



WRITTEN OBSERVATIONS

*submitted to the European Court of Human Rights
in the case*

*Gavril ȘUTA v. Romania
(Application No. 41836/19)*

*Claire de La Hougue,
Doctor in Law, Research Fellow*

March 13, 2020

1. The question raised concerns the impossibility for the applicant to contest his paternity, in the light of new biological evidence, after the expiry of the limitation period. Parentage is therefore established, although no details are given as to how it was established or whether the applicant brought up or contributed to the upbringing of the child.
2. A brief reminder of the definition of filiation is necessary to be able to determine the criteria and issues involved in a change in filiation, in the light of the Court's case-law.

I. PARENTAGE

Definition

3. Parentage is the bond of kinship that unites the child with his or her father or mother; in other words, it is the legal recognition of biological reality.
4. Under the Roman law, which affirms the mother-child relationship, maternal filiation is generally presumed by the designation of the mother in the child's birth certificate, without needing the mother to recognise the child, even in the case of birth out of wedlock. Taking up this principle, Article 2 of the European Convention on the Legal Status of Children Born out of wedlock (1975) states: "*Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child.*" In the past, it was common practice that the mother of a child born out of wedlock had to recognize him.¹
5. The father, always under Roman law, is designated by marriage. Marriage, which implies fidelity, makes it possible to guarantee his paternity. It ensures the child's filiation, i.e., his identity and his belonging to a family. It also assures the mother that she will not be abandoned with her offspring. In other words, it guarantees both legal and material security for the child and its mother.
6. When birth happens outside of wedlock, paternal filiation may be established by recognition (whether anticipated or not) or by a court decision in action to establish paternity. Adoption is an example of a court established filiation.
7. In the vast majority of cases, parentage aims at reflecting biological reality. It sometimes happens that the spouse or the person making the acknowledgment is not the biological father, whether he knows it or not, but this is accidental, "a-normal" situation, assumed through legally established filiation. In the case of adoption, the aim is to credibly reproduce the natural situation, in the interests of the child.
8. Parentage has a biological, a voluntary, and a social dimension. In a "normal" family situation (the one most favourable to the child's development), these dimensions are combined, but they may differ or even conflict in other situations. The same applies to motherhood, whose genetic, biological, and social dimensions may be split in the case of transsexualism, heterologous medically-assisted procreation, or practice such as surrogate motherhood, between the oocyte provider, the mother giving birth and the intended-parent.

¹ See *Mareckx v. Belgium*, A31, 13 June 1979, no. 6833/74. It may be pointed out that the draft bioethics law currently under discussion in France contemplates at restoring maternal recognition: filiation in couples composed of two women was to be established in the same way for both, denying the specificity of the mother, by means of a joint declaration made in advance before a notary.

9. In principle, the social and voluntary parts of filiation are secondary to the biological dimension. In a way, they confirm it. Constituting possession of status, social and voluntary aspects of filiation may supplement or replace the biological dimension only when the biological father is unknown or deceased. In most cases, the holder of such a status is the biological father.

10. The multiplication of situations where these dimensions are dissociated inevitably leads to conflicts. It is, therefore, important to determine the main criterion on which filiation is based.

Effects of parentage

11. Parentage has important effects on the lives of those concerned. It is a determining factor in the status of persons, i.e., all the elements that define their legal personality. Parentage gives rise to a person's identity, which is largely determined by his or her name and ancestry. Nationality also depends largely on filiation. The establishment of parentage can, therefore, be decisive for the right to enter and reside in a country. The status of persons cannot be subjected to agreements or modified by the will of the person concerned.

12. Filiation also has consequences regarding the property, firstly because of the parents' obligation to feed, taking care and raise the child and the reciprocal food obligations between ascendants and descendants, and secondly, in matters of succession.

13. Changes in a person's parentage, therefore, have consequences that need to be carefully measured. They can have a significant impact on a person's identity, in particular his or her name, family affiliation, and nationality, and considerable financial consequences for the weaker party, even to the extent of placing the child or elderly parent in need as a result of the disappearance of maintenance obligations. They also affect the ability to access to an estate, which, apart from the property dimension, strongly affects the peace of families. Contestation of paternity often has been used as a tool to gain the inheritance. The contestation of paternity by the putative father when the child has reached the age of majority generally has an inheritance reason: the putative father has founded a family and does not want to deprive his legitimate children of a share of the inheritance. The same is often the case when the adult child wants to establish filiation: he wishes to have access to the inheritance.

14. Changes in filiation may also generate many conflicts, particularly concerning the responsibility for the maintenance of a minor child. There are arrangements for such circumstances in the United Kingdom with the *Child Maintenance Service*, which operates concerning paternity disputes.²

15. To ensure legal certainty, countries have restricted the actions to contest paternity to strict conditions concerning both the interest in bringing proceedings and the limitation periods, particularly where possession of status is by the title (birth certificate or judgment). Only the public prosecutor can then challenge paternity out of time despite the possession of status if evidence from the records themselves makes it implausible or in cases of fraud against the law.

16. In some countries, the law has evolved to expand the possibilities for challenging paternity. For example, in Russia, the Family Code has been amended to remove the statute of limitations on finding and contesting paternity. In Romania, action to contest the paternity of a child born in wedlock is now imprescriptible as regards both the child and the biological

² Child Maintenance Service: <https://www.nidirect.gov.uk/articles/disputing-parentage>

father. On the other hand, it may be time-barred within three years in respect of the mother and her husband, who is presumed to be the father (previously the period was six months). In the case of the latter, the limitation period is calculated from the date on which the presumed father learns the relationship or from a date later than the former, on which the presumed father learns that the relationship does not exist.

II. QUESTIONS AND ISSUES

17. To determine parentage or to justify a change in parentage, it is necessary to choose which criterion is more decisive: biological, voluntary, or social.

If we favour the biological dimension

18. This corresponds to the concrete reality, the first and principal dimension of filiation in principle corroborated by the other two. It is also in line with the right of access to origins and corresponds to the current development of the law in many countries and the case-law of the Court.

19. The risk is that family relationships may be weakened if it is discovered that the biological link is non-existent and that legal certainty may be undermined. The situation is obviously different depending on whether the child is a minor or an adult. If he or she is a minor, his or her interests must be a primary consideration. In particular, the existence or not of an identified biological father must be taken into account.

20. Allowing paternity to be contested if it is established that there is no biological link will also affect heterologous medical procreation. In the case of oocyte donation, the rule that the mother is the one who gives birth continues to apply. In the case of sperm donation, on the other hand, the spouse or partner of the mother is not the genetic father. Where States permit heterosexual procreation, they generally prohibit the contestation of parentage with respect to the mother's husband or partner and of establishing parentage with the sperm donor.

21. This poses a problem of access to origins and even discrimination since children born of heterosexual procreation are the only ones unable to contest a filiation that is certainly unrelated to reality.

If we favour the voluntary dimension

When establishing parentage

22. Parentage has been accepted solely based on the voluntary dimension in the context of surrogacy, or parentage with regard to the spouse (male or female) of the biological father is recognised.³

23. When establishing filiation, the parents' intention will be considered as the primary factor, since the child is not in a position to express himself or herself. This raises several questions:

³ See Court of Appeal of Rennes, January 27, 2020, Nos. 18/04247; 18/04245; 18/02580; 18/02429; 18/01737 and February 10, 2020, No. 19/04400.

what if the parents do not (or no longer) agree with each other? If the intent disappears? If there are conflicts on this matter between coming of age children and their parent?

24. Sometimes a mother may not want her child to have an established filiation to the father. Can she prevent the biological father from recognising the child? According to the Convention on the Rights of the Child, the child has, as far as possible, the right to know and be cared for by his or her parents. And if parentage is established but the mother reveals, when the couple breaks up, that her spouse is not the biological father, even though he wishes to keep his link with the child, can the putative father be deprived of the link with the child he has brought up and believed to be his son or daughter?

25. Moreover, if intention becomes the criterion of the parentage and disregards the biological reality, then, there would be no reason to limit the number of parents at two: there could be 3, 4, or 5 “parents,” or even more, regardless of sex, age, etc. Filiation would be devoid of any substance, and its effects (identity, heritage, etc.) would be impossible to determine.

In the case of a change of parentage

26. If the will is the primary basis of filiation, the same will that established filiation must make it possible to put an end to it. It is not legitimate in this case to maintain filiation after the will has disappeared. Filiation thus becomes temporary, relating to a subjective criterion, which removes all legal certainty.

27. If filiation can be established in respect of the child of the spouse based on will, the break-up of the couple should be able to lead to the end of filiation; therefore, why not establish a new relationship in respect of a new spouse or new “parents”?

28. On the other hand, if parentage is based on will, it is not reasonable to only focus on the parents. The children’s filiation must also be admitted, at least when they reach majority or even earlier. This would lead to endless disputes.

29. Even if the will of parties and biological considerations are combined, the wills of the parties still could be contradictory. A party’s consent may be lacking, for example, if a DNA sample was taken without the knowledge of a party. In some countries, such as France, genetic tests can only be carried out on the order of a judge, with the express consent of the parties concerned. Tests carried out outside this framework have no probative value and are subject to criminal penalties (Articles 226-28 of the Criminal Code). Other States may be less demanding concerning the procedure, in which case the problem remains: the biological reality could formally contradict the legally established parentage. A legal fiction is based on probability that the situation is “normal”. It is discredited if subsequently proved otherwise. To what extent is it relevant to maintain a fiction that is not supported by reality? In principle, a presumption is only valid until proven otherwise.

30. Moreover, if it is the child who challenges parentage against the parent, is parental consent required? Admittedly, in an unlikely case, the child may wish to have filiation annulled to evade his or her obligations to an elderly parent in need. It is fair for a child to support his or her elderly parent who raised that child. The child may simply want to match his or her parentage with reality. It doesn’t seem fair to force the child to maintain a false parentage.

If we favour the social dimension

31. The social dimension is most often associated with the will to be parent, but there are special cases. For example, if a couple wants to raise children but does not wish to adopt them. In most cases, parentage reflects biological reality. If it is considered as the main criterion, it may establish a filiation that is neither true nor the will of the persons concerned. The fact that relatives believe in a parent-child relationship is a little light to establish it legally, even if it has happened that a child was taken in by a couple who had refused to adopt him or her has obtained a deed of notoriety giving him or her access to the estate...

III. CASE LAW OF THE COURT

In case of a request from the putative father

32. The Court had several comparable cases where a man complained that he could not contest his paternity even though he proved that he was not the biological father of the child. These were generally cases involving children born before DNA testing that established with certainty whether paternity existed. In some cases, the adult child consented the DNA analysis and to the disavowal of paternity that had been imposed on the applicant by judicial decision without the regard to the contest from the outset.⁴ In all these cases, the Court found a violation of Article 8.

33. While recognizing the legitimate interest in ensuring legal certainty and stability of family ties and the need to protect the interests of the child, the Court's well-established case-law affirms that: "*a situation in which biological reality cannot prevail over a legal presumption of paternity is not compatible with the obligation to ensure effective respect for private and family life.*"⁵

34. In contrast, where the legal actions brought by putative fathers sought to impose a DNA test to determine the biological link, the Court attached decisive importance to the fact that there was no biological evidence contradicting the legally established parentage. The Court finds it reasonable for the domestic courts to give more weight to the interests of the child and the family in which he lives than to the interests of the applicant in ascertaining a biological fact.⁶

35. In practice, this position amounts to giving decisive importance to the biological dimension associated with the consent of all the parties. If all the parties have agreed to carry out the test, which may lead to the annulment of the parentage, the Court considers that the will of the parties must be respected, and thus the parentage annulled where appropriate.

⁴ *Paulík v. Slovakia*, no. 10699/05, 10 October 2006; *Ostace v. Romania*, no. 12547/06, 25 February 2014.

⁵ Free translation of: *Ostace v. Romania*, no. 12547/06, 25 February 2014 § 40; see also *Mizzi v. Malta*, no. 26111/02, 12 January 2006, § 113; *Shofman v. Russia*, no. 74826/01, 24 November 2005, § 45; *Kroon and Others v. the Netherlands*, no. 18535/91, 27 October 1994, Series A no. 297-C, § 40; *Paulík v. Slovakia*, no. 10699/05, § 46, *Tavlı v. Turkey*, no. 11449/02, 9 November 2006 § 35.

⁶ *İyilik v. Turkey*, no. 2899/05, 6 December 2011, § 32, and *I.L.V. v. Romania*, no. 4901/04, dec. 24 August 2010, § 40.

36. On the other hand, if one of the parties - in this case, the child, since the various cases were brought by putative fathers - refuses the genetic test, the Court considers the national authorities who refused to order the test was justified.

In the case of a request from the child

37. The Court recognized the “*right to know one’s origins*” under Article 8 for the first time in the *Odièvre*⁷ decision. Moreover, the *Mikulic* judgment stated: “*respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual’s entitlement to such information is of importance because of its formative implications for his or her personality. . . persons in the applicant’s situation have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity.*”⁸ This rationale concerned the search for the biological mother in the *Odièvre* judgment and the biological father in the *Mikulic* judgment.

38. In *Mennesson*, the Court emphasized “*Having regard to the importance of biological parentage as a component of identity.*”⁹ It emphasized the need to match parentage with biological reality. The Court stated that “*it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof.*”¹⁰

39. The Court did not distinguish between mere knowledge of origins and the establishment of parentage: knowing from whom a person was born is not enough, the legal recognition of the link is required.

40. Given the importance of biological parentage, which must be recognised by a legal bond, the voluntary deprivation of a child of part of his or her biological parentage is an infringement of that child’s right to identity. Heterologous methods of procreation, which erase part of the biological parentage by excluding gamete donors or the surrogate mother, therefore infringe the child’s right to identity.

41. Conversely, if the absence of a biological link is established, it is problematic to maintain legal parentage, especially if this is not the wish of the parties.

IV. Artificialization of procreation

42. The biological bond between parents and children is highly sought after by those whose health status or life choices prevent natural procreation, as well as by children cut off from their biological parentage. Many children born of heterologous assisted reproduction and adopted children seek to identify their biological parents and bear witness to the suffering caused by ignorance of their origins. Instead of adopting a child, couples who are unable to have children resort to medically assisted reproduction, or even surrogate motherhood in

⁷ *Odièvre v. France*, no. 42326/98, 13 February 2003, § 44.

⁸ *Mikulic v. Croatia*, no. 53176/99, 7 February 2002, §§ 54 and 64.

⁹ *Mennesson v. France*, no. 65192/11, 26 June 2014, § 100.

¹⁰ *Ibid.*, § 100.

order to link the child genetically to at least one member of the couple. Female couples go so far as to implant an embryo in the womb of one woman with an egg from the other¹¹ to have a biological link with the child, while male couples have twins carried by a surrogate mother to be the progenitor of one child each.

43. The rapid evolution of medical practices, and sometimes the law is leading to the multiplication of situations that do not conform to biological reality or even lack credibility. Disputes in parentage is no longer merely a question of births outside marriage or even only of medically assisted procreation, but of births to female couples after artificial insemination or *in vitro* fertilisation, adoption by a same-sex partner,¹² or even surrogacy. In the case of heterologous medically assisted procreation (notably when it excludes the father, in the case of women alone or a couple with another woman) and gestation by others, the mismatch between biological reality and filiation is voluntary. These situations are decided by adults in their interests and are detrimental to the interests of the children, in particular their right to identity. These practices should, therefore, not be legalised. Only “homologous medically assisted procreation” respects children’s right to identity, and therefore, only it can be legitimate in this respect.

44. The inextricable situations and the problems that are difficult to resolve arising from reproductive methods that are disconnected from natural reality should prompt States to exercise the utmost caution when legislating in these matters, and the Court should exercise the utmost restraint. The Court should in no way encourage reluctant States to legalize such practices or to endorse them when their nationals resort to them abroad.

45. Even if any change in parentage undermines the principle of the unavailability of the status of persons, it is desirable to bring legally recognised parentage into line with biological reality, especially where this is by the will of the parties. However, care must be taken not to undermine the principle of the unavailability of the status of persons because it is intended to protect persons.

Conclusion

46. The biological criterion is the only undoubtedly well-founded one, which is not arbitrary and cannot fluctuate according to changing moods and feelings. It is, therefore, the only one that must be legally inviolable. Filiations established on other bases, in the exclusive interest of the adult, must be open to challenge - especially by the child - since they are far away from natural reality and based on will, which is, by definition, changeable. It would not be fair to children to lock them up in a false and non-credible filiation without any possible challenge.

¹¹ Cf. the pending case of *R. F. and others v. Germany*, No. 46808/16.

¹² Even against the father’s advice, cf. *X and Others v. Austria*, no. 19010/07, 9 February 2013.