CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 34070/03
by Dmitriy IVANOV
against Azerbaijan

The European Court of Human Rights (First Section), sitting on 15 February 2007 as a Chamber composed of:

Mr C.L. ROZAKIS, *President,*
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS,
Mr G. MALINVERNI, *judges,*

and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 29 July 2003,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

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, Mr Dmitriy Ivanov, is an Azerbaijani national who was born in 1973 and lives in Kazi-Magomed. He was represented before the Court by Mr I. Aliyev, a lawyer practising in Azerbaijan. The Azerbaijani Government ("the Government") were represented by their Agent, Mr C. Asgarov.

A. The circumstances of the case

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

In December 1999 the applicant got married. He and his wife lived together until March 2000.

After the applicant had moved out of his wife's house, he had an intention to commence divorce proceedings. However, approximately at this time, he found out that his wife was pregnant. Believing that he was not the father of the yet unborn child, in August 2000 he requested the Ali-Bayramli Register of Civil Status Acts not to list him as the biological father in the birth certificate upon the child's birth.

In October 2000 the applicant's wife gave birth to a daughter. Despite the applicant's earlier request, based on a statutory presumption of paternity, the Register of Civil Status Acts issued a birth certificate mentioning the applicant as the child's father. As the applicant and his wife were separated and no longer lived together as a family, on 27 November 2000 the Ali-Bayramli District Court ordered the applicant to pay child support to his wife.

The applicant then instituted civil proceedings, disputing his paternity and asking the court to strike out his name as the child's father from the relevant civil status documents. He claimed that, on the night after his wedding, he discovered that his wife was not a virgin as he expected. He was shocked by this and refused to continue the sexual intercourse with her. He further maintained that thereafter he had never had any sexual intercourse with his wife and that the child had been conceived in an adulterous relation with another person.

After a preliminary hearing, on 22 February 2001 the Ali-Bayramli District Court ordered a biological expert examination to determine the paternity. On 29 November 2001, an expert of the Ministry of Health issued an opinion on the applicant's paternity. The expert performed an ABO blood group test by comparing the applicant's, the child's and the mother's blood types and, based on its results, concluded that the applicant "could be the child's father". The expert noted that a DNA test would yield a more precise conclusion, but the expert did not possess adequate medical inventory to perform such a test.

Relying on the results of the ABO blood group test, the fact that the applicant and his wife lived together at the time of the child's conception, as well as the witness testimony concerning the relations between the applicant and his wife, on 10 January 2002 the Ali-Bayramli District Court dismissed the applicant's claim.

The applicant filed an appeal, arguing that the District Court's judgment was arbitrary, because the expert opinion used by the court did not provide a definite conclusion and because the results of the ABO test could not be

considered as a reliable source for identifying the child's biological father. He further argued that only the DNA test could provide a conclusive answer to the question of paternity.

On 13 May 2002 the Court of Appeal upheld the first instance court's judgment, holding that the applicant failed to substantiate his arguments or present any new evidence proving that he was not the child's father. In its judgment, the court was silent about the applicant's request for a DNA test. Upon the applicant's appeal in cassation, on 29 January 2003 the Supreme Court upheld the lower courts' judgments dismissing the applicant's claim.

In May 2003 the applicant filed an additional cassation complaint with the President of the Supreme Court, requesting that the proceedings be reopened. On 6 June 2003 the President rejected this request.

However, in April 2005 the proceedings were reopened and the case was referred to the Plenum of the Supreme Court based on an application by the President of the Supreme Court. On 15 April 2005 the Plenum found that the Court of Appeal breached the procedural requirements by ignoring the applicant's request to order a DNA test. It further noted that such a test would constitute the "principal type of evidence" in this case. The Plenum quashed the decision of the Supreme Court of 29 January 2003 and the related judgment of the Court of Appeal of 13 May 2002 and remitted the case to the Court of Appeal.

On 11 August 2005 the Court of Appeal instructed the Forensic Medicine and Pathologic Anatomy Department of the Ministry of Health to conduct a DNA test of the applicant, his former wife and her child. Despite having been notified about the time and place of the DNA testing, the applicant failed to appear for the test without any good reason. According to the Government, the applicant received several such notifications.

Furthermore, although they had been informed about the time and place of the appeal hearing, neither the applicant nor his former wife appeared for the hearing. In such circumstances, on 8 December 2005 the Court of Appeal noted that it had been impossible to obtain DNA evidence due to the applicant's failure to cooperate. It therefore found that the parties (and in particular, the applicant) were not interested in obtaining new evidence that would enable the court to reach a different conclusion. For these reasons, the Court of Appeal again upheld the Ali-Bayramli District Court's original judgment of 10 January 2002.

No cassation appeal was filed against the Court of Appeal's judgment of 8 December 2005 within the statutory three-month period for filing cassation appeals.

B. Relevant domestic law

1. Law "On Courts and Judges" of 1997

Article 77. The Supreme Court

"[T]he Supreme Court shall be the highest judicial authority with regard to civil ..., criminal, administrative and other disputes falling within the jurisdiction of the general and specialised courts.

The Supreme Court [is] a court of cassation instance..."

Article 79. The Plenum of the Supreme Court and its competence

"The Plenum of the Supreme Court shall be composed of the President, Vice Presidents and judges of the Supreme Court, the President of the Economic Court, the President of the Court of Appeal and the President of the Supreme Court of the Nakhchivan Autonomous Republic. ...

The Plenum of the Supreme Court ... shall, in the manner established by law, review cases under the procedure of additional cassation ..., on submission of the President of the Supreme Court, or pursuant to a protest by the Chief Prosecutor or appeal by the defendant ..."

Article 83. The competence of the President of the Supreme Court

"The President of the Supreme Court ... shall, in cases and under the procedure provided by law, submit cassation-instance decisions for the review of the Plenum of the Supreme Court..."

2. Code of Civil Procedure of the Republic of Azerbaijan of 2000

Article 419. The decision of the cassation-instance court

"419.4. The decision [of the cassation-instance court] shall enter into force from the moment of its delivery."

Article 422. Review of cassation-instance decisions

"Decisions of the Supreme Court of the Republic of Azerbaijan ... may be reviewed by the Plenum of the Supreme Court of the Republic of Azerbaijan under the procedure of additional cassation upon a submission, appeal or protest."

Article 423. The right to file a submission, appeal or protest

"A submission concerning a decision of the Supreme Court of the Republic of Azerbaijan ... may be made by the President of the Supreme Court on the basis of an application by persons non-parties to the case whose interests are affected by the judicial acts. An appeal may be filed by a party to the case represented by an advocate. [A protest may be filed by the Chief Prosecutor in certain specified circumstances.]"

Article 424. The grounds for review by the Plenum of the Supreme Court

"424.1. The Plenum considers cases exclusively on the points of law."

Article 424.2 lists the grounds which merit the review of the Supreme Court's cassation-instance decision by the Plenum of the Supreme Court. These grounds are present if, *inter alia*, the Supreme Court's decision was drawn up in violation of the formal requirements concerning the contents of a judicial decision, or was based on a legal norm declared as unconstitutional by the Constitutional Court, or if the Supreme Court's ruling infringed the rights and obligations of persons who were not a party to the case.

Article 426. Referral of a submission, appeal or protest [to the Plenum]

"426.1. If appropriate grounds exist, the President [of the Supreme Court] shall refer the submission, appeal or protest, together with the case file, to the Plenum of the Supreme Court.

426.2. The submission, appeal or protest shall be filed within two months after the date of delivery of the [relevant] decision of the Supreme Court. ..."

Article 429. The competence of the Plenum of the Supreme Court

"429.0. Upon review of a case under the procedure of additional cassation, the Plenum of the Supreme Court has the competence to: ...

429.0.1. uphold the decision of the cassation-instance court and dismiss the submission, appeal or protest;

429.0.2. make amendments to the decision of the cassation-instance court;

429.0.3. quash, in full or in part, the decision of the cassation-instance court, as well as the related decision of the appellate court, and remit the case for re-examination by the appellate court; ..."

COMPLAINT

The applicant complained under Article 6 § 1 of the Convention that, by ignoring his request to order a DNA blood test in determining his paternity, the domestic courts had violated his right to a fair trial.

THE LAW

The applicant complained that the domestic proceedings were unfair because the courts ignored his request to order a DNA test. He relied on Article 6 § 1 of the Convention, which provides as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. The parties' submissions

The Government submitted that the applicant had not exhausted domestic remedies because he failed to appear for the DNA testing as well as the hearing in the Court of Appeal following the quashing of earlier judgments by the Plenum of the Supreme Court.

The applicant argued, relying on *Babayev v. Azerbaijan* ((dec.), no. 36454/03, 27 May 2004), that the Plenum of the Supreme Court did not constitute an effective remedy and, therefore, the Court should not take into consideration any domestic proceedings which took place after the Supreme Court's final decision of 29 January 2003.

The applicant further argued that, at the time of lodging of the present application with the Court, he had exhausted all the available domestic remedies by 29 January 2003, when a final decision was delivered by the Supreme Court. Only after the application had been lodged with the Court, the proceedings were reopened and the case examined by the Plenum of the Supreme Court and subsequently re-examined by the Court of Appeal. Therefore, the applicant contended that, because he had exhausted the domestic remedies available by the time of lodging of the application, he had fulfilled the requirement of exhaustion of domestic remedies.

B. The Court's assessment

The Court observes that the applicants' complaint partially relates to facts that occurred prior to 15 April 2002, the date of the Convention's entry into force with respect to Azerbaijan. Specifically, the first instance judgment in the original civil proceedings had been delivered prior to that date. However, the Court considers that it is not necessary to determine whether the complaint falls, either fully or partially, within the Court's competence *ratione temporis* because, even assuming that to be the case, the application is inadmissible for the following reasons.

The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system, thus dispensing the States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with this rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2275-76, §§ 51-52). Article 35 of the Convention normally requires also that the complaints intended to be made subsequently at Strasbourg should have been made to those same courts, at least in

substance and in compliance with the formal requirements and time-limits laid down in domestic law (see *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 18, § 34).

Moreover, the Court emphasises that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. This rule is neither absolute nor capable of being applied automatically. For the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, *inter alia*, that the Court must examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see *Estamirov and Others v. Russia*, no. 60272/00, § 74, 12 October 2006).

The Court observes in this case that the impugned civil proceedings ended with the Supreme Court's final decision of 29 January 2003. However, after the lodging of the present application with the Court, these proceedings were reopened, the original judgments of the Court of Appeal and the Supreme Court were quashed and the case was remitted for a new examination by the Court of Appeal.

The Court does not accept the applicant's argument that the re-opened proceedings should not be taken into account. In particular, the Court notes that the applicant relied on the case of *Babayev v. Azerbaijan* (cited above). In that case, the Court found that the request for reopening of the proceedings in the Plenum of the Supreme Court constituted an extraordinary appeal dependent on the discretionary power of the Supreme Court's President. Therefore, a letter from the Supreme Court's President rejecting the request to have the proceedings reopened could not be considered as a final domestic decision for the purposes of calculating the six-month period for filing an application with the Court. This rejection letter did not constitute a decision on the merits of the case.

However, the Court notes that, although the refusal of an application to reopen proceedings is not considered as a final domestic decision restarting the running of the six-month period, the situation is different when the request to reopen the proceedings is successful and the proceedings are actually reopened (see, *mutatis mutandis*, *G. v. the Federal Republic of Germany*, no. 10431/83, Commission decision of 16 December 1983, Decisions and Reports (DR) 35, p. 241, and *Pufler v. France*, no. 23949/94, Commission decision of 18 May 1994, DR 77, p. 140). In the present case, the proceedings were actually reopened and the case was referred to the Plenum which examined the case on the points of law. The Plenum quashed the earlier court judgments, thus delivering a decision in the applicant's favour. Accordingly, the Supreme Court's judgment of 29 January 2003 no longer constituted the final domestic decision on the merits and the case was returned to the appellate stage. In such circumstances, the Court finds that,

due to the reopening of the proceedings, a new remedy actually became available to the applicant on the domestic level.

As to the applicant's argument that he had exhausted the domestic remedies at the time of lodging his application, the Court recalls that it examines the question of exhaustion of domestic remedies based on the facts existing as of the time it is called upon to decide on the admissibility of the complaint, and not as of the time of lodging of the application (see, for example, *Yolcu v. Turkey* (dec.), no. 34684/97, 3 May 2001, and *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, p. 38, § 91). The Court observes that the substance of the applicant's complaint, both before the domestic courts and the Court, concerned the courts' implicit refusal to order a DNA test in determining his paternity. However, after the reopening of the proceedings, the case was remitted to the Court of Appeal which actually complied with the applicant's request and ordered DNA testing of the applicant and his former wife's child. The Court considers that the Court of Appeal was an effective remedy because, were the results of this DNA test to prove that the applicant was not the child's biological father, it was capable of changing the outcome of the case. However, despite having been duly notified in advance, the applicant failed to appear both for the DNA test and the court hearing without any good reason, thus depriving the State of the opportunity to put matters right through its own legal system. Moreover, the applicant failed to file a cassation appeal from the Court of Appeal's judgment of 8 December 2005. Accordingly, having regard to the particular circumstances of the present case, the Court finds that the applicant failed to exhaust remedies which were still available to him on the domestic level (see, *mutatis mutandis*, *Guliyev and Ramazanov v. Azerbaijan* (dec.), no. 34553/02, 14 February 2006).

It follows that the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Decides to discontinue the application of Article 29 § 3 of the Convention and *declares* the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President