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

COURT (CHAMBER)

**CASE OF KROON AND OTHERS v. THE NETHERLANDS**

*(Application no. 18535/91)*

JUDGMENT

STRASBOURG

27 October 1994

**In the case of Kroon and Others v. the Netherlands*,**

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A**, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr S.K. MARTENS,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr A.B. BAKA,
Mr G. MIFSUD BONNICI,
Mr D. GOTCHEV,

and also of Mr H. PETZOLD, *Acting Registrar*,

Having deliberated in private on 21 April and 20 September 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

## PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 3 July 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18535/91) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by three Netherlands nationals, Catharina Kroon, Ali Zerrouk and Samir M'Hallem-Driss, on 15 May 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

---

* The case is numbered 29/1993/424/503. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

the respondent State of its obligations under Article 8 (art. 8) of the Convention, taken either alone or in conjunction with Article 14 (art. 14+8).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr S. K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 25 August 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr I. Foighel, Mr A.N. Loizou, Mr J.M. Morenilla, Mr A.B. Baka, Mr G. Mifsud Bonnici and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 26 November 1993 and the applicants' memorial on 30 November. The Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 6 December 1993 the Commission produced certain documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President, who had given the applicants leave to use the Dutch language (Rule 27 para. 3), the hearing took place in public in the Human Rights Building, Strasbourg, on 19 April 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr K. de VEY MESTDAGH, Ministry of Foreign Affairs, *Agent*,
  Mr E. LUKÁCS, Ministry of Justice, *Adviser*;
- for the Commission
  Mr C.L. ROZAKIS, *Delegate*;
- for the applicants
  Mr A.W.M. WILLEMS, advocaat en procureur, *Counsel*.

The Court heard addresses by Mr Rozakis, Mr Willems and Mr de Vey Mestdagh and also replies to its questions.

# AS TO THE FACTS

## I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. The first applicant, Catharina Kroon, is a Netherlands national born in 1954. The second applicant, Ali Zerrouk, born in 1961, was a Moroccan national at the time of the events complained of; he subsequently obtained Netherlands nationality. Although they were not living together at the time, they had a stable relationship from which the third applicant, Samir M'Hallem-Driss, was born in 1987; he has both Moroccan and Netherlands nationality. All three applicants live in Amsterdam.

8. In 1979, Mrs Kroon had married Mr Omar M'Hallem-Driss, a Moroccan national.

The marriage broke down towards the end of 1980. Thereafter, Mrs Kroon lived apart from her husband and lost contact with him. It appears from official records that he left Amsterdam in January 1986 and his whereabouts have remained unknown ever since.

9. Samir was born on 18 October 1987. He was entered in the register of births as the son of Mrs Kroon and Mr M'Hallem-Driss.

Mrs Kroon instituted divorce proceedings in the Amsterdam Regional Court (arrondissementsrechtbank) one month after Samir's birth. The action was not defended and the divorce became final when the Regional Court's judgment was entered in the register of marriages on 4 July 1988.

10. On 13 October 1988, relying on section 1:198 (1) of the Civil Code (Burgerlijk Wetboek - "CC" - see paragraph 19 below), Mrs Kroon and Mr Zerrouk requested the Amsterdam registrar of births, deaths and marriages (ambtenaar van de burgerlijke stand) to allow Mrs Kroon to make a statement before him to the effect that Mr M'Hallem-Driss was not Samir's father and thus make it possible for Mr Zerrouk to recognise the child as his.

The registrar refused this request on 21 October 1988. While expressing sympathy, he noted that Samir had been born while Mrs Kroon was still married to Mr M'Hallem-Driss, so that unless the latter brought proceedings to deny paternity (see paragraphs 18 and 21 below) recognition by another man was impossible under Netherlands law as it stood.

11. On 9 January 1989 Mrs Kroon and Mr Zerrouk applied to the Amsterdam Regional Court for an order directing the registrar to add to the register of births Mrs Kroon's statement that Mr M'Hallem-Driss was not Samir's father and with Mr Zerrouk's recognition of Samir. They relied on Article 8 (art. 8) of the Convention, taken both alone and together with Article 14 (art. 14+8), pointing out that while it would have been possible for Mrs Kroon's former husband to deny the paternity of Samir, it was not possible for her to deny her former husband's paternity of the child.

The Regional Court refused this request on 13 June 1989. It held that in spite of the justified wish of Mrs Kroon and Mr Zerrouk to have biological realities officially recognised, their request had to be refused since, under the law as it stood, Samir was the legitimate child of Mr M'Hallem-Driss. There were only limited exceptions to the rule that the husband of the mother was presumed to be the father of a child born in wedlock. This was justified in the interests of legal certainty, which were of great importance in this field, and by the need to protect the rights and freedoms of others. The law as it stood was therefore not incompatible with Articles 8 and 14 (art. 8, art. 14) of the Convention.

12. Relying again on Articles 8 and 14 (art. 8, art. 14), Mrs Kroon and Mr Zerrouk appealed to the Amsterdam Court of Appeal (gerechtshof).

The Court of Appeal rejected the appeal on 8 November 1989. It held that Article 8 (art. 8) was applicable but had not been violated. The restrictions imposed on the mother's right to deny the paternity of her husband satisfied the requirements of Article 8 para. 2 (art. 8-2). There had, however, been a violation of Article 14 taken together with Article 8 (art. 14+8), since there was no sound reason for the difference of treatment which the law established between husband and wife by not granting the latter the possibility, available to the former, of denying the husband's paternity. Nevertheless the appeal could not be allowed; it was not open to the court to grant the applicants' request, as that would require the creation of new Netherlands law, including administrative procedure, and would therefore go beyond the limits of the judiciary's powers to develop the law. Only the legislature could decide how best to comply with Article 14 (art. 14) of the Convention as regards the possibility of denying paternity of a child born in wedlock.

13. Mrs Kroon and Mr Zerrouk then lodged an appeal on points of law with the Supreme Court (Hoge Raad).

They argued, firstly, that the Court of Appeal had violated Article 8 (art. 8) of the Convention by holding that the limitations imposed by section 1:198 CC on the mother's possibility of denying her husband's paternity - more particularly the fact that she might do so only in respect of a child born after the dissolution of the marriage - satisfied the requirements of Article 8 para. 2 (art. 8-2). The Court of Appeal had not properly weighed up the interests involved. It ought to have considered the relative weight of, on the one hand, the interests of the biological father and his child and, on the other, the interests protected by the legislation. The Court of Appeal should have given priority to the former interests, which in the case before it were best served by severing the legal ties between Samir and Mr M'Hallem-Driss and establishing such ties between Samir and Mr Zerrouk, who were entitled, under Article 8 (art. 8) of the Convention, to have their family relationship recognised.

In addition, they suggested that it followed from the Court of Appeal's finding of a violation of Article 14 (art. 14) that the interference concerned could not under any circumstances be covered by Article 8 para. 2 (art. 8-2).

Secondly, they argued that, by holding that it was not empowered to grant the applicants' request as that would require the creation of new Netherlands law, the Court of Appeal had violated Articles 14 and 8 (art. 14+8) taken together. In the applicants' submission, there was no reason to consider that only the legislature was able to remove the discrimination which the Court of Appeal had rightly found to exist; it was sufficient to disregard the requirement that the child must have been born after the dissolution of the mother's marriage.

14. Following the advisory opinion of the Advocate General, the Supreme Court rejected the appeal on 16 November 1990.

The Supreme Court did not rule on the question whether section 1:198 CC violated Article 8 (art. 8), or Article 14 taken together with Article 8 (art. 14+8). It considered that it was not necessary to do so, because it agreed with the Court of Appeal that, even if there had been such a violation, solving the problem of what should replace section 1:198 CC went beyond the limits of the judiciary's powers to develop the law. This finding was based on the following reasoning:

> "In this connection, it should not be overlooked that if a possibility were to be created for the mother to deny [her husband's] paternity [of a child born] during marriage, the question would immediately arise as to what other limitations should apply in order not to jeopardise the child's interest in certainty regarding its descent from its legitimate parents, which interest the child generally has and which is part of the basis for the present system. Such limitations have therefore also been written into the Bill to Reform the Law of Descent (Wetsvoorstel Herziening Afstammingsrecht; Bijlage bij de Handelingen van de Tweede Kamer der Staten-Generaal - Annex to the Records of the Lower House of Parliament -, 1987-88, 20626, sections 201 et seq.), which is now before Parliament ... [I]t is not certain whether [these limitations] will be retained, added to or withdrawn in the course of the further parliamentary discussion, many variations being conceivable, regard also being had to the need to ensure equal treatment of the father and the mother, in so far, at any rate, that unequal treatment is not justified."

The judgment of the Supreme Court was reported in Nederlandse Jurisprudentie (Netherlands Law Reports - "NJ"), 1991, 475.

15. Three more children were born to Mrs Kroon and Mr Zerrouk after the birth of Samir: a daughter, Nadia, in 1989 and twins, Jamal and Jamila, in 1992. They were all recognised by Mr Zerrouk.

Mrs Kroon and Mr Zerrouk do not cohabit. The applicants claim, however, that Mr Zerrouk contributes to the care and upbringing of their children.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The register of births

16. Every municipality has a separate register for births (section 1:16 (1) CC); this is kept by one or more registrars of births, deaths and marriages (section 1:16 (2)).

An entry in the register of births, or birth certificate, mentions the mother's husband as the father if the mother was married at the time of the birth or within a period of 306 days immediately preceding the birth; in all other cases, the name of the father is mentioned only if he recognises the child before or at the time the entry is made (section 1:17 (1) (c) CC).

17. An interested party or the public prosecutor (officier van justitie) can apply to the Regional Court within the jurisdiction of which the register in question is located for an order to correct or add to the register of births. The Regional Court's decision is forwarded to the registrar of births, deaths and marriages; the correction or addition is made in the form of a note in the margin or at the foot of the certificate (section 1:29 (1)-(3) CC).

### B. Establishment of paternity and recognition

18. Section 1:197 CC reads as follows:

> "The husband shall be the father of a child born in wedlock. Where a child is born before the 307th day following dissolution of the marriage, the former husband shall be its father, unless the mother has remarried."

Section 1:197 CC thus creates two legal presumptions. Firstly, a child born during marriage is presumed to be the issue of the mother's husband; secondly, a child born before the 307th day following the dissolution of the mother's marriage is presumed to be the progeny of the mother's former husband. The first presumption may be rebutted only by the mother's husband, who to that end must provide proof to the contrary (sections 1:199-200 CC - see paragraph 21 below). The second presumption may be rebutted by either the mother or her former husband; the mother's former husband will, however, have to adduce proof, whereas for the mother a statement is sufficient (section 1:198 CC - see following paragraph).

19. Section 1:198 CC reads as follows:

> "1. The mother may deny that a child born to her within 306 days following the dissolution of the marriage is the child of her former husband by making a statement to that effect before the registrar of births, deaths and marriages, provided that another man recognises the child by the instrument in which that statement is recorded ...
>
> 2. The mother's statement and the recognition must take place within one year of the child's birth.

> 3. The [mother's] statement and the recognition shall take effect only if the mother and the man who recognises the child marry each other within one year of the birth of the child ... 4. If a judgment annulling the recognition in an action brought by the former husband becomes final, the mother's statement shall also lose its force.
>
> 5. ..."

20. In its judgment of 17 September 1993 (NJ 1994, 373), the Supreme Court deprived section 1:198 (3) CC of its effect.

In the case in question - in which a child had been born within 306 days of the dissolution of its mother's marriage - it was established, firstly, that there was a relationship between the child and its biological father which qualified as "family life" for the purposes of Article 8 (art. 8) of the Convention and, secondly, that the mother and the biological father, who did not wish to marry, wanted the paternity of the mother's former husband to be denied and the child to be recognised by its biological father.

The Supreme Court found that section 1:198 (3) CC constituted an "interference" within the meaning of Article 8 (art. 8), since it obstructed the formation of legally recognised family ties unless the mother and the biological father got married.

In deciding whether such interference was permissible under the terms of Article 8 para. 2 (art. 8-2), the Supreme Court noted that when section 1:198 (3) CC had been enacted it was considered more important to protect a child from being deprived of its "legitimate" status than to enable it to establish ties with its biological father. Since then, however, the relative importance of these two opposing interests had changed; in particular, following the judgment of the European Court in the Marckx v. Belgium case (13 June 1979, Series A no. 31), legal differences between "legitimate" and "illegitimate" children had to a large extent disappeared. In view of these developments, it could no longer be said that in cases where, for the purposes of Article 8 (art. 8) of the Convention, there was a relationship between the child and its biological father amounting to "family life", the importance of maintaining a child's "legitimate" status overrode the interest protected by section 1:198 (3) CC.

21. Section 1:199 CC reads as follows:

> "The husband can only deny paternity of the child by bringing an action to this end against the mother as well as against the child, which, unless it has come of age, shall be represented in the proceedings by a guardian ad litem appointed for that purpose by the District Court (kantonrechter)."

Section 1:200 CC reads:

> "1. The court shall allow the action to deny paternity if the husband cannot be the father of the child.
>
> 2. If during the period in which the child was conceived the husband did not have intercourse with the mother, or if they lived apart during that time, the court shall also

declare the action to deny paternity well-founded, unless facts are established which make it appear possible that the husband is the father of the child."

Such proceedings must be brought within six months from the day on which the father became aware of the fact that the child had been born; however, if the mother has made a statement of the kind provided for in section 1:198 CC (see paragraph 19 above), this time-limit does not expire until eighteen months after the birth of the child (section 1:203 CC).

22. According to section 1:205 CC, legitimacy is proved by a person's parentage (afstamming) and the marriage of his or her parents. If there is no birth certificate, the parentage of a "legitimate" child is proved by the undisturbed possession of the status of "legitimate" child.

23. Section 1:221 (1) CC reads as follows:

"An illegitimate child has the status of natural child (natuurlijk kind) of its mother. Upon recognition it acquires the status of natural child of its father."

Section 1:222 CC reads as follows:

"An illegitimate child and its descendants have legally recognised family ties (familierechtelijke betrekkingen) with the child's mother and her blood relations and, after the child has been recognised, also with the father and his blood relations."

Section 1:223 CC reads as follows:

"Recognition may be effected: (a) on the child's birth certificate; (b) by an instrument of recognition drawn up by a registrar of births, deaths and marriages; (c) by any notarial deed (notariële akte)."

There is no requirement that the man recognising an "illegitimate" child should be the biological father. Moreover, it is not possible for a man to recognise a "legitimate" child, even if he is the biological father.

Recognition under section 1:198 CC (see paragraph 19 above) may be annulled on application by the mother's former husband if the man who has recognised the child is not the child's biological father (section 1:225 para. 3 CC).

### C. Adoption by a parent and a stepparent of the child (stiefouderadoptie)

24. Section 1:227 CC reads as follows:

"1. Adoption is effected by a decision of the Regional Court at the request of a married couple who wish to adopt a child.

2. The request can only be granted if the adoption is in the apparent best interests of the child, as regards both breaking the ties with the [natural] parents and reinforcing the ties with the adoptive parents, or - in the case of adoption of a legitimate or natural child of one of the adoptive parents - as regards both breaking the ties with the other parent and reinforcing the ties with the stepparent, and provided that the conditions laid down in the following section are satisfied.

3. ...

4. ..."

Section 1:228 CC reads as follows:

"1. Adoption shall be subject to the following conditions:

(a) ...

(b) that the child is not the legitimate or natural child of a legitimate or natural child of one of its adoptive parents;

(c) that neither adoptive parent is less than eighteen or more than fifty years older than the child;

(d) that the request is not opposed by a parent or the parents with legally recognised family ties with the child. Nevertheless the court shall not be obliged to refuse a request opposed by a parent who was summoned more than two years previously to be heard on the occasion of a similar request by the same couple that was refused, although the conditions laid down in paragraphs (e) to (g) below were satisfied;

(e) ...

(f) ...

(g) that the adoptive parents were married at least five years before the day the request was filed.

2. In the case of adoption of a legitimate or natural child of one of the adoptive parents, the conditions set forth in paragraphs (c) and (g) of the preceding subsection shall not apply. In the case of adoption of a legitimate child of one of the adoptive parents, the condition specified in paragraph (d) shall be replaced by the condition that the former spouse, whose marriage with the spouse of the stepparent has been terminated [by divorce or dissolution of the marriage after judicial separation], if he or she has legally recognised family ties with the child, does not oppose the request.

3. ..."

Section 1:229 (1) CC reads as follows:

"By adoption the adopted person acquires the status of legitimate child of the adoptive parents. However, if the adopted person already had the status of legitimate child of one of the spouses who adopted him or her, he or she shall retain it and by adoption acquire the status of legitimate child of the other spouse."

## PROCEEDINGS BEFORE THE COMMISSION

25. Mrs Kroon, Mr Zerrouk and Samir M'Hallem-Driss applied to the Commission on 15 May 1991. They complained that they were unable

under Netherlands law to obtain recognition of Mr Zerrouk's paternity of Samir and that while a married man might deny the paternity of a child born in wedlock, it was not open to a married woman to do so; they relied on Article 8 (art. 8) of the Convention, both taken alone and in conjunction with Article 14 (art. 14+8). They further argued that by not accepting these claims the Supreme Court had denied them an effective remedy within the meaning of Article 13 (art. 13).

26. On 31 August 1992 the Commission declared the application (no. 18535/91) admissible as to the complaints relating to Articles 8 and 14 (art. 8, art. 14) of the Convention and inadmissible as to the remainder. In its report of 7 April 1993 (Article 31) (art. 31), it expressed the opinion, by twelve votes to six, that there had been a violation of Article 8 (art. 8) taken alone and, unanimously, that there had been no violation of Article 14 in conjunction with Article 8 (art. 14+8). The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment*.

## FINAL SUBMISSIONS TO THE COURT

27. In their memorial, the Government concluded

"that in the present case:

- Article 8 (art. 8) was not applicable, or

- Article 8 para. 1 (art. 8-1) had not been violated, or

- the restriction of the rights referred to in Article 8 para. 1 (art. 8-1) was justifiable in accordance with Article 8 para. 2 (art. 8-2), and that

- Article 14 in conjunction with Article 8 (art. 14+8) had not been violated".

* For practical reasons this annex will appear only with the printed version of the judgment (volume 297-C of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

# AS TO THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

28. The applicants complained that under Netherlands law it was not possible for Mrs Kroon to have entered in the register of births any statement that Mr M'Hallem-Driss was not Samir's father, with the result that Mr Zerrouk was not able to recognise Samir as his child. They relied on Article 8 (art. 8) of the Convention, which reads:

> "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 denied that any violation had taken place, whereas the Commission agreed with the applicants.

### A. Applicability of Article 8 (art. 8)

29. The Government argued that the relationship between Mr Zerrouk on the one hand and Mrs Kroon and Samir on the other did not amount to "family life". Since Samir had been born of an extramarital relationship, there was no family tie ipso jure between him and Mr Zerrouk. Moreover, Mrs Kroon and Mr Zerrouk had chosen not to marry and it was from choice that the latter did not reside with Mrs Kroon and Samir. In addition, the Government alleged that Mr Zerrouk did not contribute to Samir's care and upbringing in any way and that there was nothing to show that he fulfilled the role of Samir's "social father".

The Commission noted the long-standing relationship between Mrs Kroon and Mr Zerrouk and the fact that it was not disputed that not only was the latter the biological father of Samir but also three other children had been born of that relationship.

The applicants noted that Netherlands law did not require a man to live with a child and its mother in order to have the right to recognise the child as his and thereby create legally recognised family ties. They also claimed that Mr Zerrouk did in fact spend half his time on Samir's care and upbringing and made financial contributions from his modest income.

30. Throughout the domestic proceedings it was assumed by all concerned, including the registrar of births, deaths and marriages, that the

relationship in question constituted "family life" and that Article 8 (art. 8) was applicable; this was also accepted by the Netherlands courts.

In any case, the Court recalls that the notion of "family life" in Article 8 (art. 8) is not confined solely to marriage-based relationships and may encompass other de facto "family ties" where parties are living together outside marriage (see as the most recent authority, the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, pp. 17-18, para. 44). Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto "family ties"; such is the case here, as since 1987 four children have been born to Mrs Kroon and Mr Zerrouk.

A child born of such a relationship is ipso jure part of that "family unit" from the moment of its birth and by the very fact of it (see the Keegan judgment, ibid.). There thus exists between Samir and Mr Zerrouk a bond amounting to family life, whatever the contribution of the latter to his son's care and upbringing.

Article 8 (art. 8) is therefore applicable.

### B. General principles

31. The Court reiterates 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 (see, as the most recent authority, the above-mentioned Keegan judgment, p. 19, para. 49).

32. According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family (see, mutatis mutandis, the above-mentioned Keegan judgment, p. 19, para. 50).

### C. Compliance with Article 8 (art. 8)

33. The applicants argued that Article 8 para. 1 (art. 8-1) placed the Netherlands under a positive obligation to enable Mr Zerrouk to recognise

Samir as his child and so establish legally recognised family ties between the two.

In the alternative, the applicants suggested that the existence of legislation which made impossible such recognition constituted an "interference" with their right to respect for their family life and that such interference was not necessary in a democratic society.

34. The Government argued that, even assuming "family life" to exist, the Netherlands had complied fully with any positive obligations it might have as regards the applicants.

They pointed, firstly, to the possibility of "stepparent adoption" (see paragraph 24 above), i.e. adoption of Samir by Mrs Kroon and Mr Zerrouk. It was true that this possibility was contingent on there being no opposition from Mr Omar M'Hallem-Driss and on Mrs Kroon and Mr Zerrouk marrying each other. However, the possibility of any objection on the part of Mr M'Hallem-Driss could be discounted; if, for reasons of their own, Mrs Kroon and Mr Zerrouk did not wish to marry, that was not a state of affairs for which the State could be held responsible, since it placed no obstacles in the way of their marriage.

Further, under legislation in the course of preparation, an unmarried parent who had previously exercised sole parental authority over his or her child would be allowed joint custody with his or her partner; this would give the partner complete legal authority, on an equal footing with the parent.

In the alternative, the Government argued that if there was an "interference" with the applicants' right to respect for their family life then this was "necessary in a democratic society" in the interests of legal certainty.

35. In the Commission's view the fact that it was impossible under Netherlands law for anyone but Mr Omar M'Hallem-Driss to deny his paternity and for Mr Zerrouk to recognise Samir as his child constituted a lack of respect for the applicants' private and family life, in breach of a positive obligation imposed by Article 8 (art. 8).

36. The Court recalls that in the instant case it has been established that the relationship between the applicants qualifies as "family life" (see paragraph 30 above). There is thus a positive obligation on the part of the competent authorities to allow complete legal family ties to be formed between Mr Zerrouk and his son Samir as expeditiously as possible.

37. Under Netherlands law the ordinary instrument for creating family ties between Mr Zerrouk and Samir was recognition (see paragraph 23 above). However, since Samir was the "legitimate" child of Mr Omar M'Hallem-Driss, Mr Zerrouk would only be in a position to recognise Samir after Mr M'Hallem-Driss's paternity had been successfully denied. Except for Mr M'Hallem-Driss himself, who was untraceable, only Mrs Kroon could deny Mr Omar M'Hallem-Driss's paternity. However, under section 1:198 CC the possibility for the mother of a "legitimate" child to

deny the paternity of her husband was, and is, only open in respect of a child born within 306 days of dissolution of the marriage (see paragraph 19 above). Mrs Kroon could not avail herself of that possibility since Samir was born when she was still married. Indeed, this was not contested by the Government.

38. The Government, however, suggested that there were other ways of achieving an equivalent result.

The first such alternative suggested by the Government, step-parent adoption, would make Samir the "legitimate" child of Mr Zerrouk and Mrs Kroon. However, it would require Mrs Kroon and Mr Zerrouk to marry each other. For whatever reason, they do not wish to do so.

A solution which only allows a father to create a legal tie with a child with whom he has a bond amounting to family life if he marries the child's mother cannot be regarded as compatible with the notion of "respect" for family life.

39. The second alternative suggested by the Government, namely that of joint custody, is not an acceptable solution either. Even if the legislation being prepared comes into force as the Government anticipate, joint custody will leave the legal ties between Samir and Mr Omar M'Hallem-Driss intact and will continue to preclude the formation of such ties between Samir and Mr Zerrouk.

40. In the Court's opinion, "respect" for "family life" requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, the Court concludes that, even having regard to the margin of appreciation left to the State, the Netherlands has failed to secure to the applicants the "respect" for their family life to which they are entitled under the Convention.

There has accordingly been a violation of Article 8 (art. 8).

## II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8 (art. 14+8)

41. The applicants also complained that, while Netherlands law made it possible for the husband of a child's mother to deny being the father of the child, the mother's right to challenge her husband's paternity was much more limited. They relied on Article 14 (art. 14) of the Convention, which reads:

> "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, birth or other status."

42. The Court finds that this complaint is essentially the same as the one under Article 8 (art. 8). Having found a violation of that provision taken

alone, the Court does not consider that any separate issue arises under that Article in conjunction with Article 14 (art. 14+8).

## III. PPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

43. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of the decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

44. The applicants maintained that they had suffered non-pecuniary damage as a result of the Netherlands' failure to allow the establishment of legal family ties according to their wishes. Since there was no possibility under Netherlands law of obtaining restitutio in integrum, they claimed compensation in the amount of 30,000 Netherlands guilders (NLG).

45. The Court considers it likely that the impossibility of obtaining legal recognition of their family ties has caused the applicants some frustration. However, this is sufficiently compensated by the finding of a violation of the Convention.

### B. Costs and expenses

46. As to costs and expenses incurred in the Strasbourg proceedings, the applicants claimed NLG 26,000, plus value-added tax, for lawyer's fees (65 hours at NLG 400), NLG 250 for out-of-pocket expenses and an unspecified amount for travel and subsistence in connection with their representative's attendance at the Court's hearing.

47. The Court reiterates that it allows claims for costs and expenses only to the extent to which they were actually and necessarily incurred and reasonable as to quantum.

In the instant case the Court finds it reasonable to award NLG 20,000 for lawyer's fees, less 13,855.85 French francs (FRF) paid by the Council of Europe in legal aid; any value-added tax that may be due is to be added to the resulting figure. However, it rejects the claims for out-of-pocket expenses and Mr Willems's travel and subsistence, since these have been covered by the Council of Europe's legal-aid scheme.

## FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that Article 8 (art. 8) of the Convention is applicable;

2. Holds by seven votes to two that there has been a violation of Article 8 (art. 8) of the Convention;

3. Holds unanimously that no separate issue arises under Article 14 of the Convention in conjunction with Article 8 (art. 14+8);

4. Holds unanimously as regards the claim for non-pecuniary damage that the finding of a violation constitutes, in itself, sufficient just satisfaction;

5. Holds by eight votes to one that the respondent State is to pay to the applicants, within three months, NLG 20,000 (twenty thousand Netherlands guilders), less FRF 13,855.85 (thirteen thousand eight hundred and fifty-five French francs and eighty-five centimes) to be converted into Netherlands guilders in accordance with the rate of exchange applicable on the date of delivery of the present judgment, plus any value-added tax that may be payable on the resulting figure, in respect of legal costs and expenses;

6. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 October 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Morenilla;

(b) dissenting opinion of Mr Mifsud Bonnici.

R.R.
H.P.

# DISSENTING OPINION OF JUDGE MORENILLA

I regret that I am not able to agree with my colleagues who have found a violation of Article 8 (art. 8) of the Convention in this case.

I can nevertheless agree with their conclusion (paragraph 30 in fine) that this Article (art. 8) is applicable to the Netherlands authorities' refusal to grant the request by Catharina Kroon and Ali Zerrouk for official recognition of the "biological reality" of Mr Zerrouk's paternity of Samir M'Hallem-Driss (the third applicant), who was registered as the matrimonial son of Mrs Kroon and Mr Omar M'Hallem-Driss notwithstanding that they were separated de facto although not yet divorced. However, my agreement is based only on the fact that this refusal, which was in conformity with the Netherlands Civil Code, gives rise to an "interference" in the personal sphere (family life) of the three applicants, since it affects the legal situation of the alleged progenitor, the son and the mother. It also affects Mr Omar M'Hallem-Driss, the legal father of Samir and former spouse of Catharina Kroon, who is not a party in this litigation and who has not been heard in the case since his whereabouts are unknown.

I dissent from my colleagues' finding of a violation because I think that the interference of the Netherlands authorities was justified under paragraph 2 of Article 8 (art. 8-2), which draws the dividing line between the right of the individual to respect for his private and family life and the right of the State to take necessary action to protect the general interest of the community or the equal rights or interests of other persons. Paragraphs 1 and 2 of this Article (art. 8-1, art. 8-2) form a "whole" (Luzius Wildhaber, "Kommentierung des Artikels 8", in Internationaler Kommentar zur Europäischen Menschenrechtskonvention, 1992, pp. 11-12) and have to be considered as such when deciding whether or not the interference was arbitrary and, in consequence, whether the respondent State has denied the applicants' right to respect for their family life. The Court's task, in each case, is to strike the proper balance between the general interest of society and the protection of the rights of the alleged victim.

Following its Marckx v. Belgium judgment of 13 June 1979 (Series A no. 31), the Court has been developing an expanding case-law on the "positive obligations" of the Contracting States under Article 8 para. 1 (art. 8-1) of the Convention, and this involves significant modifications in the content of the right secured by this provision. This principle of "evolutive and creative" interpretation (see Luzius Wildhaber, "Nouvelle jurisprudence concernant l'article 8 (art. 8) CEDH", in Mélanges en l'honneur de Jacques-Michel Grossen, 1992, p. 106), which allows the Convention to be adapted to the changing circumstances of our democratic societies, thus making it "a living instrument", means however that in practice the Court is confronted with a difficult dilemma: that "of guarding against the risk of exceeding its given judicial role of interpretation by overruling policy decisions taken by

elected, representative bodies who have the main responsibility in democratic societies for enacting important legislative changes, whilst not abdicating its own responsibility of independent review of governmental action" (see Paul Mahoney and Søren Prebensen, "The European Court of Human Rights", in The European System for the Protection of Human Rights, R. St. J. Macdonald, F. Matscher, H. Petzold, 1993, pp. 638-40).

This dilemma is even greater in matters such as marriage, divorce, filiation or adoption, because they bring into play the existing religious, ideological or traditional conceptions of the family in each community. The majority of my colleagues have, however, considered there to be a "positive obligation" incumbent on the Netherlands to recognise the right of the natural father to challenge the presumption of the paternity of the legal father (the husband of the mother), thus giving priority to biological ties over the cohesion and harmony of the family and the paramount interest of the child. In my opinion, this conclusion involves a dangerous generalisation of the special circumstances of the instant case and one which imposes on the Contracting States an obligation not included in the text of Article 8 (art. 8), based on changeable moral criteria or opinions on social values.

The Court, citing the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985 (Series A no. 94), said in the Johnston and Others v. Ireland judgment of 18 December 1986 (Series A no. 112, p. 25, para. 55):

> "[E]specially as far as those positive obligations are concerned, the notion of 'respect' is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals ..."

The aim of the Council of Europe to harmonise the legislation of the Contracting States in the field of family law has been accomplished by the recommendations adopted by the Committee of Ministers over the last two decades and by specialised conventions available for ratification by the member States. This has led to reforms in family law in many countries of Europe, from the 1970s onwards. These reforms have achieved a certain approximation of national laws but not their uniformity, particularly in regard to the regulation of procedures for denying legal paternity, which still take many different forms. On the other hand, there is a tendency in the regulation of the use of new techniques of human reproduction towards prohibiting challenges to legal paternity by anonymous sperm donors.

Account should also be taken of the importance of the family in many Contracting States, of the persistence in these countries of a social rejection of adultery and of the common belief that a united family facilitates the

healthy development of the child. These factors provide justification for interference by the State, in accordance with paragraph 2 of Article 8 (art. 8-2), with the applicants' exercise of their right to respect for family life, since its aim is the protection of "morals" or the protection of the interests of the child against the intrusion of an alleged biological father into his or her family circle or legal status.

The social consequences of denying legal paternity as regards the cohesion and harmony of the family, or in terms of legal certainty concerning affiliation and parental rights, are better assessed by the national authorities in the exercise of the extensive margin of appreciation conferred on them. As the Court said in the Handyside v. the United Kingdom judgment of 7 December 1976 (Series A no. 24, p. 22, para. 48) in relation to the requirements of morals: "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements ..."

The Court, when determining the scope of the margin of appreciation enjoyed by the Netherlands authorities in this case, should also take into consideration Netherlands family law as a whole, particularly sections 1:199 and 1:200 of the Civil Code (paragraph 21 of this judgment) and the possibility of adoption by a stepparent of the child (paragraph 24). This legal framework provides an alternative to the applicants' claim whilst protecting the interests of the community.

# DISSENTING OPINION OF JUDGE MIFSUD BONNICI

1. I have found it difficult to follow the majority of the Court, principally because certain basic concepts have not been duly taken into account while others have been given a meaning to which I cannot subscribe.

2. Samir M'Hallem Driss, who is included among the applicants in the proceedings, was born on 18 October 1987. One year later, on 13 October 1988, the two other applicants, his mother Catharina Kroon and Ali Zerrouk, initiated the first steps which eventually culminated in the present proceedings. Catharina Kroon requested the Amsterdam registrar of births, deaths and marriages to allow her to enter a declaration to the effect that Samir's father was not her husband (as stated on the official birth certificate of the child) but another man, namely Ali Zerrouk, who was prepared to acknowledge his paternity of the child.

Netherlands law, like the legislation of some other Contracting States, in given circumstances "presumes" the paternity of a child, in conformity with the maxim of Roman law "pater is est quem nuptiae demonstrant" (L.5 De in jus voc.= Dig. 2,4,5), thereby establishing and ensuring inter alia the rights of the child. In matters of this type, I believe that it is a principle of good law to hold that the interests of the child are paramount. In the present case, the child Samir will be seven years old when the judgment of this Court will be delivered. He is listed as an "applicant" together with the mother and his auto-proclaimed "father". The interests of the child were never looked after by an independent person, a "curator ad litem", and in fact they are not mentioned in the judgment. The "interests" of the mother and of the other applicant are the only interests which have really been considered.

The "family life" which, in the instant case, Netherlands law is alleged to have failed to "respect" in terms of Article 8 (art. 8) of the Convention is the fact that the mother and the self-proclaimed "father" of a child of one year (as Samir was when all this began) who (a) refuse to marry (as is their right); and (b) refuse to live together with the children (as is also their "right") are not allowed by Netherlands law to deprive the child of his legal status and to replace it by a "biological" one (as they allege). I am not able to see that, here and now (before Samir has a real chance to look after his interests), by losing his legal status Samir is, definitely and incontrovertibly, gaining.

This is the first consideration motivating my dissent.

3. The second refers to the notion of "family life" which has been arrived at. In paragraph 30 of the judgment it is stated:

> "... the Court recalls that the notion of `family life' in Article 8 (art. 8) is not confined solely to marriage-based relationships and may encompass other de facto `family ties' where parties are living together outside marriage."

and to this I subscribe. But then it continues:

> "Although as a rule living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto `family ties'; such is the case here, as since 1987 four children have been born to Mrs Kroon and Mr Zerrouk."

In my opinion, "family life" necessarily implies "living together as a family". The exception to this refers to circumstances related to necessity, i.e. separations brought about by reasons of work, illness or other necessities of the family itself. Forced or coerced living apart, therefore, is clearly an accepted exception. But, equally clearly, this does not apply when the separation is completely voluntary. When it is voluntary, then clearly the member or members of the family who do so have opted against family life, against living together as a family. And since these are the circumstances of the instant case where the first two applicants have voluntarily opted not to have a "family life", I cannot understand how they can call upon Netherlands law to respect something which they have wilfully opted against. The artificiality of this approach is in strident contradiction with the natural value of family life which the Convention guarantees. The judgment moreover fails to explain how "a relationship [which] has sufficient constancy to create ... family ties" can be made equivalent to "a relationship which has sufficient constancy to create family life" - as manifestly these two propositions are by no means the same or equivalent.

4. In conclusion therefore, I cannot agree with the majority of my colleagues because: (a) in the legislation of a substantial number of Contracting States rules similar to those of the impugned Netherlands law are principally concerned with the protection of the rights and interests of the child (even against the "opportunist" wishes of the parents) and this vital and important factor has not been given sufficient consideration in a matter which may have a substantial impact as to where exactly the margin of appreciation lies which each one of the Contracting States enjoys in this matter; and (b) there is no "family life" in the instant case, even if there are biological reasons for holding that there are "family ties". Moreover, in paragraph 40 of the judgment, reference is made to "social reality" as one of the factors which should prevail over the legal presumption of paternity. In my opinion, ever mindful of the frequent appeals and invocations made to "social reality" in justification of certain notorious laws enacted in Soviet Russia (1920-1989) and in Nazi Germany (1933-1945), it is dangerous and unsafe to bring such criteria into the field of family rights. The approach to those rights should be made from steadier and more stable platforms.

5. It follows from the above that I am against granting any financial relief to the applicants under Article 50 (art. 50).