AS TO THE ADMISSIBILITY OF

Application No. 24659/94
by Alfred JUDMAIER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 28 June 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
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN

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 6 June 1994 by Alfred JUDMAIER against Austria and registered on 21 July 1994 under file No. 24659/94;

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

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

The applicant is an Austrian farmer residing in Frojach (Austria). Before the Commission he is represented by Mr. E. Moser, a lawyer practising in Murau (Austria).

A. Particular circumstances of the case

On 13 October 1968 M.G. gave birth to her son A.G. born out of wedlock.

Subsequently the official guardian (Amtsvormund) of A.G. instituted proceedings before the Murau District Court (Bezirksgericht) against the applicant for recognition of paternity and maintenance payments. In these proceedings the applicant recognised paternity of A.G. On 31 March 1969, following this declaration and without the taking of further medical evidence the District Court gave a judgment (Anerkenntnisurteil), in accordance with Section 163 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch) recognising the applicant as A.G.'s father. This judgment became final.

In March 1987 M.G., A.G. and the applicant underwent a medical examination as a result of which the applicant had to be excluded as the biological father of A.G.

On 2 July 1993 the applicant filed an action with the Murau District Court against A.G. for a declaration that he was not A.G.'s father. The applicant referred to the medical report of March 1987.

On 12 July 1993 the District Court rejected the applicant's action. Having regard to its judgment of 31 March 1969 the District Court found that it could not deal with the applicant's action for reasons of res judicata.

On 19 July 1993 the applicant appealed against the District Court's decision.

On 3 August 1993 the Leoben Regional Court (Landesgericht) dismissed the applicant's appeal. It confirmed the District Court's decision and refused leave to an ordinary appeal on points of law (ordentlicher Revisionsrekurs).

On 10 August 1993 the applicant lodged an extraordinary appeal on points of law (außerordentlicher Revisionsrekurs) with the Supreme Court (Oberster Gerichtshof). He submitted that according to the legislation in force as from 1970 on judgments establishing paternity on the mere declaration of the putative father without further evidence being taken were no longer possible. However, the legislator had failed to provide adequate means for challenging a judgment based on recognition given before 1970.

On 7 December 1993 the Supreme Court dismissed the applicant's extraordinary appeal on points of law.

The Supreme Court found that the applicant's action could not be rejected as res judicata.

It considered further whether there existed doubts as to the constitutionality of Section 163 of the Civil Code as in force until 1970. It noted that the legislator, when amending Sections 163 et seq. of the Civil Code in 1970, had acted with the explicit intention that establishment of paternity by recognition and by judgment should have the same legal consequences. However it would appear that under Section 164b of the Civil Code an action for challenging the establishment of paternity by recognition before the Office for Matters of Personal Status (Standesamt) could be introduced at any time, while the establishment of paternity based on a court judgment could only be challenged within the absolute time-limit of 10 years for actions for re-opening of proceedings. This result, based on a merely formalistic interpretation of the law, was manifestly contrary to the legislator's intentions. The Supreme Court concluded that the absolute time-limit of 10 years for actions for re-opening of proceedings, as provided for in Section 530 para. 2 of the Code of Civil Proceedings, was not applicable in paternity matters. Thus, no doubts as to the constitutionality of Section 163 of the Civil Code as in force until 1970 existed.

However, the Supreme Court found that the applicant's action was inadmissible as being filed out of time. According to the Section 534 para. 1 subpara. 4 of the Code of Civil Proceedings an action for re-opening of proceedings must be filed within 4 weeks after the person has learned about the relevant new circumstances. In the present case this was the expert opinion of March 1987 according to which the applicant had to be excluded as father of A.G. The applicant filed his action more than six years later and this action was therefore introduced out of time no matter if one would apply the 4 weeks time limit under Section 534 para. 1 of the Code of Civil Proceedings or the one year time-limit under Section 164b para. 2 of the Civil Code.

B. Relevant domestic law

Sections 163 et seq. of the Austrian Civil Code concern paternity in respect of children born out of wedlock.

Paternity is established either by recognition (Anerkenntnis) before the Office for Matters of Personal Status (Standesamt) or by judgment done in civil court proceedings upon an action filed by the representative of the child born out of wedlock (Section 163b and 163c of the Civil Code). In the latter proceedings since 1970 a formal judgment merely based on the acceptance of the claim by the defendant (Anerkenntnisurteil), as provided for in Section 395 of the Code of Civil Proceedings (Zivilprozeßordnung), is no longer possible (Part 5 para. 4 of the Act on the Reform of the Legal Situation of Children Born out of Wedlock - Gesetz über die Neuordnung der Rechtsstellung des Unehelichen Kindes, BGBl. 1970/432). Thus, the court can only base its findings on the taking of evidence, in particular medical expert reports.

The father can at any time challenge the establishment of paternity based on recognition, if he can prove the existence of circumstances which would rebut the presumption that he was the biological father and which he had not known at the time of the recognition. He has to introduce such proceedings at latest one year after he had learned about these new facts or evidence (Section 164b para. 2 of the Civil Code).

A court judgment establishing paternity over a child born out of wedlock can be challenged by the father with an action for re-opening of proceedings under Sections 529 et seq. of the Code of Civil Proceedings.

Re-opening of civil proceedings can be requested if one of the parties has new relevant facts or evidence (Section 530 para. 7 subpara. 7 of the Code on Civil Proceedings). A request for re-opening must be made within 4 weeks after the person has learned about these new facts or evidence (Section 534 para. 1 of the Code of Civil Proceedings). There is an absolute time limit of ten years after which proceedings cannot be re-opened (Section 530 para. 2 of the Code of Civil Proceedings).

COMPLAINTS

The applicant complains under Article 8 of the Convention that the denial of the Austrian courts to recognise formally that he was not the father of A.G. violated his right to respect for his private and family life. He submits that the law in force did not provide for an adequate possibility to challenge the District Court's judgment of 31 March 1969 according to which he was the father of A.G.

He submits further that he relied on the unequivocal provision of Section 530 para. 2 of the Code of Civil Proceedings according to which re-opening of proceedings was excluded after the elapse of absolute time-limit of ten years. Thus, the Supreme Court's judgment of 7 December 1993 only opened up a theoretical possibility of challenging the wrong establishment of paternity which he could not have actually availed himself of.

THE LAW

The applicant complains under Article (Art. 8) 8 of the Convention that the denial of the Austrian courts to recognise formally that he was not the father of A.G. violated his right to respect for his private and family life.

Article 8 (Art. 8) of the Convention 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 and morals, or for the protection of the rights and freedoms of others."

The Commission considers that the applicant's interest to have established whether he was or was not the father of A.G. may be considered as a matter of his private and family life within the meaning of Article 8 para. 1 (Art. 8-1) (see Eur. Court H.R., Rasmussen judgment of 28 November 1984, Series A no. 87, p. 13, para. 33).

The Commission recalls that the essential object of Article 8 (Art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (Eur. Court H.R., Kroon and others judgment of 27 October 1994, para. 31, to be published in Series A no. 297-C). Respect for family life requires that biological and social reality prevail over a legal presumption of paternity (Kroon judgment, loc cit., para. 40).

In the present case, the applicant in 1969 recognised paternity over A.G. and on 31 March 1969 the Murau District Court established that he was the father of A.G. In March 1987, the applicant learned, as a result of a medical examination, that he had to be excluded as biological father of A.G. However, he did not take any immediate action but introduced civil court proceedings for having established that he was not the father of A.G. in July 1993. In these proceedings the Supreme Court, on 7 December 1993, found that his action, lodged more than six years after he had learned about the new circumstances in 1987, was out of time.

The Commission finds that the applicant, once he had learned that his paternity had to be excluded, could and should have tried to challenge the District Court's judgment of 1969. In this respect the Commission observes that the applicant's argument that no absolute time-limit for re-opening should be applied in paternity proceedings was accepted by the Supreme Court. However, the applicant having learned about the relevant circumstances in 1987, waited for a further six years until he introduced proceedings challenging paternity. When he did so in 1993, the time limits provided for under Section 164b para. 2 of the Civil Code and Section 534 para. 1 of the Code of Civil Proceedings for bringing such proceedings had already expired.

The applicant submits that he relied on the unequivocal provision of Section 530 para. 2 of the Code of Civil Proceedings according to which re-opening of proceedings was excluded after the absolute time-limit of ten years had elapsed. Thus, the Supreme Court's judgment of 7 December 1993 only opened up a theoretical possibility of challenging the establishment of paternity which he could not have actually availed himself of.

However, the Commission notes that the applicant in his extraordinary appeal to the Supreme Court explicitly submitted his view

that the relevant legislation hindered him in effectively challenging the District Court's judgment of 1969.

The Commission can see no reasons why the applicant could not have raised this argument in proceedings introduced earlier which could possibly have led to a successful challenge of the District Court's judgment of 1969.

In these circumstances the Commission finds that the judgment of the Supreme Court rejecting the applicant's action for failure to have complied with a statutory time-limit, does not disclose any lack of respect for his private and family life. Consequently, there is no appearance of a violation of Article 8 (Art. 8) of the Convention.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

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)