AS TO THE ADMISSIBILITY OF

Application No. 24124/94
by A.S.
against Turkey

The European Commission of Human Rights (First Chamber) sitting in private on 24 october 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 18 April 1994 by A. S. against Turkey and registered on 11 May 1994 under file No. 24124/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

A. Particular circumstances of the case

The applicant is a Turkish citizen, born in 1928 and resident in Ankara. Before the Commission he is represented by Güney Dinç, a lawyer practising in Izmir.

The facts of the present case as submitted by the applicant may be summarised as follows:

On 10 November 1960 a daughter X. was born to Y. out of wedlock.

On 18 December 1960, Y. instituted paternity proceedings against the applicant (babalik davasi). She claimed that the applicant was the biological father of her daughter, X.

On 12 November 1962 the Izmir Court of First instance (Asliye Hukuk Mahkemesi), after having examined the parties' submissions and having obtained an expert opinion which had involved blood tests, granted the action. The Court held that the evidence submitted to it sufficiently proved that the applicant was the father of X.

On 6 November 1967 the applicant applied for the reopening of the

proceedings. In his application for reopening, the applicant submitted, inter alia, that based on lack of medical facilities in Turkey at the time when the court had decided that he was the father, the blood tests carried out by the experts were not scientifically reliable. He argued the existence of recent methods used in blood tests, namely the determination of sub-blood groups, which the experts had not taken into consideration in the paternity proceedings. In support of his arguments, he submitted a medical report dated 23 August 1967.

In the course of proceedings, the Izmir Court of First Instance ordered blood tests. On 13 July 1968, the Forensic Medical Institution, after having carried out an examination on the blood groups of the applicant, X. and Y., concluded that the applicant could not be the biological father of X.

On 10 October 1968 the Izmir Court of First Instance granted the applicant's request and annulled the decision dated 12 November 1962.

Y. appealed. On 24 March 1969 the Court of Cassation granted the appeal and quashed the decision dated 10 Ocober 1968 referring the case back to the court of first instance. In its judment, the Court of Cassation held, "The grounds for reopening of the proceedings are limited to those that are enumerated in the law. These grounds cannot be broadened by analogy or interpretation. The facts that scientific methods, allegedly unknown at the time of the previous judgment which has acquired force of res judicata, have been later discovered and that scientific developments have occurred since then, cannot be regarded as a force majeure within the meaning of Article 445 para. 1 of the Code of Civil Procedure (Hukuk Usulü Muhakemeleri Kanunu).

On 20 November 1969 the Izmir Court of First Instance, referring to the reasoning of the Court of Cassation, dismissed the action.

The applicant appealed. On 30 June 1970 the Court of Cassation dismissed the appeal.

On 26 October 1992, the Medicine Faculty of the Ankara University, following a request by the applicant, issued a report which confirmed that the applicant could not be the biological father of X. The Report relied on scientific arguments.

On 22 January 1993 the applicant filed another request for the reopening of the proceedings. He relied on the above medical report dated 26 October 1992.

In a decision dated 27 October 1993, the Izmir Court of First Instance dismissed his request. The Court noted that the proceedings had been previously reopened and determined by the courts. It held that the provisions of the Code of Civil Procedure disallowed to have the case reopened again once it has already been reopened and determined.

The applicant appealed. On 8 February 1994 the Court of Cassation dismissed the appeal. It upheld the cogency of the Court of First Instance's assessment of evidence and its reasoning in rejecting the applicant's appeal.

B. Relevant domestic law

Article 445 of the Code of Civil Procedure (CCP)

Article 445 of the CCP, in so far as relevant, provides:

<translation>

> "A person may request the reopening of the proceedings against judgments which are given in last resort or which

have acquired force of res judicata under one of the following conditions:

1. if a document, which had not been submitted to the Court on account of a force majeur or an act of the party in whose favour the court had decided, is submitted to the Court after decision is made ..."

<original>

"Katiyen verilen veya katiyet iktisap etmis olan kararlar hakkinda asagidaki sebeplere binaen iadei muhakeme telep olunabilir:

1. Muhakeme esnasinda esbabi mücbireye veya lehine hükmolunan tarafin fiiline binaen elde edilemeyen bir senet veya vesikanin hükmün itasindan sonra ele geçirilmis olmasi ..."

Article 452 of the CCP

Article 452 of the CCP provides:

<translation>

"Reopening of the proceedings against a decision concluding the reopening is not available. Only an appeal against this decision would be permissible."

<original>

"iadei muhakeme üzerine verilen karar aleyhine iadei muhakeme olunamaz. Bu karar ancak kabili temyizdir."

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention:

- that he had been denied access to court to contest his paternity. He refers in this regard to the dismissal by the national courts of his second request to have the proceedings reopened;

- that in determination of his paternal rights, he did not have a hearing within a reasonable time. He claims that the period to be taken into consideration for assessing the length of the proceedings started on 18 December 1960, when the paternity proceedings were instituted against him and ended on 8 February 1994 by the final decision of the Court of Cassation concerning his second request for reopening of the proceedings; and

- that, the national courts failed to consider the expert opinions which contained new information in light of the scientific developments and which verified that he was not the biological father of X.

2. The applicant also complains under Article 8 of the Convention that the decisions of the national courts in relation to his paternity, constituted an interference with his private life. He further alleges a violation of Article 3 of the Convention in that, the emotional stress and anxiety which he had been suffering since 1962, when the national courts had decided for paternal affiliation, amounted to degrading and inhuman treatment.

THE LAW

1. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention of the fairness and length of the proceedings and lack of

access to a court in the determination of his paternity.

Article 6 para. 1 (Art. 6-1), in so far as relevant provides:

"1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by [a] ... tribunal established by law".

The Commission observes that Turkey has recognised the competence of the Commission to receive individual petitions under Article 25 (Art. 25) of the Convention only in relation to allegations made in respect of the facts, including judgments which are based on such facts, which have occurred subsequent to 28 January 1987. It must therefore, in the first place, decide whether and to what extent it is competent ratione temporis under Article 25 (Art. 25) of the Convention to examine the applicant's complaints.

The Commission recalls that the proceedings before a court are embodied in its final decision which thus incorporates any defect by which they may have been affected (see, No. 6916/75, Dec. 8.10.76, D.R. 6, pp. 107, 111; see also, mutatis mutandis, H. v. Finland, Comm. Report 5.4.95, para. 99).

The Commission further recalls that according to its constant case-law, the term "final decision" within the meaning of Article 26 (Art. 26) of the Convention must be considered as referring to the final decision resulting from the exhaustion of all "effective and sufficient" domestic remedies according to the generally recognised rules of international law. (see e.g., No. 10530/83, Dec. 16.5.85, D.R. 42, pp. 171, 172). The Commission also recalls that a final decision given on an application for the reopening of the proceedings cannot be regarded as a "final decision" within the meaning of Article 26 (Art. 26) of the Convention, unless the proceedings are reopened and such a decision is given, in principle, by the decision of the highest national authority competent to decide on the complaint which forms the object of the application to the Commission (cf. e.g., No. 10431/83, Dec. 16.12.83, D.R. 35, pp. 241, 243; No. 23949/94, Dec. 18.5.94, D.R. 77, pp. 140, 142; cf. also, e.g., No. 17128/90, Dec. 10.7.91, D.R. 71, pp. 275, 281).

In the present case, the Commission observes that the first two sets of proceedings, namely, the paternity proceedings and subsequent reopening proceedings were concluded in 1962 and 1970 respectively.

It is true that on 29 September 1992, the applicant sought, once again, the reopening of the proceedings. However, on 8 February 1994 the Court of Cassation declared the applicant's appeal against the refusal by the Izmir Court of First Instance inadmissible on the grounds that under Turkish law, a person cannot request reopening of the proceedings twice in connection with the same judgment. Therefore the decision of the Court of Cassation dated 8 February 1994 cannot be regarded as a "final decision" within the meaning of Article 26 (Art. 26) of the Convention.

In light of the above, the Commission finds that the "final decision" in the applicant's case was given, at the latest, on 30 June 1970 that is before 28 January 1987, i.e., the date as from which Turkey has recognised the Commission's competence to receive individual petitions.

It follows that this part of the application is outside the competence ratione temporis of the Commission and therefore incompatible with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

To the extent that the applicants complaints may be understood as being exclusively related to the proceedings concerning the second

request of reopening dated 29 September 1992, the Commission recalls that Article 6 (Art. 6) of the Convention does not oblige States to allow individuals the opportunity of having their case reopened once the judgment has become final. Nor does it apply to the proceedings for reopening a trial (cf. No. 7761/77, Dec. 8.5.78, D.R. 14, pp. 171, 173).

Therefore, in so far as the applicant's complaints fall within the scope of the Commission's competence ratione temporis, they must be rejected as being incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

2. The applicant also complains under Article 8 (Art. 8) of the Convention that the decisions of national courts, by which it was established that he was the father, constituted an interference with his private life. He lastly complains of a violation of Article 3 (Art. 3) on account of emotional stress and anxiety which he had been allegedly suffering since 1962, when the national courts had decided for paternal affiliation.

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of the provisions invoked by the applicant, as this part of the application is incompatible with the provisions of the Convention for the following reasons:

The Commission firstly recalls the scope of Turkey's declaration on the competence of the Commission to receive individual applications referred to in paragraph 1 above. Next, it observes, in line with its above findings, that in the present case, the final decision in the paternity proceedings was given, latest, on 30 June 1970. The Commission therefore finds that the applicant's complaints relate to the facts which had occurred before 28 January 1987, i.e. the date as from which Turkey has recognised the Commission's competence to receive individual petitions.

It follows that this part of the application is outside the competence ratione temporis of the Commission and therefore incompatible with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)