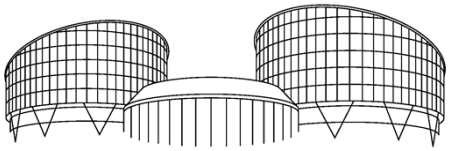

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF FRÖHLICH v. GERMANY

(Application no. 16112/15)

JUDGMENT

STRASBOURG

26 July 2018

FINAL

26/10/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Fröhlich v. Germany,

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

Erik Møse, *President,*
Angelika Nußberger,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 3 July 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 16112/15) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Arnulf Fröhlich ("the applicant"), on 30 March 2015.

2. The applicant was represented by Mr G. Rixe, a lawyer practising in Bielefeld. The German Government ("the Government") were represented by one of their Agents, Mrs K. Behr, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged, in particular, that the domestic courts' decision to refuse him information about the girl S., of whom he claimed to be the biological father, violated his rights under Article 8 of the Convention.

4. On 22 December 2015 this complaint was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1966 and lives in Köthel.

A. Background to the case

6. In 2004 the applicant began a relationship with X, a married woman who continued to live with her husband, with whom she had six children. In early 2006, X became pregnant and disclosed this to the applicant. In October 2006, she gave birth to a girl. Shortly after, the relationship with the applicant ended.

7. X and her husband, the girl's legal father, refused the applicant's subsequent initiatives to have contact with the child. They disputed that the applicant was the biological father but refused to consent to paternity testing.

8. The applicant initiated various proceedings to establish his legal paternity, to have biological paternity testing conducted and to obtain joint custody. His requests were to no avail.

B. Proceedings at issue

1. The proceedings before the Family Court

9. On 21 December 2010 the applicant applied to Obernburg Family Court to obtain regular contact with the child, referring to the Court's judgment in the case of *Anayo v. Germany* (no. 20578/07, 21 December 2010) delivered on the same day. He claimed to be the child's biological father and offered to prove this claim by means of an expert's report. In addition, he made a sworn declaration that he had had sexual intercourse with X around the time of conception.

10. On 9 May 2011 the Family Court dismissed the applicant's request. It held that the applicant's paternity had not been established and that, consequently, he could not be granted contact.

2. The proceedings before the Court of Appeal

(a) The appeal proceedings

11. On 14 June 2011 the applicant appealed. On 16 November 2011 he supplemented his appeal, mainly relying on the Court's judgment in the case *Schneider v. Germany* (no. 17080/07, 15 September 2011) and requested contact with the child at least once a month, initially under supervision.

12. On 1 December 2011, the Court of Appeal orally heard the applicant and the child's legal father. The latter declared that he knew about the relationship between his wife and the applicant and also assumed that there had been sexual contact. In October 2005 the mother had told him and the children that her relationship with the applicant was terminated although he could not rule out, and indeed considered it likely, that she had continued the relationship without his knowledge. He had learned of his wife's

pregnancy in February 2006 and concluded that he was the father. In December 2006 the applicant had told him on the telephone that he was the child's father. At that moment, the mother had felt relieved that the time of secrets was over. This moment had been a breakthrough for them as a couple and their relationship had improved subsequently. The child had been desired by both. Even assuming that the applicant were the child's father, he would not agree to any contact because the applicant had caused them much suffering and had to bear the consequences of his behaviour. The proceedings the applicant had instituted were a burden for the couple but did not have a negative impact on the relationship with his wife, but had rather consolidated it. Everyone in the family but the child knew that the applicant believed that he was the child's father.

13. On 9 February 2012 the Court of Appeal orally heard the child's mother. At the end of the hearing it informed the parties that it considered contact with the applicant not to be in the child's best interest for the time being and suggested that the applicant withdraw his appeal.

14. On 21 June 2012 the child's appointed guardian *ad litem* (*Verfahrenspfleger*), a psychologist, furnished a detailed written statement concluding that contact with the applicant would be detrimental to the child's well-being at this age.

15. On 17 August 2012 the applicant requested the Court of Appeal to mandate an expert opinion on the question of whether contact would be detrimental to the child or would at least serve her best interest; to hold an oral hearing where the guardian *ad litem* should explain her written statement; to conduct a paternity test and to hear the child.

16. On 28 September 2012, the Court of Appeal informed the parties that it considered it necessary to hear the child. The child's guardian *ad litem* opposed this. She submitted, *inter alia,* that the child had no knowledge of the applicant's claims, that the latter could not prove his fatherhood in the absence of a legal basis and that the child's legal parents had not submitted any proof of their allegations that the mother's husband was also the child's biological father.

17. On 29 October 2012 the Court of Appeal heard the six-year-old child in the presence of her guardian *ad litem* only. According to the minutes, the child was aware - without knowing the real reasons - that her parents were in dispute with the applicant, who wanted to visit her or wanted her to visit him, but that neither her parents nor herself agreed to this.

18. On 19 November 2012 the guardian *ad litem* submitted that the child's hearing confirmed her written statement of June 2012.

19. On 21 November 2012 the applicant commented on the child's hearing, submitted a private expert opinion and requested the Court of Appeal to mandate an expert opinion regarding contact rights and to appoint a new guardian *ad litem*. He further asked the Court of Appeal to inform the child about his application during a new hearing. He added that in the event

that his appeal were to be denied, he should receive a written report on the child's development and two recent photographs every six months.

(b) The decision of the Court of Appeal

20. On 13 December 2012 the Court of Appeal dismissed the applicant's requests. It observed, at the outset, that the applicant could not rely on Article 1684 § 1 of the Civil Code as he was not the child's legal father. He could not rely on Article 1685 § 2 of the Civil Code either, because he had never borne any actual responsibility for the child. The Court of Appeal then addressed the question of whether Article 1685 § 2 of the Civil Code could be interpreted, in the light of the Court's judgments *Anayo* and *Schneider* (cited above), as assuming that a father who was able to prove that he had seriously tried to bear actual responsibility but failed to do so because of the mother's or legal parent's resistance, could be considered as having borne actual responsibility within the meaning of this Article.

21. This question could, however, be left open because contact had in any event to serve the child's best interest. In this respect the Court of Appeal held that it was already contrary to the child's best interest to address the preliminary question of whether the applicant was the child's biological father. The child was living in a well-organised and emotionally stable family unit consisting of a father, a mother and other children. The Court of Appeal pointed out that it was convinced that this family union would be destroyed if the applicant's paternity were established and contact rights ordered. The hearing of the child and the legal parents had shown that in the child's perception of the world, there was only one father, the mother's husband. There were no indications that the latter did not assume his role as a father towards the child or assumed it differently than towards his other children. The child was well-integrated in the family, where she felt protected and secure. This assessment was also consistent with the conclusions of the child's curator *ad litem*.

22. The Court of Appeal feared that clarifying the question of paternity bore the risk that the family unit would break up, which would have considerable negative consequences on the child because she would lose her essential attachment figures. As it had indicated after the hearing, it held it to be more likely that the applicant was the child's biological father. This question could, however, ultimately only be determined by a paternity test, to which the child's legal parents were opposed. The mother affirmed that her husband was the biological father of her daughter and both stood firm against the applicant. According to the Court of Appeal it resulted from the hearing that the legal father trusted, in principle, his wife's assertions but at the same time had doubts as to his paternity, although he had not explicitly expressed them. In spite of these doubts, and the long-lasting court proceedings, he did not put in question his wife's statements. The Court of Appeal received the impression that the spouses had barricaded themselves

against the applicant as if they were in a corral, as had shown the legal father's declaration that the legal proceedings did not have a negative impact on the relationship with his wife but had rather consolidated it. The Court of Appeal concluded that the legal father could live with this uncertainty, and that his attitude had no consequences for the child. If, however, the applicant's biological paternity were to be established, the legal father would realise that his long-standing trust in his wife was not justified. It was not possible to predict the legal father's reaction, but the manifest risk that the spouses' marriage would break up could not be dismissed in view of the couple's past difficulties. The couple's separation would amount to the breaking-up of the child's family unit and the loss of her relationships, which would endanger her well-being.

23. The Court of Appeal pointed out that it was aware that, in view of the importance of the child's well-being, it could be a long time before the preliminary question of paternity could be clarified and years before contact rights could be granted. This might evolve once the child started to ask questions, but for now it was not in her best interest to be confronted with the paternity issue. It was therefore not advisable to tell her about the applicant's allegations or to substitute the child's guardian *ad litem*.

24. The Court of Appeal went on to say that, even assuming that the applicant was the child's biological father, contact with the applicant was not in the child's best interest. Due to the highly emotional conflicts between the legal parents and the applicant, and the fact that the applicant had not ruled out that he might tell the child that he was her biological father if he saw her, contact would jeopardise the child's well-being. Therefore it was not advisable to order an expert opinion regarding the question of whether and how the child would deal with two fathers or whether it was in general advisable to grant children contact with their biological fathers at an early stage. These issues had to be assessed in the light of the extremely tense relations between the applicant and the child's legal parents, and in view of the predictable consequences for the child if contact were granted. The Court of Appeal added that it could decide on these questions on its own after having orally heard the persons involved, and based on the written statements of the guardian *ad litem*, an experienced psychologist well-known from other proceedings.

25. As regards the applicant's request for information the Court of Appeal held as follows:

> "The applicant's request for information, claimed in the alternative in his lawyer's submissions of 21 November 2012, does not exist. Such claim cannot be based on Article 1686, 1st sentence, of the Civil Code because the applicant is not, as required by this provision, the child's legal father. Whether the provision can be interpreted in the light of the above mentioned decisions of the European Court of Human Rights, as assuming that a biological father can also claim a right for information, can be left open: that would require addressing the preliminary issue of whether the applicant

was the child's biological father. It has already been shown that clarifying this question by ordering a paternity test would be contrary to the child's well-being."

26. On 11 February 2013, the Court of Appeal dismissed the applicant's objection alleging a violation of the right to be heard.

3. The proceedings before the Federal Constitutional Court

27. Previously, on 28 January 2013, the applicant had lodged a constitutional complaint with the Federal Constitutional Court (no. 1 BvR 844/13).

28. On 18 July 2013 the Federal Constitutional Court informed the applicant that on 13 July 2013, the Law for the strengthening of the rights of biological but not legal fathers had entered into force which, pursuant to Article 1686a of the Civil Code, provided a new possibility for biological fathers to be granted contact and information rights even if they had no social and family relationship with the child (see paragraph 32 below). It added that in court proceedings concerning the enforcement of such rights, the determination of the preliminary question of paternity could be necessary, pursuant to Article 167a § 2 of the Family Matters Act (see paragraph 33 below). It enquired of the applicant whether, under these circumstances, he would withdraw his constitutional complaint.

29. On 13 August 2013 the applicant replied that he would maintain his complaint because, even under the new law, he would not have obtained a more favourable decision. He pointed out that the Court of Appeal had rejected his request for contact rights, even assuming that he was the child's biological father, since contact did not serve the child's well-being. The Court of Appeal had thus already decided in the light of the new Article 1686a of the Civil Code. The applicant added that the same reasoning applied to his request for information. Given that, in its view, the determination of paternity would endanger the family unit, the Court of Appeal would refrain from ordering a measure of examination because the legal parents could not reasonably be expected to undergo any examination, under Section 167a § 2 of the Family Matters Act.

30. On 21 September 2014 the Federal Constitutional Court declined to consider the applicant's constitutional complaint without providing reasons.

II. RELEVANT DOMESTIC LAW AND PRACTICE

31. The domestic law applicable at the relevant time is summarised in *Schneider v. Germany* (cited above, §§ 29-37).

32. The relevant parts of Article 1686a of the Civil Code, as in force since 13 July 2013, read as follows:

"(1) As long as the paternity of another man exists, the biological father who has demonstrated a serious interest in the child has

1. a right of contact with the child, if such contact serves the child's best interest,

2. a right to be provided with information from each parent regarding the personal circumstances of the child, where he has a legitimate interest and in so far as this is not contrary to the child's best interest.

..."

33. The relevant parts of Section 167a § 2 of the Act on Proceedings in Family Matters and Matters of Non-Contentious Jurisdiction (Family Matters Act), in its version of 4 July 2013 (in force since 13 July 2013), read as follows:

"(1) Applications for the grant of contact or information rights pursuant to section 1686a of the Civil Code shall only be permissible when the applicant submits a declaration in lieu of an oath that he engaged in sexual intercourse with the mother during the period of conception.

(2) To the extent clarification of the biological father is necessary in proceedings concerning rights of contact or information pursuant to section 1686a of the Civil Code, each person must acquiesce to examinations, particularly the taking of blood samples, unless the person cannot reasonably be expected to undergo the examination.

..."

34. In a decision of 19 November 2014 the Federal Constitutional Court (no. 1 BvR 2843/14) observed that ordering a paternity test constituted an interference with the existing family's right to family life. Granting contact or information rights pursuant to Article 1686a of the Civil Code assumed that, other than biological paternity, the claimant has a serious interest in the child, that contact served or information was not contrary to the child's best interest and that the claimant had a legitimate interest in obtaining such information. Article 1686a did not, however, determine the order in which the court had to assess its conditions. At the same time, the order of assessment had to take into account that an interference with the person's basic rights was admissible only when necessary. With reference to its decision of 17 December 2013 (no. 1 BvL 6/10) the Federal Constitutional Court emphasised that in order to prevent an unnecessary interference with the right to family life of the existing family, the competent court might order a paternity test only when the further conditions of the provisions were met. However, where the determination of the further conditions of this provision would constitute a heavy burden on the persons involved, the court might order a paternity test first. When assessing the degree of interference with family life, the question of whether paternity was in dispute between the parties was of particular importance.

35. On 5 October 2016 the Federal Court of Justice (no. XII ZB 280/15) held, with regard to contact rights of the actual biological father pursuant to Article 1686a § 1 of the Civil Code, that the legal parents' negative attitude towards the biological father and the fact that they opposed contact alone was not sufficient to justify refusing the biological father contact rights. In

the light of Article 8 of the Convention the biological father could not as such be regarded as disturbing the sheltered legal family ("*Störenfried der behüteten rechtlichen Familie*"), leading to the presumption that contact was against the best interest of the child only because it affected the established relationship between the members of the family. If the negative attitude of the legal parents, which might influence the child's best interests, was the only reason to deny contact, a strict and comprehensive assessment was necessary.

THE LAW

I. COMPLAINT ABOUT THE REFUSAL OF CONTACT RIGHTS

36. The applicant complained that the domestic courts' decision to refuse him contact with the child violated his right to respect for his private and family life under Article 8 of the Convention. He further submitted that the domestic courts' failure to investigate sufficiently the relevant facts concerning his relationship with his daughter, in particular his paternity, violated Article 8, read in conjunction with Article 6 of the Convention.

37. The Court considers that the complaint falls to be examined under Article 8 alone which, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 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 ... for the protection of the rights and freedoms of others."

38. The applicant submitted that the Court of Appeal gave, as a principle, priority to the social family without considering the different interests at stake and without conducting a balancing of these interests with an open outcome. He complained that the Court of Appeal did not consider accompanied contact and failed to mandate an expert opinion on the question of whether contact would be in the child's interest.

39. The Court considers that the Court of Appeal's refusal to grant the applicant contact rights amounted to an interference at least with the applicant's right to private life (*Anayo*, § 58; *Schneider*, § 90, cited above). It further notes that the Court of Appeal's decision had a legal basis in domestic law and aimed to protect the rights and freedoms of the child.

40. In determining whether the interference was "necessary in a democratic society", the Court refers to the principles laid down in its case-law. It reiterates in particular that Article 8 can be interpreted as imposing on the member States an obligation to examine whether it was in the child's best interests to allow a biological father to establish a

relationship with his child, in particular by granting contact rights (*Anayo*, cited above, §§ 67-73; *Schneider*, cited above, §§ 95-105; and *Ahrens v. Germany*, no. 45071/09, § 74, 22 March 2012). This may imply the establishment, in contact proceedings, of biological – as opposed to legal – paternity if, in the special circumstances of the case, contact between the alleged biological father – presuming that he is in fact the child's biological parent – and the child were considered to be in the child's best interests (*Schneider*, cited above, § 103; and *Kautzor v. Germany*, no. 23338/09, § 76, 22 March 2012).

41. The Court also reiterates that the member States' margin of appreciation is wide in respect of the determination of a child's legal status, but is more limited regarding questions of contact and information rights (*A.I. v. Poland*, no. 28609/08, § 68, 18 February 2014; *L.D. and P.K. v. Bulgaria*, nos. 7949/11 and 45522/13, 59, 8 December 2016). There will, however, usually be a wide margin of appreciation if the State is required to strike a balance between competing private and public interests or Convention rights (*S.H. and Others v. Austria* [GC], no. 57813/00, § 94, 3 November 2011; *Mandet v. France*, no. 30955/12, § 52, 14 January 2016 with further references).

42. The Court observes at the outset that the Court of Appeal considered that the applicant could not claim contact rights under German civil law in force at that time because he was neither the child's legal father nor had he borne actual responsibility for the child. It further notes that regarding the possibility to base contact rights on the applicant's alleged biological paternity in bearing in mind the Court's judgments *Anayo* and *Schneider*, the Court of Appeal held that the determination of the applicant's biological paternity against the legal parents' will was contrary to the child's well-being; it could, however, leave open this question because contact with the applicant would, in any event, jeopardise the child's well-being due to the deep conflicts between the legal parents and the applicant and the risk entailed by the fact that the applicant had not ruled out telling the child that he was her biological father. The Court of Appeal, thus, adduced relevant reasons to justify its decision.

43. As regards the decision-making process the Court observes, firstly, that the applicant was directly involved in the proceedings in person and was advised by counsel. Secondly, the Court of Appeal heard not only the applicant, but also the child and the child's legal parents. Furthermore, in taking its decision to refuse contact, the Court of Appeal had regard to the entire family situation and relied on an extensive written statement by the child's guardian *ad litem*, an experienced psychologist. There is therefore no indication that the judges of the Court of Appeal had based their findings on standardised arguments in favour of social families. Moreover, while it is true that the Court of Appeal refused the applicant's request to establish his paternity, the Court also finds it true that a court could refrain from ordering

a paternity test in cases where the further conditions for contact were not met (compare *Schneider*, cited above, § 103; see also the Federal Constitutional Court's case-law, paragraph 34). The Court is therefore satisfied that the Court of Appeal's procedural approach was, in this regard, reasonable.

44. Having regard to the foregoing, the Court is satisfied that the domestic courts adduced sufficient reasons for their decision to refuse the applicant contact rights and provided the applicant with the requisite protection of his interests.

45. The applicant's complaints are thus manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. COMPLAINT CONCERNING THE REFUSAL TO PROVIDE INFORMATION ABOUT THE CHILD

46. The applicant complained that the domestic courts' decision to refuse him information about the child's personal circumstances violated his right under Article 8 of the Convention to respect for his private and family life. He further submitted that the domestic courts' failure to investigate sufficiently the relevant facts concerning his relationship with his daughter, in particular his paternity, violated Article 8, read in conjunction with Article 6 of the Convention. The Court considers that the complaint falls to be examined under Article 8 alone.

47. The Government contested that argument.

A. Admissibility

48. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

49. The applicant was of the opinion that the decision refusing him information about the child S. had no legal basis as Article 1686 of the Civil Code was applicable only to the child's parents. The decision had moreover no legitimate aim, nor had it been necessary in a democratic society. The Court of Appeal had only held that the judicial determination of paternity, together with the granting of contact rights, would put the family unit into

danger but had not decided that the right to obtain information about the child had been contrary to the child's well-being. Furthermore, the Court of Appeal could have taken evidence regarding the applicant's paternity in an informal manner.

50. The applicant emphasised that the Court of Appeal considered his paternity probable, whereas it qualified the opposing allegations of the child's mother unconvincing. He had had sexual intercourse with the mother around the time of conception, had publicly announced his paternity, had visited the mother in hospital in October 2006, had had contact with the mother until February or March 2007 and had submitted considerable evidence to confirm his paternity.

51. The Court of Appeal's assumption that the family unit would break up was therefore pure speculation and not based on sustainable evidence. In this respect the applicant observed that the mother's husband had never explained why, in spite of the submitted evidence, he nevertheless claimed to be the child's father. He had never declared either that he would leave the mother in case of determination of the child's paternity. The legal parents' allegation that X's husband trusted the mother's statement regarding paternity amounted to procedural tactics to prevent any contact or information rights.

52. The applicant finally complained that, contrary to the Government's observations, the Court of Appeal had not based its decision declining information rights on the written statement of the child's guardian *ad litem*. In any event, a guardian *ad litem* for the child did not have the same function as a court-appointed expert.

(b) The Government

53. The Government acknowledged that the impugned decision had interfered with the applicant's right to respect for his private life and possibly also for his family life. It was based on Article 1686 of the Civil Code, as in force at the relevant time. At the same time, the Court of Appeal interpreted this provision in the light of the Court's judgments in the cases of *Schneider* and *Anayo* (cited above) as also applicable in cases where the biological father wanted information about his child. The Court of Appeal's decision was aimed at protecting the child's best interests, the rights of the legal parents and their children, and was necessary in a democratic society.

54. The Government emphasised that a right to be informed about the child's development could only be granted against the will of the legal parents if the claimant had a close legal or biological relationship with the child. In the present case, it had not been established that the applicant was S.'s biological father, contrary to the situation in the case of *Schneider* where the German courts had taken their decision on the assumption that the applicant was the biological father. Thus, the child's right to protection of her private life had to prevail in the present case. The applicant had no claim

to have his paternity proved, because this would not have been in the child's best interests.

55. The Government took the view that, according to the Court's case-law, the determination of paternity did not always prevail over the interest of the other persons involved (*Jäggi v. Switzerland*, no. 58757/00, § 38, 13 July 2006) and national authorities could attach greater weight to the privacy and family interests of a legal (adoptive) family than to the interests of the biological mother (*I.S. v. Germany*, no. 31021/08, § 86, 5 June 2014). When it came to balancing the different interests at stake the decisive element was the child's well-being (*Kautzor*, cited above, § 64, *K. and T. v. Finland* [GC], no. 25702/94, § 135, 12 July 2001). The Court of Appeal had not based its findings on standardised arguments in favour of social families but on a thorough and detailed analysis of the family situation and, in particular, of the child's role within the family unit and the role of the mother's husband towards the child. It reached its conclusions after having orally heard all the persons involved and on the basis of the written statements of the child's curator *ad litem*, an experienced psychologist. Nothing indicated therefore that the decision-making process was not fair.

56. The Government finally took the view that the Court of Appeal would have reached the same conclusion under the new legal situation applicable as from 13 July 2013. According to section 167a § 2 of the Family Matters Act it is within the family court's discretion to decide whether biological paternity or the question of the child's best interest should be examined first. The determination of paternity can be refused if the person to be tested cannot reasonably be expected to undergo the examination. In this respect, the Government stressed that the unreasonableness had to be assessed both as regards the form of the test as well as the consequences of the result of the test for the person and for relatives of that person.

2. The Court's assessment

57. The Court notes, at the outset, that it was common ground between the parties that the impugned decision constituted an interference with the applicant's right to private life. Having regard to its case-law in cases where it had to decide whether an intended family life fell within the ambit of Article 8 (compare *Schneider*, cited above, §§ 79-90) it concludes that the Court of Appeal's decision to refuse the applicant information about S., taking into account the specific circumstances of the case, interfered with his right to respect for his private life (*ibid.* § 90).

58. This interference constitutes a violation of Article 8 unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of this provision and can be regarded as "necessary in a democratic society".

59. The Court of Appeal based its decision to refuse the applicant information about S. on Article 1686 of the Civil Code and left open the question of whether a different conclusion could be drawn when interpreting this provision in the light of the Court's case-law. The decision was aimed at pursuing the best interest of the child and the rights of her legal parents. It was therefore taken to protect their "rights and freedoms" and, accordingly, pursued a legitimate aim within the meaning of Article 8 § 2.

60. In determining whether the interference was "necessary in a democratic society", the Court refers to the principles laid down in its case-law cited above (paragraphs 40-41). The Court would reiterate in particular that the national authorities have the benefit of direct contact with all the persons concerned and that it is not the Court's task to substitute itself for them in the exercise of their responsibilities regarding access issues or issues concerning information about the child's personal development, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercice of their power of appreciation (*Anayo*, cited above, § 66, *Schneider*, cited above, § 94). Furthermore, the existing family ties between the spouses and the children they actually care for warrant protection under the Convention (compare *Anayo*, cited above, § 70; *I.S. v. Germany*, cited above, § 86; *Krisztián Barnabás Tóth v. Hungary*, no. 48494/06, § 35, 12 February 2013; *Mandet*, cited above, § 56).

61. The Court observes that, at the time of the Court of Appeal's decision, German family law did not provide for the possibility of a judicial examination of the question of whether any relationship, either by way of contact between an - assumed - biological father and his child or by way of providing information about the child, would be in the child's best interests if another man was the child's legal father and if the biological father had not yet borne any responsibility for the child (compare *Schneider*, cited above, § 92).

62. However, the Court of Appeal did not base its refusal of information rights on the absence of a legal basis in domestic law but because it found that clarifying the paternity issue as a preliminary question would in itself be contrary to the well-being of the child, who did not know about the applicant's claims. It argued that if the applicant's biological paternity were established, it could not be ruled out that this might destroy the child's present family as the mother's husband might lose trust in his wife.

63. The Court notes that the Court of Appeal held it more likely that the applicant was the child's biological father than the mother's husband. According to the Court of Appeal, the latter may have had doubts about his biological paternity but they concluded that he could live with this uncertainty and his attitude had no negative consequences for the child. The Court notes that the Court of Appeal was convinced that if the applicant's biological paternity were to be established against the spouses' will, there

was a risk that their marriage would break up, thereby endangering the well-being of the child who would lose her family unit and her relationships. The Court of Appeal came to this conclusion after a thorough analysis of the child's integration in the family where she felt protected and secure, the role of the mother's husband as father and by taking into account the spouses' difficulties and crisis in the past, which were related to the applicant.

64. The Court further notes that the Court of Appeal was aware of the importance the question of paternity might have for the child in the future, when it would start to ask about her origin, but held that for the time being, it was not in the best interest of the six-year-old child to be confronted with the paternity issue.

65. As regards the decision-making process the Court refers to its considerations made above (see paragraph 43). It notes in particular that the Court of Appeal specifically decided to orally hear the child against the opinion of the child's guardian *ad litem*. Furthermore, even if the latter in her written statement had only addressed the question of compatibility of contact rights with the child's well-being, the Court of Appeal could extract relevant general information as regards the family in which the child grew up.

66. The Court considers therefore that the Court of Appeal's decision has been made in the child's best interest and it is satisfied that the latter adduced relevant and sufficient reasons to justify its refusal not only to grant contact rights (see paragraphs 42-45 above) but also to order the child's parents to provide the applicant with information about the child. It is true that in this context the Court of Appeal did not specifically address the right to information. In particular, it did not give any weight to the question whether the obligation to provide the applicant with information about the child would have any significant impact on the spouses' right to respect of their family life. However, in the specific circumstances of the case, the Court can accept the Court of Appeal's argumentation based on the negative consequences for the child of the determination of paternity which was a necessary preliminary condition for granting information rights (see paragraph 25 above).

67. Having regard to these considerations, and bearing in mind the Court's subsidiary role and the State's margin of appreciation, the Court is satisfied that the domestic courts adduced sufficient reasons for their decision to refuse the applicant information rights and provided the applicant with the requisite protection of his interests.

68. There has accordingly been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning a right to information admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 26 July 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Erik Møse
Registrar	President