FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 1338/03
by THE ESTATE OF KRESTEN FILTENBORG MORTENSEN
against Denmark

The European Court of Human Rights (Fifth Section), sitting on 15 May 2006 as a Chamber composed of:

Mrs S. Botoucharova, *President*,
Mr P. Lorenzen,
Mr K. Jungwiert,
Mr V. Butkevych,
Mrs M. Tsatsa-Nikolovska,
Mr R. Maruste,
Mr J. Borrego Borrego, *judges*,
and Mrs C. Westerdiek, *Section Registrar*,
Having regard to the above application lodged on 8 January 2003,

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 Danish national, Mr Kresten Filtenborg Mortensen, ("KFM"), was born in 1926 and died on 10 February 1999. His estate is the applicant in the present case, represented by his son, Mr Niels Filtenborg Mortensen, ("N"), who was represented before the Court by Mr Tyge Trier, a lawyer practising in Frederiksberg.

The Danish Government ("the Government") were represented by their Agent, Mr Peter Taksøe-Jensen, of the Ministry of Foreign Affairs, and their co-Agent, Mrs Nina Holst-Christensen of the Ministry of Justice.

A. The circumstances of the case

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

At the time of KFM's death, he was divorced and had one legitimate son, N, born on 24 August 1951.

During his marriage, KFM had a relationship with a married woman, J, who gave birth to two sons, B and P, in 1956 and 1957 respectively. From 1963 until her death in 1994, J lived with KFM, who had by then divorced his first wife.

Following KFM's death in February 1999, B and P requested the City Court of Holstebro *(Retten i Holstebro)*, under the Administration of Justice Act (*Retsplejeloven)*, to establish their paternity, since in their view their father was KFM and not the man to whom their mother had been married.

At a hearing before the City Court on 8 November 1999, B and P testified that they had been told by their mother, J, that KFM was their biological father as opposed to their legal father. Their legal father testified that he had divorced J because he suspected her of adultery and that J's family had told him that he was not the father of B and P. N testified that KFM had never said anything to him about having children with J and that when J died in 1994, KMF had remarked that things were now settled "with J's family".

By decision of 10 November 1999 the City Court decided, in view of the evidence adduced, that it could not be ruled out that KFM was the biological father of B and P, and that the estate of KFM should therefore be a party to the paternity proceedings in accordance with section 456 (k) of the Administration of Justice Act. Moreover, in accordance with the said provision, forensic genetic tests should be carried out, as they might be expected to produce evidence of considerable weight for or against KFM's being the biological father of B and P. KFM's estate appealed against both decisions before the High Court of Western Denmark (*Vestre Landsret*), which found against it on 16 March 2000.

Accordingly, blood samples were taken from B and P, their legal father, two of J's siblings, and a sister of KFM. N did not wish to participate in the genetic tests.

Subsequently, on the basis of the samples provided, the Forensic Genetics Institute (*Retsgenetisk Institut)* found it established that B and P's legal father, with a probability that exceeded 99.99 %, was not their biological father. Moreover, it found that the results suggested that KFM, rather than some random man, was B and P's biological father, with probability ratios of 9:1 and 3:1 respectively.

Eight testimonies were submitted before the City Court by KFM's siblings, colleagues and acquaintances, all of whom endorsed the notion that KFM was B and P's father.

On 5 June 2000 B died.

On 28 November 2001 the Forensic Genetics Institute answered two questions put by the City Court as to the likelihood of obtaining valid DNA results from the tissue of a deceased person.

On 5 December 2001 the City Court decided, in accordance with section 456(k) of the Administration of Justice Act, that KFM's body was to be exhumed for the purpose of taking DNA samples, as such samples were assumed to be of significant, and probably decisive, importance in establishing paternity, and were the only remaining option.

KFM's estate appealed against the decision before the High Court of Western Denmark which, by decision of 21 February 2002, amended the City Court's decision. It stated that the estate of the deceased was party to the paternity suit and that it was therefore obliged, pursuant to section 456 (k) of the Administration of Justice Act, to participate in tests which entailed providing blood samples or similar, if the court decided that such tests were necessary. Furthermore, it followed from section 456 (l) of the Act that the court could decide to use the various measures mentioned in Section 178 of the Act to compel parties to participate in such tests if they refused to do so voluntarily. The High Court found, however, that in paternity cases neither the Administration of Justice Act nor any other provision of Danish law provided a basis for taking body samples by the use of physical force, as opposed to measures to compel living persons to give samples. Hence, the High Court found that tests of the kind ordered by the City Court constituted interference with the sanctity of the grave and that such interference was comparable with the measures to compel living persons to give samples. The High Court concluded that such interference could not be effected by force for the purpose of obtaining evidence in a paternity suit without an explicit legal basis, which the High Court found did not exist in domestic law. Accordingly, the High Court refused to order the exhumation of KFM and the taking of samples from his corpse for use in the paternity suit.

P was granted leave to appeal against the judgment before the Supreme Court (*Højesteret*), which on 4 September 2002 permitted the taking of biological material from KFM's corpse. In reaching its decision, the Supreme Court stated as follows:

"By decision of 16 March 2000 the High Court of Western Denmark upheld the City Court's decision that the estate of [KFM] was a party to the paternity suit. That decision is not under review by the Supreme Court in the present case.

Since [P] was born in 1957, it is the provisions inserted into the Administration of Justice Act by Act No. 135 of 7 May 1937 in chapter 42 (a) concerning the proceedings in paternity suits that are applicable, pursuant to the provisions on the entry into force of the Act contained in section 2(1) of Act No. 201 of 18 May 1960 amending the Administration of Justice Act. The provisions of the said Act concerning the court's duty to elucidate the case which are relevant in the present case are broadly similar to the provisions of the Administration of Justice Act (chapter 42 (a)) currently in force. Hence, if the court considers forensic genetic testing of the parties to the case to be necessary, it may order such tests under section 456 (l) of the 1937 Act, sections 456 (k) and 456 (l) of the 1960 Act and section 456 (h) (7) of the current Act. The reference therein to the provisions of the Administration of Justice Act on measures to require witnesses to comply must be understood as specifying the measures which can be taken against a party who is alive, and are therefore without relevance if the test is to be carried out on a party who is deceased."

The majority of the Supreme Court (three judges) went on to state:

"The fact that the Administration of Justice Act does not contain any specific rules on forensic genetic testing of deceased persons should not lead to the existing rules, according to which [in a paternity case] the court may decide to compel the parties to undergo genetic testing, being narrowly construed to mean that the [existing] legal basis does not cover testing of deceased persons.

Pursuant to section 16 (1) of the Act on Cornoner's Inquests, Post-Mortem Examinations and Transplantation, etc. (*Lov om ligsyn, obduktion og transplantation m.v.),* interference with a corpse, other than the kind mentioned in chapter 3 of the Act (on post-mortem examinations) and in chapter 4 (on transplantation), may be carried out only if the deceased person, having turned 18 years old, consented thereto in writing. According to the preparatory notes (*Folketingstidende 1989/1990, tillæg A, spalte 3814*), the above provision concerns interference with a scientific or educational purpose which is not carried out in connection with a post-mortem examination. It is not mentioned, however, whether the provision applies to other forensic tests under chapter 42 (a) of the Administration of Justice Act [that is, to paternity cases] or to other civil proceedings involving the estate or a surviving relative in which it becomes necessary to carry out forensic tests on a deceased person in order to gather evidence.

In these circumstances we consider that section 16 of the Act on Coroner's Inquests, Post-Mortem Examinations and Transplantation does not restrict the legal basis provided by chapter 42 (a) of the Administration of Justice Act [to the effect] that, if deemed necessary, the court may decide that forensic genetic tests should be carried out, even on a deceased party. In its assessment, however, having regard to the principle of proportionality, the court must balance the extent of such interference with the need to elucidate the particular case.

[N] having refused to participate in forensic genetic testing, tests have been carried out on all possible living persons [in the case]. In view of the fact that these tests, and the information submitted in the case, have confirmed [P's] allegation that [KFM] is his father, and in the light of the content of the Forensic Genetics Institute's letter of 18 November 2001, we uphold the City Court's decision of 5 December 2001 authorising the taking of tissue samples from the deceased [KFM]."

The minority of the Supreme Court (two judges) found:

"Without the existence of clear support in section 456 (g) and 456 (l) of the Administration of Justice Act [No. 135 of 7 May 1937, in force at the relevant time, when P was born] or the preparatory notes, we find it insufficiently established that these provisions confer authority to take blood samples or carry out other tests on the deceased.

In our opinion it is a matter for the legislator to decide whether it should be possible to carry out such testing, and in the affirmative to indicate the specific conditions governing it. Accordingly, we vote in favour of upholding the High Court's decision."

Following the Supreme Court's decision, KFM's corpse was exhumed and tissue samples were taken. However, the Forensic Genetics Institute was unable to make a typological classification of the samples, apparently owing to the time that had elapsed since KFM's burial.

On 19 January 2004 the City Court of Holstebro delivered the following judgment:

"The forensic genetic tests carried out and the content of the written statements corroborate the claim that [KFM] is the father of [B and P]. The court does not find, however, that the test results and the statements can be given such weight as to prove with sufficient certainty that [KFM] had

intercourse with the mother at the time of conception. Therefore, the court finds in favour of the defendant [the estate of KFM].”

Accordingly, N, as the only legitimate son of KFM and sole heir, inherited the estate.

B. Relevant domestic law

The Administration of Justice Act was amended by Act No. 135 of 7 May 1937 when a special chapter 42 (a) on paternity suits was inserted. The relevant provisions of this chapter read as follows:

Section 456 (g)

“The court shall ensure of its own motion that the [paternity] case is elucidated. Anyone who, according to information which emerges during the proceedings, could have made the woman in question pregnant shall be made a party to the case by the court.

The court itself shall decide on the calling of parties and witnesses to give testimony, and the obtaining of expert statements and other evidence. ...”

Section 456 (l)

If, in order to elucidate the case, the court finds it necessary to require blood-type determination of the mother, the child or the respondent(s), it shall ensure that the necessary tests are carried out. When the circumstances strongly support such action and it can be taken without significant disturbance to the person in question, the court may also take steps to have other tests carried out on these persons, who shall be required to present themselves for tests, provide blood samples, etc. If they refuse, the measures in sections 177 and 189 shall be applicable.”

The above-mentioned provisions of the Administration of Justice Act were amended by Act No. 201 of 18 May 1960. This Act contains the following section 2 concerning scope and transitional period:

“This Act shall enter into force on 1 January 1961. It shall not apply to the Faroe Islands or Greenland. The Act shall apply only to cases concerning children born after its entry into force [...].”

Sections 456 (k) and 456 (l) of the current Administration of Justice Act read as follows:

Section 456(k)

“If, in order to elucidate the case, the court finds it necessary to require blood-type determination or other tests to be carried out on the parties, it shall ensure that such tests are carried out. The persons concerned shall be required to undergo the tests, give blood samples, etc.”

Section 456 (l)

"The measures set out in section 178 shall be applicable with regard to the parties' obligations set out in the present chapter."

The measures to ensure compliance referred to in section 456 (l) above of the **Administration of Justice Act as amended in 1937** (sections 177 and 189) are broadly similar to those found in the current Administration of Justice Act, section 178, which reads as follows:

Section 178:

"If for no legitimate reason a witness fails to appear ... or for no legitimate reason refuses to testify, the court may

1) impose a fine on the witness

2) fetch the witness with the assistance of the police

3) order the witness to reimburse costs occasioned by him or her

4) impose a daily fine, for a period not exceeding six months in the same case, continuously or in total

5) impose police detention or impose on the witness the measures prescribed in section 765, until the person appears before the court to give testimony or until the witness agrees to testify. Such measures may not be applied for a period of more than six months in the same case, continuously or in total.

Section 16 (1) of the Act on Coroner's Inquests, Post-Mortem Examinations and Transplantation, etc., reads as follows:

"Interference with a corpse, other than that mentioned in chapters 3 and 4, may take place only if the deceased person, having turned 18 years old, gave his or her consent in writing."

COMPLAINT

KFM's estate complained that the exhumation of KFM's corpse for the purpose of taking DNA samples constituted a breach of Article 8 of the Convention, as it was not "in accordance with the law" as required by Article 8 § 2 of the Convention.

THE LAW

The applicant, KFM's estate, relied on Article 8 of the Convention, which provides:

"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 submitted firstly that the application lodged by KFM's estate was incompatible *ratione personae* with the Convention. They pointed out in that connection that, in contrast to various cases dealt with by the Court in which an applicant had died after the alleged violation had taken place, or in which a complaint was filed on behalf of a living person who later died, the present case concerned an alleged violation of KFM's right to private life under Article 8 of the Convention relating to a paternity suit that was raised only after his death and in which, by definition, KFM could never himself have lodged a complaint.

Secondly, the Government maintained that the application lodged by KFM's estate under Article 8 of the Convention was incompatible *ratione materiae*, in that the notion of "private life" within the meaning of the said provision related to the circumstances of living individuals, as opposed to a corpse, which could hardly have a "private life". In the Government's view the concept of "the sanctity of the grave" had been created to protect the living relatives rather than the deceased. Hence, in their view, the legitimate son of KFM, namely N, could have lodged a complaint against the decision of the courts, arguing that the exhumation and examination of his recently departed father affected him directly or indirectly to such an extent that his right to respect for his private life had been violated. However, he had not initiated any proceedings on his own behalf, but instead used his powers as representative of the estate to lodge the complaint on the estate's behalf.

Thirdly, the Government submitted that, even if KFM's estate could claim to be a victim of a violation of the Convention, it could not be represented by N, whose personal interests obviously conflicted with those of the estate. On the one hand, N had an interest in seeing the courts reach the conclusion that B and P were not KFM's biological sons, thereby preventing them from claiming a third of the inheritance each. The estate, on the other hand, could not have any legitimate interest in preventing persons who had a substantiated presumption regarding their family relationship with the deceased from ascertaining whether or not that family relationship actually existed.

Fourthly, the Government contended that the issue of KFM's corpse having human rights had never been brought up during the domestic proceedings, either directly or in essence, and at no point during the national proceedings had it been suggested that the exhumation of KFM's body would constitute interference with the deceased's right to respect for private life under Article 8 of the Convention.

The applicant submitted that the Court had allowed a broad range of applicants, including estates, to lodge complaints in accordance with the basic principle of providing practical and effective protection of rights.

In the present case the estate had been an active party in the domestic proceedings and it had a moral obligation to ensure that the right of the deceased to rest in peace was protected and

respected by the State. In addition, that right and the rights covered by Article 8 of the Convention had been relied on before the national courts and the case had not been dismissed on the ground that the estate did not have *locus standi.*

In any event, it was irrelevant whether those rights had been pursued by the estate or the representative of the deceased, since, as the sole beneficiary, N was the only person who had legal authority and capacity to act on behalf of the estate.

In the applicant's observations of 25 April 2005 it was emphasised that, for obvious reasons, N had a legitimate and strong interest, as representative of his father's estate, in ensuring respect for his father's right to rest in peace, as the matter had affected him directly, both emotionally and mentally. The exhumation of his father's body had been an intrusion of his privacy and his inner emotional life. It was pointed out that the concept of resting in peace had indeed been created to protect both the deceased and the remaining family members.

Finally, the applicant disputed the Government's submission as to exhaustion of domestic remedies, since the applicant had consistently relied on the argument concerning the right to rest in peace and it could not be held against the applicant that the national courts had failed to spell out the interests of the sanctuary of the grave and the interests of the estate and the close relatives of the deceased person.

The Court points out that when the present application was lodged with the Court, on 8 January 2003, the applicant was "the estate of KFM", which complained that the Supreme Court's decision of 4 September 2002 constituted a violation of "the rights of the estate of KFM" as protected under Article 8 of the Convention. "The estate of KFM" alone had been party to the domestic proceedings.

The Court reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22). Also, a compulsory medical intervention, even if it is of minor importance, constitutes an interference with the right to respect for a person's private life (see *X v. Austria*, no. 8278/78, Commission decision of 13 December 1979, Decisions and Reports (DR) 18, p. 155; *Acmanne and Others v. Belgium*, no. 10435/83, Commission decision of 10 December 1984, (DR) 40, p. 254; and *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX).

However, it would stretch the reasoning developed in this case-law too far to hold in a case like the present one that DNA testing on a corpse constituted interference with the Article 8 rights of the deceased's estate.

Accordingly, the Court considers that there has been no interference with the rights of KFM's estate for the purposes of Article 8 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

In so far as the applicant is to be understood as "the estate of KFM", alleging on behalf of KFM that the Supreme Court's decision of 4 September 2002 constituted a violation of "the rights of KFM" as protected under Article 8 of the Convention, it should be recalled that KFM had died before the dispute arose at domestic level and hence before the alleged violation took place.

The Government submitted that Article 8 of the Convention did not extend to the protection of corpses and that therefore the Supreme Court's decision of 4 September 2002 could not constitute interference with KFM's private life at the relevant time.

The applicant pointed out that the right to rest in peace and the objection to KFM's corpse being exhumed could only be invoked after KFM's death. It was settled case-law that an individual had rights under the Convention even after death, for example under Articles 2, 3 and 6.

The Court recalls that in *Pretty v. the United Kingdom*, no. 2346/02, § 67, ECHR 2002-III, it was not prepared to exclude that the applicant's prevention by law from exercising her choice to avoid what she considered to be an undignified and distressing end to her life constituted interference with her right to respect for private life as guaranteed under Article 8 § 1 of the Convention.

In *Pannullo and Forte v. France*, no. 37794/97, ECHR 2001-X, the Court found that a delay by the judicial authority in issuing a burial certificate and returning the body of a four-year-old daughter to the applicant parents constituted interference with the latter's right to respect for their private and family life.

In *Znamenskaya v. Russia*, no. 77785/01, 2 June 2005, the Court found that the domestic courts' refusal to establish the paternity of the applicant mother's stillborn baby and change its name accordingly violated her right to respect for her private and family life.

In application no. 8741/79, decision of 10 March 1981, DR 24, p. 137, the former Commission found that the applicant's wish to have his ashes spread out over his own land was so closely connected to private life that it fell within the sphere of the said provision. The Commission found, however, that not every regulation on burials constituted an interference with the exercise of that right.

In the Court's view, the present case is to be distinguished from the above cases, in which Article 8 § 1 of the Convention was relied on by individuals who were alive when they lodged their complaint with the Court and who maintained that their right to respect for private or family life had been breached, as opposed to a deceased person's right to respect for private or family life.

In the present case the individual in question, namely KFM, was deceased when the alleged violation took place and hence when his estate, on his behalf, lodged the complaint with the Court alleging an interference with his right, or rather his corpse's right, to respect for private life. In such circumstances, the Court is not prepared to conclude that there was interference with KFM's right to respect for private life within the meaning of Article 8 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

Finally, the Court recalls that pursuant to Article 35 § 1 of the Convention it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

In the applicant's observations to the Court of 25 April 2005 the applicant submitted that the exhumation of KFM's corpse also constituted an intrusion of N's privacy and inner emotional life. Although N is not formally the applicant, for the sake of completeness the Court is prepared to examine whether, in line with the above case-law, the Supreme Court's decision of 4 September 2002 constituted a violation of "N's rights" as protected under Article 8 of the Convention. It notes, however, that there is no evidence to support the assertion that N, as the representative of the estate of KFM, complained at any point during the domestic proceedings, in form or in substance, that his rights under Article 8 of the Convention had been violated. In any event, even if this part of the application is not inadmissible for non-exhaustion of domestic remedies, the complaint was submitted only on 25 April 2005, that is, more than six months after the date on which the final decision was taken.

It follows that this part of the application must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek Snejana Botoucharova
Registrar President

ESTATE OF KRESTEN FILTENBORG MORTENSEN v. DENMARK

DECISION