Michaelmas Term
[2020] UKPC 28
Privy Council Appeal No 0021 and 0027 of 2019

JUDGMENT

Ally Khan (Appellant) *v* Abdool (Respondent) (Mauritius)

Ally Khan (Appellant) *v* Abdool (Respondent) (No 2) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Kerr
Lady Black
Lord Lloyd-Jones
Lord Briggs
Lord Leggatt

JUDGMENT GIVEN ON

2 November 2020

Heard on 23 July 2020

1st Appellant
Angélique A Desvaux de Marigny

(Instructed by Sheridans)

Respondent
Antoine Domingue SC
Yasser Caunhye
(Instructed by Lajpati Gujadhur, Attorney-at-law)

2nd Appellant
Gilbert Ithier SC
G Thierry Saminaden
(Instructed by Sheridans)

Appellants:

(1) Mohammad Fahd Peer Ally Khan
(2) Ibrahim Rossanally Peer Ally Khan

LADY BLACK:

1. This appeal arises from an "action en recherche de paternité" brought by Nushrat Begum Abdool ("Nushrat" or "the plaintiff"), seeking to establish that she is the natural daughter of the late Abdullah Rossan Ally Peer Ally Khan ("the late Peer Ally Khan") who died in 1999. She sought to have her birth certificate amended to reflect this, and sought a declaration that the sole heirs to the late Peer Ally Khan's estate were herself, Ibrahim Rossanally Peer Ally Khan ("Ibrahim"), and Mohammad Fahd Peer Ally Khan ("Fahd"). Ibrahim is the acknowledged natural son of the late Peer Ally Khan, and Fahd is the late Peer Ally Khan's adopted son. Ibrahim and Fahd were defendants in the proceedings brought by Nushrat (and accordingly sometimes referred to hereafter as "the defendants"). Other parties were also involved in the proceedings, but now that the matter has reached the Board, it is Ibrahim and Fahd who are the active appellants and Nushrat who responds.

2. During the course of the paternity proceedings, an order was made under section 8 of the DNA Identification Act 2009 for a DNA test of Nushrat and Ibrahim to ascertain whether there was a family relationship between them. The forensic science report on the testing was provided by Miss P Goodur in March 2012. She concluded that the likelihood of Nushrat and Ibrahim being related was very remote. The issues in the appeal include how the learned trial judge, Devat J, should have dealt with this evidence, and with the application that was made for a post-mortem DNA test to be carried out on the late Peer Ally Khan. The appeal also encompasses the treatment by the judge of other evidence upon which she relied in concluding that paternity had been established. A further issue is whether Nushrat's action en recherche de paternité was time-barred.

Article 340 of the Mauritian Civil Code

3. Central to the appeal is article 340 of the Mauritian Civil Code which provides:

> 340. La paternité hors mariage peut être judiciairement déclarée:
>
> > 1. Dans le cas d'enlèvement ou de viol, lorsque l'époque de l'enlèvement ou du viol se rapportera à celle de la conception;
> >
> > 2. Dans le cas de séduction accomplie à l'aide de manœuvres dolosives, abus d'autorité, promesse de mariage ou fiançailles;

3. Dans le cas où il existe des lettres ou quelque autre écrit privé émanant du père prétendu et desquels il résulte un aveu non équivoque de paternité;

4. Dans le cas où le père prétendu et la mère ont vécu en état de concubinage notoire pendant la période légale de la conception ;

5. Dans le cas où le père prétendu a pourvu ou participé à l'entretien et à l'éducation de l'enfant en qualité de père.

L'action en reconnaissance de paternité ne sera pas recevable:

1. S'il est établi que, pendant la période légale de la conception, la mère était d'une inconduite notoire ou a eu commerce avec un autre individu;

2. Si le père prétendu était, pendant la même période, soit par suite d'éloignement, soit par l'effet de quelque accident, dans l'impossibilité physique d'être le père de l'enfant;

3. Si le père prétendu établit par l'examen des sangs qu'il ne peut être le père de l'enfant.

L'action n'appartient qu'à l'enfant. Pendant la minorité de l'enfant, la mère, même mineure, a seule qualité pour l'intenter.

Elle devra, à peine de déchéance, être intentée dans les deux années qui suivront l'accouchement. Toutefois, dans les cas prévus aux paragraphes 4 et 5 ci-dessus, l'action pourra être intentée jusqu'à l'expiration des deux années qui suivront la cessation, soit du concubinage, soit de la participation du prétendu père à l'entretien et à l'éducation de l'enfant.

A défaut de reconnaissance par la mère, ou si elle est décédée ou dans l'impossibilité de manifester sa volonté, l'action sera intentée par le tuteur avec l'autorisation du Juge en Chambre conformément aux dispositions de l'article 438 alinéa 3.

Si l'action n'a pas été intentée pendant la minorité de l'enfant, celui-ci pourra l'intenter pendant les deux années qui suivront sa majorité.

4. In short, the article sets out, in its first paragraph, the five circumstances in which paternity may be declared (the "cas d'ouverture"). The action may not be initiated

unless the case falls within one of the cas d'ouverture. However, establishing one of the cas d'ouverture will not necessarily lead to a declaration of paternity; they give rise only to presumptions, which can be rebutted. This is evident from the opening sentence of the article, which provides that paternity may be declared ("peut être … déclarée"), not that it shall be declared. The second paragraph sets out three grounds on which an action for recognition of paternity will be summarily dismissed without a hearing on the merits (the "fins de non-recevoir"). The remaining four paragraphs of the article set out that the action belongs to the child, or the child's mother during the child's minority, and deal with limitation.

5. Although the whole of article 340 is reproduced here, in order that the arguments can be seen in context, it will be helpful to identify the parts of it which are of special relevance in this particular case.

6. Here, the action en recherche de paternité was commenced on the plaintiff's behalf during her minority, in April 2001. She was born in November 1990, so this was not within the two years following her birth, as is normally required. However, article 340 extends the limitation period where the action is based on the fourth or fifth of the cas d'ouverture. In the present case, reliance is placed upon the fifth cas d'ouverture, namely (translating loosely) the putative father's involvement, as a father, in the maintenance and education of the child. Where this applies, the limitation period is two years following the cessation of the involvement. If properly commenced on this basis, the action is not confined to that cas d'ouverture, and the plaintiff can rely on other cas d'ouverture as well. The plaintiff therefore seeks to rely also upon the third cas d'ouverture, namely the existence of written material demonstrating an unequivocal admission of paternity.

7. Also relevant, in light of the DNA test result, is the third of the fins de non-recevoir, which applies if the putative father establishes "par l'examen des sangs" that he cannot be the father of the child.

The first instance decision

8. The submission was made to Devat J on behalf of the defendants that, given the result of the DNA test, the third of the fins de non-recevoir was established and the case should be dismissed without further examination. The judge dealt with this as a preliminary matter, rejecting the submission on the basis that it is the putative father who has to establish, by analysis of his blood and the putative child's blood, that he cannot be the father of the child. Since the late Peer Ally Khan was already dead, the requisite blood tests could not be carried out so, on the judge's reasoning, the provision did not apply. The judge went on to give a second reason for concluding that the DNA findings could have "no bearing on the issue of 'non-recevabilité'", namely that the

sibling test was "a last resort test" and "not as conclusive as a paternity test on account of its complex statistical calculations". Thirdly, she appears also to have been influenced by the fact that this was the first sibling profile test that Miss Goodur had carried out.

9. The judge next turned, in her judgment, to the question of whether the plaintiff's action was time-barred. The evidence which was relied upon as establishing that the claim was not time-barred was evidence of the plaintiff spending time at the late Peer Ally Khan's house, celebrating her birthday there in 1999, and being requested by him to visit him in hospital before he died, plus evidence about financial contributions, including certain documentation concerning a bank account, about which more will need to be said in due course. The judge heard from a number of witnesses whose evidence was relevant to the time issue, including the plaintiff and her mother, but it is clear that their evidence also ranged more widely than that. Although the judge chose the heading, "The evidence relevant to the issue of the time-bar", for the section in which she set out an account of the evidence she had received, she did not in fact confine herself narrowly to matters which went to limitation, covering the witnesses' evidence more generally, then proceeding, in the following section, to reach conclusions about the central issue of paternity, before returning again to the time-bar question. She accepted the plaintiff and her witnesses as credible. She saw the plaintiff's case as resting, essentially, on the evidence of her mother, about which she said:

> "I have no reason not to accept her evidence that the plaintiff was born out of her intimate relationship with late Peer Ally Khan and that accordingly the plaintiff is the latter's natural daughter; that he regularly participated in her upkeep and maintenance even after their separation until the plaintiff's birthday in November 1999."

10. As the judge saw it, no evidence had been adduced by the defendants in rebuttal of the mother's evidence. She observed that:

> "… save for subjecting [the mother] to a lengthy and searching cross-examination in order to test her credibility, which as I have earlier said has remained unshaken, not an iota of evidence has been adduced by [the defendants] in rebuttal of her version."

11. The judge then went on to find that the father-daughter relationship that existed between the plaintiff and the late Peer Ally Khan continued until his death in December 1999, involving fatherly care and affection, plus continuous participation in her upkeep, maintenance and education, "en qualité de père". As the plaintiff's action was commenced in April 2001, it was therefore within the prescription period of two years

following the "cessation … de la participation du prétendu père à l'entretien et à l'éducation de l'enfant".

12. The judge gave separate consideration to a document which has become known as "P1". This is a photocopy of a letter, dated 3 December 1995, with instructions from the late Peer Ally Khan to his bank, requesting the transfer of a sum of money from an account of his to a fixed deposit account in the joint names of himself and the plaintiff. The instruction was that the account should be operated exclusively by the late Peer Ally Khan himself during his lifetime, and after his death by the plaintiff (to whom he referred as "Ms Nushrat Begum Abdool also called Nushrat Peerallykhan"), or her legal representative if she was still under age. A bank statement for the account (referred to as "P23") showed that the amount in it in the summer of 1999, shortly before the late Peer Ally Khan died, was GBP 265,997.43. The plaintiff's case was that, as well as being proof of the late Peer Ally Khan's participation in her maintenance and education, the letter and the bank statement amounted to "un aveu non équivoque de paternité".

13. The judge concluded that the irresistible inference to be drawn from the letter was that the late Peer Ally Khan had acknowledged the plaintiff as his natural daughter and that it did indeed constitute un aveu non équivoque de paternité.

14. As her overall conclusion was that paternity had been established, the judge made an order to that effect and directed that the plaintiff's birth certificate be amended accordingly.

The Court of Civil Appeal

15. The Court of Civil Appeal dismissed the appeals brought against the judge's orders.

16. Rejecting the argument that the judge erred in failing to give due weight and consideration to the expert evidence about DNA, the court said:

> "We note that a DNA test where alleged siblings are tested is not conclusive as parentage testing and it does not in any manner whatsoever assert real paternity. To the extent that such test can only give an indication of the relationship between siblings, and in this particular case the test not having established any such relationship, the learned trial judge was right not to have acted solely on the basis of the report to decide whether [the late Peer Ally Khan] was the biological father of the respondent."

17. As to the possibility that there might be post-mortem testing of the late Peer Ally Khan, it simply noted that Mauritian law is silent on the issue, but France takes a restrictive approach to it. In 1997, the Cour d'Appel de Paris authorised the exhumation of Yves Montand with a view to resolving a paternity suit. In the Court of Civil Appeal's view, however, reliance could not be placed upon this, because the provisions of the French Civil Code were modified after that decision, so that it now forbids the identification of a deceased through DNA testing unless the person in question gave his express consent to the performance of such measure of inquiry when alive.

18. On the non-recevabilité issue, the Court of Civil Appeal confirmed that the case was not within the provision in question because, for it to apply, it had to be the putative father who established by way of blood analysis that he could not be the father of the child.

19. As to the challenge that was made to the judge's evaluation of the evidence, which can be summarised as being a submission that her findings as to paternity were against the weight of the evidence, the Court of Appeal rejected that, saying:

> "We note that, overall, there has been consistent evidence on record to establish that late [Peer Ally Khan] had participated in the maintenance, upkeep and education of [the plaintiff] *'en qualité de père'*. Furthermore, documents P l and P23 (the contents of which remained unchallenged in the course of the trial) contain the required elements such as to constitute an 'aveu non-equivoque de paternité'".

20. The appeal against the judge's conclusion that the action was brought within time also failed, on the basis that the "cessation de la participation du prétendu père à l'entretien et à l'éducation" of the plaintiff occurred in December 1999 and the action was launched within two years of that.

The appellants' arguments

21. Between them, the appellants raise a number of issues which can be summarised broadly, prior to further discussion. First, there is the treatment of the DNA test result. It is no longer argued that the DNA test result gave rise to a fin de non-recevoir. The concentration is instead upon the role that it should have played in the judge's determination of the paternity issue. It should have been taken into account in that context, it is submitted, and would have shed a very different light on the question. The judge erred in excluding it from her consideration, relying instead upon what has been termed the "sociological evidence" (witness testimony and photographs). Had she given

it proper weight, it is submitted that the "inescapable conclusion" would have been that it is more likely than not that Nushrat is not the daughter of the late Peer Ally Khan.

22. Secondly, there is the question of a post-mortem DNA test on material obtained from the late Peer Ally Khan. It is conceded that the trial judge was not asked to order post-mortem testing, but it is argued that she should have done so of her own motion, because parentage is a matter of public order. Furthermore, it is submitted that the Court of Civil Appeal should not have rejected the possibility of post-mortem testing, but should have remitted the case to the trial judge, with directions to explore whether such testing should be ordered. It was wrong to rely upon the position in French law in rejecting the possibility, because the amendment made to French law after the *Yves Montand* case Recueil Dalloz 1998 p 122 has not been mirrored in Mauritius, and, it is submitted, there is nothing in Mauritian law that prohibits the ordering of a post-mortem test. The importance of finding the truth about parentage, and achieving certainty about it, where possible, is also stressed.

23. Thirdly, it is argued that the plaintiff's claim was in fact time-barred. It is submitted that the acts of the late Peer Ally Khan between May 1996 and his death do not satisfy the requirements of "l'entretien" and "l'éducation" in the fifth cas d'ouverture in article 340. It is said that he did not participate in the plaintiff's education in such a way as to come within the provision. And, neither, it is submitted, did he maintain her. It is said that maintenance connotes a continuous remittance of funds for the upkeep of a child, that occasional pecuniary gifts do not suffice, and that a capital payment, such as the setting up of the fixed deposit account, does not qualify. In any event, it is argued, the date of the transfer of the funds was 1995, so even if it could be relevant, more than two years elapsed following the transfer so the claim was still barred. It is submitted that the plaintiff was entitled to the capital from 1995, she was told about it at the time, and the later remittance of the documents to her in 1999 did not save the claim from being time-barred.

24. Fourthly, it is argued that the letter, P1, did not constitute an admission of paternity. Nowhere in it is there a concession that the late Peer Ally Khan fathered the plaintiff. The reference to her being called Nushrat Peerallykhan could be a reference, it is said, to a niece rather than a daughter. As for the bank statement, P23, that does not amount to an admission of paternity at all.

Discussion

25. It is convenient to start with a consideration of the judge's treatment of the DNA evidence. On behalf of the plaintiff, counsel submit, entirely correctly, that that evidence was not in the same class as DNA testing carried out on a sample from the putative father, and did not decide the central issue of paternity. Whilst apparently

accepting that the evidence was potentially relevant to the court's determination of the question, they say that the weight to be given to it was a matter for the sovereign appreciation of the trial court. They emphasise that the trial judge had the advantage of seeing and hearing the various witnesses give evidence. She was entitled to take the view, they say, that the result was inconclusive and did not assist in determining parentage, and to base her decision instead on the rest of the evidence, having found the plaintiff and her witnesses straightforward, credible and convincing.

26. As counsel for Fahd concedes, a judge is not obliged to accept the evidence of an expert witness if he or she reaches a different conclusion (see article 323 of the Civil Code). However, the Board agrees that, as counsel submits, the judge would need to provide reasons for such a decision.

27. Devat J's consideration of the DNA evidence was carried out as part of her determination of the issue of the recevabilité of the plaintiff's action. Once she had dealt with that issue in her judgment, she did not return to the DNA evidence at all, and in particular she did not refer to it when she was reviewing the sociological evidence, and explaining her conclusions about paternity. Indeed, she went so far as to say (see para 10 above) that not an iota of evidence had been adduced by the defendants in rebuttal of the evidence of the plaintiff's mother. Even if it was accurate to say that the DNA evidence was not "adduced by" the defendants, the Board finds it disconcerting that the judge made the observation that she did, without qualifying it, here or at any time during this section of her judgment, by referring to the existence of the DNA evidence. She was engaged in assessing the credibility of the evidence of the plaintiff's mother, on whose testimony she had observed the case essentially rested, and the DNA evidence needed to be addressed as material running counter to the other evidence upon which she was placing reliance. The Board also notes that the judge said, in similarly unqualified terms, that she had "no reason not to accept [the mother's] evidence that the plaintiff was born out of her relationship with late Peer Ally Khan".

28. It may have been that the judge had put the DNA evidence out of her mind in light of the weaknesses in it that she had identified whilst dealing with the recevabilité question, but the Board is not persuaded that those matters were sufficient to justify leaving the result completely out of account in evaluating the evidence of paternity. Of the three matters that the judge raised in relation to Miss Goodur's evidence, the first related only to the interpretation of the particular fin de non-recevoir upon which reliance was being placed. The second reason (see para 8 above) was that a sibling test was a last resort and "not as conclusive as a paternity test". Whilst the judge was correct to consider the test less conclusive, that did not mean that it was irrelevant in determining paternity, although, of course, extra complications would arise which would not be present with a DNA test of material obtained from the putative father, such as the degree of confidence that the "sibling" who provided material for testing was in fact the child of the putative father. The third, and last, reason given by the judge was that this was the first sibling profile test Miss Goodur had been asked to carry out.

It does not necessarily follow from this, or indeed from the complexity of the calculations involved in a sibling test, that the result was unreliable, and the Board has been told that at no point in cross-examination was Miss Goodur's expertise in relation to the test questioned.

29. In the Board's view, therefore, the finding of paternity that the judge made cannot be supported because relevant evidence was wrongly left out of account. Although the Court of Civil Appeal was correct in highlighting that a sibling test is directed to the relationship between siblings, and is "not conclusive as parentage testing", neither is it irrelevant in the evaluation of the evidence of paternity. It required addressing by the judge in that context, and that was not done.

30. It follows that the judge's finding of paternity must be set aside. This is not a case in which the evidence leads inexorably to a finding either way on the paternity question, and the Board declines the invitation to substitute its own finding on the issue. It can see no viable alternative to remitting the case for a rehearing before a different judge, who will be able to hear whatever live testimony from witnesses is considered appropriate, and examine all of the relevant evidence as a whole. In these circumstances, the Board sees it as important to keep its further commentary on the case to a minimum, so that the new trial judge can evaluate the evidence for him or herself without the distraction of arguments about what the Board may or may not have thought about it. However, there are several matters upon which the Board feels that it cannot avoid expressing its view, in an attempt to confine the scope of the dispute hereafter.

31. The first of these is the argument advanced on behalf of Fahd that the scientific evidence had greater relevance in this case because of the route by which it came to be adduced in the case. This argument is based on there having been a contrat judiciare between the parties as to the treatment to be afforded to the test results. This is said to derive from the fact that the proposal that there be a sibling DNA test came from counsel on behalf of Nushrat, was agreed to by the other parties, and endorsed by the court in an order. It is asserted that the "agreed premise" for this was that Ibrahim was the natural son of the late Peer Ally Khan. It follows, the argument goes, that the parties are bound by an agreement that Ibrahim is indeed biologically related to the late Peer Ally Khan, and that the test results would be used to resolve the dispute between them.

32. The Board fails to see how the mere fact of seeking, and obtaining, an order for a DNA test involving Ibrahim can serve to restrict the plaintiff's approach to the evidence now that it is available. The common understanding at the time of the order appears to have been that Ibrahim was the biological son of the late Peer Ally Khan, in accordance with the late Peer Ally Khan's acknowledgment, so that the test would have some value in the paternity action. The Board does not consider that, by proceeding upon this basis, the plaintiff can be said to have debarred herself from questioning that premise in the light of the scientific evidence. That, in the Board's view, is reading too

much into the exchange in court on 16 February 2011 which led to the court's order. Furthermore, counsel for Fahd herself emphasised the importance of biological truth and certainty in parentage cases. That objective would not be assisted by confining the role played by the parties in the litigation to the positions taken by them before the DNA report was produced.

33. Secondly, it is important for the Board to rule upon the argument that the plaintiff's claim is time-barred because, if it were, there would be no point in remitting it for a rehearing. This requires a consideration of the arguments advanced in relation to the fifth cas d'ouverture. It is sufficient to deal with the position as it pertains to the large sum of money shown in the bank statement, P23, as being in an account with the Habib Bank in Paris in July 1999, without going into the evidence about other contributions made by the late Peer Ally Khan to the plaintiff's life. The plaintiff's evidence, accepted by the trial judge, was that this statement was provided to her in August 1999 by the late Peer Ally Khan, together with the letter, P1, to which reference has been made above. The plaintiff's account was that the late Peer Ally Khan said that the money was to meet her higher education expenses.

34. It was Ibrahim's counsel who dealt with the time-bar question in their written case. They did not there question the fact that a capital payment had taken place, but focused instead upon the argument that such a capital payment did not constitute participation in "entretien" or "éducation" within the fifth cas d'ouverture, and in any event did not assist the plaintiff on limitation because it occurred in 1995. However, at the oral hearing before the Board, the submission was made that there was in fact no evidence that the transfer of funds was ever implemented, and attention was drawn to the fact that the bank statement, P23, was addressed to the late Peer Ally Khan alone.

35. The Board notes that the Court of Civil Appeal recorded that the contents of documents P1 and P23 "remained unchallenged in the course of the trial". The Board is not enthusiastic about the late emergence of submissions questioning the import of the documents now, and rejects those submissions. There is no reason not to infer that the instruction to the bank in 1995 was acted upon in the normal way. No evidence to the contrary has been produced, and the inference is, moreover, consistent with the plaintiff's account of how the late Peer Ally Khan dealt with the matter with her in 1999, and the production by her of the bank statement. The fact that the bank statement was addressed only to the late Peer Ally Khan is perhaps not surprising, given that his instruction to the bank had been that he was to operate the account exclusively during his lifetime.

36. Accordingly, the Board turns to the argument that the capital payment does not come within the fifth cas d'ouverture. The Board's attention is drawn to the amendment made to the corresponding provision in the French Civil Code, in 1972, adding "établissement" (settlement) to it so that it reads as follows:

> "Dans le cas où le père prétendu a pourvu ou participé à l'entretien et à l'éducation *ou à l'établissement* de l'enfant en qualité de père." (Added words italicised.)

Counsel for Ibrahim argues that this demonstrates that "entretien" and "éducation" do not cover the payment of a capital sum and imply, instead, a continuous payment. As the Mauritian provision does not mention établissement, capital payments are not within it, so the argument goes.

37. The Board has been provided with a passage from Précis Dalloz dealing with the amendment to the French provision. This does not support the argument. There is a footnote to the text which explains that before 1972, the jurisprudence had sometimes allowed for a one-off payment by the putative father provided that it was of a significant character, and also that the payment could be posthumous. The footnote refers to an example where a sum of money had been paid to a notary for periodical payments to be made to the mother, the last payment not having been made until several months after the man died. Mr Ithier SC conceded in oral argument that, in these circumstances, the purpose of the French amendment could simply have been to resolve an ambiguity, and he did not dissent from the proposition that, viewed in that way, the addition of établissement to the French text could be taken to support a similar interpretation of the Mauritian text.

38. The Board does interpret the fifth cas d'ouverture as including, in an appropriate case, the payment of a capital sum for the support of the child. Child support, whether it be funding daily living expenses or education, can just as well be provided by the provision of a lump sum as by continuing regular payments, and the Board sees no reason to confine the fifth cas d'ouverture to continuous payments. The transfer of funds into a joint account in this case therefore falls within the provision.

39. It remains to deal with the argument that the payment was made in 1995, and that more than two years had therefore elapsed following it by the time the plaintiff's claim was commenced in April 2001. The Board cannot accept this argument. It is not appropriate to view the transaction as complete in 1995. The account was to be operated exclusively by the late Peer Ally Khan during his lifetime, and it is artificial to view the contribution that he made in providing the funds in it as complete until he died. There remained over a quarter of a million pounds sterling in the account in July 1999. If any payments out were in fact made for the plaintiff's benefit between then and the death of the late Peer Ally Khan in December 1999, they were within the two years prior to the commencement of the claim. As for the position on his death, nothing to the contrary having been shown, it can be inferred that the monies remaining in the account would then have been for the benefit of the plaintiff alone, intended (as he told her) for her tertiary education. It follows that the plaintiff's claim was commenced well within the two-year prescription period, as the trial judge found.

40. The Board should make clear that it does not express any opinion as to whether the letter, P1, constitutes an aveu non equivoque de paternité by the late Peer Ally Khan, for the purposes of the third cas d'ouverture. This is a question that will have to be addressed by the new trial judge in the light of the evidence as a whole.

41. The Board equally does not consider that it is appropriate to offer any views on the question of post-mortem testing. This is a delicate issue which requires full consideration locally, by the Mauritian courts. It was not raised with the judge at first instance and came up for the first time in the Court of Civil Appeal. That court dealt with it shortly, by holding that the defendants could not rely on the *Yves Montand* case because the French Civil Code had subsequently been amended to forbid post-mortem DNA testing unless the deceased had given his express consent to it before death. Save for noting that Mauritian law was "silent on this issue", the Court of Civil Appeal did not deal with the argument, which featured in submissions to the Board, that there is a material difference between French law and Mauritian law, because the Mauritian Civil Code has not been correspondingly amended. Nor did it evaluate more generally whether there is power in Mauritian law to require post-mortem testing, which it is submitted could be done under section 8 of the DNA Act or the court's inherent power.

42. The Board accordingly considers that if an application for post-mortem testing is pursued, it should be the subject of full submissions to the new trial judge, who can rule not only upon the law, but also upon whether post-mortem testing would be feasible and/or appropriate in the present case, as to which neither the Court of Civil Appeal nor the Board has had the necessary information.

Disposal

43. For the reasons explained earlier, the Board would allow the appeal and remit the plaintiff's claim to a fresh judge for determination of the paternity issue. The limitation question is no longer a live issue, however, in view of the Board's conclusion that the claim was made within time. Furthermore, in light of the fact that it is no longer argued on behalf of the defendants that there is a fin de non-recevoir based on the DNA test result, the Board anticipates that, with the possible exception of the post-mortem testing issue (depending on whether that is pursued), the trial will be able to proceed directly to the core of the matter, namely to the determination of the main paternity issue taking into account not only the sociological evidence but also the scientific evidence.