

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 18535/91

K., Z. and S.

against

the Netherlands

REPORT OF THE COMMISSION

(adopted on 7 April 1993)

TABLE OF CONTENTS

Page

I.	INTRODUCTION (paras. 1-15)	1
A.	The application (paras. 2-4)	1
B.	The proceedings (paras. 5-10)	1
C.	The present Report (paras. 11-15)	2
II.	ESTABLISHMENT OF THE FACTS (paras. 16-22)	3
A.	Particular circumstances of the case (paras. 16-20)	3
B.	Relevant domestic law (paras. 21-22)	3
III.	OPINION OF THE COMMISSION (paras. 23-59)	6
A.	Complaints declared admissible (para. 23)	6
B.	Points at issue (para. 24)	6
C.	As regards Article 8 of the Convention (paras. 25-44)	6
	Conclusion (para. 45)	9
D.	As regards Article 14 of the Convention (paras. 46-56)	9
	Conclusion (para. 57)	10
E.	Recapitulation (paras. 58-59)	10
	DISSENTING OPINION OF MR. H.G. SCHERMERS	11

OPINION DISSIDENTE DE MM. J.-C. SOYER ET F. MARTINEZ
A LAQUELLE SE RALLIENT MM. A. WEITZEL
ET A.S. GÖZÜBÜYÜK 14

OPINION DISSIDENTE DE M. J.-C. GEUS 16

APPENDIX I : HISTORY OF THE PROCEEDINGS 17

APPENDIX II : DECISION ON THE ADMISSIBILITY OF
THE APPLICATION 18

I. INTRODUCTION

1 The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

A. The application

2 The applicants, who are Dutch nationals, were born in 1954, 1961 and 1987 respectively and reside at Amsterdam. The first applicant is the mother, the second applicant the biological father, of the third applicant. Before the Commission they are represented by Mr. Arnoud Willems, a lawyer practising in Amsterdam.

3 The application is directed against the Netherlands, whose Government are represented by their Agent, Mr. Karel de Vey Mestdagh of the Netherlands Ministry of Foreign Affairs.

4 The applicants complain that they are unable under Dutch law to obtain a legal recognition of the second applicant's paternity in respect of the third applicant and that under Dutch law a married woman's right to challenge the paternity of her child is more limited than that of a married man. They submit that, as a result, the third applicant remains legally the son of a man, who is not the real father, whereas the third applicant is denied a legal relationship with the second applicant, the real father, who feels responsible for his child. The applicants rely on Article 8 of the Convention taken alone and in conjunction with Article 14 of the Convention.

B. The proceedings

5 The application was introduced on 15 May 1991 and registered on 17 July 1991.

6 On 2 December 1991 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

7 The Government's observations were submitted on 26 March 1992. The applicants submitted their observations in reply on 29 May 1992.

8 On 31 August 1992 the Commission declared the application admissible and the parties were invited, should they so desire, to submit further observations regarding the merits of the application.

9 The respondent Government submitted further observations on 23 November 1992. No further observations were received from the applicants.

10 After declaring the case admissible, the Commission, acting

in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present report

11 The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
A. S. GÖZÜBÜYÜK
A. WEITZEL
J. C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C. L. ROZAKIS
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

12 The text of the Report was adopted on 7 April 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 1 of the Convention.

13 The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

- (1) to establish the facts, and
- (2) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14 A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II.

15 The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. Particular circumstances of the case

16 The first applicant, K., and the second applicant, Z., have since 1983 had a permanent relationship, but without being married and without living together. The first applicant is the mother, the second applicant the biological father, of the third applicant, S., who was born in October 1987. A second child of K. and Z. was born in 1989.

17 When S. was born, K. was still married to M., although they had not been living together for a long time. Their divorce was

pronounced on 6 April 1988. M. was registered as being S.'s father, but he does not even know of S.'s existence and has never seen him. In fact, he disappeared to an unknown destination a long time ago. His present whereabouts are unknown.

18 K. and Z. first asked the civil registration authority to make it possible for K. to declare that M. was not the father of S. and for Z. to recognise the paternity. However, this was rejected by a letter from the authority of 21 October 1988.

19 K. and Z. then brought proceedings for the same purpose before the Regional Court (Arrondissementsrechtbank) of Amsterdam. By judgment of 13 June 1989 their claim was rejected by the Regional Court which considered that Dutch law did not make it possible for them to challenge M.'s paternity and that, although the plaintiffs had a justified wish to see the biological reality recognised, the law in force could not be considered to be in conflict with Articles 8 and 14 of the Convention.

20 Their appeal was rejected by the Court of Appeal (Gerechtshof) of Amsterdam on 5 February 1990. A further appeal on points of law was rejected by the Supreme Court (Hoge Raad) on 16 November 1990. The Supreme Court left it open whether the applicable rules in Book 1, Section 198 of the Dutch Civil Code (Burgerlijk Wetboek) were in conflict with the Convention, considering that, if there was such a conflict, it must be the task of the legislator to adopt the new rules which should replace Book 1, Section 198 of the Civil Code.

B. Relevant domestic law

21 The relevant provisions of the Civil Code read as follows:

Book 1, Section 197

<Dutch>

"Het kind dat staande huwelijk is geboren, heeft de echtgenoot tot vader. Het kind dat vóór de 307de dag na de ontbinding van het huwelijk is geboren, heeft de vroegere echtgenoot tot vader, tenzij de moeder was hertrouwd."

<Translation>

"The child born in wedlock has the husband as father. The child born before the 307th day after the dissolution of the marriage has the former husband as a father, unless the mother has remarried."

Book 1, Section 198

<Dutch>

"1. De moeder kan door een verklaring, afgelegd ten overstaan van een ambtenaar van de burgerlijke stand, ontkennen dat een kind dat binnen 306 dagen na de ontbinding van het huwelijk uit haar is geboren, het kind van haar vroegere echtgenoot is, mits een andere man het kind erkent bij de akte die van die verklaring wordt opgemaakt. (...)

2. De verklaring van de moeder en de erkenning moeten geschieden binnen een jaar na de geboorte van het kind.

3. De verklaring en de erkenning hebben slechts gevolg, indien de moeder en de man die het kind erkent, binnen

een jaar na de geboorte van het kind met elkander in het huwelijk treden of (...).

4. (...)

5. (...)."

<Translation>

"1. The mother can, by making a declaration before an officer of the civil registration authority, contest that a child whom she has borne within 306 days after the dissolution of the marriage, is the child of her former husband, provided that another man recognises the child in connection with the document in which the declaration is recorded (...).

2. The mother's declaration and the recognition must be made within one year from the birth of the child.

3. The declaration and the recognition only have effect, if the mother and the man who recognises the child marry each other within a year from the birth of the child or (...).

4. (...).

5. (...)."

Book 1, Section 199

<Dutch>

"De man kan slechts ontkennen de vader van het kind te zijn door een rechtsvordering tot ontkenning van het vaderschap in te stellen tegen de moeder en tevens tegen het kind, dat terzake, tenzij het meerderjarig is, vertegenwoordigd wordt door een bijzondere curator, daartoe benoemd door de kantonrechter."

<Translation>

"The man can only contest the paternity to the child by instituting proceedings regarding challenge of paternity against the mother and also against the child who, unless it has come of age, will be represented in the case by a special curator who will be appointed by the District Court judge."

22 As a result of changes in society and generally held views on issues as marriage and the legitimacy or illegitimacy of children, a Bill (no. 20 626) amending the law of parentage is at present pending before the Dutch Parliament. This Bill maintains restrictions of the possibility to contest paternity, but on the basis of equality between husband and wife.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

23 The Commission has declared admissible the applicants' complaints that they are unable under Dutch law to obtain a legal recognition of the second applicant's paternity in respect of the third applicant and that under Dutch law a married woman's right to challenge the paternity of her child differs from that of a married man.

B. Points at issue

24 Accordingly, the issues to be determined are:

- whether there has been a violation of Article 8 (Art. 8) of the Convention taken alone; and
- whether there has been a violation of Article 14 in conjunction with Article 8 (Art. 14+8) of the Convention.

C. As regards Article 8 (Art. 8) of the Convention

25 Article 8 (Art. 8) of the Convention 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."

26 The applicants submit that, although the second applicant does not live with the first and third applicants, he has a permanent relationship with the first applicant since 1983 and contributes to the best of his abilities to raising the third applicant. The applicants, therefore, consider that this complaint falls within the scope of Article 8 (Art. 8) of the Convention.

27 The Government submit that it has not been argued convincingly that the relationship of the second applicant to the third applicant is one of a social father and that, therefore, it cannot be concluded there is family life between them in the sense of Article 8 (Art. 8) of the Convention. The Government further argue that the fact that Dutch law makes no provision for a mother contesting the paternity of her husband whilst remaining married to him does not constitute any interference with "family life" within the meaning of Article 8 (Art. 8) of the Convention.

28 The Government further argue that, even if family life exists in the present case, the legal consequence desired by the parties, namely the establishment of relations under family law between the second and third applicants, could have been achieved by other means. They point out that, under Book I, Section 227 of the Civil Code, the first and second applicants could jointly have adopted the third applicant, a condition being that the adopters had first married each other. An alternative would be to make an application under Book I, Section 7 of the Civil Code to have the third applicant's surname changed to the second applicant's surname, which would have the effect of socially reinforcing the relationship between the second and third applicants.

29 Finally the Government submit that, if there is in the present case an interference with the applicants' rights under Article 8 para. 1 (Art. 8-1) of the Convention, that interference is justified under para. 2 of that Article (Art. 8-2) as being necessary in a democratic society for the protection of the rights and freedoms of others. The Government point out in this respect that it is a fundamental principle, precisely with a view to protecting the child's legal security, that where a child is born in wedlock, the mother's husband must be regarded as the child's father.

30 The applicants contest that adoption would be a valid

alternative solution, since for other reasons the first and second applicants do not wish to get married.

31 The Commission recalls that the right to respect for family life is not confined to "legitimate" families and that, in order to ascertain whether in a given case it is appropriate to speak of "family life" within the meaning of Article 8 (Art. 8) of the Convention, it has considered not only whether the persons concerned were related but also whether it was in fact possible to point to such a link as can be considered to establish "family life" referred to in Article 8 (Art. 8) of the Convention (cf. No. 11418/85, Dec. 14.5.86, D.R. 47 p. 243).

32 The Commission notes that, although they do not live together, there is a longstanding relationship between K., the first applicant, and Z., the second applicant, and it is not disputed that Z. is the biological father of K.'s son S. and of K.'s second child born in 1989.

33 The Commission is of the opinion that the links between the applicants involve several aspects of private and family life within the meaning of Article 8 (Art. 8) of the Convention.

34 The Commission, therefore, concludes that Article 8 (Art. 8) of the Convention is applicable to the present case.

35 The Commission notes that the Netherlands authorities have not actively "interfered" with the applicants' private or family life. However, the Commission recalls that although the object of Article 8 (Art. 8) is essentially that of protecting the individual against arbitrary interference, it does not merely compel a Contracting 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 or family life (see eg. Eur. Court H.R., X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, para. 23).

36 The Commission observes that Z. assumes the responsibility of being S.'s father and that all applicants wish to see the biological reality of his paternity legally recognised.

37 However, Dutch law does not make this possible. The question is whether this constitutes a lack of respect for the applicants' private and family life.

38 The rules in the Dutch Civil Code are in this respect characterised by their lack of flexibility. They do not at all make it possible for the mother of a child or for the child itself to contest the mother's former husband's paternity where, as in the present case, the child was born before the marriage had been formally dissolved.

39 The Commission accepts that the generally recognised rule, according to which a married man is presumed to be the father of his wife's children ("*pater est quem nuptiae demonstrant*"), creates a reasonable presumption and that there are good reasons why this presumption should not easily be overturned.

40 Nevertheless, there are cases where it is clear that the presumption does not correspond to the real situation, and at least in some such situations the right to respect for private and family life in Article 8 (Art. 8) of the Convention may require that the real paternity is also legally recognised.

41 In the present case, it seems clear that M. cannot be S.'s father and it appears that he is not even aware of S.'s existence. Moreover, the divorce between K. and M. was pronounced in April 1988,

i.e. about half a year after S.'s birth. On the other hand, K. and Z. had a stable relationship already a long time before S. was born. They agree that Z. is S.'s father, and Z. is prepared to take the responsibility for S. Furthermore K. and Z. also have another child together. In view of the fact that in the specific circumstances of this case M. cannot be considered to have any real interests which should be taken into account, the situation is somewhat similar to that of a child born out of wedlock, in respect of whom an agreement between the mother and a man about the latter's paternity would normally constitute a sufficient basis for having that paternity legally recognised.

42 It is true, as the Government have pointed out, that Z. and K. could jointly adopt S. but only if they first got married. Apparently, they do not wish to get married. The Commission cannot find, in such circumstances, that the possibility of an adoption is sufficient to eliminate the effects on their private and family life created by the impossibility to contest the legal paternity.

43 Nor can the possibility of changing S.'s family name be considered a valid alternative to the establishment of Z.'s paternity.

44 In these circumstances, the Commission considers that the impossibility under Dutch law to contest M.'s paternity and to have Z. recognised as S.'s father implies a lack of respect for the applicants' private and family life contrary to Article 8 (Art. 8) of the Convention.

Conclusion

45 The Commission concludes by 12 votes to 6 that there has been a violation of Article 8 (Art. 8) of the Convention.

D. As regards Article 14 (Art. 14) of the Convention

46 Article 14 (Art. 14) of the Convention, insofar as relevant, provides as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex (...) or other status."

47 The applicants allege a violation of this provision in that under Dutch law a married woman's right to challenge the paternity of her child is more limited than that of a married man.

48 The Government submit that the fundamental principle underlying the introduction in 1969 of Sections 198 and 199 of the Civil Code concerning the repudiation of a child's legitimacy, was to maximise a child's legal security. This implies avoiding situations in which a child has to be regarded as illegitimate and creating exceptions only for those situations where the greatest need might arise for either the mother or the husband, considered separately.

49 With reference to the position of the mother the Government point out that the legislator endeavoured to ensure that a child born shortly after the dissolution of a marriage could as far as possible be granted the status of legitimacy. As regards children born in wedlock, the father was provided with legal safeguards to prevent legal ties being created with a child of whom he was not the biological father.

50 The Commission recalls that whether or not a difference in treatment constitutes discrimination in the sense of Article 14 (Art. 14) depends on whether there exists an objective and reasonable justification. The difference in treatment must pursue a legitimate

aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see eg. Eur. Court H.R., Inze judgment of 28 October 1987, Series A no. 126, p. 18, para. 41).

51 The Commission further recalls that Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law and that the scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background (Eur. Court H.R., Rasmussen judgment of 28 November 1984, Series A no. 87, p. 15, para. 40).

52 It is not the task of the Commission to examine issues in the abstract, but to determine whether in the present case the way in which Dutch law was applied to the applicants disclosed a discrimination contrary to Article 14 (Art. 14) of the Convention.

53 The Commission observes that when S. was born in 1987, K. was still married to M., who had disappeared a long time ago, whereas she and Z. had a relationship since 1983. The Commission further notes that the marriage between K. and M. was dissolved in April 1988.

54 The Commission notes that in the Rasmussen case the European Court of Human Rights pointed out that in the Contracting States' legislation regarding paternity proceedings there is no common ground and that in most of these States the position of the mother and that of her husband are regulated in different ways. On this basis the Court found that a difference in time-limits applicable to the institution of paternity proceedings was not discriminatory (Rasmussen judgment, loc. cit., para. 41).

55 Similar considerations apply in the present case. The Commission also notes that the difference existing in Dutch law in regard to the right to contest paternity could hardly be considered to have affected the first applicant since her former husband, M., was not even aware of the birth of S. and his legal right to contest his paternity was therefore only theoretical.

56 For these reasons, the Commission considers that the applicants are not victims of discrimination contrary to Article 14 in conjunction with Article 8 (Art. 14+8) of the Convention.

Conclusion

57 The Commission concludes unanimously that there has been no violation of Article 14 in conjunction with Article 8 (Art. 14+8) of the Convention.

E. Recapitulation

58 The Commission concludes, by 12 votes to 6, that there has been a violation of Article 8 (Art. 8) of the Convention (para. 45).

59 The Commission concludes, unanimously, that there has been no violation of Article 14 in conjunction with Article 8 (Art. 14+8) of the Convention (para. 57).

Secretary to the Commission

President of the Commission

(H. C. Krüger)

(C. A. Nørgaard)

DISSENTING OPINION OF MR. H.G. SCHERMERS

Article 8 para. 1. Is the article applicable in case of adultery?

I agree with the majority of the Commission that Article 8 of

the Convention is applicable in the present case. In my opinion one should accept as a matter of principle that there is always family life between a biological father and his child. It may be true that this kind of family life does not always merit protection, e.g. in the case of artificial insemination or rape, but the exceptions should be based on para. 2 of Article 8. There should be no interference by public authorities with the family life of fathers and children even if the children have been conceived by means of artificial insemination or as a result of rape, if there are no interests of other people involved and if both the father and the child want to enjoy their family life. I may illustrate this with an example.

Assume a child is born as a result of rape. The mother does not want any contact with the father of the child. Article 8 para. 2 will then permit that public authorities interfere with the family life between father and child for the protection of the rights of others (the mother, perhaps also the child). This does not, however, exclude any possibility of family life under Article 8 para. 1. Let us assume that the mother dies, that the child has no other family and that father and child both want to establish family life. The authorities cannot then interfere on the ground that family life of a rapist cannot be recognised. Human rights are for the benefits of the bad as much as for the good. Equally, the applicability of Article 8 may not be denied on the ground that adultery is considered unacceptable. In the present case, therefore, Article 8 is applicable and it should be considered whether interference is permitted under Article 8 para. 2.

Article 8 para. 2

According to the established case-law of the Court an interference with the exercise of an Article 8 right will not be compatible with paragraph 2 unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society" for the aforesaid aim or aims (see *Dudgeon Case*, series A no. 45, p. 19, para. 43 and *mutatis mutandis*, the *Young, James and Webster* judgment of 13 August 1981, Series A no. 44, p. 24, para. 59).

It has not been contested that the first of these three conditions was met. The interference is "in accordance with the law" since it results from Articles 197-199 of the Dutch Civil Code.

It next falls to be determined whether the interference is aimed at "the protection of morals", "the protection of the rights and freedoms of others" or "the protection of disorder". All three aims are of some relevance.

Although as the sole aim it may not be decisive, the aim of protection of morals is relevant. Adultery still being considered as immoral by many people, one may accept that the law refuses to recognise its consequences.

"The protection of the rights and freedoms of others" is another aim relevant in the present case. By making it impossible to challenge the paternity of children born in wedlock all families are protected against legal acts casting doubts upon the paternity of children.

In my opinion, the main aim of the Dutch legislation is to create legal certainty about the parental relations of children. Such legal certainty is to the benefit of the legal order and therefore serves for the prevention of disorder.

As it has never been established that the aim or aims for which measures under Article 8 para. 2 are taken must in themselves be

effective, each of the three aims mentioned above may be sufficient to fulfil the requirement of a legitimate aim. The three aims together in any case meet this requirement.

In my opinion the case hinges on the question whether or not the Dutch legislation can be seen as "necessary in a democratic society" for one or more of these aims.

A number of principles relevant to the assessment of the necessity in a democratic society, of a measure taken in furtherance of an, under the Convention, legitimate aim, have been stated by the Court in its case-law.

Firstly, "necessary" in this context does not have the flexibility of such expression as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question (see the Handyside judgment, Series A no. 24, p. 22, para. 48).

In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them (*ibid.*). However, their decision remains subject to review by the Court (*ibid.*, p. 23, para. 49).

As was illustrated by the European Court in the Sunday Times judgment, the scope of the margin of appreciation is not identical in respect of each of the aims justifying restrictions on a right (Series A no. 30, p. 36, para. 59). The margin of appreciation will be more extensive where the protection of morals is concerned. It is an indisputable fact, as the Court stated in the Handyside judgment, that "the view taken ... of the requirements of morals varies from time to time and from place to place, especially in our era", and that "by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements" (*ibid.* p. 22, para. 48).

In determining whether a State remains within the margin of appreciation granted to it a balance must be found between the general interest for which the interference was made and the interest of the individual.

In the present case the interest of the biological father and his child for recognition of their relationship should be weighed against the interest of society in legal certainty with respect to the parentage of children born in wedlock. The presumption that children born in wedlock are children of the husband of their mother prevents litigation about paternity in many cases. For many different reasons people may claim paternity of children of others. This may lead to insecurity and social tensions. A law providing that a child is always the child of the husband of the mother is to prevent such litigation. In my opinion such provision may be considered necessary in a democratic society for the prevention of disorder and for the protection of morals. The impossibility to challenge the paternity of children born in wedlock is an important part of the security of married life and should not be discarded lightly. Also the majority of the Commission accepts that the generally recognised rule, according to which a married man is presumed to be the father of his wife's children ("pater est quem nuptiae demonstrant"), creates a reasonable presumption and that there are good reasons why this presumption should not easily be overturned (para. 39 of the report).

One could submit that the Netherlands' legislation should be refined to the effect, that the presumption is maintained, but that legal paternity could be challenged, if undisputable proof is

available. Perhaps this could be further restricted, e.g. by strict time limits. However, the security of families may still then be endangered since modern medical means are now available to indeed prove that the child of a family is not the child of its legal father, whilst another man with whom the wife had a relation many years ago can almost certainly be identified as the father. The permanent threat that the other man might claim "his" child could seriously endanger family life. The growing possibilities of proof might encourage natural fathers of adulterine children to claim their paternity if the law permitted them to do so.

Taking account of the margin of appreciation which should be left to the national authorities and of the existing alternative for the natural father (stepfather's adoption), my conclusion in the present case is that Article 8 of the Convention is applicable, but that the interference is justified under para. 2 of that provision.

OPINION DISSIDENTE DE MM. J.-C. SOYER ET F. MARTINEZ
À LAQUELLE SE RALLIENT MM. A. WEITZEL ET A.S. GÖZÜBÜYÜK

1. D'après le Code Civil des Pays-Bas (articles 197 à 199), la paternité d'un enfant conçu puis né tandis que le mariage était encore valide ne peut pas être contestée par un homme qui veut reconnaître cet enfant.
2. Pour la majorité de la Commission, cette solution réaliserait un manque de respect pour la vie privée de la mère, de l'enfant et du père prétendu. Par là seul, l'article 8 de la Convention serait violé. Nous ne partageons pas cet avis. Il va trop loin.
3. La règle "pater est quem nuptiae demonstrant" nous semble connue de la plupart des Etats parties à la Convention. Cette présomption fait du mari le père, sauf des exceptions étroitement limitées. Car il y va tout à la fois de l'intérêt de l'enfant, et de la stabilité de la famille légitime.
4. Dans le cas particulier soumis à la Commission, le soi-disant père vit séparé de la mère. Il ne prétend d'ailleurs pas vouloir l'épouser, ce qui lui aurait permis d'adopter l'enfant ultérieurement. Il nous paraît difficile, dans ces conditions, d'y voir un manque de respect pour la vie privée et familiale de personnes qui se refusent, précisément, à fonder une famille, que ce soit par la cohabitation ou que ce soit par une union légalement consacrée.
5. Mais, même en admettant qu'existe un tel manque de respect, il ne s'ensuivrait pas, par cela seul, une violation de l'article 8 de la Convention. Encore faudrait-il vérifier si ce manque de respect, ou cette ingérence, manque de justification.
6. L'avis de la Commission, de façon surprenante à nos yeux, s'abstient d'une telle vérification. Elle conduit pourtant à constater que l'ingérence (à supposer qu'il en existe une) réunit les trois conditions qui la justifient pleinement.
7. En premier lieu, la base légale ne fait pas de doute. Elle réside dans les articles précités (197 à 199) du Code Civil Néerlandais.
8. En deuxième lieu, le but est de ceux que légitime l'article 8 de la Convention. Il est évident que, protégeant la stabilité de la famille et des enfants nés dans le mariage, le Code Civil vise à assurer la protection des droits d'autrui et celle de la morale.
9. En troisième lieu, il doit exister une proportion raisonnable entre l'ingérence et le besoin social convenant à une société démocratique. Or, cette proportion me paraît évidente dans le cas

présent.

Lorsqu'un homme ne sait pas offrir un nouveau foyer à l'enfant dont il revendique la paternité, qu'il se refuse à épouser la mère, ou même, tout simplement, à vivre avec elle, est-il vraiment excessif de lui refuser la protection qu'il ne fait pas lui-même l'effort de procurer à son enfant prétendu?

OPINION DISSIDENTE DE M. J.-C. GEUS

A supposer qu'il y ait ingérence dans la vie familiale des requérants, cette ingérence serait nécessaire à la défense de l'ordre et à la protection des droits d'autrui.

D'une part, l'ordre social ne saurait s'accommoder de l'instabilité et de l'incertitude dans l'établissement de la filiation légale, et d'autre part, sont en jeu les droits de celui dont la paternité est reconnue par la loi, et de l'enfant qui ne pourrait se voir attribuer des pères successifs au gré des affections de sa mère.

Par ailleurs, si les organes de la Convention n'ont pas à indiquer aux Etats les moyens qu'ils doivent utiliser pour redresser la violation qu'ils constatent, encore faut-il qu'ils s'interrogent sur la possibilité d'opérer un tel redressement, qui doit être efficace non seulement de manière générale mais également dans le cas particulier qui a donné lieu à la constatation de violation.

La première possibilité consisterait à ouvrir au père biologique une action en justice lui permettant d'obtenir le renversement de la présomption de paternité et la reconnaissance légale de sa paternité biologique.

S'il est possible d'établir scientifiquement qu'un homme ne peut être le père d'un enfant déterminé, il est impossible d'établir que tel homme est indiscutablement le père de tel enfant. L'application du principe "actor incumbit probatio" a pour effet de priver de toute efficacité l'action en justice envisagée, et un système juridique permettant le renversement de la présomption légale et la reconnaissance de paternité sans qu'aucune preuve soit apportée engendrerait de nombreux conflits positifs de paternité ; il ne peut donc être raisonnablement envisagé.

Reste la voie de l'adoption qui, actuellement, n'est ouverte aux Pays-Bas qu'aux couples mariés, ce qui, à mon avis, ne se justifie pas. Toutefois, l'adoption ne peut être accordée que dans l'intérêt de l'enfant, ce qui implique que l'enfant pourra s'épanouir au contact d'un père et d'une mère attentifs à son bien-être quotidien, à son développement intellectuel et affectif.

En l'espèce, le père biologique se refuse au mariage - ce qui est son droit - mais également à la vie commune, et n'a de ce fait que des contacts épisodiques avec son enfant.

Dans de telles circonstances, l'adoption ne pourrait être accordée dans l'intérêt de l'enfant.

Je n'aperçois donc aucune solution acceptable au problème tel qu'il est posé par les requérants.

Les contacts limités qu'a le requérant avec son fils rendent hypothétique l'existence d'une vie familiale entre eux, et donc l'existence d'une ingérence. C'est pour cette raison que je n'ai pu me rallier à la majorité.

HISTORY OF PROCEEDINGS

Date	Item
15 May 1991	Introduction of application
17 July 1991	Registration of application
Examination of admissibility	
2 December 1991	Commission's decision to invite the Government to submit their observations on the admissibility and merits of the application
26 March 1992	Government's observations
29 May 1992	Applicant's observations in reply
31 August 1992	Commission's decision to declare the complaints relating to Articles 8 and 14 admissible and the remainder of the application inadmissible. Commission's decision to invite the parties, should they so desire, to submit further observations on the merits of the application
Examination of the merits	
23 November 1992	Further observations by the respondent Government on the merits of the application
30 March 1993	Commission's deliberations on the merits and final vote
7 April 1993	Adoption of the Report