



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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 77785/01
by Natalya ZNAMENSKAYA
against Russia

The European Court of Human Rights (First Section), sitting on 25 March 2004 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,

Mrs F. TULKENS,

Mrs N. VAJIĆ,

Mr E. LEVITS,

Mrs S. BOTOCHAROVA,

Mr A. KOVLER,

Mr V. ZAGREBELSKY, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application introduced on 14 November 2001,

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, Mrs Natalya Vasilyevna Znamenskaya, is a Russian national, who was born in 1955 and lives in Moscow. She is represented before the Court by Mrs E. Liptser, a lawyer with the International Protection Centre in Moscow. The respondent Government are represented

by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

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

On 4 August 1997 the applicant had a still-birth. She decided to bury the child.

On 13 August 1997 the still-birth was registered by the Chertanovskiy branch of the Civil Acts Registration Service (*Чертановский отдел ЗАГС*). Mr Z., who had been the applicant's husband until their divorce on 25 March 1997, was entered as the still-born child's father in the birth certificate (*акт о рождении*) and in the birth register (*книга записей рождений*).

The applicant submits that the biological father of the still-birth was Mr G. with whom the applicant had been living as man and wife since 1994. The applicant states that her partner expected the child and talked about their future son as his own. The applicant explains that she and her partner could not file a joint declaration establishing the child's paternity because her partner had been placed in custody on 20 June 1997. It appears that the applicant had no access to her partner after that date. On 12 October 1997 the applicant's partner died in custody.

The applicant refused to put her former husband's name on the still-born child's tombstone and left it empty.

On 10 August 2000 the applicant requested the Chertanovskiy District Court of Moscow to establish Mr G.'s paternity in respect of the still-birth and amend the child's last name and patronymic [In the Russian language patronymics are formed from the first name of the father plus a special ending *-vich* for sons or *-vna* for daughters] accordingly.

On 21 November 2000 the applicant's former husband died.

On 16 March 2001 the Chertanovskiy District Court of Moscow refused to examine the applicant's request. The court held:

“As it has been established by the documents, the child was still-born and, therefore, did not acquire civil rights...”

The court held that Article 49 of the Family Code on which the applicant grounded her claim only applied to live children. The court did not give reasons for this conclusion. The court ordered the proceedings on the applicant's claim to be terminated because “it was not fit for examination and determination in the framework of civil proceedings”.

On 18 May 2001 the Moscow City Court, on the applicant's appeal, upheld the judgment of 16 March 2001. The court repeated that “the case

could not be examined as a civil action because the child had not acquired civil rights”.

B. Relevant domestic law

1. The Civil Code of the Russian Federation (of 30 November 1994) provides that a person's legal capacity shall begin at the moment of birth and terminate on death (Article 17 § 2).

2. The Family Code of the Russian Federation (of 29 December 1995) provides:

Article 48. Establishment of the child's descentance

“2. If a child is born to the parents who are married to each other or within three hundred days after their divorce... or death of the spouse of the child's mother, the spouse (former spouse) of the mother shall be the father of the child unless proved otherwise...”

3. If the child's mother declares that her spouse (former spouse) is not the child's father, the child's paternity shall be established in accordance with paragraph 4 of this Article or Article 49 of this Code.

4. The paternity of the person who is not married to the child's mother shall be established on the basis of a joint declaration filed by the father and mother of the child...”

Article 49. Establishment of the paternity in the court proceedings

“If a child is born to the parents who are not married to each other and there is no joint declaration and no declaration by the child's father (Article 48 § 4 of this Code), the paternity of the child shall be established in the court proceedings on the application of either parent... [In such proceedings] the court shall have regard to any evidence that show with certainty the child's paternity.”

Article 50. Establishment of the fact of acknowledgement of paternity by a court

“If the person who acknowledged the paternity of the child, but was not married to his/her mother, dies, the fact of his having acknowledged his paternity may be established by a court in accordance with the rules on civil procedure.”

COMPLAINTS

The applicant complains under Article 6 of the Convention that she was not given a fair and public trial within a reasonable time by an independent and impartial tribunal.

The applicant complains under Article 8 of the Convention that her right to respect for private and family life was violated by the refusal of the domestic courts to establish the paternity of Mr G. in respect of the still-birth that prevented her from amending the documents and engraving the correct last name and patronymic on the tombstone.

THE LAW

A. Objection of the Government as to the exhaustion of domestic remedies

The Government indicate that on 1 February 2003 the new Code of Civil Procedure of the Russian Federation came into force. Pursuant to Article 376 of that Code, if a party to civil proceedings believes that the court judgments violated his (her) rights or lawful interests, such party may lodge a request for supervisory review of the judgments. The supervisory review proceedings may only be set in motion at the request of a party to the original proceedings. As the applicant never lodged such a request, the Government consider that she did not exhaust the domestic remedies available to her. They refer generally to the Court's decisions to discontinue the examination of Italian "length-of-proceedings" applications after the Pinto Act had introduced a new domestic remedy in Italy.

The applicant disagrees. She contends that Article 376 of the new Code of Civil Procedure sets a one-year time-limit for lodging a supervisory review request. As the final judgment in her case was made on 18 May 2001, she could not avail herself of this remedy after the new Code came into force.

The Government clarify, in addition, that, according to Resolution no. 2 of the Plenary Session of the Supreme Court of the Russian Federation of 20 January 2003, a request for supervisory review of judgments made before 1 February 2003 could have been lodged within one year starting from 1 February 2003, i.e. until 31 January 2004.

The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system (*ibid.*). In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is

subsidiary to the national systems safeguarding human rights (see *Akdivar and Others v. Turkey*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 65, and *Aksoy v. Turkey*, 18 December 1996, *Reports* 1996-VI, p. 2275, § 51).

The Court reiterates that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it (see *Baumann v. France*, no. 33592/96, § 47, 22 May 2001, unreported). Nevertheless, this rule is subject to exceptions, which may be justified by the particular circumstances of a case. Thus, after the Italian Parliament passed a special act designed to provide a domestic remedy for alleged violations of the “reasonable-time” requirement (“the Pinto Act”), the Court found a departure from that general principle justified because the growing number of identical applications threatened to “affect the operation, at both national and international level, of the system of human-rights protection set up by the Convention” (see *Giacometti and Others v. Italy* (dec.), no. 34939/97, 8 November 2001). The Court also had regard to the fact that the transitional provisions of the Pinto Act were explicitly designed to bring within the jurisdiction of the national courts all applications to this Court that had not yet been declared admissible (*ibid.*).

The Court observes that in the instant case the Government did not indicate any such circumstances that might warrant a departure from the general rule and, accordingly, the basic principle that the exhaustion requirement must be assessed with reference to the time at which the application was lodged applies.

The Government do not claim that as at the date the application was introduced there were any domestic remedies that the applicant had failed to exhaust (cf. *Baumann v. France*, cited above, § 47). The request for supervisory review, as it existed at that time, was not considered to be an “effective” remedy for the purpose of Article 35 § 1 (see *Pitkevich v. Russia* (dec.), no. 47936/99, 8 February 2001). In the present case the Court is not required to decide whether the procedure for supervisory review provided for in the new Code of Civil Procedure is an effective remedy because it only became available on 1 February 2003, i.e. after the present application was lodged. The Court therefore considers that the domestic remedies have been exhausted.

Accordingly, the Government's objection is dismissed.

B. Admissibility of the complaints

1. The applicant complains under Article 8 of the Convention that the domestic courts refused her claim to establish the still-born child's descent from her late partner and to change the still-born child's name accordingly. Article 8 provides as follows:

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

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.”

The Government accept that the domestic courts' refusal to entertain the applicant's claim had no legal basis. Pursuant to Article 50 of the Family Code, even in the case of death of a person who acknowledged his paternity and was not married to the child's mother, the courts could have established the fact of his having acknowledged the paternity. Such acknowledgement would entail, as a consequence, amendment to the birth certificate and attribution of the presumed father's last name and patronymic to the child.

The applicant submits that the domestic authorities failed in their positive obligation to ensure effective respect for her private and family life. She refers to the Court's case-law to the effect that “‘respect' for 'family life' requires that biological and social reality prevail over a legal presumption which... flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone” (*Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, § 40).

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant complains under Article 6 of the Convention about a violation of her right to a fair and public hearing within a reasonable time by an impartial tribunal. Article 6 provides, in the relevant part, as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal...”

To the extent that the applicant alleges a violation of her right to a hearing “within a reasonable time”, the Court notes that the proceedings at two levels of jurisdiction lasted from 10 August 2000 (when the claim was lodged) until 18 May 2001 (the final judgment), i.e. for a total of nine months and eight days. The Court finds that that period was compatible with the “reasonable time” criterion of Article 6 § 1. The remainder of the applicant's complaints under Article 6 is not substantiated.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints that the domestic courts' refusal to establish the paternity of the still-birth and change its name accordingly violated her right to respect for private and family life;

Declares inadmissible the remainder of the application.

Søren NIELSEN
Registrar

Christos ROZAKIS
President