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

FIFTH SECTION

DECISION

Application no. 26610/09
Hans-Gerd HÜLSMANN
against Germany

The European Court of Human Rights (Fifth Section), sitting on 5 November 2013 as a Committee composed of:

Boštjan M. Zupančič, *President,*
Angelika Nußberger,
Helena Jäderblom, *judges,*

and Stephen Phillips, *Deputy Section Registrar,*

Having regard to the above application lodged on 30 April 2009,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Hans-Gerd Hülsmann, is a German national, who was born in 1960 and lives in Xanten. He was represented before the Court by Mr G. Rixe, a lawyer practising in Bielefeld.

A. The circumstances of the case

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

1. Background to the case

Ms S.B. has been living with her future husband, Mr B., since 1997. In March 1999 she entered into a relationship with the applicant. She became pregnant in August 1999. According to the applicant, she confirmed to him and their respective relatives that he was the child's father.

On 17 March 2000 B. acknowledged paternity of the child to be born (M.) before the Sonsbeck Civil Registry Office with S.B.'s consent.

On 8 May 2000 M. was born. The applicant visited S.B. and the child on several occasions in hospital and at their home up to August 2000.

On 22 August 2000 the Wesel Youth Office refused to register the applicant's acknowledgment of paternity because B. had already acknowledged paternity of M.

On 25 September 2000 S.B. and B. married.

On 20 June 2001 the Rheinberg District Court dismissed the applicant's request of 24 August 2000 to appoint the child M. a *curator ad litem* for bringing future proceedings aimed at challenging B.'s paternity in M.'s interest.

The applicant saw M. again on nine occasions between September 2002 and January 2003. In the applicant's submission, S.B. and / or B. prevented further contact before and after that period.

On 29 April 2003 the applicant declared in an instrument certified by a notary that he acknowledged paternity of M.

2. The proceedings at issue

On 20 March 2002 the applicant brought an action in the Rheinberg District Court to have his paternity established. M.'s legal parents S.B. and B. contested that the applicant was the biological father of M.

On 10 December 2002 the Rheinberg District Court dismissed the applicant's action.

On 24 June 2003 the Düsseldorf Court of Appeal, endorsing the reasons given by the District Court, dismissed the applicant's appeal. It found that pursuant to Article 1600d § 1 of the Civil Code (see Relevant domestic and comparative law and practice below), the applicant did not have a right to determination of paternity, as B. was M.'s father as a result of his acknowledgment of paternity with S.B.'s consent pursuant to Article 1592 no. 2 of the Civil Code (see Relevant domestic and comparative law and practice below). He was also precluded from challenging B.'s paternity under Article 1600 of the Civil Code (see Relevant domestic and comparative law and practice below) as, in accordance with the requirements set up by the Federal Constitutional Court in its case-law, there was a social and family relationship between B. and M.

On 25 July 2003 the applicant lodged a constitutional complaint with the Federal Constitutional Court against these decisions. He argued, in particular, that the impugned decisions violated his rights under Articles 8 and 14 of the Convention.

On 3 December 2006 B. died.

On 19 September 2007 the applicant repeated two earlier inquiries about the progress of the proceedings.

On 13 October 2008 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 1 BvR 1548/03). It found, in particular, that Article 1600 of the Civil Code, which precluded

a presumed biological father from challenging the paternity of the legal father if there was a social and family relationship between the latter and the child concerned did not breach the presumed biological father's parental rights under the Basic Law. Moreover, the applicant's personality rights did not entail a right to have his biological descent (not entailing any parental responsibility) established alongside B.'s legal paternity.

The decision was served on the applicant's counsel on 31 October 2008.

3. Previous proceedings before this Court

On 18 August 2003 the applicant brought an application (no. 26556/03) to the Court in relation to the proceedings here at issue, at a time when those proceedings were still pending before the Federal Constitutional Court. On 22 January 2008 a Committee of three judges of the Court declared the application inadmissible for non-exhaustion of domestic remedies.

The applicant further brought another application (no. 33375/03) before the Court concerning the refusal of the German courts to grant him access to M. On 18 March 2008 a Chamber of the Court declared the application inadmissible, finding that it was manifestly ill-founded.

B. Relevant domestic and comparative law and practice

1. Provisions on establishment and challenging of paternity

The relevant domestic and comparative law is summarised, in particular, in the Court's judgment in the case of *Kautzor v. Germany* (no. 23338/09, §§ 32-39, 22 March 2012).

The provisions referred to in the present case provide as follows. Under Article 1592 of the Civil Code, a child's father is either the man who on the date of the child's birth was married to the child's mother (no. 1), or the man who acknowledged paternity (no. 2), or whose paternity is judicially established under Article 1600d of the Civil Code (no. 3). Article 1600d § 1 of the Civil Code provides that paternity is to be established by the courts if there is no paternity under Article 1592 nos. 1 and 2 of the Civil Code. Under Article 1600 § 1 of the Civil Code, in the version in force at the time of the decisions of the civil courts, entitlement to challenge paternity lay only with the man whose paternity existed under Article 1592 nos. 1 and 2, with the mother and with the child.

2. The Act on Legal Redress for Protracted Court Proceedings and Criminal Investigations

The Act on Legal Redress for Protracted Court Proceedings and Criminal Investigations (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*) entered into force on 3 December 2011. It was enacted in response to the Court's pilot

judgment in the case of *Rumpf v. Germany* (no. 46344/06, 2 September 2010). In that case, the Court found a violation of Article 6 § 1 of the Convention on account of the excessive length of the civil proceedings at issue. It further held that there had been a violation of Article 13 of the Convention on account of the lack of an effective domestic remedy in respect of the applicant's complaint about the unreasonable duration of the proceedings. Moreover, it held that the respondent State had to set up an effective domestic remedy or combination of such remedies capable of securing adequate and sufficient redress for excessively long proceedings, in line with the Convention principles as established in the Court's case-law.

The provisions contained in the said Act are summarised, in particular, in the Court's decisions in the cases of *Taron v. Germany* ((dec.), no. 53126/07, §§ 15 and 18-29, 29 May 2012) and *Garcia Cancio v. Germany* ((dec.), no. 19488/09, §§ 19 and 26-38, 29 May 2012). The newly added section 198 § 1 of the Courts Organisation Act (*Gerichtsverfassungsgesetz*) provides, in particular, for a compensation claim for parties to proceedings who suffered a disadvantage from the unreasonable duration of the proceedings. The reasonableness of the length of the proceedings depends on the circumstances of the case, in particular the difficulty and importance of the proceedings and the conduct of the parties and relevant third persons.

Under the new section 198 § 2 of the Courts Organisation Act, compensation for non-pecuniary damage in the amount of 1,200 euros per year of protraction may be claimed if compensation by other means is insufficient. If the amount calculated is not equitable in the circumstances of the case, the court may fix a higher or a lower sum.

Since the entry into force of sections 198 ss. of the Courts Organisation Act, the domestic courts have repeatedly confirmed that these provisions applied to proceedings before the civil courts in family matters as the legislator intended to settle the problem of the lack of an effective remedy to complain about unreasonably lengthy court proceedings in a conclusive manner (see, for instance, Thuringian Court of Appeal, file no. 1 WF 634/11, decision of 29 December 2011, §§ 10-11; Brandenburg Court of Appeal, file no. 13 WF 235/13, decision of 6 January 2012, § 4; Düsseldorf Court of Appeal, file no. II-8 WF 21/12, 8 WF 21/12, decision of 15 February 2012, § 4; Bremen Court of Appeal, file no. 4 WF 137/12, decision of 12 November 2012, §§ 10-15 by reference to the legislator's explanatory report).

In applying sections 198 ss. of the Courts Organisation Act to proceedings in family matters, it has been considered at times that, whereas the protracted length of custody proceedings may lead to or increase an alienation between a parent and a child, this did not justify a deviation from the lump sum amount of compensation under section 198 § 2 of the Courts Organisation Act (see Karlsruhe Court of Appeal, file

no. 23 SchH4/12 EntV, judgment of 11 January 2013, §§ 114-116). Conversely, it has also been found that a higher amount than the lump sum calculated under section 198 § 2 of the Courts Organisation Act had to be awarded in a case concerning the unreasonable duration of proceedings relating to contacts between a father and his son. The compensation had to be increased the more the length of the proceedings had had an impact on their outcome. Moreover, proceedings concerning child care were, as a rule, particularly burdensome for the parties (see Braunschweig Court of Appeal, file no. 4 SchH 1/12, judgment of 8 February 2013, §§ 188, 193-195).

COMPLAINTS

The applicant complained, in particular, under Articles 8, 6, 13 and 14 of the Convention that the domestic courts had not allowed him to challenge B.'s legal paternity and to have his own paternity established, which had violated his right to respect for his private and family life and had discriminated against him. He further argued that the length of the proceedings had been unreasonable and that there had been a lack of an effective remedy available to him in that respect.

THE LAW

A. Alleged violation of Article 8 of the Convention

The applicant complained under Articles 8 and 6 of the Convention that the domestic courts' refusal to allow him to challenge B.'s legal paternity and to have his own paternity established even after B.'s death and the unreasonable length of the proceedings had violated his right to respect for his private and family life.

The Court considers that this part of the application falls to be examined under Article 8 of the Convention in the first place, which reads 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 Court, having regard to its case-law (see, in particular, *Kautzor*, cited above, § 63; and *Ahrens v. Germany*, no. 45071/09, § 60, 22 March 2012),

finds that the domestic courts' decision to reject the applicant's request to establish his paternity of M. interfered with his right to respect for his private life.

In determining whether that interference, which was in accordance with Articles 1600d § 1, 1592 no. 2 and 1600 of the Civil Code and taken for the protection of the rights of B., S.B. and M., was necessary in a democratic society for the purposes of Article 8 § 2, the Court reiterates the following.

1. Substantive requirements

Article 8 can be interpreted as imposing on the Member States an obligation to examine whether it was in the child's best interests to allow a biological father to establish a relationship with his child, in particular by granting contact rights (see *Anayo v. Germany*, no. 20578/07, §§ 67-73, 21 December 2010; *Schneider v. Germany*, no. 17080/07, §§ 95-105, 15 September 2011; and *Kautzor*, cited above, § 76). This may imply the establishment, in access proceedings, of biological – as opposed to legal – paternity if, in the special circumstances of the case, contact between the alleged biological father – presuming that he was in fact the child's biological parent – and the child were considered to be in the child's best interests (see *Schneider*, cited above, § 103; and *Kautzor*, cited above, § 76).

However, the Court has further found that this did not imply a duty under the Convention to allow the alleged biological father to challenge the legal father's status or to provide a separate action to establish biological – as opposed to legal – paternity (see *Kautzor*, cited above, § 77; and *Ahrens*, cited above, § 74). Having regard, in particular, to the lack of a consensus among the Member States and to the wider margin of appreciation to be accorded to the States in matters regarding legal status, the Court considered that the decision whether the established or alleged biological father should be allowed to challenge paternity under the circumstances of the cases of *Ahrens* and *Kautzor* fell within the State's margin of appreciation (see *Ahrens* and *Kautzor*, both cited above, §§ 75 and 78, respectively; and *Koppikar v. Germany* [Committee] (dec.), no. 11858/10, 11 December 2012).

The Court cannot discern any elements which would allow distinguishing the present case from the last-mentioned cases. The fact that B., the child's legal father, died in December 2006 does not warrant a different conclusion. It can be left open whether barring a biological father from challenging paternity also after the legal father's death would fall within the State's margin of appreciation in all circumstances. In any event, it is to be noted that in the present case B. died during the proceedings before the Federal Constitutional Court, that is, after the termination of the proceedings before the civil courts, which were alone called upon to establish the facts at issue. Therefore, the above-mentioned principles established in the cases of *Ahrens* and *Kautzor* (cited above, *ibid.*) apply also in the instant case.

2. Procedural requirements

As regards the compliance of the decision-making process with the procedural requirements implicit in Article 8, the Court reiterates that in cases concerning a person's relationship with his or her child, there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a *de facto* determination of the matter (see, *inter alia*, *Hoppe v. Germany*, no. 28422/95, § 54, 5 December 2002, and *Süß v. Germany*, no. 40324/98, § 100, 10 November 2005). Furthermore, particular diligence is required in cases concerning the civil status of a young child (see *Mikulić v. Croatia*, no. 53176/99, § 44, ECHR 2002-I; and *Kautzor*, cited above, § 81).

The Court observes that the period to be taken into consideration in order to determine the length of the proceedings started on 20 March 2002, when the applicant brought his paternity action. It ended on 31 October 2008, when the Federal Constitutional Court's decision was served on the applicant's counsel. It thus lasted more than six years and seven months at three levels of jurisdiction. The case was pending, in particular, for more than five years and three months before the Federal Constitutional Court.

The Court notes at the outset that since 3 December 2011, the newly enacted sections 198 ss. of the Courts Organisation Act provide for a compensation claim for persons who suffered a disadvantage from the unreasonable duration of proceedings (see Relevant domestic and comparative law and practice above). It further takes note of the applicant's argument that an action for compensation under the new provisions would have been unable to grant him sufficient redress for a breach of his rights under Article 8 as it could not have resulted in his proceedings being conducted more speedily.

The Court reiterates that in the case of *Taron v. Germany* ((dec.), no. 53126/07, 29 May 2012) it found that there was no reason to believe that the new remedy would not afford applicants the opportunity to obtain adequate and sufficient compensation in respect of their complaint under Article 6 about the unreasonable length of proceedings. Therefore, even applicants who had lodged their application with the Court before the entry into force of the Act creating the new remedy had to avail themselves of that remedy in order to comply with the requirement of exhaustion of domestic remedies (*ibid.*, §§ 37-47; and *Bandelin v. Germany* (dec.), no. 41394/11, § 13, 22 January 2013).

As regards the question whether adequate redress may be granted in proceedings under sections 198 ss. of the Courts Organisation Act for an alleged breach of Article 8 (as distinct from Article 6) of the Convention by the unreasonable duration of proceedings, the Court observes that the domestic courts already applied the said provisions to proceedings before the civil courts sitting in family matters. It further notes that the wording of section 198 § 2 of the Courts Organisation Act puts the domestic courts in a

position to take into account, in particular, that the protracted length of proceedings in family matters may result in an alienation between a parent and a child and may thus entail a *de facto* determination of the matter (see Relevant domestic and comparative law and practice above).

The Court, however, does not have to decide in the present case whether the new remedy was capable of affording the applicant adequate and sufficient redress for the alleged breach of his rights under Article 8. Having regard to the reasons given by the domestic courts for their decision, it considers that the outcome of the case was, in any event, and contrary to the applicant's submissions, not predetermined by the duration of the proceedings before the domestic courts. The proceedings were conducted speedily before the civil courts sitting in family matters, which had to determine the factual issues. The Court notes that the Court of Appeal rejected the applicant's request to establish his paternity of M., in particular, as there was a social and family relationship between M. and his legal father B. already at that time. The duration of the proceedings from then therefore no longer affected the applicant's rights under Article 8 in this regard. Moreover, apart from the question of the existence of a social and family relationship between the legal father and the child concerned, the domestic courts' decisions were determined by legal questions and further factual elements (notably the prior acknowledgement of paternity by B.) which did not change with the passage of time.

In these circumstances, the Court considers that the procedural requirements of Article 8 were complied with. Therefore, the interference with the applicant's right to respect for his private life by the domestic courts' decisions was justified under Article 8 § 2 of the Convention.

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

B. Remainder of the applicant's complaints

The applicant further complained that the length of the paternity proceedings had been unreasonable and had also led to a breach of Article 6 § 1 of the Convention.

The Court, having regard to its above findings and to those in the case of *Taron* (cited above, *ibid.*), considers that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

Moreover, the applicant claimed that he did not have an effective remedy at his disposal to complain of the length of the proceedings, as required by Article 13 of the Convention.

Given that the applicant's complaint under Article 6 has been rejected for non-exhaustion of domestic remedies, the Court finds that the related

complaint under Article 13 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

Relying on Articles 8 and 14 of the Convention, the applicant also submitted that the domestic courts' refusal to allow him to challenge B.'s legal paternity and to have his own paternity established and the underlying legal provisions had discriminated against him as a biological father compared to the mother, the legal father and the child.

The Court, having regard to its above findings and to those in comparable cases (see, in particular, *Kautzor*, cited above, §§ 90-92; and *Ahrens*, cited above, §§ 88-90), considers that the decision to give the existing family relationship between the child and his legal parents precedence over the relationship with his alleged biological father falls, in so far as the legal status is concerned, within the State's margin of appreciation. The applicant has not, therefore, been treated differently compared to persons in a similar situation without an objective and reasonable justification.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips
Deputy Registrar

Boštjan M. Zupančič
President