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. 33221/96
by Michael REID
against the United Kingdom

The European Court of Human Rights, sitting on 26 June 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 29 May 1996 and registered on 27 September 1996,

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 Commission's partial decision of 9 September 1998,

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, Michael Reid, is a United Kingdom national, born in 1969 and living in Romford, Essex. He is represented before the Court by Mr S. Marine, a lawyer practising in London.

A. The circumstances of the case

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

In his statement of 16 February 1988, taken by the police, R. had stated that a gold chain had been stolen from him by a person who he knew as Michael Reid. He described Michael Reid as "about 5' 10'' he has got a flat top afro hair and is slim".

On 17 February 1988, the applicant was arrested and charged with robbing R. of his gold chain. In an interview with the police the same day, he had admitted that he had been at the premises known as "Bee-Jays" when the incident occurred on 7 February 1988. He alleged that another man called "Blue" had taken the chain and that he had talked to R., saying that he would try to get it back for him.

On 18 February 1988, the applicant was remanded in custody.

On 29 March 1988, the committal proceedings took place before the Ilford Magistrates Court. The charges were read and explained to the applicant, who was represented. R. gave evidence and described the person who robbed him as being black, pretty tall and having a flat-top hair cut. He however stated that, "At the time I didn't know the person who robbed me; I'd never seen him before at that time." Questions were put to R. in cross-examination by the applicant's counsel. The applicant was asked whether he wished to say anything in answer to the charge, to which he made no reply. The applicant was also given an opportunity to give evidence and to call witnesses. He did not do so. The applicant was committed for trial and detained on remand by order of the magistrates.

On 4 July 1988 at the trial at Snaresbrook Crown Court, prosecuting counsel from the Crown Prosecution Service ("CPS") offered no evidence in support of the prosecution. According to the statement of claim issued by the applicant in later civil proceedings, prosecuting counsel informed the court that he had only just received the papers and that there were problems with them, referring to the identification of the applicant. After a short adjournment he asked for time to take a further statement from the victim R. He then returned to the court and offered no evidence against the applicant. The applicant was released from custody.

On 6 June 1994, the applicant issued proceedings against the CPS claiming damages for negligence. He alleged that the prosecution had failed to take reasonable care in assessing whether there was, at the committal proceedings on 29 March 1988, sufficient evidence against the applicant.

On 3 January 1995 the CPS issued an application to strike out the applicant`s claim on the ground that it disclosed no reasonable cause of action.

On 9 June 1995 a Deputy High Court Judge struck out the applicant`s statement of claim as disclosing no reasonable cause of action, following the Court of Appeal`s case-law to the effect that there was no general duty of care owed by the Crown Prosecution Service in relation to its prosecutions (*Elguzouli-daf v. the Commissioner of Police for the Metropolis* [1995] QB 335, see below in Relevant Domestic Law and Practice). The judge was of the opinion that the applicant`s case involved "a point of law of general importance" and issued a certificate, pursuant to Section 12(3)(b) of the Administration of Justice Act 1969 entitling the applicant to "leapfrog", i.e. to petition the House of Lords directly.

On 24 July 1995 the applicant petitioned the House of Lords for leave to appeal. Leave to appeal was refused on 30 November 1996.

B. Relevant domestic law and practice

Actions in negligence

In England and Wales, there is no single tort which imposes liability to pay compensation for civil wrongs. Instead there are a series of separate torts, for example, trespass, conversion, conspiracy, negligence and defamation.

Negligence arises in specific categories of situations. These categories are capable of being extended. There are three elements to the tort of negligence: a duty of care, breach of the duty of care and damage. The duty of care may be described as the concept which defines the categories of relationships in which the law may impose liability on a defendant in damages if he or she is shown to have acted carelessly. To show a duty of care, the claimant must show that the situation comes within an existing established category of cases where a duty of care has been held to exist. In novel situations, in order to show a duty of care, the claimant must satisfy a threefold test, establishing that:

– damage to the claimant was foreseeable;
– the claimant was in an appropriate relationship of proximity to the defendant; and
– it is fair, just and reasonable to impose liability on the defendant.

These criteria apply to claims against private persons as well as claims against public bodies. The leading case is *Caparo Industries v. Dickman* ([1990] 2 AC 605).

If the courts decide that as a matter of law there is no duty of care owed in a particular situation, that decision will (subject to the doctrine of

precedent) apply in future cases where the parties are in the same relationship.

The decision in Elguzouli-daf

In the case of *Elguzouli-daf v. the Commissioner of Police for the Metropolis* [1995] QB 335, the Court of Appeal decided that no duty of care in negligence was owed by the Crown Prosecution Service ("CPS") to defendants in fulfilling its statutory duty in prosecuting crime.

The case concerned two plaintiffs, who had been arrested, charged and arrested in custody for serious offences and after periods of 22 and 85 days respectively the CPS had discontinued the proceedings against them. They had instituted proceedings against the CPS claiming *inter alia* that the CPS had been negligent in failing to act with reasonable diligence in concluding that they were either innocent/or the prosecution bound to fail. The claims were struck out by the judge on the basis that they disclosed no reasonable cause of action. Their appeals to the Court of Appeal were dismissed. In the leading judgment, Lord Justice Steyn referred to the three criteria laid down in *Caparo* (cited above) and had regard to the considerations as to whether the CPS should be treated differently in tort from private citizens and corporations. He noted that the CPS was a public law enforcement agency acting for the public as a whole and that, having regard to the torts of malicious prosecution and misfeasance in public office, a citizen aggrieved by a prosecutor's decision had potentially extensive private law remedies for a deliberate abuse of power.

> "That brings me to the policy factors which, in my view, argue against the recognition of a duty of care by the CPS to those it prosecutes. While it is always tempting to yield to an argument based on the protection of civil liberties, I have come to the conclusion that the interests of the whole community are better served by not imposing a duty of care on the CPS. In my view, such a duty of care would tend to have an inhibiting effect on the discharge by the CPS of its central function of prosecuting crime. It would in some cases lead to a defensive approach by prosecutors of their multifarious duties. It would introduce a risk that prosecutors would act so as to protect themselves from claims of negligence. The CPS would have to spend valuable time and use scarce resources in order to prevent law suits in negligence against the CPS. It would generate a great deal of paper to guard against the risks of law suits. The time and energy of CPS lawyers would be diverted from concentrating on their prime function of prosecuting offenders. That would be likely to happen not only during the prosecution process but also when the CPS is sued in negligence by aggrieved defendants. The CPS would be constantly enmeshed in an avalanche of interlocutory civil proceedings and civil trials. That is a spectre that would bode ill for the efficiency of the CPS and the quality of our criminal justice system. …
>
> Recognising that individualised justice to private individuals or trading companies who are aggrieved by careless decisions of CPS lawyers militates in favour of the recognition of a duty of care, I concluded that there are compelling considerations, rooted in the welfare of the whole community, which outweigh the dictates of individualised justice. I would rule that there is no duty of care owed by the CPS to

> those it prosecutes. In so ruling I have considered whether a distinction between operational and discretionary lapses, with potential liability in the former but not the latter, should be made. Whatever the merit of such a distinction in other areas of the law, I would reject it in regard to the CPS as impractical and unworkable and not capable of avoiding the adverse consequences for the CPS on which I have rested my decision. Subject to one qualification, my conclusion that there is no duty of care owed by the CPS to those it prosecutes is intended to be of general application. The qualification is that there may be cases of which *Welsh v. the Chief Constable for the Merseyside Police* [1993] 1 All E.R. 692 was an example, where the CPS assumes by conduct a responsibility to a particular defendant… And it is trite law that such an assumption of responsibility may generate legal duties. …"

Striking out procedure

At the relevant time, Order 18 rule 19 of the Rules of the Supreme Court provided that a claim could be struck out if it disclosed no reasonable cause of action. This jurisdiction has been described as being reserved for "plain and obvious cases", in which a claim was "obviously unsustainable".

In applications to strike out, the courts proceeded on the basis that all the allegations set out in the claimant's pleadings were true. The question for the courts was whether, assuming that the claimant could substantiate all factual allegations at trial, the claim disclosed a reasonable cause of action.

The striking out procedure, now contained in the Part 3.4(2) of the Civil Procedure Rules in force since 1999, is regarded as an important feature of English civil procedure, performing the function of securing speedy and effective justice, *inter alia* by allowing it to be decided promptly which issues need full investigation and trial and disposing summarily of the others. By means of this procedure, it can be determined at an early stage, with minimal cost to the parties, whether the facts as pleaded reveal a claim existing in law.

The Crown Prosecution Service ("CPS")

The CPS is a statutory public law enforcement agency set up by the Prosecution of Offences Act 1985 to prosecute criminal offences. It is an autonomous and independent body which reviews police decisions to prosecute and conducts prosecutions on behalf of the Crown. The CPS is headed by the Director of Public Prosecutions ("the DPP") and is answerable to Parliament through the Attorney General.

The conduct of Crown Prosecutors is regulated by the Code for Crown Prosecutors, issued under section 10 of the 1985 Act. Paragraph 10 provides that review of the police decision to prosecute is a continuing process, so that Crown prosecutors are required to take into account any change in circumstances.

Before bringing a prosecution, a Crown prosecutor had, at the relevant time, to be satisfied that it fulfilled two sets of criteria set out in the code, firstly concerning evidential sufficiency and, secondly, concerning the

public interest. The first required that that a Crown Prosecutor be satisfied that there was enough evidence to provide a "realistic prospect of conviction". This involved an assessment whether a jury or bench of magistrates, properly directed in accordance with law, would be more likely than not to convict the defendant of the charge alleged. The Crown Prosecutor was required to draw on his experience of how the evidence was likely to "stand up" (paragraph 6). Under the public interest criteria, the Crown Prosecutor had, *inter alia*, to consider the very serious harm the stigma of a conviction could cause very young adults and take into account any change in the complainant/victim's attitude, e.g. the expression of a wish, after the initial complaint, that no action should be taken (paragraphs 8(iii), 8(vii) and 20ff).

COMPLAINTS

The applicant complains, under Article 5 § 1 (c) of the Convention, that he was unlawfully detained after reasonable suspicion of having committed an offence had ceased (after 29 March 1988 at the latest). He claims that although he may have been lawfully arrested as the police may have had, at the time of arrest, a reasonable suspicion that he was guilty of theft, the reasonable suspicion clearly ceased when R. gave evidence at the committal proceedings on 29 March 1988. He complains, under Article 5 § 5 of the Convention that he has been denied a right to compensation for this unlawful detention.

The applicant also contends that he has been denied access to courts to sue the CPS, in contravention of Article 6 § 1 of the Convention, and contends that the limitation imposed by the immunity does not achieve a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

THE LAW

1. The applicant complains that he was held in detention in the absence of any reliable evidence that he had committed an offence, invoking Article 5 § 1 (c) of the Convention.

Article 5 of the Convention provides as relevant:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: …

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence …"

The Government submit that the applicant was brought before a competent legal authority and remanded in custody on the order of the magistrates at his committal hearing. The identification evidence was sufficient to give rise to a *prima facie* case against the applicant as a participant in the robbery. It was incorrect to maintain that no evidence was offered at trial because the identification evidence was unsustainable at the outset. It is not known what problems might have arisen with the evidence at trial - for example, there could have been unwillingness by the key prosecution witness to stand by his previous description.

The Government point out that the applicant's previous arrest records contained descriptions similar to the victim's description. An arrest form dated 27 June 1986 described the applicant as "5ft 9 in, 9 + stone, slim build, hair (description) square cut like Grace Jones". The arrest form in this case described the applicant as "5ft 10in, 10 stone, slim build, hair (description) short afro". At the committal, the applicant heard the description given by the victim but did not claim that it did not match him. The magistrates were in a position (and under a duty) to assess whether the description matched the applicant and plainly were of a view that it did.

The Government maintain that throughout the applicant's detention the CPS had the required reasonable suspicion. He was committed for trial after a full oral hearing at which the evidence against the applicant was put before the magistrates. The victim was cross-examined by the applicant's counsel and no suggestion was put to him that his description did not match the applicant. It would have been normal if such evidence could be challenged for it to be challenged in cross-examination and for there to be defence submissions that the identification evidence was insufficient to warrant committal for trial. No such challenge or submissions were made, the applicant's counsel accepting that the applicant had been present during the robbery but taking issue on whether he had participated in it.

The applicant maintains that the description given by the victim of the robbery, R., on 16 February and 29 March 1988 did not fit him particularly. While he admitted to the police that he was at the premises where the robbery was committed, he had categorically denied that he had made any threats or taken the stolen chain, and it was plain that he had no involvement in the robbery. Insofar as the Government refer to previous police records of his description, this would not have been relevant or admissible evidence in court. His complaint was that the victim's description of the robber was unspecific and could have applied to numerous individuals, and that this was insufficient to justify instituting or continuing the prosecution against him. There were precise and onerous duties on a prosecutor relying on identification evidence - it had to be cogent and reliable and, according to

domestic case-law, where the quality was poor, there had to be some form of corroborative evidence. In this case there was no corroborative evidence and as soon a competent lawyer addressed himself to the question it was apparent that a prosecution was hopeless. The applicant however had been kept in detention for five months before prosecuting counsel examined the evidence.

The applicant submits that there is nothing to support the Government's contention that there was some other explanation for the decision to drop the prosecution besides the fact that the evidence of the victim did not provide any realistic prospect of conviction as the descriptions were unspecific in the sense that they described a very large class of male black persons. As regards the Government's assertion that the problem should have been raised in the committal hearing, he contends that it was neither normal nor prudent to challenge identification evidence as such in cross-examination in the committal hearing as opposed to the circumstances in which it was made. The inadequacy of the identification was a matter of comment and submissions.

The Court recalls that pursuant to Article 5 § 1(c) of the Convention detention pending trial on grounds that the applicant has committed a criminal offence requires that a reasonable suspicion exist that he is implicated in such an offence. The persistence of such suspicions is also a condition for the validity of the continued detention of the person concerned (see, amongst other authorities, Letellier v. France judgment of 26 June 1991, Series A no. 207, p. 18, § 35).

The applicant accepted, in his application form, that at the time of his arrest the police might have had a reasonable suspicion that he was guilty of theft. His main argument is that, following the later statement made by the victim of the offence, it became clear that there was no reliable or cogent evidence identifying him as involved. On that basis, no reasonable suspicion existed from the date of the committal hearing on 29 March 1988 at the latest, whereas he continued to be detained on remand until his trial was discontinued on 4 July 1988.

The Court considers that there was a reasonable suspicion that the applicant had committed the robbery existing until the committal hearing. There was a signed statement by the victim R., naming the applicant as the assailant. The description given by the victim was also consistent with the appearance of the applicant, who had admitted that he was present at the scene of the robbery.

The question remains whether, in the light of the testimony given by R. before the magistrates at the committal hearing, that reasonable suspicion ceased to exist. The notes of evidence of R. indicate that, in describing the occurrence, the victim said that he had not known the identity of his assailant at that time. He described him again but did not mention his name. The applicant submits that the general description given of height, build and

hair style would have been consistent with numerous black men and was unspecific enough to identify the applicant as the offender.

The Court observes that it is not apparent that any questions were put to the victim R. querying why, if he did not know the name of his assailant, he gave the name of Michael Reid to the police. Nor, apparently, were any submissions put to the magistrates that the oral evidence of R. was far too vague to support an identification of the applicant as the assailant.

Any inconsistency in the victim's written statement and oral evidence might perhaps have been reconciled by the fact that the victim learned of Michael Reid's identity after the event - both men referred in their statements to a later meeting shortly after the incident in Bee-Jays. That would explain why the victim gave the applicant's name to the police and why before the magistrates he said that he did not know the assailant's identity at the time. However, no points were raised concerning the sufficiency of R.'s evidence before the magistrates and the matter was not examined at trial as the prosecution decided not to proceed. The Court is therefore not persuaded that at the committal hearing it had become evident that there was no evidence providing reasonable grounds of suspicion that the applicant had been involved in the incident.

The applicant has argued that the only reason for the discontinuance of the trial was the prosecution's belated realisation that the identification evidence was too weak. The Government have stated that other difficulties could have arisen, such as the reluctance of the principal witness to maintain his earlier statement. At the present time, some thirteen years after the event, the Court is not in a position where it can determine the point. The most that can be assumed is that on the morning of the trial the Crown Prosecutor took the view that there were no realistic prospects of obtaining a conviction.

The Court would observe that the test to be satisfied by a Crown Prosecutor in proceeding with a trial, namely that there be a realistic prospect of obtaining a conviction, is not identical to the requirement laid down in Article 5 § 1(c) of the Convention. This latter criterion, which permits arrest and detention on reasonable suspicion that the applicant has committed an offence, is not linked to considerations of eventual success at trial, which assessment may take into account perceptions, based on a prosecutor's experience, as to how evidence may be received by a judge or jury.

The fact therefore that the prosecutor discontinued the proceedings on the basis of no realistic prospects of success is not decisive of the question as to whether there was a reasonable suspicion which had continued to justify the applicant's detention up to that point. The Court recalls that there was a statement to the police by the victim which named the applicant, that the descriptions given by the victim were concordant with the appearance of the applicant, albeit in a general manner, and that the applicant had admitted

being at the scene of the robbery. There was no unequivocal indication in the evidence before the magistrates that the victim was intending to depart from his statement to the police naming the applicant as his assailant.

The Court concludes therefore that the applicant's detention until trial on 4 July 1988 may be regarded as falling within the terms of Article 5 § 1 (c) of the Convention. It follows that his complaints in this respect are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant next complains that he had no enforceable right to compensation for his detention on remand contrary to Article 5 § 5 of the Convention, which provides:

> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The Government submit that an applicant detained in contravention of Article 5 where the CPS failed to discontinue a prosecution on a manifest lack of identification evidence would have private law remedies as there would be a deliberate abuse of power. An applicant could bring an action for damages for the tort of malicious prosecution or for the tort of misfeasance in public office.

The applicant disputes that there were private law remedies available to him. Malicious prosecution was a complex tort, extremely difficult to prove, and provided no real protection against mistaken or careless prosecutions.

The Court notes that Article 5 § 5 applies where there is a breach of one of the other provisions of Article 5 of the Convention. It has rejected the applicant's complaints under Article 5 § 1 and, in those circumstances, he cannot claim a right to compensation under Article 5 § 5. It follows that this complaint must also be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

3. Finally, the applicant complains that he was denied access to court to sue the CPS for negligence, invoking Article 6 § 1 of the Convention which 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. …"

The Government submit that the applicant cannot claim under Article 6 § 1 of the Convention to enjoy a civil right to sue the CPS in negligence as no such right was recognised under domestic law. They refer to the Court's case-law which establishes that Article 6 § 1 cannot be relied on to create civil rights which have no legal basis in the State concerned (e.g. Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, §§ 65-67). Under English law, in order to obtain damages in negligence, a

plaintiff must show the defendant owed him "a duty of care". This is the concept which defines the relationships in which the law may impose liability on a defendant in damages if he is shown to have acted carelessly. Where, as in this situation, no duty of care is held to exist by the courts, there is no basis for awarding damages. The duty of care is a matter of substantive law and not a procedural exclusionary rule.

In any event, the Government argue that in deciding that no duty of care arose, the domestic courts' ruling in the case of *Elguzouli-Daf v. the Commissioner of Police for the Metropolis* [1995] QB 335 pursued the legitimate aim of safeguarding the interests of the public, in the efficient functioning of the prosecution service, in a fair and proportionate manner. The interests of individual defendants were protected by the possibility of obtaining damages for any deliberate misuse of powers, while judicial control of the CPS could be exercised through the bringing of judicial review proceedings. Furthermore, a defendant enjoyed the constant protection of the courts under the criminal procedures to which he was subject, those courts directly supervising the prosecution and to whom the defendant could make applications concerning abuse of procedure or lack of evidence.

The applicant submits that it was reasonably foreseeable that his detention would be unreasonably prolonged by a CPS failure to take reasonable care to assess whether the identification evidence was cogent and reliable. In his case, the CPS argued that there was no general duty of care owed in negligence by them and that they were immune from actions in negligence. The absence of a remedy for the applicant arose because the court held that it was not fair, just and reasonable to impose a duty because of a blanket exclusionary rule of policy. This constituted an arbitrary and disproportionate restriction on access to court. He relies in this context on the case of Osman v. the United Kingdom (judgment of 28 October 1998, *Reports* 1998-VIII, §§ 151-154). He rejects the Government's argument that he is relying on Article 6 to create a new cause of action. In the case of *Elguzouli-daf*, the Court of Appeal were being invited to apply the long-established cause of action of negligence to a new set of circumstances.

In excluding such claims, the applicant argues that the domestic courts failed to strike a fair balance between the public interest and that of individual defendants. There were no other real remedies available to the applicant. The supervision of the CPS referred to by the Government was only formal and theoretical and not effective in practice. A blanket exclusion did not allow the individual circumstances of each case to be taken into account and gave no weight to the principle that wrongs ought to have a remedy. As a result, the CPS was in effect put above the law by an immunity placed on a specific category of persons. This is neither fair nor proportionate.

The Court recalls its constant case-law to the effect that "Article 6 § 1 extends only to *contestations* (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; it does not itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States" (see the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 46, § 81; the Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, p. 70, § 192; the Holy Monasteries v. Greece judgment of 9 December 1994, Series A no. 301, p. 37, § 80). It will however apply to disputes of a "genuine and serious nature" concerning the actual existence of the right as well as to the scope or manner in which it is exercised (Benthem v. the Netherlands judgment of 23 October 1985, Series A no. 97, p. 15, § 32).

In the present case, the applicant was claiming damages on the basis of negligence, a tort in English law which is largely developed through the case-law of the domestic courts. His case was rejected by the High Court on 9 June 1995, the judge applying the Court of Appeal's decision in the case of *Elguzouli-daf* (see Relevant domestic law and practice). This decision had held that the CPS owed no duty of care to those prosecuted, save in limited circumstances where the CPS had assumed specific responsibility. It appears however that prior to this case there was no previous court decision which indicated that liability existed in respect of carelessness by the CPS in the performance of their prosecution functions. It was in the case of *Elguzouli-daf* that the domestic courts were called on to rule whether this situation fell within one of the existing categories of negligence liability, or whether any of the categories should be extended to this situation.

The applicant had lodged his claim prior to the Court of Appeal decision on 16 November 1994 and his case was struck out in June 1995 after the decision was issued. The Court is satisfied that at the outset of the proceedings there was a serious and genuine dispute about the existence of the right asserted by the applicant under the domestic law of negligence, as shown *inter alia* by the grant of legal aid to the applicant and the fact that the *Elgouzuli-daf* case was litigated to the Court of Appeal while his claim was pending. In such circumstances, the Court finds that the applicant had, on at least arguable grounds, a claim under domestic law.

Article 6 was therefore applicable to the proceedings brought by the applicant alleging negligence by the CPS. The Court must therefore examine whether the requirements of Article 6 were complied with in those proceedings.

The Court, in the Golder case, held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and expeditiousness, would be meaningless if there was not protection of the pre-condition for enjoyment of those guarantees, namely, access to court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the

principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36).

Article 6 § 1 "may ... be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 § 1" (see the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, § 44). Where there is a serious and genuine dispute as to the lawfulness of such an interference, going either to the very existence or the scope of the asserted civil right, Article 6 § 1 entitles the individual "to have this question of domestic law determined by a tribunal" (see the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, § 81; see also the Tre Traktörer v. Sweden judgment of 27 July 1989, Series A no. 159, p. 18, § 40).

The right is not however absolute. It may be subject to legitimate restrictions, for example, statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind, etc. (see the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-3, §§ 51-52; the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 80-81, §§ 62-67; the Golder judgment, cited above, p. 19, § 39). Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). If the restriction is compatible with these principles, no violation of Article 6 will arise.

It is contended by the applicant in this case that the decision of the Court of Appeal, finding that the CPS owed no duty of care, deprived him of access to court as it was effectively an exclusionary rule, or an immunity from liability, which prevented his claim being decided on the facts.

The Court observes, firstly, that the applicant was not prevented in any practical manner from bringing his claims before the domestic courts. The matter came before the High Court and certification was given for appeal to the House of Lords, though leave was in the end refused by the House of Lords. Nor is it the case that any procedural rules or limitation periods were invoked. The High Court was concerned with the application brought by the defendant to have the case struck out as disclosing no reasonable cause of action. This involved the pre-trial determination of whether, assuming that the facts of the applicant's case as pleaded were true, there was a sustainable claim in law. The arguments before the court were therefore concentrated on

the legal issues, primarily whether a duty of care in negligence was owed to the applicant by the CPS.

Moreover, the Court is not persuaded that the court's decision, based on *Elguzouli-daf* that as a matter of law there was no duty of care in the applicant's case, may be characterised as either an exclusionary rule or an immunity which deprived him of access to court. The Court of Appeal had been concerned in *Elguzouli-daf* with the issue whether a novel category of negligence, that is a category of case in which a duty of care had not previously been held to exist, should be developed by the courts in their law-making role under the common law. The Court of Appeal, after weighing in the balance the competing considerations of public policy, decided not to extend liability in negligence into a new area. In so doing, it circumscribed the range of liability under tort law.

The decision of the High Court on 9 June 1995, applying that Court of Appeal precedent, did end the case, without the factual matters being determined on the evidence. However, if as a matter of law there was no basis for the claim, the hearing of evidence would have been an expensive and time-consuming process which would not have provided the applicant with any remedy at its conclusion. There is no reason to consider the striking out procedure which rules on the existence of sustainable causes of action as *per se* offending the principle of access to court. In such a procedure, the plaintiff is generally able to submit to the court the arguments supporting his or her claims on the law and the court will rule on those issues at the conclusion of an adversarial procedure (see *Z and Others v. the United Kingdom* judgment of 10 May 2001, no. 29392/95, [GC] § 97).

Nor is the Court persuaded by the suggestion that, irrespective of the position in domestic law, the decision disclosed an immunity in fact or practical effect due to its allegedly sweeping or blanket nature. That decision concerned only one aspect of the exercise of the CPS' powers and duties and cannot be regarded as an arbitrary removal of the courts' jurisdiction to determine a whole range of civil claims (see Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294, pp. 49-50, § 65). As pointed out by the Court of Appeal, civil law remedies existed in respect of any deliberate abuse of power by the CPS and rights would accrue in those cases where the CPS assumed specific responsibility in respect of a defendant. It has recalled above that it is a principle of Convention case-law that Article 6 does not in itself guarantee any particular content for civil rights and obligations in national law, although other Articles such as those protecting the right to respect for family life (Article 8) and the right to property (Article 1 of Protocol No. 1) may do so.

Furthermore, it cannot be said that the Court of Appeal came to its conclusion without a careful balancing of the policy reasons for and against the imposition of liability on the CPS in the circumstances of the applicants'

case. Lord Justice Steyn in his leading judgment in the Court of Appeal acknowledged that considerations of individualised justice to private individuals or trading companies who were aggrieved by careless decisions of CPS lawyers militated in favour of the recognition of a duty of care. He weighed that argument against the other public policy concerns in reaching the conclusion that it was not fair, just or reasonable to impose a duty of care on the CPS.

In the present case, the Court concludes that the inability of the applicant to sue the CPS flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to court of the kind contemplated in the Ashingdane judgment (cited above, *loc. cit.*). The applicant may not therefore claim that he was deprived of any right to a determination on the merits of his negligence claims. His claims were properly and fairly examined in the light of the applicable domestic legal principles concerning the tort of negligence. Once the High Court had ruled on the arguable legal issues that brought into play the applicability of Article 6 § 1 of the Convention, the applicant could no longer claim any entitlement under Article 6 § 1 to obtain any hearing concerning the facts. As pointed out above, such a hearing would have served no purpose, unless a duty of care in negligence had been held to exist in his case. It is not for this Court to find that this should have been the outcome of the striking out proceedings, since this would effectively involve substituting its own views as to the proper interpretation and content of domestic law (see the above-mentioned *Z . and Others v. the United Kingdom* judgment, § 101).

Accordingly, the Court finds that the applicant has not been deprived of access to court contrary to Article 6 of the Convention and that this part of the application must also 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