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. 74826/01
by Leonid SHOFMAN
against Russia

The European Court of Human Rights (First Section), sitting on 25 March 2004 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application introduced on 5 September 2001,

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 Leonid Mikhaylovich Shofman, is a Russian national, who was born in 1957 and lives in Groß-Rohrheim, the Federal Republic of Germany. He is represented before the Court by Mr G. Rixe, a lawyer practising in Bielefeld, Germany. The respondent Government are represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

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

On 10 August 1989 the applicant registered his marriage with Ms G. in Novosibirsk. After the marriage they moved to St. Petersburg.

On 12 May 1995, during her stay at her parents' home in Novosibirsk, Ms G. gave birth to a son and gave him her last name, despite the applicant's objections. Shortly thereafter the birth was registered; the applicant was listed in the birth record as the child's father.

In late September 1995 Ms G. and her son returned to St. Petersburg. The applicant believed that he was the father of the boy and treated him as his own.

On 28 March 1996 the applicant moved to Germany. Until September 1997 the applicant waited for Ms G. and her son to join him in Germany. By a letter of September 1997 Ms G. told the applicant that she had no plans to continue their marriage and that she was applying for child support alimony. At about that time the applicant's relatives in Novosibirsk advised him that he had not been the father of Ms G.'s son.

On 16 December 1997 the applicant filed an action for divorce and to contest paternity. On 12 April 1999 the divorce was granted.

On 16 November 2000 the Zheleznodorozhniy District Court of Novosibirsk delivered a judgment. The court established that, according to the results of genetic (DNA) expert examinations of 28 June 1999 and 5 June 2000, the applicant could not be the father of Ms G.'s son. Ms G. maintained that the applicant was the father of the child. On finding no grounds to doubt the validity of the examinations, the court ruled that the applicant was not the father of Ms G.'s son. However, the court found that the case should be governed by the RSFSR[1] Code on Marriage and Family of 30 July 1969 because the child had been born before 1 March 1996 (the date when the new Family Code of the Russian Federation came into effect). The RSFSR Code on Marriage and Family set a one-year time-limit for contestation of paternity, the time-limit was to be calculated from the moment when the person was informed about the registration of paternity. The court found that the applicant had not contested paternity when the child had been born, and that the applicant had only applied to court in December 1997, after the expiration of the time-limit, and, accordingly, his action was time-barred. Finally, the court pronounced that the applicant's reliance on the new Family Code setting no time-limits for paternity disputes was invalid because it could only be applied to family law disputes that arose after 1 March 1996.

[1] RSFSR – Russian Soviet Federalist Socialist Republic.

On 15 March 2001 the Civil Chamber of the Novosibirsk Regional Court upheld, on the applicant's appeal, the judgment of 16 November 2000.

On 20 April and 26 October 2001 the Novosibirsk Regional Court and the Supreme Court of the Russian Federation, respectively, refused the applicant's requests for supervisory review.

On 12 September 2002 the Justice of the Peace of the 3rd Court Circuit of the Zheleznodorozhniy District of Novosibirsk granted the action of Ms G. for payment of alimony and ordered seizure of the applicant's interest in the flat.

B. Relevant domestic law

Article 49 of the RSFSR Code on Marriage and Family of 30 July 1969 (*Кодекс РСФСР о браке и семье*) provided that a person entered in the birth register as the mother or the father of a child could contest such entry within a year of the moment when he or she had become aware or should have become aware that such entry had been made.

Article 52 § 1 of the Family Code of the Russian Federation of 29 December 1995 (*Семейный кодекс РФ*) provides that a person entered in the birth register as the mother or the father of a child may challenge in court the parents' registration entry. No time-limit for the contestation is set. The Family Code of the Russian Federation entered into force on 1 March 1996.

Resolution no. 9 of the Plenary Session of the Supreme Court of the Russian Federation of 25 October 1996 "On application by courts of the Family Code of the Russian Federation to examination of cases concerning paternity and alimony" confirmed that, in respect of children born before 1 March 1996, the RSFSR Code on Marriage and Family was to be applied and, accordingly, the time-limit for contestation of paternity was to be one year from the moment when the person had become aware or should have become aware about his or her registration as the child's parent.

COMPLAINTS

The applicant complains under Article 6 of the Convention that the domestic courts wrongly interpreted the relevant provisions of family law. The applicant complains under Article 8 of the Convention that the time-limit for contesting paternity applied by domestic courts violated his right to respect for his private and family life.

THE LAW

1. The applicant complains under Article 8 of the Convention that the one-year time-limit that started running from the child's registration was too short to enable him to disclaim his presumed paternity. Article 8 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 Government submit that the judgments of the domestic courts were in full compliance with the domestic law, and namely the RSFSR Code of Marriage and Family which was held to be applicable in the applicant's case. The domestic courts established that the applicant had agreed to his registration as the child's father in July 1995 and, accordingly, he could contest the record until 30 June 1996. However, he only applied to a court in December 1997 and therefore his action was time-barred. The Government conclude that there was no interference with the applicant's right to respect for his private and family life.

The applicant submits, firstly, that even though the paternity proceedings were aimed at the dissolution of existing family ties, the determination of his legal relations with his child undoubtedly concerned his private life (he refers to *Rasmussen v. Denmark*, judgment of 21 November 1984, Series A no. 87, p. 13, § 33; *A. v. Germany*, no. 10085/82, Commission decision of 11 March 1985, Decisions and Reports (DR) 42, p. 105). In the applicant's opinion, Article 8 guarantees the right to dissolve a family tie which is not grounded on a biological bond. He concludes on the basis of the *Kroon v. the Netherlands* judgment that biological and social reality should prevail over legal presumptions and the quest for legal certainty of relations, so that any presumption of paternity must be effectively capable of being rebutted and not amount to a *de facto* rule (cf. *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, § 40). The applicant contends that the decisions of the domestic courts to declare his action for contestation time-barred constituted an interference with his right to respect for his private and family life.

The applicant accepts that the judgments of the domestic courts were based on the law in force at the material time. He points out, however, that the Government have not advanced any reasons showing that the law in question pursued a legitimate aim and the interference was necessary in a

democratic society. The applicant submits that the interference was not necessary or justified for the following reasons.

The time-limit provided for in the national law and applied in the applicant's case started running irrespective of the fact that the husband did not have any doubts concerning his biological paternity during that period. A legal father would only disclaim his paternity, if he got notice of the facts that disprove his parenthood. Only under these circumstances he can make an informed choice regarding the child: either to disavow the child or retain the fatherhood, the latter being a kind of legalised adoption. Therefore the legislator should have provided for an appropriate time period during which the presumed father can take a considered decision. In the applicant's assessment, his rights would only be sufficiently safeguarded if the time-limit of one year had run from the moment when the husband learnt of the facts suggesting that he might not have been the natural father. Furthermore, he contends that such arrangement would not impair the interests of the child and, with regard to psychological implications, they would be better served if the legal fatherhood were to correspond to the natural one.

The applicant lays emphasis on the fact that the new Russian Family Code (effective from 1 March 1996) contains no time-limit for contesting paternity. An authoritative legal commentary on the new Family Code authored by a former Russian Justice Minister acknowledges that the position of the legislator reflected in the new Code "put an emphasis on the factual lineage of the child as opposed to the mere formalism of the civil record which impeded the establishment of the truth". In the applicant's opinion, this change at the domestic level has demonstrated that the protected interests of children can be safeguarded without preventing presumed fathers from contesting their paternity.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires 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 6 of the Convention that the domestic courts failed to apply the provisions of the new Russian Family Code. Article 6, in the relevant part, provides as follows:

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

As to the allegedly incorrect interpretation and application of the domestic law, the Court recalls that it is not called upon to examine the alleged errors of facts and law committed by the domestic judicial authorities, insofar as no unfairness of the proceedings can be detected and

the decisions reached cannot be considered arbitrary (see, e.g., *Novoselov v. Russia* (dec.), no. 66460/01, 16 October 2003). On the basis of the materials submitted by the applicant, the Court notes that within the framework of the civil proceedings the applicant was able to introduce all necessary arguments in defence of his interests, and the judicial authorities gave them due consideration and applied the law which was effective at the material time.

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

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint concerning an alleged violation of his right to respect for private and family life;

Declares inadmissible the remainder of the application.

Søren NIELSEN
Registrar

Christos ROZAKIS
President