



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF KALACHEVA v. RUSSIA

(Application no. 3451/05)

JUDGMENT

STRASBOURG

7 May 2009

FINAL

07/08/2009

This judgment may be subject to editorial revision.

In the case of Kalacheva v. Russia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Rait Maruste, *President*,

Karel Jungwiert,

Anatoly Kovler,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 April 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 3451/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Ms Anna Anatolyevna Kalacheva (“the applicant”), on 23 December 2004.

2. The applicant was represented by Mr S. Koshmarev, a lawyer practising in Astrakhan. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged a violation of her right to respect for her private life.

4. On 1 September 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and lives in Astrakhan.

6. On 5 September 2003 the applicant gave birth to a daughter out of wedlock.

7. On 11 November 2003 she lodged a claim with the Kirovskiy District Court of Astrakhan against Mr A., with whom she allegedly had been in a relationship since 2000, in order to establish paternity and obtain child maintenance. In the course of the proceedings the applicant was represented by a counsel.

8. On 15 December 2003 the court ordered a DNA test to be carried out. The blood samples were collected in Astrakhan and sent to a specialised institute in Moscow for a forensic genetic examination. According to the expert conclusion submitted on 19 March 2004, the probability that Mr A. was the father of the applicant's daughter was 99.99%.

9. On 2 June 2004 the court heard the defendant's representative, who contested the admissibility of the DNA test on account of procedural shortcomings, and the applicant, who insisted on its accuracy; and rejected the applicant's claim in full. It found that the applicant had failed to support her allegations. With respect to the expert forensic report the court found as follows:

“...Blood sampling for the expert report was entrusted to the Bureau of forensic-medical examinations in the Astrakhan Region...

According to the Instruction on organisation and production of expert examinations in Bureaus of forensic medical examinations, blood samples must be packed individually... An envelope must be supplied, with identifying information (on the basis of an identity document) and signatures of a medical worker who took the blood samples and two medical workers who were present during this procedure...

On the envelopes with the blood samples of Mr A., Ms Kalacheva and Ms K.D. [the applicant's daughter] there are no data based on the identity documents of the above persons. Moreover, there are only two signatures on the envelopes, one of which belongs to a person who took the blood samples...

Taking into account that the blood samples were collected with serious violations of the Instruction..., the court is critical of the expert conclusion, since it cannot exclude the possibility that the blood samples received by the experts were not those collected from the parties.”

10. The court found the other evidence submitted by the applicant, namely a photo showing her with the defendant and a badge in her name, issued by the hostel (where they allegedly met), insufficient to conclude that the defendant was her child's father.

11. The applicant and her lawyer lodged an appeal against this judgment, claiming that the case should be sent to a fresh examination due to the court's failure to respect the civil procedural law. On 29 June 2004 the Astrakhan Regional Court upheld the judgment of 2 June 2004. It mentioned that, under civil procedural law, an expert conclusion was not binding on the court, and that in the present case the DNA test, carried out in breach of the relevant procedure, was not corroborated by other evidence.

12. On 20 June 2005 the Supreme Court of the Russian Federation rejected an application for supervisory review lodged by the applicant's lawyer.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. Under Article 37 of the Code of Civil Procedure of the Russian Federation ("CCP", in force as of 1 February 2003), rights and interests of minors are protected in court proceedings by their legal representatives – parents, adoptive parents or tutors. Under Article 49 of the Family Code of the Russian Federation of 29 December 1995 (*Семейный кодекс РФ*, in force as of 1 March 1996), if a child is born to parents who are not married to each other and there is no joint declaration or declaration by the child's father, the paternity of the child shall be established in court proceedings on the application of either parent, or tutor, or a child in question upon reaching a full age. In such proceedings the court shall have regard to any evidence that establishes the child's paternity with certainty.

14. Article 67 of the CCP provides that a court shall evaluate evidence in confidence, based upon a comprehensive, detailed and impartial review of all the evidence of the case. No evidence has a predetermined value.

15. An expert conclusion is not binding upon the court, and shall be evaluated by the court according to the rules stated in Article 67 of this Code. If the court disagrees with the expert conclusion, it shall explain its reasons in its decision (Article 86 § 3 of CCP). In case of doubt as to the accuracy or reasonableness of the expert conclusion, a court may order a second expert opinion to be prepared by other experts (Article 87 § 2 of CCP).

16. Resolution no. 9 of the Plenary Supreme Court of the Russian Federation of 25 October 1996 on application by the courts of the Family Code of the Russian Federation to cases concerning paternity and maintenance provides that in order to establish paternity the court may, if necessary, order a forensic examination. Under Article 86 § 3 of the CCP, the experts' conclusion regarding a child's descent, including a DNA test, is evidence that must be weighed together with other evidence (Article 6).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

17. The applicant complained under Articles 6 and 8 of the Convention that the domestic courts failed to establish the paternity of her daughter's

biological father regardless of the results of the DNA test. The Court considers that this complaint falls to be examined under Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

18. The Government contended that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention because she had failed to lodge an application for supervisory review with the Supreme Court.

19. The Court notes, firstly, that the applicant did in fact apply for a supervisory review, but was unsuccessful (see paragraph 12 above). It reiterates that an application for supervisory review is not a remedy that has to be exhausted under Article 35 § 1 of the Convention (see *Shulepov v. Russia*, no. 15435/03, § 23, 26 June 2008). Therefore, the Government’s objection as to the non-exhaustion of domestic remedies must be dismissed.

20. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Parties’ submissions

(a) The applicant

21. The applicant insisted that the DNA test had been carried out in the Bureau of forensic medical examinations at the Astrakhan Regional Health Department in strict accordance with the procedure prescribed by law. That was why she had not had any reason to believe that the result would be doubted and to request an additional expert examination.

22. She further noted that Article 87 § 2 of the RF Code of Civil Procedure clearly provided that in case of doubt as to the accuracy of the expert examination it was up to the court to order a second expert report. The law did not impose a duty on the parties to request such a report, and the court had to do that on its motion in order to solve the paternity dispute.

23. The applicant stressed that the Kirovskiy Court had had clear and convincing evidence of A.'s paternity, but had failed to give due consideration to all the circumstances of her case and had shown a lack of respect for her private life. It is unclear what other evidence she could present, also given that she and A. had concealed their relationship.

(b) The Government

24. The Government stated that the blood sampling for the DNA test in the present case had been carried out by the Astrakhan Regional Health Department with an essential breach of the Instruction on organisation and production of expert examinations in Bureaus of forensic medical examinations. Blood sampling was conducted on 10 February 2004 in the presence of the parties, their lawyers and four medical workers, including a person who took the samples. However, there were only two signatures on the envelopes with the samples instead of the three required; furthermore, these signatures were not decoded as there were no names or positions next to them.

25. The Government claimed that inappropriate blood sampling which led to the DNA test being declared inadmissible did not amount to an interference with the applicant's right guaranteed by Article 8 of the Convention. Under Article 87 § 2 of the Code of Civil Procedure, a court could order a second test if it doubted the accuracy of the previous one; however the applicant had failed to request a new test.

26. Furthermore, under civil procedural law a plaintiff had to substantiate his or her claim; yet the applicant had neither called witnesses nor presented any other reliable evidence to prove that her child was A.'s daughter or that she had had an intimate relationship with A., whilst in the course of the proceedings it had been proved that A. had a wife and two children and had never lived together with the applicant as a family. The Government thus saw no violation of the applicant's rights guaranteed by Article 8.

2. The Court's assessment

(a) Applicability of Article 8 of the Convention

27. The Court reiterates that "private life" is a broad term encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-...).

28. The Court has previously examined cases in which a man wished to institute proceedings to contest his paternity of a child born in wedlock or, alternatively, to have his putative biological paternity recognised. In those

cases the Court noted that the determination of the father's legal relations with his putative child concerned his "private life" (see *Shofman v. Russia*, no. 74826/01, § 30, 24 November 2005; *Yildirim v. Austria* (dec.), no. 34308/96, 19 October 1999; *Rasmussen v. Denmark*, 28 November 1984, § 33, Series A no. 87; and *Róžański v. Poland*, no. 55339/00, § 62, 18 May 2006). In a number of cases the Court has also held that a right to respect for private life includes a right of a child born out of wedlock to determine the legal relationship between him or her and his or her natural father (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I, and *Jäggi v. Switzerland*, no. 58757/00, §§ 25-26, ECHR 2006-...).

29. The present application is, however, different. The applicant, a mother of a child born out of wedlock, complained of a violation of her own right guaranteed by Article 8. Thus, a core of the present case is the applicant's ability to obtain recognition of A. as the biological father of her daughter. In the Court's view, establishment of paternity of the applicant's daughter is a matter related to the "private life" of the applicant, who bears full responsibility for her minor child. Recognition of the natural father, apart from its financial and emotional purposes, may also be important from the point of view of the applicant's social image, her family medical history and the web of entwined rights and duties between the biological mother, biological father and the child concerned.

30. Accordingly, the Court finds that Article 8 is applicable in the present case, which concerns the applicant's right to respect for her private life. This is, in fact, not disputed between the parties.

(b) Compliance with the requirements of Article 8 of the Convention

31. The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance to be struck between the competing interests (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 70, ECHR 2007-...).

32. In the present case the domestic judicial authorities faced a conflict between the competing interests of the mother of a child born out of wedlock and the putative father. While it is not the Court's task to substitute itself for the competent national authorities in determining the most appropriate method for the establishment of paternity through a domestic

judicial process, it should examine whether the domestic authorities, in handling the applicant's claim, complied with the requirements and spirit of Article 8 of the Convention (see, *mutatis mutandis*, *Mikulić*, cited above, § 59).

33. According to Russian family law, a decision establishing paternity should follow from a comprehensive and objective analysis of all evidence which may confirm or rebut a child's real origin. Furthermore, no evidence may have a predominant value for a court.

34. The Court takes note of the domestic court's finding and the Government's argument that the applicant failed to provide sufficient proof of her relationship with A. and his paternity. However, the Court observes that in the course of the domestic proceedings the Kirovskiy Court ordered a DNA test to solve this paternity dispute. The test showed a 99.99% probability that the defendant was the child's father. The Court does not lose sight of the fact that today a DNA test is the only scientific method of determining accurately the paternity of the child in question; and its probative value substantially outweighs any other evidence presented by the parties to prove or disprove the fact of an intimate relationship. Furthermore, the applicant suggested that she and the defendant had concealed their relationship; hence the genetic examination could have been the only persuasive evidence of the disputed paternity.

35. The defendant subsequently challenged the admissibility of this test, referring to its alleged shortcomings, namely inappropriate marking of the envelope with blood samples. The applicant, in her turn, contested his arguments and insisted on the accuracy of the test. The domestic courts found the test inadmissible and rejected the applicant's claim without ordering a new test.

36. The Court recalls that, according to Article 8 of the Convention, in ruling on an application to have paternity established, the courts should have special regard to the best interests of the child at issue (see *Jevremović v. Serbia*, no. 3150/05, § 109, 17 July 2007). In the instant case the best interest of the child implicated an unambiguous answer on whether or not A. was her father. It appears that this issue could not be addressed satisfactorily without a DNA test, and the second test was necessary as long as the first one was found inadmissible for formal procedural reasons. It is true that the applicant failed to request the second test, as the Government pointed out. However it follows from the wording of the Russian Code of Civil Procedure that it is at the court's discretion to order a second expert examination if the accuracy of the previous expert conclusion is doubted (see paragraph 15 above). This is of particular importance in the present case, where the breach of the rule concerning a sampling procedure, if it occurred, appears to be attributable to the Bureau of forensic medical examinations, i.e. a State institution. Against this background, the domestic courts by simply declaring the first court-ordered DNA test inadmissible

without ordering a new test, did not apply Article 87 § 2 of the Code of Civil Procedure in the light of the principles enshrined in Article 8 of the Convention.

37. In these circumstances the Court considers that the domestic authorities' approach in handling the applicant's case fell short of the State's positive obligation to strike a fair balance between competing interests of the parties to the proceedings with due regard to the best interests of the child.

38. There has therefore been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

40. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

41. The Government found this claim groundless and excessive.

42. The Court accepts that the applicant has suffered damage of a non-pecuniary nature as a result of the State's failure to comply with its positive obligations relating to the right to respect for her private life. It considers that the non-pecuniary damage sustained by the applicant is not compensated for by the finding of a violation of the Convention. Making an assessment on an equitable basis, it awards the applicant EUR 5,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

43. The applicant also claimed 68,596 Russian roubles (RUB) for the costs and expenses incurred before the domestic courts and the Court. These included the costs of the expert examination (RUB 19,096), counsel's fees (RUB 40,000) and translation costs (RUB 9,500). She produced documents confirming the above amounts.

44. The Government pointed out that the expenses incurred in the domestic proceedings should not be reimbursed.

45. The Court accepts that in the domestic proceedings legal expenses were incurred in order to prevent the violation of the applicant's right to respect for her private life. According to the Court's case-law, an applicant

is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 covering costs under all heads, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

46. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage plus any tax that may be chargeable on that amount; and
 - (ii) EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on that amount;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Rait Maruste
President