1987 July 22

[A. LOIZOU, STYLIANIDES, PIKIS, JJ.]

IN THE MATTER OF SECTION 3 OF THE CONVENTION ON THE LEGAL STATUS OF CHILDREN BORN OUT OF WEDLOCK (RATIFICATION) LAW 50/79.

AND

IN THE MATTER OF SECTION 54 OF THE WILLS AND SUCCESSION LAW CAP. 195

AND

IN THE MATTER OF SECTION 6 OF THE ILLEGITIMATE CHILDREN LAW CAP. 278,

AND

IN THE MATTER OF ELEFTHERIA CHARALAMBOUS OF NICOSIA ILLEGITIMATE CHILD OF ANDREAS CLEANTHOUS OF VASILIA LATE OF NICOSIA, DECEASED,

Applicant - Appellant.

(Civil Appeal No. 6835).

Illegitimate children —Legitimation of — The European Convention on the legal Status of Children Born out of Wedlock and its ratifying Law 50/79 and section 4 of such law — The status of the Convention in the legal order of Cyprus under Art. 169 of the Constitution — It has superior force and enjoys precedence over domestic legislation in its application — The Illegitimate Children Law, Cap. 278, section 6 — Any domestic legislation limiting cases, in which legal proceedings to establish paternity may be brought, is incompatible with Article 3 of the Convention — It follows that the restrictions of subsections (2) and (3) of section 6 of Cap. 278 are not applicable.

Illegitimate children — Legitimation of — Review of the historical evolution of the law of Cyprus on the matter.

Constitutional Law — Judgments in Civil and Criminal proceedings — Constitution, Art. 30.2 — A judgment must be duly reasoned — What is required by «due reasoning».

Evidence — Hearsay evidence — Pedigree cases — The exception of the rule against hearsay evidence in pedigree proceedings.

Practice — Forms and procedents — Useful, but servile adherence to them not required.

Practice — Petition for establishing paternal affiliation — Faulty reference to law on which it was based — Irregularity, remedied by the steps taken by the respondent.

The appellant, who was born in 1939 out of wedlock, filed application 1/84 in D.C. Nicosia for her paternal affiliation, seeking a declaration that she is the illegitimate child of Andreas Cleanthous, late of Vassilia, who died on 26.8.83 and whose estate is administered in Probate application 408/83, D.C. Nicosia.

The application was modelled on the Wills and Succession (Declaration of Death and Legitimation) Rules, 1953.

The trial Court dismissed the application on the following grounds, namely:

a) That the applicant was precluded by section 6 of Cap. 278 to file or prosecute the petition, as the late Andreas Cleanthous has not recognised her by will as her child. In this respect the trial Court held that neither the aforesaid Convention nor the law, whereby it was ratified, changed or affected the restrictive provisions of Cap. 278, and

(b) That in any event the appellant failed to prove her case.

Hence this appeal.

Held, allowing the appeal: (1) Before the enactment of the Wills and Succession Law the only method of legitimation was by subsequent marriage of the parents of the Child born out of wedlock. The said law (Cap. 220 in the 1949 Edition, now Cap. 195) provided that an illegitimate child shall have the status of a legitimate child in respect of his mother and her relatives by blood (Section 52); it, also, provided for the legitimation of such a child by subsequent marriage (Section 53) and by order of the Court (Section 54).

The aforesaid sections 53 and 54 were repealed and replaced by Cap. 278, which provided for legitimation by subsequent marriage (section 4 and 5) and by an order of the Court (Section 6*).

* Quoted at pp. 433-434 post.

Subsection 2 of section 6 reads as follows

«An order under subsection (1) may be made on application to the Court by or on behalf of the father

Provided that where the father is dead such application may be made by the child himself, if the father has recognised by his will the child as his»

On 1 12 78 Cyprus signed the European Convention on the Legal Status of Children Born out of Wedlock The Convention was ratified by Law 50/79

(2) The operative parts of the aforesaid Convention are Articles 2-10 Section 4 of the ratifying Law 50/79 empowers the Supreme Court to make rules governing, inter alia, the procedure in any case by virtue of that law and adds that until such rules are issued, the procedure will be governed by the Rules of Court for the time being in force

(3) The Convention and its status in the legal order of Cyprus under Art 169 of the Constitution was considered in *Malachtou v Armefts and Another* (1987) 1 C L R 207 It was held that the Convention has superior force, not in the sense of repealing any inconsistent with it domestic law, but in the sense of having superiority and precedence in its application

(4) Any provision of the internal law limiting cases in which legal proceedings to establish paternity may be brought is incompatible with the Convention (Art 3, which, also, provides for two ways of evidencing or establishing paternity) It follows that subsections 2 and 3 of Cap 278 are incompatible with the Convention and, therefore, are inapplicable The applicant had a right to file and pursue her application for judicial decision in respect of her paternal affiliation

(5) The Petition was based on Law 50/79, Section 54 of the Wills and Succession Law, Cap 195 and section 6 of Cap 278 Sections 44 and 46 of Cap 195 restrict the right of inheritance to legitimate children of a deceased and their descendants only The petition is based on the correct law But even if the reference to the Law was to some extent faulty, this would amount to irregularity, remedied by the steps taken by the respondents

(6) The prescribed forms in the Wills and Succession (Declaration of Death and Legitimation) Rules were adapted and used in this petition As it has been held almost a hundred years ago in *Bell v Clubbs* [1891-1892] 8 T L R 296 it is very convenient to have forms, but servile adherence to such forms is not required

(7) The trial Judge referred, also to the witnesses who testified, and said that as the evidence was conflicting and Andreas Cleanthous was not alive, he could not accept the evidence adduced by the applicant

The duties of a Judge in the Judicial process were set out in *Christou and Another v Angelidou and Another* (1984) 1 C L R 492 Art 30 2 of the Constitution provides that the judgment of a Court in civil or criminal proceedings «shall be reasoned» What is required by due reasoning was explained in *Pioneer Candy Ltd and Another v Stelios Tryphon and Sons Ltd* (1981) 1 C L R 540 The trial Court has a duty under Art 30 2 of the Constitution to furnish proper reasoning for its findings The reasons must be persuasive and this is a fundamental attribute of judicial process In this case there has been almost no evaluation and the reasoning is inadequate

(8) The submission of counsel for the respondents that in any event the evidence adduced at the trial was inadmissible as being hearsay cannot be accepted because there was ample evidence which was not hearsay and in any event hearsay evidence to pedigree is admissible by way of exception to the general rule

Appeal allowed with costs Order for retrial Costs of first trial to be costs in cause in the new trial, in any event not against the appellant

Cases referred to

Malachtou v Armeftis and Another (1987) 1 C L R 207,

Re Pritchard (Deceased) [1963] 1 All E R 873,

Spyropoullos v Transavia (1979) 1 C L R 421,

In re HadjiSotenou (1986) 1 C L R 429,

In re Williams and Glyn's Bank plc (1987) 1 C L R 85

Bell v Clubbs [1891-1892] 8 T L R 2996,

Christou and Another v Angelidou and Another (1984) 1 C L R 492,

Pioneer Candy Ltd & Another v Stelios Tryphon & Sons Ltd (1981) 1 C L R 540,

La Cloche v La Cloche [1872] L R 4 P C 325,

In Re Davy [1935] P 1,

Battle v Attorney General [1949] P 359

Appeal.

Appeal by applicant against the judgment of the District Court of

Nicosia (Ioannides, D.J.) dated the 10th November, 1984 (Appl. 1/84) whereby applicant's application for a declaration that she is the illegitimate child of Andreas Cleanthous late of Vassilia who died on 26.8.83 was dismissed.

E. Efstathiou with M. Tsangarides, for the appellant.

C. Gavrielides, for the respondents.

Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Mr Justice Stylianides.

STYLIANIDES J.: This appeal turns on the interpretation and application of the Convention on the Legal Status of Children Born out of Wedlock and Law No. 50/79 whereby it was ratified.

The applicant-appellant was born in 1939 out of wedlock. She is the natural child of her mother, Panayiota Paraskeva. They come from Vassilia village of Kyrenia district, which is, since the summer of 1974, under occupation by the Turkish forces.

Andreas Cleanthous of Vassilia was unmarried. He was living at all material times at Vassilia. Later he moved to Morphou where he ran a shop for sometime and later he established himself in Nicosia. From 1951 he was cohabiting with a certain Maroulla Cleanthous who gave birth to a chilld Eleni Cleanthous. About a year before his death he married the said Maroulla Cleanthous. He passed away on 26/8/83.

Marios Lambriandies was granted letters of administration of the estate of the said deceased in Probate Application No. 408/83 of the District Court of Nicosia.

On 12/1/84 the applicant commenced proceedings by Application No. 1/84 in the District Court of Nicosia for her paternal affiliation by judicial decision. By this application the applicant seeks declaration and order that she is the illegitimate child of Andreas Cleanthous late of Vassilia, who died on 26/8/83 in Nicosia and who is the person whose estate is administered in Probate Application 408/83 of the District Court of Nicosia. This petition is modelled on the Wills & Succession (Declaration of

Death and Legitimation) Rules and the forms prescribed therein, made under Section 86 of the Wills & Succession Law, Cap. 220, of the 1949 Edition of the Laws of Cyprus. These Rules were made in 1953.

Copy of the petition and the relevant affidavit were served of the Attorney-General of the Republic and the three respondents, the administrator of the estate of the late Andreas Cleanthous, his surviving wife Maroulla Cleanthous and Eleni Lambrianidou née Cleanthous the daughter who was legitimated by the subsequent marriage to which we have just referred above. The Attorney-General did not take part in the proceedings. The other respondents contested the petition.

The Court after hearing 7 witnesses for the petitioner and 3 witnesses for the respondents dismissed the petition on the ground that the applicant was precluded by the provisions of Section 6 of the Illegitimate Children Law, Cap. 278, to file or prosecute this petition, as the late Andreas Cleanthous has not recognized her by will as his child and that neither the Convention on the Legal Status of Children Born out of Wedlock nor the Law ratifying it under Article 169 of the Constitution, i.e. Law No. 50/79, changed or affected the restrictive provisions of Cap. 278. The trial Judge proceeded further. He referred to the witnesses who testified and arrived at the conclusion that the petition would fail on the substance as well. He ultimately dismissed it with order for costs against the petitioner.

This appeal is directed against the said decision. The grounds of appeal are:-

1. That the trial Judge misdirected himself on a matter of law; that the Convention, after its ratification, has superior force and displaced and superseded the provisions of Section 6 of the Illegitimate Children Law, Cap. 278; and that the limitations provided in Section 6 of Cap. 278 are inapplicable.

2. That the trial Judge failed to evaluate the evidence and the judicial process was faulty; and that his findings of fact are not warranted by the evidence before him.

Before the Wills and Succession Law 1945 (No. 25/45) came into operation on 1/9/1946, the only method of legitimation was

by subsequent marriage of the parents of the child born out of lawful wedlock, a method which has been adopted through Byzantine law by the Canon law of the Greek Orthodox Church The Law of Succession was based on creed

Section 52 of the Wills and Succession Law, Cap 220 (1949 edition), provided that an illegitimate child shall have the Legal Status of a legitimate child in respect of his mother and his relatives by blood Section 53 provided for legitimation by subsequent marriage, and Section 54 for legitimation by order of Court

The right of application to the Court for legitimation was limited to the father of the child with the consent of the mother of the child and of the child himself, if the child was of age and under no disability, the mother could apply only within 12 months of the birth of the child

This part of the Wills and Succession Law was repealed and substituted by the Illegitimate Children Law, 1955 (No 15/1955) which is Cap 278 in the 1959 edition of the Laws of Cyprus

The following methods of protection to an illegitimate child were adopted in this legislation -

(a) By subsequent marriage of the parents (Section 4 and 5),

(b) By a legitimation order of Court

The legal effect of legitimation by an order of the Court is to render the illegitimate child legitimate, as from the date of its birth in respect of both his father and mother and their relatives by blood (Section 7)

An order for legitimation may be made under Section 6 only on application to the Court by/or on behalf of the father and where the father is dead on the application of the child if the father has recognized by his will the child as his

We consider pertinent to quote seriatim Section 6 of this Law -

«6 (1) An illegitimate child may be declared legitimate by an order of a Court under the provisions of this section

(2) An order under subsection (1) may be made on application to the Court by or on behalf of the father:

Provided that where the father is dead such application may be made by the child himself if the father has recognized by his will the child as his.

(3) No order shall be made under subsection (2) unless -

(a) at the time of the conception of the child a marriage between the parents would not be forbidden, on account of relationship by blood or by marriage, by the family law of the religious community to which the person, who claims or is alleged to be the father, belongs;

(b) the father cannot adopt the child under the provisions of the Adoption Law;

(c) the legitimation by subsequent marriage under section 4 became impossible owing to the death of the mother or for any other reason;

(d) where the father is married, his wife consents to such an order being made;

(e) where the child is not the applicant, such child or in case of his incapacity his guardian or the person appointed by the Court to represent the child in this respect, consents to such an order being made.»

The European Convention on the Legal Status of Children Born out of Wedlock was done at Strasbourg on the 15th day of October, 1975. It was signed on behalf of the Republic of Cyprus on 1/12/78, subject to ratification pursuant to a decision of the Council of Ministers No. 17.257 of 28/9/78 in accordance with Article 11.1 of the Convention and by virtue of Article 169, paragraph 2, of the Constitution of the Republic of Cyprus.

It was ratified by the Convention on the Legal Status of Children Born Out of Wedlock (Ratification) Law, 1979 (No. 50 of 1979).

According to Article 11 the instruments of ratification, acceptance or approval are deposited with the Secretary General

*Reported in (1987) 1 C.L.R. 207.

of the Council of Europe The Convention came into force there months after the date of the deposit of the third instrument of ratification, acceptance or approval, i e on 11/8/78 The instrument of ratification of the Republic of Cyprus was deposited with the Secretary General of the Council of Europe on the 11th day of July, 1979 and pursuant to paragraph 3 of Article 11, the Convention came into force three months after the date of the deposit of the instrument of ratification in respect of Cyprus, i e 11/10//79

Under Article 14 any State may, at the time of signature, or when depositing its instrument of ratification, acceptance approval or accession, make not more than three reservations in respect of the provisions of Articles 2 to 10 of the Convention The Republic of Cyprus made no reservation whatsoever

This Convention, its application in the legal order of Cyprus and Article 169 of the Constitution were judicially considered in Civil Appeal No 6616, *Toulla G Malachtou v Christodoulos G Armeftis and Another*, unreported*, taken by five Judges of this Court It was held that the Convention has superior force and any incompatible provisions of the Municipal Law are not applicable The law applicable is that set out in the Convention The Convention prevails over an inconsistent law anterior or posterior, on the principle of lex superior derogat inferior The Convention has superior force, not in the sense of repealing the inconsistent law but in the sense of having superiority and precedence in its application

Article 1 of the Convention reads -

> «Each Contracting Party undertakes to ensure the conformity of its law with the provisions of this Convention and to notify the Secretary General of the Council of Europe of the measures taken for that purpose »

In the Explanatory Report, Chapter «Commentaries on the Provisions of the Convention», in respect of Article 1 it is recorded that the measures referred to in this Article will usually take the form of legal or administrative texts These measures should be taken not later than the entry into force of the Convention in relation to the Contracting Party concerned

The Cypriot Legislator has chosen to include Section 4 of the

*Reported in (1987) 1 C L R 207

Ratifying Law, empowering the Supreme Court to issue Rules governing the practice and procedure of the Courts under the provisions of that Law and in particular the procedure to be followed before them in any case by virtue of the said law and the payment of fees. Section 4 goes further and by its proviso provides that until such Rules of Procedure are issued, all matters, the procedure and the payment of fees, will be governed mutatis mutandis, by the Rules of Court in force theretofore.

The operative parts of the Convention are Articles 2 to 10, all of which create objective rules of general application. They regulate the rights and responsibilities of all individuals governed by the Laws of Cyprus.

Article 3 of the Convention, as it is plain from its wording, and from the Explanatory Report - paragraphs 16 and 17 - sets out two ways of evidencing or establishing paternal affiliation. It also sets out the general rule according to which legal proceedings to determine paternity should in all cases be allowed. Thus, subject to reservations formulated in accordance with Article 14, any provision of the internal law limiting cases in which legal proceedings to establish paternity may be brought will be incompatible with the Convention.

The legislation of this country regulating the position of the illegitimate children strived to balance two equally just but not so consistent principles, that of the preservation of the sanctity of marriage on the one hand and that of removing a social stigma which may stamp certain persons during the whole lifetime, through no fault of theirs, on the other hand. This endeavour was labouring against the innocent, the illegitimate children.

International society moved forward in the way of the protection of the illegitimate children. Children born as a result of even adulterous association or even the products of relationship of incestuous nature are equally protected by the Convention.

The restrictions, limitations and conditions set out in subsections 2 and 3 of Section 6 of Cap. 278 are incompatible with the Convention and therefore are inapplicable.

It might be very helpful if the legislator had the provisions affected by the Convention amended and brought into line with the Convention, for anyone to find upon looking up the relevant Law, rather than to have every time to go through the

Conventions ratified in order to ascertain whether and to what extent any particular statutory provision has been affected by such ratification.

The applicant had a right to file and pursue her application for judicial decision in respect of her paternal affiliation. «Affiliation» in the Convention has not the same meaning as «affiliation order» in Part III of the Illegitimate Children Law. Establishment of paternal affiliation as envisaged in the Convention gives to a child born out of wedlock the same rights of succession as a child born within wedlock in the estate of its father and its mother and a member of its father's or mother's family.

Mr. Gavrielides for the respondents, though he did not file a cross appeal, argued that the application was not based on the proper law and the Rules of Court were not strictly adhered to. The petition is based on the Law Ratifying the Convention, «Section 54 of the Wills and Succession Law, Cap. 195» and Section 6 of the Illegitimate Children Law, Cap. 278.

Section 54 of Cap. 195 provides that this Law shall not be applied in any case in which the application thereof shall appear to be inconsistent with any obligation imposed by treaty.

The provisions of Section 44 and Section 46 of the Wills and Succession Law and the first schedule thereto restrict the right of inheritance to legitimate children of a deceased and their descendants only.

The petition is based on the correct Law. But even if the reference to the Law was to some extent faulty, this would amount only to an irregularity which was waived and/or remedied by the steps taken by the respondents. (*Re Pritchard (deceased)* [1963] 1 All E.R. 873; *Spyropoullos v. Transavia* (1979) 1 C.L.R. 421; *In re HadjiSoteriou* (1986) 1 C.L.R. 429; *In re Williams and Glyn's Bank plc,* C.A. 7040 delivered 19/3/87, unreported*.)

The prescribed forms in the Wills and Succession (Declaration of Death and Legitimation) Rules were adapted and used in this petition. With regard to the forms we repeat what was said almost a hundred years ago by Mr. Justice Hawkins in *Bell v. Clubbs* 8 T.L.R. [1891-1892] 296 at p. 298:-

«It was very convenient to have forms, which if followed,

* Reported in (1987) 1 C L.R 85.

should be sufficient. But it did not require a servile adherence to the forms provided, for this might do infinite mischief and make the forms traps instead of aids».

Rule 12 provides that the Attorney-General shall be one of the respondents and Rule 16 that a copy of the petition and a copy of the affidavit should be delivered or sent by the petitioner to Attorney-General.

Legitimation Order affects the status of a person and the State has an interest in it. The Attorney-General, though it may not be strictly necessary to be a party, he should be notified in time of the proceedings by serving on his office copy of the petition and of the affidavit in support, so as to take any part in the proceedings as he may deem fit.

The applicant in this case adhered to this provision, but the Attorney-General did not think fit to appear or take part in the proceedings.

The trial Judge after deciding to dismiss the application on the ground that the applicant was barred by the provision of Section 6(2) to apply, referred to the witnesses who testified before him and said that as the evidence was conflicting and Andreas Cleanthous was not alive, he could not accept the evidence adduced by the applicant. It is noteworthy that the applicant, her mother, a brother and a sister of the deceased testified for the petitioner. The trial Judge failed in his duty to analyse the evidence adduced and to make a proper evaluation.

The duties of the Judge in the judicial process were set out in *Christou and Another v. Angelidou and Another* (1984) 1 C.L.R. 492 as follows at p. 495:-

«There is a need for the trial Judge to formulate clearly in his judgment the specific issue or issues of fact arising between the parties and to state his finding on such issue or each one of such issues. Judges trying civil disputes should unfailingly do so. (*Papaellina v. EPCO (Cyprus) Ltd. and Lion Products Ltd.*, (1967) 1 C.L.R. 338, at p. 362).

Paragraph 2 of Article 30 of our constitution provides that the judgment of a Court in civil or criminal proceedings 'shall be reasoned'.

In *Pioneer Candy Ltd. & Another v. Stelios Tryphon & Sons*

Ltd., (1981) 1 C.L.R. 540, at p. 541, it was said:-

'The authorities establish that for the requirement of due reasoning, there must be:

(a) An analysis of the evidence adduced in the light of the issues as arising and defined by the pleadings;

(b) Concrete findings as the necessary prelude to the judgment of the Court;

(c) A clear judicial pronouncement indicating the outcome of the case'.

In the present case the judicial process was faulty. The judgment does not amount to a sufficient judicial determination of the disputes between the parties. The trial Court failed to determine the issues which had arisen, and give reasons for his such decision - (*Theodora Ioannidou v. Charilaos Dikaeos*, (1969) 1 C.L.R. 235; *Chambou & Others v. Michael & Another*, (1981) 1 C.L.R. 618).»

The trial Court has a duty under Article 30.2 of the Constitution to furnish proper reasoning of its findings. The reasons must be persuasive and this is a fundamental attribute of the judicial process.

In the present case there was almost no evaluation and the reasoning is inadequate. The findings are faulty as they are tainted with misdirection, lack of adequate direction on the evidence and lack of proper reasoning.

Mr. Gavrielides having regard to the powers of this Court under Section 25(3) of the Courts of Justice Law and the Civil Procedure Rules, 0.35, r.8, submitted that the evidence adduced by the petitioner was inadmissible as being hearsay and therefore this Court has power to sustain the judgment under appeal on other grounds.

We are unable to agree with him for two reasons: There was ample evidence which was not hearsay and secondly hearsay evidence as to pedigree is admissible in exception to the rule excluding hearsay evidence. (*La Cloche v. La Cloch* [1872] L.R.4. P.C. 325, English Reports 17 P.C.) In *Re Davy* [1935] P.1, it was held that declarations of deceased made «ante litem motam» are admissible in evidence in proceedings for legitimation and although the party sought to be legitimated is filius mullius until

decree and therefore before decree can have no relations, the result of excluding the declarations would be to take away by a rule of evidence the benefit that the statute intended to confer upon persons whose birth has been originally illegitimate apart from the operation of the statute. (See, also, *Battle v. Attorney-General* [1949] P. 359.)

For the foregoing reasons the judgment under appeal is set aside and new trial of the application is ordered before another Judge.

We trust that all necessary arrangements will be made for a speedy new trial.

With regard to costs, the costs of the first trial to be costs in the cause in the new trial, but not to be against the appellant at any rate. Costs of this appeal to be paid by the respondents.

Appeal allowed.
New trial ordered.