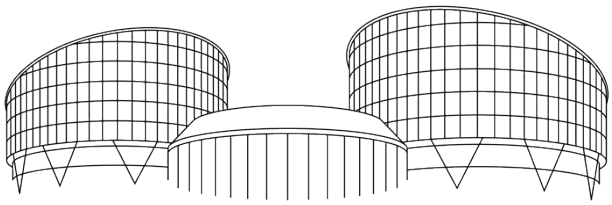

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF AHRENS v. GERMANY

(Application no. 45071/09)

JUDGMENT

STRASBOURG

22 March 2012

FINAL

24/09/2012

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

In the case of Ahrens v. Germany**,**

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

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Mark Villiger,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 21 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 45071/09) 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 Denis Ahrens ("the applicant"), on 18 August 2009.

2. The applicant was represented by Mr G. Rixe, a lawyer practising in Bielefeld. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that the domestic courts' refusal to allow him to challenge another man's legal paternity had violated his rights to respect for his family life and discriminated against him. He further complained that the length of the domestic proceedings had been unreasonable and that there had been a lack of an effective remedy available to him.

4. On 4 May 2010 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1) and to give priority to the application (Rule 41). On 23 August 2010 the President of the Fifth Section granted leave, under Article 36 § 2 of the Convention and Rule 44 of the Rules of Court, for Ms P. and Mr M., the legal parents of the girl R., to intervene as a third party in the written proceedings before the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Berlin.

6. From Easter to September 2003 the applicant had a relationship with Ms P. In February 2004 Ms P. started a relationship with Mr M. In September 2004 Ms P. and Mr M. moved into a joint household. In October and November 2004 the applicant had intimate contact with Ms P. In December 2004 Ms P. informed the applicant that she was pregnant.

7. On 28 June 2005 Mr M., with the consent of Ms P., acknowledged paternity of Ms P.'s future child. On 10 August 2005 Ms P. gave birth to a daughter, R. Ms P. and Mr M. jointly exercise parental authority and are bringing up the child together.

8. On 27 October 2005 the applicant lodged an action to challenge Mr M.'s paternity, submitting a statutory declaration that he had had sexual intercourse with the child's mother during the period of conception. Mr M. submitted in reply that he lived with the child in a social-familial relationship and that he assumed full parental responsibility for the child, even if he was not her biological father.

9. On 24 November 2005 the Tempelhof-Kreuzberg District Court (*Amtsgericht*) scheduled a hearing for 17 January 2006. On 13 January 2006 the District Court cancelled the hearing, as a guardian *ad litem* to represent the child's interests had to be appointed. On 6 February 2006 the District Court appointed a guardian *ad litem*. On 21 March 2006 the guardian submitted that a loving father-child relationship existed between Mr M. and R. and that the applicant's action ran counter to the child's best interests.

10. On 28 March 2006, following a reminder by the applicant's counsel, the District Court scheduled a hearing for 30 May 2006. On 27 April 2006 the District Court, following M.'s request, postponed the hearing to 6 June 2006.

11. On 6 June 2006 the District Court, having heard the applicant, Mr M. and Ms P., ordered an expert opinion on the question whether Mr M. was the child's biological father. On 7 September 2006 the District Court requested the expert to submit information on the state of the proceedings.

12. On 4 October 2006 the expert informed the District Court that Mr M. and Ms P. had postponed several appointments for the taking of blood samples on medical grounds. Mr M. had his blood sample taken on 4 October 2006. On 2 November 2006 the expert informed the court that he had received the blood samples of Ms P. and the child. On 27 November 2006 the expert submitted his report which concluded that Mr M. was not the child's biological father.

13. On 1 December 2006, following a reminder by the applicant's counsel, the District Court scheduled a further hearing for 16 January 2007. On 6 February 2007 the District Court ordered an expert opinion by the same medical expert as to the applicant's alleged paternity.

14. On 15 March 2007 the expert submitted his report which concluded that it had been proved to a probability of 99.99 % that the applicant was the child's biological father.

15. On 12 March 2007 the District Court scheduled a hearing for 10 April 2007.

16. On 27 April 2007 the District Court delivered a judgment establishing that Mr M. was not the child's father and that the applicant was the child's father. The District Court found the applicant's action admissible, as he had submitted a statutory declaration that he had had sexual intercourse with the child's mother during the period of conception. The action was well-founded, as it had been proved by expert opinion that the applicant was the child's biological father. The District Court considered that the applicant had not been precluded from challenging paternity under Article 1600 § 2 of the Civil Code (see relevant domestic law below), as there had been no social and family relationship between Mr M. and the child at the time of the last court hearing. It could not be assumed that Mr M. bore actual responsibility for the child. This would have required the legal father and the child to have lived together for a longer period of time, which, according to the District Court, necessitated a minimum period of approximately two years. Taking into account the constitutional right of the biological father under Article 6 § 2 of the Basic Law, it was necessary that the factual relationship between the legal father and the child enjoyed a certain stability. This stability could only be assumed after a period of two years, which had not passed in the instant case. Under these circumstances, it was not relevant that the applicant actually took care of the child together with the child's mother.

17. On 24 August 2007 the Berlin Court of Appeal (*Kammergericht*) quashed the District Court's judgment and rejected the applicant's action. The court noted that it was undisputed between the parties that Mr M. had lived with the child and her mother since the child's birth and that he had continued to live with them after it had been established by an expert that he was not the child's biological father.

18. According to the Court of Appeal, the District Court had failed to recognise that the applicant did not have the right to challenge paternity because of the existence of a social and family relationship between Mr M. and the child. The Court of Appeal considered that such a relationship had not only existed at the time it decided on the appeal, but already a long time before, as Mr M. had lived together with the child and her mother in a joint household since the child's birth. A young child could not possibly live together with another person for a period of time longer than his or her own

lifetime. The legislature had not strictly defined which period of time would amount to a "longer period of time", but had left this assessment to the courts adjudicating each individual case.

19. The period of time which was necessary to establish a social and family relationship was not absolute, but had to be assessed with regard to the circumstances of each individual case and, in particular, the child's age. There was no doubt that a child, during the first months of his or her life, developed a social and family relationship with the persons taking care of him or her on a daily basis. During the first two years of his or her life, a child was in particular need of secure family relationships, which allowed him or her to develop further social contacts. A child's interest in learning about its true descent could only become relevant at a more advanced age. According to the intentions of the legislature, who were guided by the Federal Constitutional Court's case-law, external disturbances should be avoided in the child's best interests and in the interest of the already existing family relationship. The constitutional rights of the biological father should not prevail over the equally protected rights of the legal father, if and as long as the latter assumed parental responsibility within the meaning of social parentage. Against this background, even a period of a few months which elapsed between a child's birth and the bringing of an action to challenge paternity could be considered as a "longer period" within this specific context.

20. The Court of Appeal did not find it necessary to decide whether the period of time which had elapsed between the child's birth and the lodging of the applicant's action would have been sufficient to establish a social and family relationship. According to the case-law of the Federal Law Court, in cases in which the child had lived since birth without interruption together with his or her legal parents, the existence of a social-family relationship had to be assumed if the cohabitation persisted and the judge was convinced that the legal father assumed actual parental responsibility in a way which appeared to be long-lasting. It was not decisive whether the social and family relationship already existed when the action was lodged, but only whether there was a social and family relationship at the time of the last court hearing. The applicant had failed to point to any circumstances which could call into question the existence of such a relationship in the instant case. Conversely, the fact that the relationship between the legal parents had endured the crisis which had been caused by the mother's breach of trust indicated that the relationship was particularly stable. The Court of Appeal did not allow an appeal on points of law.

21. On 20 May 2009 the Federal Constitutional Court, sitting as a panel of three judges, refused to admit the applicant's constitutional complaint for adjudication. This decision was served on the applicant's counsel on 3 June 2009.

II. RELEVANT DOMESTIC LAW

1. Provisions of the Basic Law

22. Under Article 3 of the Basic Law, everyone is equal before the law (§ 1); men and women have equal rights (§ 2).

23. Article 6 of the Basic Law, in so far as relevant, provides:

> "(1) Marriage and the family shall enjoy the special protection of the State.
>
> (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the performance of this duty."

2. Establishment of paternity

24. According to Article 1592 of the Civil Code, a child's father is either the man who on the date of the child's birth was married to the child's mother (no. 1), or the man who acknowledged paternity (no. 2), or whose paternity is judicially established under Article 1600d of the Civil Code (no. 3). An acknowledgement of paternity is not valid as long as the paternity of another man exists (Article 1594 § 2 of the Civil Code). Paternity can only be validly acknowledged with the mother's consent (Article 1595 § 1).

3. Challenging paternity

25. Paternity may be challenged within a time-limit of two years. The period commences on the date on which the entitled person learns of the circumstances that militate against the established paternity; the existence of a social and family relationship does not prevent the period from running (Article 1600b § 1). Under Article 1600 § 1 of the Civil Code, entitlement to challenge paternity lies with the man whose paternity exists under Article 1592 nos. 1 and 2, with the mother and with the child, and also with the man who makes a statutory declaration that he had sexual intercourse with the child's mother during the period of conception. However, pursuant to Article 1600 § 2, the biological father has a right to challenge the paternity of the man who is the child's legal father under Article 1592 nos. 1 or 2 only if there is no social and family relationship between the legal father and the child. A social and family relationship is considered to exist if the legal father has or had actual responsibility for the child at the relevant point in time. There is, as a rule, an assumption of actual responsibility if the legal father is married to the mother of the child or has lived together with the child in a domestic community for a long period of time (Article 1600 § 4).

4. Examination of paternity in separate proceedings

26. Under Article 1598a of the Civil Code as in force since 1 April 2008, the legal father, the mother and the child can request the examination of paternity by genetic testing. The outcome of these proceedings does not change the legal status of the persons involved. However, no such right is granted to a third person alleging that he is the biological father.

III. RELEVANT COMPARATIVE LAW

27. Research undertaken by the Court in respect of twenty-six Council of Europe Member States shows that in twenty-one of those States acknowledgment of the paternity of a child born out of wedlock requires the mother's consent. In seventeen Member States (namely Azerbaijan, Croatia, Cyprus, Estonia, France, Georgia, Ireland, Italy, Lithuania, Moldova, Romania, Russia, San Marino, Spain, Turkey, Ukraine and the United Kingdom), the presumed biological father is entitled to challenge the legal paternity of a third party established by acknowledgment. This right may be subject to certain time-limits. In fifteen States this remains the position where the legal father has lived with the child in a social and family relationship. In France and Spain, the biological father may not challenge paternity if the child has lived in a social and family relationship with the legally acknowledged father for a period of at least five or four years, respectively (*la possession d'état conforme au titre*).

28. By contrast, in nine Member States (Armenia, Bulgaria, Hungary, Iceland, Latvia, the Netherlands, Poland, Slovakia and Switzerland) the biological father does not have standing to challenge the paternity of the legal father established by acknowledgement. In those nine jurisdictions, the courts are not entitled to judicially consider (on the grounds of the best interests of the child or otherwise) whether the biological father should be allowed to challenge paternity.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicant complained that the domestic courts' refusal to allow him to challenge Mr M.'s paternity and to have his own paternity legally established violated his right to respect for his private and family life as protected by Article 8 of the Convention. He complained, in particular, that the relevant legislation, as construed by the family courts, let the social family's interests generally prevail over the biological father's interests,

without allowing for an examination of the specific circumstances of the case. He further complained under Article 8, read in conjunction with Article 6 of the Convention, that the family courts had failed to examine sufficiently whether there existed an enduring relationship between the child and her legal father. He further complained that the alleged excessive length of the proceedings had predetermined their outcome.

30. The Government contested these arguments.

31. The Court considers that this complaint falls to be examined under Article 8 alone, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

32. 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 applicant's submissions

33. Relying on the Court's case-law the applicant asserted that the relationship between R. and him as her biological father amounted to family life. He submitted that he had entertained a relationship with Ms P. from Easter until the end of September 2003 and that they had continued to have a sexual relationship until December 2004. It followed that the child had been conceived during a long-lasting relationship. When the applicant had been informed by Ms P. of her pregnancy, they had both assumed that he was the father. It was not true that his first reaction on learning about the pregnancy had been one of absolute rejection. On the contrary, he had been willing to assume parental responsibility for the child and had repeatedly tried to contact Ms P. during her pregnancy. However, Ms P. had been opposed to that and had prevented any further contact as from February 2005. After birth, the applicant had instituted paternity proceedings in order to establish his legal fatherhood and exercise parental responsibility, thus showing a demonstrable interest in and commitment to the child. Ms P. had

prevented him from establishing a legal bond with his child and from establishing a factual relationship.

34. In any event, the applicant's interest in having his paternity legally established formed part of his private life and was thus protected under Article 8. Referring to the Court's case-law, in particular to the case of *Mikulić v. Croatia* (no. 53176/99, §§ 53-55, ECHR 2002-I), the applicant submitted that private life included the determination of the legal relationship between a child and the biological father.

35. The domestic authorities had interfered with this right by preventing him from establishing paternity. He pointed out that he had no legal means to challenge the acknowledgment of paternity which had been declared by Mr M. with the mother's consent and without his own participation.

36. The applicant further argued that the interference with his rights under Article 8 had not been justified under paragraph 2 of that provision. In particular, it had not been "necessary in a democratic society". The legal recognition of the relationship constituted a lifelong legal link between the child and his or her parent, which was generally based on ascendancy. It fulfilled different functions relating to the social order and to the individual's place within society. Furthermore, it had a legal function. It was thus of primary importance not only for the child, but also for the parent. It followed that the margin of appreciation attributed to the domestic authorities in this respect had to be narrow.

37. According to the Court's case-law, where the existence of a family tie had been established, the State had to act in a manner calculated to enable this tie to be developed. In the applicant's view, the legislature had disrespected this tenet and the principle of proportionality by allowing the mother to choose another man as the child's legal father and to deny the applicant any factual relationship with his child. On the basis of the law as it had been applied by the domestic courts, the applicant had practically no possibility of becoming the legal father of his child, as the courts had let the factual and legal situation which had been one-sidedly created by the mother prevail over the applicant's interests as a biological father.

38. This situation had been further exacerbated by the fact that the applicant bore the burden of proof that no social and family relationship existed between the child and his legal father and that he had been precluded from challenging paternity in the future even if the relationship between the mother and the legal father should come to an end and the legal father should lose interest in the child.

39. During the domestic proceedings, Mr M. had failed to submit any details about the relationship between himself and the child R. Under these circumstances, the family courts would have been obliged to examine the relevant facts of their own motion. Furthermore, it would have been necessary to hear an expert opinion on the question whether Ms P. would continue to live with Mr M. The legal reasoning given by the Berlin Court

of Appeal had the practical consequence that any action challenging paternity brought by a biological father had to be rejected for the mere reason of the period of time which necessarily elapsed during the paternity proceedings.

40. Moreover, the courts had failed to weigh the competing interests and to examine whether the challenge to paternity would harm or would serve the child's best interests. There had been no scientific evidence in support of the Court of Appeal's presumption that the child had to be protected from "external disturbances" during the first two years of her life. In the instant case, both the applicant and the child had a protected interest in having the true biological descent legally established, which outweighed the legal father's interest in the maintenance of his status. There had been no indication that the establishment of the applicant's paternity would jeopardise the relationship between Mr M. and the child, as the latter had confirmed during the domestic proceedings that he was willing to assume parental responsibility even after it had become clear that he was not the biological father.

41. The approach adopted by the German legislature lacked justification and was contrary to the case-law of the Court (the applicant referred to the cases of *Różański v. Poland*, no. 55339/00, 18 May 2006, and *Zaunegger v. Germany*, no. 22028/04, 3 December 2009), according to which the competing interests had to be balanced in each individual case. This implied that children necessarily had to bear a certain amount of stress caused by judicial proceedings. In many cases, the taking of an expert's opinion would already be necessary to establish the factual relationship between the child and his or her legal father. In those cases, there would be no further stress if the court examined their welfare with regard to the challenge of paternity.

42. In the instant case, it further had to be taken into account that the District Court had failed to process the proceedings with particular diligence, as required in cases concerning civil status. The outcome of the instant proceedings had thus been predetermined by their excessive length.

43. The applicant maintained that German law accorded a considerably weaker position to the biological father than the applicable provisions in the majority of European States. The findings in a report drawn up in March 2010 by the German Institute for Youth Human Services and Family Law at the Government's request were not convincing or representative of the legal situation in Europe. There was a clear tendency in a great majority of States towards allowing the biological father to challenge paternity without restrictions.

2. The Government's submissions

44. The Government argued that the domestic courts' decisions had not interfered with the applicant's right to respect for his family life. Referring to the Court's case-law, the Government maintained that mere biological

kinship, without any close personal relationship, was insufficient to engage the protection of Article 8. In the present case, R. had lived together with her mother and her legal father in a stable family unit. No factual family relationship had existed between the applicant and the child R. The Government stressed that the intimate relationship between the applicant and Ms P. had ended eight months prior to R's birth. Even before the end of all contact between Ms P. and the applicant, the two of them had already not had an established relationship since September 2003, but merely occasional sexual contact. The applicant had neither been present at the child's birth, nor had he attempted to gain access to her.

45. Moreover, even though the Court had considered that intended family life might, exceptionally, fall within the ambit of Article 8, the Government argued that this was not the case in the circumstances of the present application. They stressed that the applicant and the mother of the child no longer had a relationship. Referring to the third party submissions (see §§ 54-57 below), the Government submitted that the applicant's first reaction to the news of the pregnancy was one of absolute rejection. The applicant had asked about the child only once after her birth. Furthermore, the legal parents had not prohibited contact with the applicant. The Government expressed their doubts as to whether the applicant's willingness to assume responsibility, which had been communicated via legal counsel, was really genuine.

46. According to the Government, the domestic courts had thoroughly examined the existence of an enduring relationship between the child and her legal father. By doing so, the courts had taken into account the fact that Mr M. had acknowledged paternity even before the child's birth and that the legal parents had entertained a relationship since February 2004 and had lived together for almost a year by the time the child was born. During the domestic proceedings, Mr M. and Ms P., when separately heard by the District Court, unanimously declared that they jointly took care of the child. The applicant did not contest this. There was thus no doubt that Mr M. had assumed parental responsibility and that there was no need for the Court of Appeal to further examine these facts.

47. The domestic decisions had not interfered with the applicant's right to respect for his private life. Even assuming that there had been an interference with the applicant's rights under Article 8 § 1, this had a legal basis in Articles 1592 No. 2 and 1600 of the Civil Code and served the legitimate aim of protecting the rights and freedoms of the child and her legal parents.

48. That interference had also been necessary in a democratic society. The applicant's preclusion from challenging paternity served the child's best interests. The biological father might have had an interest in getting to know and building a relationship with his child. In the instant case, it had, however, to be taken into account that the child lived in a functioning

social-legal family. Conversely, no social ties existed between the child and the applicant. It followed that the child's interest in growing up undisturbed in her social-legal family took precedence.

49. The German legislature had balanced the competing interests involved in a manner which complied with the requirements of Article 8. The legislature had intensively debated the question whether the biological father of a child should be granted the right to challenge paternity and had originally decided against it. However, following a decision of the Federal Constitutional Court dated 9 April 2003 (no. 1 BvR 1493/96 and 1724/01) the legislature had decided to allow a biological father to challenge paternity if no social-family relationship existed between the legal father and the child. The decisive consideration was that, in the interest of the social family and of the required legal certainty in the law on parentage, the biological father had no constitutional right to be granted paternity as a matter of priority, if the legal father exercised his parental responsibility in the sense of social parentage. The decision to grant precedence to the legal family was in line with the case-law of the Court (the Government referred to the case of *Nylund v. Finland* ((dec.), no. 27110/95, ECHR 1999-VI).

50. The legislature's approach also served the child's best interests by avoiding the considerable strains which would be caused by ascertaining in every individual case whether the respective challenge was in the child's best interests. Furthermore, it protected the existing family from having to reveal private details concerning their family life.

51. It was acceptable to impose the burden of proof for the non-existence of a social and family relationship on the biological father. The latter remained free to submit facts which militated against the assumption of the existence of such a relationship, such as the fact that the child did not live together with his or her legal father.

52. The applicant had not been denied the right to challenge paternity because of the mere period of time which had elapsed during the court proceedings. The length of the proceedings had not been excessive. Furthermore, the Court of Appeal had not based its decision on the additional time which had elapsed during the proceedings, but had made it clear that the social and family relationship in question had already existed for a considerably long time.

53. The Government further submitted that Germany was not in an isolated position when it came to the weighing of interests between biological fathers on the one hand and social fathers on the other. According to an expert report drawn up in March 2010 by the German Institute for Youth Human Services and Family Law (*Deutsches Institut für Jugendhilfe und Familienrecht e. V.,* a registered association and non-governmental organisation), which covered, in addition to Germany, seventeen other Council of Europe Member States, the status of biological fathers under

German law could not be regarded as being weaker than that in other European legal systems.

3. The third parties' submissions

54. Ms P. and Mr M., the child R.'s legal parents, submitted that the domestic proceedings had put a heavy strain on their family and that it would have serious consequences for them if the domestic decision were to be overturned. They feared, in particular, that the applicant would try to interfere with the family's private affairs and burden the relationship between R. and Mr M.

55. The third parties contended that Ms P. had not had any relationship with the applicant during her pregnancy. Neither had they entertained a relationship at the time when the child had been conceived. After their separation, they had only had occasional sexual contact. When first learning about Ms P.'s pregnancy, the applicant had invited her to have an abortion.

56. By contrast, Ms P. and Mr M. had been living together even before the child's conception. They had been aware of the fact that both men, the applicant and Mr M., could be the biological father. Following counselling, they had decided against an abortion and to ensure that the child could grow up within the comfort and love provided by a stable family. Mr M. had accompanied Ms P. to ultrasound examinations and prenatal classes and had been present when she had given birth.

57. Some time after R.'s birth the applicant had called Mr M. by telephone and demanded a paternity test. Mr M. had replied that he did not want such a test and that they wished to let R. decide by herself if she wanted a paternity test when she was older. Neither the applicant nor his counsel had ever tried to get in touch with them afterwards.

4. Assessment by the Court

58. The Court reiterates that the notion of "family life" under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. The Court has further considered that intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases where the fact that family life has not yet fully been established is not attributable to the applicant (compare *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 143 and 146, ECHR 2004-V). In particular, where the circumstances warrant it, "family life" must extend to the potential relationship which may develop between a child born out of wedlock and the natural father. Relevant factors which may determine the real existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child both before and after

the birth (see *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI; *Nekvedavicius v. Germany* (dec.), no. 46165/99, 19 June 2003; *L. v. the Netherlands*, no. 45582/99, § 36, ECHR 2004-IV; and *Anayo v. Germany*, no. 20578/07, § 57, 21 December 2010).

59. Turning to the instant case, the Court observes that the relationship between Ms P. and the applicant had ended approximately one year before the child R. was conceived. According to the applicant's own submissions, the ensuing relations between himself and Ms P. were of a purely sexual nature. There is no indication that the applicant and Ms P., who cohabitated at the time with Mr M., envisaged founding a family together. There are no signs of any commitment of the applicant towards the child before it was born. Under these circumstances, the Court is not convinced that the applicant's decision to demand a paternity test and to bring an action aimed at establishing his paternity were sufficient to bring the relationship between himself and R. within the scope of family life.

60. However, Article 8 protects not only "family" but also "private" life. The Court has found on numerous occasions that proceedings concerning the establishment of or challenge against paternity concerned that man's private life under Article 8, which encompasses important aspects of one's personal identity (see *Rasmussen v. Denmark*, 28 November 1984, § 33, Series A no. 87; *Nylund*, cited above; *Yildirim v. Austria* (dec.), no. 34308/96, 19 October 1999; *Backlund v. Finland*, no. 36498/05, § 37, 6 July 2010; *Pascaud v. France*, no. 19535/08, §§ 48-49, 16 June 2011 and *Krušković v. Croatia*, no. 46185/08, § 20, 21 June 2011). The Court does not discern any reason to hold otherwise in the present case. The decision to reject the applicant's request to legally establish his paternity of R. thus interfered with his right to respect for his private life.

61. Any such interference will constitute 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 that provision and can be regarded as "necessary in a democratic society".

62. The domestic courts' decision to reject the applicant's action to legally establish paternity was based on Article 1600 §§ 2 and 4 of the Civil Code. It was aimed at pursuing the best interests of the family unit consisting of Ms P., Mr M. and the child R.

63. In determining whether the interference was "necessary in a democratic society", the Court refers to the principles established in its case-law. It has to consider whether, in the light of the case as a whole, the reasons adduced to justify that interference were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, *inter alia*, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 70, ECHR 2001-V, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 62, ECHR 2003-VIII). Consideration of what lies in the best interests of the child concerned is of paramount importance in every case of this kind; depending on their nature

and seriousness, the child's best interests may override that of the parents (see *Sommerfeld*, cited above, § 66, and *Görgülü v. Germany*, no. 74969/01, § 43, 26 February 2004).

64. According to the Court's well-established case-law, it must further be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see, *inter alia*, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A; *Görgülü*, cited above, § 41; and *Sommerfeld*, cited above, § 62).

65. The choice of the means employed to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. There are different ways of ensuring "respect for private life", and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see *Odièvre v. France* [GC], no. 42326/98, § 46, ECHR 2003-III). The width of the margin of appreciation will not only depend on the specific right or rights which are concerned, but also on the nature of what is at stake for the applicant (compare *Pascaud*, cited above, § 59).

66. The Court further refers to its judgment in the case of *Anayo v. Germany* (no. 20578/07, 21 December 2010), which concerned the refusal of the German courts to grant Mr Anayo, who was the biological father of twins, access to his children on the ground that he had no social and family relationship with the children. The Court observed, in that application, that the domestic court had refused the applicant access to his children without giving any consideration to the question whether, in the particular circumstances of the case, contact between the twins and the applicant would be in the children's best interest. The Court accordingly found that the domestic court had failed to fairly balance the competing rights involved. As the reasons given for refusing Mr Anayo contact with his children had thus not been "sufficient" for the the purposes of paragraph 2 of Article 8, Article 8 had been violated (see *Anayo*, cited above, §§ 67-73).

67. Turning to the circumstances of the instant case, the Court observes at the outset that the applicant instigated proceedings which were aimed at obtaining full legal status as the child's father. If the applicant's action had been successful, all parental links between the child and Mr M., who had acknowledged paternity before the child's birth and who continued to perform the role of her social father, would have been severed. Such proceedings must therefore be considered to have a fundamentally different and more far-reaching objective than the mere establishment of biological

paternity for the purposes of having contact with the child concerned and information about that child's development, as was at stake in the *Anayo* case.

68. The Court reiterates that a number of factors must be taken into account when determining the width of the margin of appreciation to be enjoyed by the State when deciding any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, the margin will be wider (see, most recently *S. H. and Others v. Austria* [GC], no. 57813/00, § 94, 3 November 2011, with further references). Furthermore, there will usually be a wide margin of appreciation accorded if the State is required to strike a balance between competing private and public interests or Convention rights (see *S. H. and Others,* ibid.).

69. It appears from the comparative research undertaken by the Court (see §§ 27 – 28 above) that a majority of fifteen out of twenty-six Council of Europe Member States would allow a presumed biological father to challenge the legal paternity of a third party established by acknowledgment, even where the legal father lived with the child in a social and family relationship. By contrast, in a substantial minority of nine Member States the presumed biological father does not have the standing to contest the paternity of the legal father. In two further States the presumed biological father may not contest paternity if the child has lived in a social and family relationship with the legal father for a period of at least four or five years, respectively.

70. The Court concludes that there appears to be a certain tendency within the Member States towards allowing the presumed biological father to challenge the legal father's paternity under circumstances which are comparable to those examined in the present case. There appears to be, however, no settled consensus which would decisively narrow the margin of appreciation of the State. The Court further observes that the impugned decisions did not concern the question of contact rights, which call for strict scrutiny as they entail the danger that the family relations between a young child and a parent would be effectively curtailed (see, *inter alia*, *Görgülü*, cited above, §§ 41-42 and *Anayo*, cited above, § 66). It follows that the margin of appreciation enjoyed by the Member States in respect of the determination of a child's legal status must be a wider one than that enjoyed by the States regarding questions of contact and information rights.

71. With regard to the conflicting interests to be balanced in the instant case, the Court notes that the applicant had a protected interest in establishing the truth about an important aspect of his private life, namely the fact of his being R.'s father, and having it recognised in law (compare,

mutatis mutandis, *Pascaud* and *Krušković*, both cited above, § 34 and § 48 respectively).

72. On the other hand, the decision of the Court of Appeal was aimed at complying with the legislature's will to give an existing family relationship between the child and her legal father, who was actually living together with the child's mother and provided parental care on a daily basis, precedence over the relationship between a biological father and a child.

73. The Court observes that German family law, as interpreted by the domestic courts, currently does not provide the possibility of a judicial examination of the question whether contact between a biological father and his child would be in the child's best interests if another man is the child's legal father (in a "social and family relationship") and if the biological father has not yet borne any responsibility for the child. The reasons why the biological father has not previously established such a relationship are irrelevant; the provisions thus also cover cases in which the fact that such a relationship has not yet been established is not attributable to the biological father (compare *Anayo*, cited above, § 67). The Court refers to its findings in the *Anayo* case that this legal situation led to a violation of the biological father's right to respect for his private life (see *Anayo*, cited above, §§ 70-73).

74. It can be deduced from the *Anayo* judgment that Article 8 of the Convention can be interpreted as imposing on the member States an obligation to examine whether it is in the child's best interests to allow the biological father to establish a relationship with his child, for example by granting contact rights. Accordingly, the biological father must not be completely excluded from his child's life unless there are relevant reasons relating to the child's best interests to do so. However, this does not necessarily imply a duty under the Convention to allow the biological father to challenge the legal father's status. Neither can such an obligation be deduced from the Court's case-law. The present case has to be distinguished from the *Różański* case relied upon by the applicant, as in the latter case the domestic authorities had refused to deal with Mr Różański's request to establish his paternity by mere reference to the recognition of paternity by another man, without, however, examining the factual background of the case, as for example the question whether the child lived with his legal father in a social and family relationship (see *Różański*, cited above, § 78). In the case of *Mizzi v. Malta* (no. 26111/02, ECHR 2006-I), the Court found a violation of Article 8 of the Convention in that the applicant, who was the legal – but not the biological – father of a child born in wedlock, and had never lived with the child, was never afforded the possibility of bringing, with reasonable prospect of success, an action aimed at contesting paternity (see *Mizzi*, cited above, §§ 108-111). The Court considers that this case falls to be distinguished from the instant case in that Mr Mizzi alleged that the presumption of legal paternity had not been in line with social reality, as he

had never entertained any factual relationship to the child (see *Mizzi*, cited above, § 11). Conversely, in the instant case Mr M.'s legal paternity coincided with his factual role as the child's social father.

75. Having regard to the above considerations, in particular the lack of a consensus within the Member States on this issue and to the wider margin of appreciation to be accorded to the States in matters regarding legal status, the Court considers that the decision whether the biological father should be allowed to challenge paternity under the circumstances of the instant case falls within the State's margin of appreciation.

76. It remains to be determined whether the decision-making process, seen as a whole, was fair and provided the applicant with the requisite protection of his interests safeguarded by Article 8 (see *Sommerfeld*, cited above, § 66, and *Görgülü*, cited above, §§ 41- 42).

77. In this respect, the Court notes that the Court of Appeal examined whether the legal parents lived together in an enduring social family unit. The existence of a father-child relationship between Mr M. and the child had been confirmed by both legal parents and by the child's guardian. Mr M. had cohabitated with the child's mother for several months before conception and accompanied her during her pregnancy and when giving birth. The applicant, on the other hand, did not submit any facts either before the domestic courts or before the Court which could call this finding into question. There is thus no indication that the domestic courts failed to sufficiently establish the relevant facts.

78. With regard to the length of the proceedings, the Court recalls that in cases concerning a person's relationship with his or her child, there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a *de facto* determination of the matter which forms part of the procedural requirements implicit in Article 8 (see, *inter alia*, *Hoppe v. Germany*, no. 28422/95, § 54, 5 December 2002, and *Süß v. Germany*, no. 40324/98, § 100, 10 November 2005). Furthermore, the Court has found that particular diligence is required in cases concerning civil status (*Mikulić* cited above, § 44).

79. Turning to the circumstances of the instant case, the Court notes that the period to be taken into consideration began on 27 October 2005, when the applicant lodged his paternity action and ended on 3 June 2009, when the Federal Constitutional Court's decision was served on the applicant's counsel. It thus lasted some three years and seven months over three levels of jurisdiction. Even though there were certain delays before the Tempelhof-Kreuzberg District Court - where the case was pending for one year and six months - in particular owing to the fact that the court did not appoint a guardian *ad litem* immediately after the action had been lodged, the Court considers that this delay of some three months was compensated by the fact that the Court of Appeal very swiftly processed the case within less than four months. Insofar as a certain delay was occasioned by the fact

that the District Court ordered two separate examinations in order to exclude the legal father's paternity and, subsequently, to establish the applicant's paternity, the Court considers that this approach falls within the domestic court's discretion as to how to establish the relevant facts.

80. The Court further observes that it does not appear from the reasoning given by the Berlin Court of Appeal that the instant case had been predetermined by the period of time which had elapsed during the proceedings before the domestic courts. It notes, in particular, that the Court of Appeal considered that a social and family relationship between the legal father and the child R. not only existed at the time that court decided on the applicant's appeal, but already a long time before.

81. In these circumstances the Court is satisfied that the procedural requirements implicit in Article 8 of the Convention were complied with.

82. It follows from the above considerations that there has been no violation of Article 8 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

83. The applicant complained that Article 1600 of the Civil Code as construed by the Berlin Court of Appeal had discriminated against him in his capacity as a biological father compared to the mother, the legal father and the child. He relied on Article 14, read in conjunction with Article 8 of the Convention; the former provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

84. The Government contested that argument.

A. Admissibility

85. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

B. Merits

86. The applicant pointed out that both the child's mother and the legal father were entitled to challenge paternity notwithstanding the existence of a social and family relationship between the child and the legal father. According to the applicant, there were no relevant reasons which justified such different treatment. This discrimination was further exacerbated by the fact that the growing intensity of the social and family relationship between

the legal father and the child during the paternity proceedings had not impaired the mother's right to contest paternity. Furthermore, it had to be borne in mind that children, when challenging paternity, did not have to take into account their own social relationship with their mother and legal father. By contrast, the biological father was precluded from challenging paternity even if this would serve the child's best interests.

87. According to the Government, Article 14 was not applicable in the instant case, as the applicant's complaint did not fall within the scope of Article 8 of the Convention. Alternatively, the Government submitted that the groups referred to by the applicant were not comparable. The applicant, who had never lived with the child, was not in a similar position to the legal parents, as the latter lived with the child in a domestic community and bore parental responsibility. The legislature's decision to grant precedence to the social and family relationship between the legal father and the child fell within the State's margin of appreciation when weighing the competing interests.

88. The Court has already found above that the applicant's complaint falls within the scope of the right to protection of private life guaranteed under Article 8 of the Convention. It follows that Article 14 is applicable in the instant case. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification of persons in similar situations (see, among many other authorities, *Zaunegger*, cited above, § 42).

89. Turning to the circumstances of the instant case, the Court observes that the main reason relied upon by the Government in treating the applicant differently from the mother, the legal father and the child with regard to the challenging of paternity was the aim of protecting the child and her social family from external disturbances. Having regard to the above considerations relating to the proportionality of the interference with the applicant's right to respect for his private life, in particular to the lack of consensus within the Member States (see §§ 69–70 above), the Court considers that the decision to give the existing family relationship between the child and her legal parents precedence over the relationship with her biological father falls, insofar as the legal status is concerned, within the State's margin of appreciation.

90. There has accordingly been no violation of Article 14 in conjunction with Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

91. The applicant further complained that the length of the proceedings had been excessive and that there had been no available effective remedy in this regard.

92. The Government considered that the applicant had failed to comply with the six-month time-limit in respect of this complaint and contested the allegation that the length of the proceedings had been excessive.

93. Even assuming compliance with Article 35 § 1 of the Convention, the Court considers, in the light of its findings under the procedural aspect of Article 8 of the Convention (see §§ 79-80, above), that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 8 taken alone and in conjunction with Article 14 admissible and the remainder of the application inadmissible;

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

3. *Holds* that there has been no violation of Article 14 in conjunction with Article 8 of the Convention.

Done in English, and notified in writing on 22 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President