CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 53176/99
by Montana Lorena MIKULIĆ
against Croatia

The European Court of Human Rights (Fourth Section), sitting on 7 December 2000 as a Chamber composed of

Mr G. RESS, *President*,
Mr A. PASTOR RIDRUEJO,
Mr L. CAFLISCH,
Mr J. MAKARCZYK,
Mr I. CABRAL BARRETO,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application introduced on 9 October 1999 and registered on 3 December 1999,

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 is a Croatian national, born in 1996 and living in Zagreb (Croatia). She is represented before the Court by her mother Ms Mirjana Mikulić and also by Ms Mirjana Župančić, a lawyer practising in Samobor (Croatia). The respondent Government are represented by their Agent, Ms Lidija Lukina-Karajković.

## A. The circumstances of the case

**Commented [Note1]:** Where the parties' description of the facts differ their respective versions of the facts should be set out separately.

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

The applicant is a child born out of wedlock on 25 November 1996.

In January 1997 the applicant and her mother instituted proceedings with the Zagreb Municipal Court (*Općinski sud u Zagrebu*) against H. P. in order to have established the defendant's paternity.

At the hearing of 17 June 1997 the Municipal Court adopted a judgment by default against the defendant.

However, as the adoption of such a judgment is expressly excluded by the Marriage and Family Act (*Zakon o braku i porodičnim odnosima* - 1977, 1980, 1982, 1984, 1987, 1989, 1990, 1992 and 1999) in so called "status matters" (*statusni sporovi*), on 1 July 1997 the defendant appealed against that judgment.

At the hearing of 6 October 1997 the Zagreb Municipal Court annulled its own judgment. The next hearing was scheduled for 9 December 1997.

Meanwhile, the defendant filed a motion for the exemption of the presiding judge, which was granted on 27 January 1998 by the president of the Zagreb Municipal Court. Consequently, on 23 February 1998 the case was transferred to another judge who scheduled the next hearing for 18 June 1998.

The hearing of 18 June 1998 was adjourned due to the absence of the defendant's counsel.

The hearing of 14 July 1998 was adjourned as the defendant's counsel had died.

At the hearing of 14 October 1998 the defendant's new counsel submitted an *exceptio plurium concubentium* and invited the court to summon several witnesses.

At the hearing of 21 January 1999 two witnesses were heard, while the other witnesses did not appear.

During the hearing of 18 March 1999 the court ordered that a DNA blood analysis be performed on the applicant and the defendant. The appointment

at the relevant clinic was scheduled for 21 May 1999, but the defendant failed to appear.

The next appointment was scheduled for 18 June 1999 but the defendant informed the court that he would be absent from 1 June 1999 until 15 September 1999.

On 19 July 1999 the court ordered a third appointment for the blood analysis on 27 September 1999, but the defendant failed again to appear.

On 13 October 1999 the court ordered a fourth appointment for 22 October 1999, but the defendant informed the court that he would be absent that day.

On 28 November 1999 the court ordered a fifth appointment for 6 December 1999 but the defendant failed to appear.

The next hearing on 17 February 2000 was adjourned as the defendant failed to appear.

At the hearing of 29 February 2000 the court heard the testimonies from the parties and scheduled a sixth appointment for the DNA tests for 25 April 2000. However, on that date the defendant did not appear.

The next hearing on 5 June 2000 was adjourned due to the defendant's absence.

On 12 July 2000 the court concluded the hearing.

On 3 October 2000 the applicant's counsel received the Municipal Court's judgment of 12 July 2000 establishing the defendant's paternity and granting the applicant maintenance from him. On 27 November 2000 the defendant appealed that decision.

## B. Relevant domestic law and practice

The 1999 Constitutional Act on the Constitutional Court (Constitutional Court Act - *Ustavni zakon o Ustavnom sudu Republike Hrvatske*)

**Article 59 § 4**

> "The Constitutional Court may, exceptionally, examine a constitutional complaint prior to exhaustion of other available remedies, if it is satisfied that a contested act, or failure to act within a reasonable time, grossly violates a party's constitutional rights and freedoms and that if it does not institute proceedings a party will be at risk of serious and irreparable consequences."

Marriage and Family Act (1978, 1989, 1990 - *Zakon o braku i porodičnim odnosima*)

**Article 100**

"The father of the child born out of wedlock is the person who has acknowledged paternity or whose paternity has been established by a court judgment."

**Article 333**

"In paternity disputes the provisions of [article] ... 324 (1) ... shall be applied."

**Article 324**

"In disputes concerning marriage it is not possible to adopt a judgment by default (*presuda zbog izostanka*) nor a consent judgment (*presuda na temelju priznanja*)."

Civil Procedure Act (*Zakon o parničnom postupku*)

**Article 7**

"(1) The court is obliged to establish truthfully and thoroughly the facts that are relevant to the merits of the case.

(2) The parties are obliged to submit to the court all the facts on which their claims are founded and all evidence in support of those facts."

**Article 8**

"The court shall decide using its discretion and on the basis of a conscientious and diligent assessment of each piece of evidence separately and all the evidence together, and on the results of the proceedings as a whole which facts it will take as established."

**Article 10**

"The court shall proceed with a case without delays and with as little expense as possible and shall prevent any misuse of the parties' procedural rights."

**Article 269**

"(1) No coercive measures may be applied against a party who does not appear before the court nor may a party be coerced into giving testimony.

(2) The court, taking into account all the circumstances of the case, shall consider the relevance of the fact that a party has not appeared before the court or has declined to give testimony."

Inheritance Act (*Zakon o nasljeđivanju*)

**Article 23**

"(1) Children born out of wedlock and their descendants have the same inheritance rights in relation to the assets of their father, their mother and their mother's relatives as children born in wedlock.

(2) Children born out of wedlock and their descendants have the same inheritance rights in relation to the assets of their fathers' relatives as

children born in wedlock and their descendants if the father has acknowledged his paternity before the competent body, or if he has brought a child to live with him or if he has otherwise indicated that he acknowledges paternity."

**Article 221**

"(1) The Court shall suspend succession proceedings and advise the parties to institute civil proceedings or a relevant procedure with the administrative body if there is a dispute between the parties over the facts that are relevant to the parties' right.

(2) The court shall so advise in particular if the following facts are disputed:

...

3. the facts relevant to the right to inherit, in particular the legality or contents of the will or the relationship between the heirs and the deceased that serves as the basis for inheritance under the law."

## COMPLAINTS

1. The applicant firstly complains under Article 6 § 1 that, although according to the Family Act, the Court shall deal expeditiously with paternity disputes, the proceedings have already lasted for more than three years before the court of first instance and are still pending.

2. The applicant further complains under Article 8 that the failure of the domestic court to reach a decision within a reasonable time deprives her of the financial support by her natural father and of inheritance in case of his death and amounts to a lack of respect for her family and private life. In this connection she complains also under Article 13 of the Convention that, under Croatian law, there is no remedy for speeding up civil proceedings concerning paternity disputes and finally that there are no measures to ensure the appearance of the respondent before the Court.

3. Finally, she complains under Article 14 in conjunction with Article 8 of the Convention that she is discriminated against as a child born out of wedlock in regard to her right to maintenance and inheritance from her natural father, due to the inability of the courts to finalise proceedings establishing paternity.

# THE LAW

1. The applicant complains about the length of the proceedings concerning the paternity dispute, invoking Article 6 § 1 of the Convention, the relevant parts of which, read as follows:

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

The Government submit that the part of the application relating to events which took place prior to 5 November 1997, when the Convention entered into force in respect of Croatia, is outside the Court's competence *ratione temporis*.

In this connection, the Court recalls that Croatia recognised the competence of the European Commission of Human Rights to receive applications "from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by Croatia of the rights recognised in the Convention through any act, decision or event occurring after 5 November 1997." It follows that the period to be taken into consideration by the Court starts on 5 November 1997. However, in order to determine the reasonableness of the length of time in question the Court will have regard to the state of the case on that date (see, among other authorities, the *Podbielski v. Poland*, no. 27916/95, § 31, ECHR 1998-VIII).

The Government further invite the Court to declare this part of the application inadmissible on the ground that it is manifestly ill-founded within the meaning of Article 35 of the Convention. In this connection, they contend that having in mind the specific circumstances of the case, its complexity and the behaviour of the applicant and the court, the length of the proceedings does not appear excessive.

They contend that the Zagreb Municipal Court has enabled both parties to present the facts and submit their evidence and that in this respect the court has followed the parties' proposals.

They also argue that the behaviour of both parties to the proceedings contributed to the delays as the applicant and her mother failed to submit all relevant evidence already in the initial state of the proceedings, i.e., when they were filing the suit. Instead, they proposed the DNA expertise only on 14 October 1998. Furthermore, they presented other evidence, such as relevant photographs, only on 17 February 2000. In the Government's view such behaviour on the part of the applicant shows that she herself has to a great extent contributed to the length of the proceedings. On the other hand, the defendant has been consistently avoiding co-operation with the court. He also contributed to the complexity of the case by submitting an *exceptio plurium concubentium*.

As to the behaviour of the Zagreb Municipal Court, the Government contend that that court showed due diligence, objectivity and impartiality in

dealing with the case. Not only did it make numerous appointments for the DNA expertise, but it also initially adopted a judgment by default, in favour of the applicant, although under Croatian law such a judgment may not be issued in status matters.

The applicant disagrees with the Government and in particular points out that the circumstance that the court, contrary to the provisions of the Family Act, adopted a judgment by default against the defendant in fact contributed to the length of the proceedings, as that judgment had to be annulled and the case to be transferred to another judge.

The Court considers, in the light of the parties' submissions, that this complaint raises serious issues of fact and law under the Convention, the determination of which should depend on an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant complains under Article 8 of the Convention about the failure of the domestic courts to reach a decision concerning the paternity of the defendant insofar as she is deprived of the right to maintenance from him or, in the case of his death to inherit from him, as long as his paternity is not established by a court's decision. She also complains that she had no effective remedy for speeding up those proceedings or ensuring the defendant's presence before the court and invokes Article 13 of the Convention.

The relevant parts of Article 8 read as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 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."

Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

(a) The Court firstly recalls that the provision of Article 13 of the Convention cannot be invoked separately, but only insofar as the main complaint is within the scope of the Convention. In this respect, the Court observes that in the present case the issue under Article 13 is closely connected to the alleged violation of Article 8 of the Convention, as the applicant complains that she had no effective remedy concerning the length of the paternity dispute, and that it is precisely because of the excessive length of those proceedings that her rights under Article 8 are violated. As

in the present case both the factual and legal issues under both Articles invoked are closely linked, the Court considers it necessary to examine them together at this stage of the proceedings.

(b) The Government invite the Court to declare the application inadmissible on the ground that the applicant did not exhaust domestic remedies. In this respect they allege that the applicant failed to lodge a constitutional complaint pursuant to Article 59 § 4 of the newly revised Constitutional Act on the Constitutional Court. That act exceptionally allows the Constitutional Court to examine a constitutional complaint before the exhaustion of other available remedies where there is a serious risk that a party's constitutional rights and freedoms may be violated and that serious and irreparable consequences may arise from the failure of the relevant authorities to reach a decision. Instead, the applicant's mother instituted constitutional court proceedings challenging the constitutionality of the Family Act (*Obiteljski zakon*) and the Registering the Parent's Name Act (*Zakon o upisu imena roditelja*), upon which the court has not yet reached any decision. On the same grounds the Government contend that the applicant's claim under Article 13 of the Convention is manifestly ill-founded.

The applicant argues that the constitutional complaint concerning the constitutionality of the above-said acts is unrelated to the present case.

The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against the State before an international judicial body to use first the remedies provided by the national legal system, thus dispensing 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 the 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, *Assenov and Others v. Bulgaria* no. 24760/94, § 85, ECHR 1999-VIII). The rule is based on the assumption, reflected in Article 13 of the Convention - with which it has close affinity - that there is an effective remedy available in respect of the alleged breach in the domestic system, whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 22, § 48).

Furthermore, under Article 35 the existence of remedies which are available and sufficient must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, *inter alia*, the De Jong, Baljet and Van den Brink v, the Netherlands judgment of 22 May 1984, Series A no. 77, p. 19, § 39; the

Vernillo v. France judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27; and the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210 § 66). It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see the Akdivar v. Turkey judgment cited above, p. 1211, § 68).

In the instant case, the Court notes that the proceedings pursuant to Article 59 § 4 of the 1999 Constitutional Court Act are considered as being instituted only if the Constitutional Court, after a preliminary examination of the complaint, decides to admit it. Thus, although the person concerned can lodge a complaint directly with the Constitutional Court, the formal institution of such proceedings depends on the latter's discretion.

The Court further notes that although a decision of the Constitutional Court finding a violation of some substantive article of the Constitution would have been published in the Official Gazette in the present case, this would not fully remedy the criticised state of affairs as the Constitutional Court lacks jurisdiction to decide the present paternity dispute itself (see, *mutatis mutandis, Feldek v. the Slovak Republic* (dec.), no 29032/95, ECHR 2000).

The question also arises as to whether a constitutional complaint under Article 59 § 4 of the Constitutional Court Act would constitute an effective remedy in the present case. For a party to be able to lodge a constitutional complaint pursuant to that provision two cumulative conditions must be satisfied. Firstly, the applicant's constitutional rights have to be grossly violated by the fact that no decision has been issued within a reasonable time and, secondly, there must be a risk of serious and irreparable consequences for the applicant. As to the first requirement, the Court notes that the Croatian Constitution does not include the right to have one's case decided within a reasonable time in civil law matters. As to the second condition laid down in Article 59 § 4 of the Constitutional Court Act, the Court notes that "serious and irreparable consequences" is a term susceptible to various interpretations and that the Government failed to provide relevant case-law that would indicate with enough certainty what might be considered as a case involving risks of irreparable consequences. In fact, the Government failed to provide any case-law relating to Article 59 § 4 of the Constitutional Court Act.

Consequently, the Court dismisses the Government's preliminary objection in relation to the question of exhaustion of domestic remedies.

(c) The Government further argue that the application is incompatible *ratione materiae* with the provisions of the Convention. In their view, the length of proceedings concerning a paternity dispute where it is alleged that

the defendant is the plaintiff's father cannot be regarded as a violation of Article 8 of the Convention.

The Court recalls that according to its well-established case-law paternity disputes do fall within the ambit of Article 8 of the Convention (see, *mutatis mutandis*, the Vermeire v. Belgium judgment of 29 November 1991, Series A no. 214-C, p. 95, § 44; the Kroon and Others v. the Netherlands judgment of 27 October 1994, Series A no. 297-C, pp. 55-56, § 30; *Elsholz v. Germany* no. 25735/94, § 43, ECHR 2000 and *Mazurek v. France* (dec.), no. 34406/96, ECHR 2000). The Court also notes that the applicant's claim under Article 8 is closely related to the length of the civil proceedings concerning the paternity dispute. The applicant argues that her rights under Article 8 are violated in that the domestic court failed to decide her case within a reasonable time. As long as the paternity of the defendant is not established by the court's judgment, she is deprived of maintenance from him and, in the case of his death, she would not be able to inherit from him. In this respect, it cannot be excluded that the question of the length of the proceedings also concerns the issue under Article 8 of the Convention.

It follows that the Government's objection concerning the alleged incompatibility *ratione materiae* in relation to Article 8 of the Convention has to be dismissed.

(d) Alternatively, the Government submit that the facts of the case do not disclose a violation of either Article 8 or Article 13 of the Convention.

In this respect, the Government argue that the main purpose of the court's judgment establishing that the defendant is the father of the plaintiff is to establish joint custody of both parents over the child. However, such custody may not be established without the active participation of the defendant. In this respect the Government further argue that it would be difficult to expect a person who has been denying his paternity to become a responsible father only due to a court's judgment. It would be quite the opposite, they submit, if the father were a plaintiff trying to establish his paternity.

The Government further contend that, although there is no provision concerning the exact moment from which the applicant would have a right to maintenance from her alleged father, according to well established case-law, the court's judgment declaring the defendant's paternity would also contain an order to the defendant to pay maintenance to the applicant from the date of the filing of the suit. Accordingly, should the court grant the applicant's claim, the defendant would be obliged to pay maintenance from that date on, together with the interest rate prescribed by law.

In addition, the Government claim that the applicant's inheritance rights are also not impaired due to the length of the proceedings concerning paternity dispute as, in the case of the defendant's death, according to Croatian law, she would still be able to claim his paternity before the court.

With respect to the applicant's complaint under Article 13 of the Convention, the Government argue that it is true that the applicant has no remedy to ensure the appearance of the defendant before the court. However, the court enjoys discretion in assessing the relevance of the fact that the defendant is avoiding appearing before the court. The Government further argue that in status matters it is not possible to adopt a judgment by default as, otherwise, the parties might manipulate such an option, the final result being that status matters could be established *ne varietur*, due to the principle of *ne bis in idem*. Furthermore, as to the DNA examination, the Government contend that, under Croatian law, it is not permitted to apply any coercive measures for any kind of medical treatment against a person, as that might amount to an unjustified interference with one's private life.

The applicant disagrees with the Government.

The Court considers, in the light of the parties' submissions, that the factual basis of the complaints under Articles 8 and 13 of the Convention is closely related to those under Article 6 and that they raise serious issues of fact and law under the Convention, the determination of which should depend on an examination of the merits. The Court concludes therefore that those complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

3. The applicant further complains that that she is discriminated against as a child born out of wedlock in regard to her right to maintenance and inheritance from her natural father, due to the inability of the courts to finalise proceedings regarding the establishment of paternity. She invokes Article 14 of the Convention which reads as follows:

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Court notes that the applicant complains under Article 14 of the Convention in two respects. Firstly, she complains that she is deprived of maintenance from her natural father as long as the proceedings concerning paternity dispute are not resolved by the court's judgment. In this regard, the Court notes that the applicant has already raised the same issue under Article 8 of the Convention and that she has failed to substantiate her claim under Article 14 of the Convention. As the Court has examined the issue of the applicant's being deprived of maintenance due to the length of civil proceedings concerning the paternity dispute under Article 8 of the Convention, it considers that no issue in this respect arises under Article 14.

Secondly, the applicant complains under Article 14 of the Convention regarding her right to inherit from her natural father. However, in this respect the Court notes that the applicant's alleged father is still alive and

that no proceedings have so far taken place before the domestic courts as to the applicant's inheritance rights. Moreover, such proceedings might be instituted only in the case of the defendant's death. Therefore, in this respect, the applicant cannot yet claim to be a victim of such a violation. It is not for this Court to speculate whether the applicant, after the death of her alleged father, would have been recognised by the domestic courts as his heir. For the Court to be able to examine a complaint of this nature under Article 14 of the Convention a person in the applicant's position would first have to establish that Croatian authorities denied her inheritance rights form her natural father or his relatives and, therefore, discriminated against her as well as that she had subsequently exhausted domestic remedies.

Accordingly, this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and, therefore, must be declared inadmissible pursuant to Article 35 § 4.

For these reasons, the Court

unanimously

*Declares* admissible, without prejudging the merits, the applicant's complaint under Article 6 § 1 of the Convention concerning her right of having her civil rights determined within a reasonable time;

by a majority

*Declares* admissible, without prejudging the merits, the applicant's complaints under Article 8 of the Convention in conjunction with Article 13 that her right to respect for her family and private life has been violated due to the excessive length of civil proceedings concerning the paternity dispute, as well as her right to an effective remedy for speeding up those proceedings or ensuring the appearance of the defendant before the court;

unanimously

*Declares* inadmissible the remainder of the application.

Vincent BERGER
Registrar

Georg RESS
President