investigation. Bail was granted.

In April 1987, the applicant met a Mr Y. at his home, who subsequently appeared as the applicant's counsel at trial. He claims that he instructed Mr Y. that significant parts of two interviews with the police, relied on by the prosecution as containing admissions, had never taken place and that the police evidence was fabricated. Mr Y. advised him that it would be likely to antagonise the judge to accuse the police of lying.

The applicant's trial took place in November 1987 before the Crown Court. When giving evidence, he told the jury that he had no recollection of the parts of the interviews which were incriminating. He was convicted on 27 November 1987 and sentenced to four years' imprisonment.

Leave to appeal was rejected by a single judge of the Court of Appeal on 21 February 1989 and a renewed application by the full court on 27 March 1990. The grounds for the latter, which were not drawn up by Mr Y. but another barrister, contained reference to alleged incompetence by Mr Y., *inter alia*, that Mr Y. had failed to make an application to exclude the police interviews pursuant to sections 76 or 78 of the Police and Criminal Evidence Act. It appears however that, following a letter written by Mr Y., which was also before the Court of Appeal, the applicant's counsel accepted Mr Y.'s assertions that the applicant's instructions throughout had been that he did not recall the incriminating parts of the interviews and not that these parts had been fabricated.

In 1993, the applicant's solicitors applied to the Secretary of State for the case to be referred back to the Court of Appeal. A complaint was also made to the Police Complaints Authority. After a long enquiry, the PCA concluded that there were no grounds for criminal or disciplinary proceedings against the police officers concerned. However, further relevant material did emerge during the investigation which was brought to the attention of the Secretary of State.

Meanwhile, on 2 June 1993, the applicant instituted proceedings for negligence against Mr Y. concerning his alleged incompetence. He claimed principally that:

1. Mr Y. recommended himself to act in the case which he was not professionally competent to conduct;

2. Mr Y. was negligent in preparing the case for trial and in the advice which he gave;

3. Mr Y. was negligent in the conduct of the case in court;

4. Mr Y. gave incorrect and misleading information to the other lawyers involved in the appeal and to the Court of Appeal.

The applicant was granted legal aid for the proceedings.

On 3 March 1995, the High Court, on Mr Y.'s application, struck out the allegations under heads (2) and (3) above on the basis that they were covered by the immunity rule enunciated in *Rondel v. Worsley* as concerning acts in court and matters intimately connected with the conduct of the defence in court. It stayed the remaining heads pending the determination of the applicant's application for his criminal case to be referred back to the Court of Appeal. The order specified that the defendants' costs were in cause and that the parties were at liberty to apply generally or specifically to amend the pleadings or to strike out further.

On 22 May 1996, the Court of Appeal rejected the applicant's appeal against the High Court decision. It commented in strong terms that the applicant had, on his own admission, committed perjury in giving evidence at trial, contrary to the version of events which he now gave concerning the police interviews. It noted that the applicant's counsel conceded that the case of *Rondel v. Worsley* precluded him from maintaining the claims of negligence at the actual trial. The Court of Appeal agreed with the High Court judge that the allegations of negligence intimately connected with the conduct of the applicant's defence at trial should also be struck out. It also upheld the stay of the two remaining heads of negligence, noting that if the criminal conviction was quashed this would remove an important objection to the continuation of the civil proceedings, as the prospect of inconsistent decisions of courts of competent jurisdiction would disappear.

The applicant's further application to the House of Lords was dismissed on 27 November 1996.

In November 1996, in light of the new material which emerged during the investigation by the Police Complaints Authority, the Secretary of State referred the applicant's case to the Court of Appeal under section 17(1)a of the Criminal Appeal Act 1968.

In its judgment dated 11 May 2000, the Court of Appeal noted that the prosecution admitted that there was no evidence to support the claim by a police officer at trial that enquiries in Portugal showed that the applicant had made disclosures to the five individuals whose bank accounts were the subject of enquiries by the police. In light of forensic evidence, the

prosecution also admitted that part of the police interview had been re-written, though this was alleged to have been due to an error by the scribe and not an attempt at fabrication. The Court of Appeal noted that Mr Y. agreed that in giving instructions the applicant had denied that the interviews had taken place as claimed by the police and had claimed that the police had fabricated the evidence, counsel explaining that he may well have advised the applicant that an attack on the truthfulness of the police officers at trial might have alienated the judge and increased his sentence if convicted. As the forensic evidence supported the applicant's claims of fabrication and the other evidence in the case had fallen away, the Court of Appeal found that his conviction was unsafe and the conviction was quashed.

In June 2000, the applicant applied to the Home Office for compensation for his wrongful conviction pursuant to section 133 of the Criminal Justice Act 1988.

By letter of 6 February 2001, the Home Secretary decided to make, without admission of liability, a payment to the applicant. The amount was to be determined by the Home Secretary after consultation with an independent assessor and on the basis of detailed information about costs and expenses to be submitted by the applicant and his solicitors.

On 16 July 2001, the applicant's solicitors informed the Court that the parties to the civil litigation had agreed for the proceedings to be discontinued with no order for costs, save for the legal aid assessment of the applicant's costs.

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 the 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.

However, 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 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. On 20 July 2000, 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. A majority also considered that public policy considerations no longer justified an immunity in relation to criminal cases, commenting that

the public interest was sufficiently protected by the abuse of process principles set out in the *Hunter* line of authority mentioned above.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention of a denial of access to court in that his civil claims against Mr Y. were struck out on the basis of barristers' immunity.

THE LAW

The applicant invokes Article 6 § 1 of the Convention, claiming that he has been denied access to court in the determination of his civil claims against his counsel, Mr Y. This provides as relevant:

> "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. ..."

A. The parties' submissions

The Government submit that the applicant's complaints fail for non-exhaustion of domestic remedies. They argue that since the Court of Appeal quashed the applicant's conviction there is no bar to the applicant pursuing the heads (1) and (4) of his civil claims which were previously stayed by the High Court. As regards the heads (3) and (4) which were struck out by the High Court as covered by the so-called barristers' immunity, they refer to the recent House of Lords judgment in the case of *Arthur J. S. Hall and Co. v. Simons and Others* (20 July 2000), where the immunity in civil cases was unanimously swept away and the majority held that public policy grounds were no longer sufficient to support immunity even in criminal cases. In those circumstances, they submit that the applicant could seek, *inter alia,* to re-amend his statement of claim to include these grounds in the stayed action. In any such proceedings, he would also be able to refer to Article 6 § 1 of the Convention, having regard to the entry into force of the Human Rights Act 1998.

The applicant submits that he can still claim to be denied access to court, notwithstanding the developments referred to above, as he has been denied an adjudication on the facts of the negligence of Mr Y. in his conduct of his defence in court which resulted in his conviction. This was not dealt with in the decision of the Court of Appeal quashing his conviction. Though the

House of Lords decision has remedied the problem for future complainants, he disputes that he could revive the heads (2) and (3) of his civil action, stating that he would not obtain legal aid due to the award of compensation pending from the Home Office. He also refers to the fact that there is an outstanding costs order made against him by the High Court in the strike out proceedings. In these circumstances, the respondent Government have not, in his view, showed that the alleged remedy of pursuing his civil claims was practical and effective. Furthermore, special circumstances applied in his case as, through no fault of his own, he has had to wait an unreasonable period of time to be given any access to an allegedly adequate domestic remedy.

B. The Court's assessment

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 his former counsel, Mr Y., for the damage which had allegedly flowed from his careless advice and conduct of the trial which resulted in the applicant's conviction and imprisonment. 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 recalls that the applicant sought to pursue proceedings in negligence against his former counsel concerning matters relating to his criminal trial, conviction and appeal. Heads (1) and (4) of those complaints, which related to matters outside the conduct of the defence in court, were stayed pending the rehearing of the applicant's appeal against conviction and, following the quashing of that conviction, the applicant appears to accept that it would have been possible to pursue those heads in the civil courts. He maintains however that he has been denied access to court concerning the heads of negligence (2) and (3) which were found by the High Court to be intimately connected with the conduct of the case in court and thus struck out on the basis of barristers' immunity.

The Court observes that the Government argue that, in light of the recent House of Lords case in which barristers' immunity in its old form has been abolished, it would have been open to the applicant to amend his pending civil claims to take this into account. The applicant accepts that this decision

remedies matters for future claimants but considers that he remains a victim because it would be unrealistic to require him to revive matters struck out by the High Court as he would be unlikely to receive legal aid for the claims due to the imminent receipt of compensation from the Home Secretary.

The Court considers that, following the quashing of his conviction by the Court of Appeal on 11 May 2000, the applicant's stayed action before the High Court would have afforded him the opportunity of bringing before that court the claims of alleged negligence of his former counsel. This would have included the heads (1) and (4) to which the criminal conviction no longer posed any obstacle, and it would also have been possible to apply to amend the statement of claim to cover the alleged negligent conduct in court which was no longer covered by barristers' immunity. The Court notes that the applicant's principal objection to the latter possibility is not based on any lack of reasonable prospect of success on legal or factual grounds, but rather on the consideration that legal aid might be refused. 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 his 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 him to make submissions to the Legal Aid Board that it should have been continued or, potentially, to continue as a litigant in person.

As regards the applicant's reference to a costs order made against him earlier in the proceedings, the Court notes that the applicant has recently settled his substantive action against Mr Y., agreeing for it to be discontinued on the basis of no order of costs and for his legal aid costs to be assessed. It is apparent that the applicant has freely chosen to end the litigation. It may well be that he considered that this was the most practical option open to him, weighing the economic benefit of the action and the risks inherent in pursuing the claims further, in particular since he has obtained the quashing of the criminal conviction and has the prospect of obtaining substantial compensation for the damage which he has suffered. Nevertheless, it remains the case that he could have continued with his claims of negligence in the civil courts. As in the context of Article 35 § 1 of the Convention, the existence of practical difficulties or doubt about the outcome of proceedings is not sufficient in itself to deprive a particular court remedy of its effectiveness or, for the purposes of Article 6 § 1 of the Convention, to give rise to a denial of access to court.

The Court concludes, therefore, that the facts of the case do not disclose any restriction on the applicant's access to court. It follows that the application must be rejected as being 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