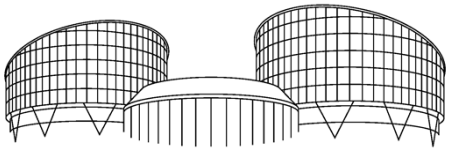

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF MIFSUD v. MALTA

(Application no. 62257/15)

JUDGMENT

STRASBOURG

29 January 2019

FINAL

29/04/2019

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

In the case of Mifsud v. Malta,

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

Branko Lubarda, *President,*
Vincent A. De Gaetano,
Helen Keller,
Dmitry Dedov,
Georgios A. Serghides,
Jolien Schukking,
María Elósegui, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 8 January 2019,

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

PROCEDURE

1. The case originated in an application (no. 62257/15) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Francesco Saverio Mifsud ("the applicant"), on 15 December 2015.

2. The applicant was represented by Dr V. Galea a lawyer practising in Birkirkara. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged that the fact that Maltese law made it mandatory to provide a genetic sample in paternity proceedings, contrary to his will, resulted in a breach of Article 8 of the Convention.

4. On 20 September 2017 notice of the application was given to the Government.

5. The Government of the United Kingdom, who had been notified by the Registrar of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44), did not indicate that they intended to do so.

6. On 3 December 2017 the applicant passed away. By letters of 6 April 2018 and 9 July 2018 the Court was informed that his wife and universal heir, Ms Margaret Mifsud, an Irish national, wished to continue with the proceedings.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1925 and at the time of the introduction of the application lived in Dublin.

A. Background to the case

8. On 20 December 2012 X (who was around 55 years old) instituted an action before the Civil Court (Family Section) requesting the court to declare the applicant to be her biological father and to order this to be reflected on her birth certificate.

9. On 11 February 2013 the Director of the Public Registry (also defendant in the proceedings) requested the court to order that the parties undergo the genetic testing provided for by Article 100A of the Civil Code, and for the applicant to submit his details, which would be required to make the relevant changes to X's birth certificate if the court had to find in X's favour.

10. On 11 February 2013 the applicant filed written submissions in reply, denying that he had been involved in the applicant's conception and raising the plea of *exceptio plurium concubentium* (defence of several lovers) on the basis that X's mother had had various partners.

11. On 7 May 2013 X filed her written statement confirmed on oath (*affidavit*), as well as that of her mother. In her affidavit X claimed that she had been born in London of a relationship between her mother (Y.) and the applicant, and that from an early age she had always been told that the applicant was her father. After her sixteenth birthday she had sent a letter to him, which remained unanswered. She claimed that in 1978, learning that the applicant was going to be in Malta, she went to meet him at the airport – on that day she had seen him arrive with his family, and noted the resemblance between herself and one of the applicant's daughters. On that occasion she had not approached him, but they met some time later before a lawyer. She stated that the applicant greeted her warmly and that, after that, they met various times. She also met the applicant's wife. According to X the applicant had told her that he would not inform his children about her in order not to disrupt their schooling and she agreed. X stated that the applicant started visiting Malta regularly on his own, and when she had become pregnant he had offered her one of his properties to live in, and in this way they lived there together on his visits to the island. On the birth of X's daughter in 1979, the applicant had been the latter's godparent as shown by relevant certification. She claimed that at the applicant's suggestion she moved to the UK, only to return sixteen months later because she missed Malta. At that stage the applicant had given her the keys to another property

for her to live in. She remained in close contact with him until 1985. In 1998 she was evicted from the property and thereafter their relationship deteriorated. X explained that during the eviction proceedings the applicant had promised her a sum of money to leave the premises peacefully and that she had accepted the deal, but he never paid up. Subsequently, she successfully issued proceedings against him to recover the sum in question (the relevant court judgments were also submitted).

12. According to Y's affidavit, Y. had had a relationship with the applicant, for whom she worked, and had become pregnant. She claimed that the applicant had wanted to interrupt the pregnancy and brought a person home to give her an injection. She later miscarried. The applicant had bought her a place to stay, and they used to meet there, since he was married. Y claimed that she had always been faithful to him as she feared him, given that he was a powerful man involved in criminal activities. Y stated that she later gave birth to a child she had with him (X) and thereafter their relationship had deteriorated, to the extent that he had also wanted her to prostitute herself. She finally plucked up courage, left him, and returned to Malta with X

13. On 13 May 2013, relying on Article 100A of the Civil Code (see Relevant Domestic Law), X requested the court to order that genetic tests be undertaken by her and the applicant. Apart from her own affidavit and that of her mother, she declared that she had no further evidence to adduce. On 4 June 2013 the applicant cross-examined Y. The cross-examination was to continue at a later date. It is unclear whether this happened.

14. On 22 May 2013 the applicant objected to the tests on the basis that such an order would breach his human rights. In particular, he argued that Article 100A of the Civil Code (which referred back to Article 70A of the same code) breached his rights under Article 8 of the Convention, and requested that the court refer the matter to the constitutional jurisdictions. He further questioned why the request had been lodged fifty-three years after X's birth and noted his advanced age, arguing that any intervention could have negative medical implications for him.

15. After hearing submissions from the parties on the matter, on 23 October 2013 the court referred the applicant's claim to the constitutional jurisdictions.

B. Constitutional redress proceedings

16. In his submissions before the constitutional jurisdictions the applicant claimed that none of the aims mentioned in sub-paragraph two of Article 8 applied in his case, and that the law in force did not allow for a fair balance of the competing interests at play. It also imposed an excessive burden in so far as it impeded his ability to contest a claim. Moreover, everyone was entitled to institute such proceedings without a shred of

evidence, and an alleged father would be bound to submit to the test, with all its consequences, even though he was sure that he was not the father. He claimed that a positive result of the test would disrupt and create havoc in his life after so many years of silence [he was 88 years old]. He requested that the court balance X's right (if any) to know who was her father against his right to respect for his private and family life.

1. At first instance

17. By a judgment of 30 October 2014 the Civil Court (First Hall), in its constitutional competence, found that there would be no violation of Article 8 if the Civil Court (in its ordinary competence) were to order the applicant to undergo a genetic test, for the specific purposes of that suit.

18. The court considered that the enactment of the impugned provisions reflected the State's action in accordance with its positive obligations in respect of the right of individuals' to know their parentage in the context of a judicial procedure. Citing *Pascaud v. France* (no. 19535/08, § 64, 16 June 2011), the court reiterated that "the interest of a presumed father was not, alone, a sufficient argument to deprive the applicant [a person seeking to establish paternity] of her Article 8 rights". According to the court, disproportionality would result if the person seeking paternity had acted negligently, by not requesting the test or not availing him or herself of an available remedy, or had renounced such right, but this was not the situation in the case in hand. Referring to the ECtHR case-law the court noted that while it was true that the absence of an obligatory test did not necessarily entail a violation, it could not be said that making it obligatory was in violation of Article 8 because it was not proportionate.

19. Furthermore, X's age was irrelevant to her quest to discover her genetic parent. This was even more so given that she had been trying to establish paternity for years and that the applicant had been part of her life for a period of time. In that light the applicant could not claim that his family life would now be in havoc.

20. Lastly, referring to *Jäggi v. Switzerland* (no. 58757/00, ECHR 2006-X) which concerned the same circumstances save that the putative father in that case was deceased – the court confirmed that a particularly rigorous scrutiny was necessary in weighing competing interests in cases of ascertaining parentage, and that a person's right to ascertain parentage was a vital interest protected by the Convention.

2. Appeal

21. On 10 November 2014 the applicant appealed. He argued, in particular, that by assessing the case in the light of positive obligations, the first-instance court had failed to assess proportionality. Nor had it looked at the lawfulness of the measure and the legitimate aim – in this connection he

contended that since the requirement to order the test was mandatory (unless it concerned a minor), it deprived the judge making such order of any possibility of balancing all the interests at stake and deciding according to his or her discretion. Furthermore, the impugned law breached the equality-of-arms principle and was contrary to procedural rules (specifically Article 562 of the Civil Code – see Relevant Domestic Law).

22. By judgment of 26 June 2015, the Constitutional Court rejected the appeal and confirmed the first-instance judgment.

23. The Constitutional Court considered that, as was clear from the first-instance judgment, the court in question had looked into the proportionality of the measure. While it had focused mostly on the legal aspects of the case, that did not mean that it had not considered the factual elements pertinent to the case, and indeed its conclusions had specifically referred to the case at issue and were not general.

24. As had been noted by the first-instance court, the Constitutional Court referred to the fact that X for a number of years had been hoping to discover the truth about an important aspect of her personal identity; she also wished to amend her birth certificate, which read "unknown father" (and was thus, in her view, incorrect), in order to avoid the humiliation which she experienced every time she had to present such certification. She also wanted to establish a claim over the applicant's property after his death, according to law. Thus, her compelling interest in determining paternity was clear. On the other hand, save for his old age, the humiliation of undergoing the test (a buccal swab), and the havoc the confirmation of such paternity would cause, the applicant had not referred to any other negative effects.

25. The Constitutional Court recognised X's right to have her paternity established for the reasons which she had adduced, namely moral and patrimonial interests. On the other hand, the applicant had not put forward any sufficiently cogent reasons to consider that the application in his case of Article 100A would breach his rights under Article 8. Reiterating the findings in *Pascaud* (cited above), the Constitutional Court emphasised that the interest of a presumed father was not, alone, a sufficient argument to deprive the applicant (a person seeking to establish paternity) of her Article 8 rights. Indeed, Article 8 paragraph 2 expressly allowed for a legitimate interference with a person's private life where such interference was "for the protection of the rights and freedoms of others". This was precisely the situation in the case in hand. Thus, the application of the relevant law to the applicant's case would be justified given that the aim was precisely to establish X's identity and to safeguard her patrimonial interest, if it were to emerge that she was the applicant's daughter.

26. In that light, and bearing in mind the applicant's submissions that Article 70A(2) of the Civil Code excluded any exercise of discretion by the court ordering the test, the Constitutional Court considered that while it could not be ruled out that there might be cases where the necessary

application (*applikazzjoni tassativa*) of Article 70A(2) of the Civil Code resulted in a breach of Article 8, namely where a fair balance has not been reached between the interests at play, in the present case that was not so, given its factual circumstances. In the Constitutional Court's view the applicant would not have suffered any humiliation in having to undergo a buccal swab, which was not an invasive action, and any turbulence which could be caused to his private and family life did not outweigh X's interests.

27. Lastly, the complaint about equality of arms was frivolous in so far as the test was available to both parties, and also because the fact that a piece of evidence amounted to conclusive evidence in favour of one party did not mean that it should be discarded.

C. Continuation of the civil proceedings

28. Following the above-mentioned Constitutional Court judgment, on 18 October 2015 the Civil Court (Family Section) ordered that the proceedings be continued and that the applicant undergo the genetic test. It appointed an expert to conduct that examination and invited her to submit a report by 28 January 2016.

29. On 24 May 2016 counsel for the applicant informed the court that inquiries were to be made with the applicant concerning the possibility of his tendering evidence by video conferencing given that he was residing abroad. On 6 October 2016 counsel informed the court that it was likely that the applicant would file an affidavit with his own evidence. However, no such written testimony was submitted.

30. The applicant underwent the test, and according to a report issued by the expert on 21 February 2017 (submitted to the ECtHR) the probability of paternity, namely of the applicant being X's father, was 99.9998%.

31. From the minutes of the hearing of 6 April 2017, it appears that the expert could not attend that hearing, so the court granted her leave to submit the report, and confirm it on oath, at the court's registry; the court also solicited the applicant's details. The case was adjourned for judgment. On the same day a note was filed by the applicant indicating his personal details.

32. On 21 June 2017 Civil Court (Family Section) declared that X was the biological child of the applicant and ordered the Director for Public Registry to make the necessary changes in the act of birth of X so as to include the applicant's details. The court judgment referred to the sworn statements of X and Y as well as to the DNA report, and the failure of the applicant to make submissions, opting to limit himself to submitting his personal details. The court noted that X and Y's testimony had not been rebutted as the applicant had failed to submit his testimony, and the applicant's initial objection had been contradicted by the result of the DNA test, which corroborated the witness testimony, particularly that of Y.

II. RELEVANT DOMESTIC LAW

33. At the relevant time, the articles of the Civil Code, Chapter 16 of the Laws of Malta, pertinent to this case, read as follows:

Article 70A (Natural parentage)

"(1) Whenever the clarification of natural parentage of a child is required -

(*a*) the father may require the mother and the child;

(*b*) the mother may require the father and the child;

(*c*) the child may require both parents; and

(*d*) the alleged natural father may require the husband, the mother and the son,

to consent to a genetic paternity test and to acquiesce in the taking of a genetic sample appropriate for the test, which sample must be taken according to the then current provisions of the law.

(2) On the application of a person entitled to clarify, the Civil Court (Family Section) must substitute consent that has not been given and order acquiescence in the taking of a sample.

(3) The Civil Court (Family Section) shall dismiss the application if and as long as the clarification of the natural parentage would result in a considerable adverse effect on the best interests of the minor child, which would be unreasonable for the child, even taking into account the concerns of the person entitled to clarify.

(4) A person, who has consented to a genetic paternity test and has given a genetic sample, may require the person entitled to clarify who has had a paternity test made, to permit inspection of the genetic paternity test report or to provide a copy. The Civil Court (Family Section) shall decide disputes arising from the claim under sub-article (1).

(5) The applications mentioned in this article shall be decided by virtue of decrees, which decrees may be appealed according to the procedure contemplated in article 229(2) of the Code of Organization and Civil Procedure."

Article 86A

"(1) The mother of a child conceived or born out of wedlock who is not acknowledged by the father, and that same child, may at all times make a judicial demand to establish the paternity of the child and for the court to order the registration of such paternity in the relative acts of civil status.

(2) The judicial demand referred to in sub-article (1) may also be sought by the heirs or the descendants of the child if the same circumstances as those which are referred to in article 85 will exist."

Article 100

"A judicial demand for a declarator of paternity or maternity may also be contested by any party interested."

Article 100A

"In causes to which this Sub-Title makes reference, the court may, without prejudice to any evidence that may be produced by the parties according to law, require the parties to submit to examinations as referred to in article 70A, and in the same manner and in the same circumstances."

34. According to Article 229 (2) of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, an appeal from a decree in causes of natural parentage may be entered before the definitive judgment subject to the procedure laid down in sub-article (4) and (5) of the same Article 229 which read as follows:

"(4) In the case of any decree under sub-articles (2) and (3), provided that any application for an appeal has not been filed, the aggrieved party may file an application within six days from the date on which the decree is read out in open court, requested [*recte* requesting] the court which delivered the decree to reconsider its decision. The application is [to] contain full and detailed reasons in support of the request and is to be served on the other party who shall have the right to file an answer thereto within six days from the date of service.

(5) The court shall decide, as expeditiously as possible by decree to be read out in open court, the application for special leave to appeal in terms of sub-article (3) or the application to reconsider its decision in terms of sub-article (4), expounding fully therein the reasons for the decision."

35. Article 562 of the Code of Organisation and Civil Procedure reads as follows:

"Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

36. The applicant complained that Maltese law made it mandatory to provide a genetic sample in paternity proceedings, and that the imposition of such an order on him, contrary to his will, resulted in a breach of Article 8 of the Convention, which provides:

"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."

37. The Government contested that argument.

A. Admissibility

1. *As to the* locus standi *of Ms Margaret Mifsud*

38. Following the introduction of the application, Mr Mifsud passed away and his widow Ms Mifsud expressed the wish to pursue the application.

39. In its case-law, the Court has differentiated between applications where the direct victim has died after the application was lodged with the Court and those applications where he or she had already died before the lodging of the application. Where the applicant has died after the application was lodged, the Court has accepted that the next-of-kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 97, ECHR 2014).

40. Having regard to the circumstances of the present case, the Court accepts that Ms Mifsud, the wife and heir of the direct victim (who had lodged the application before his death), has a legitimate interest in pursuing the application in the late applicant's stead. It will therefore continue dealing with the case at her request. For practical reasons, it will, however, continue to refer to Mr Mifsud as the applicant in the present judgment.

2. *Other matters*

41. The Government noted that in his submissions the applicant was repeatedly relying on Article 6 of the Convention, a matter which had not been raised before the domestic courts and which was therefore inadmissible for non-exhaustion. Moreover, such complaint having only been raised in the applicant's submissions of 6 April 2018, after the six-month time-limit, it was also out of time.

42. The Court notes that the application communicated to the Government concerned solely a complaint under Article 8 of the Convention, and therefore the scope of the case does not include an examination of Article 6 of the Convention *per se*, without prejudice, however, to any arguments which may be relevant to the assessment of the impugned measure under Article 8 of the Convention.

43. The Court notes that the application 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

44. In his application the applicant submitted that Article 100A of the Civil Code, which referred to Article 70A of the same code, breached his rights under Article 8. He considered that the legislation failed to meet the quality-of-law requirement, given that it breached the equality-of-arms principle by making it compulsory for a party to filiation proceedings to adduce evidence against himself, despite the opposing party having been unable to fulfil the burden of proof necessary in civil proceedings. This, coupled with the fact that it was mandatory and therefore not subject to any assessment, or discretion, by the domestic courts, rendered it contrary to the rule of law. Moreover, the law was devoid of legal certainty as it was unforeseeable as to its consequences in the event of a person refusing to submit to such test. He questioned whether such a party could be coerced through the use of physical force to provide the sample in question.

45. In his observations the applicant emphasised that the admission of such a piece of evidence in the proceedings had hindered his defence and been a determining consideration in the outcome of his case. He argued that once that evidence had been adduced in the case-file he could no longer offer his defence reiterating his original arguments without risking prosecution for the offence of perjury in civil proceedings. Thus, the very fact that the order issued to him to submit to the genetic test had been made out at the initial stage, before the applicant had been authorised to adduce his evidence, was contrary to the object of Article 8, as well as to that of Article 6 of the Convention. The applicant emphasised the early stage at which the test had been ordered – even before the applicant's version of events had been heard – when he had not yet produced any submissions or evidence and no cross-examinations had yet taken place, and argued that the factual circumstances referred to by the Constitutional Court had been "one-dimensional" and prejudicial to his right to defend himself in the civil proceedings. This had been made worse by the ambiguous wording of Article 100A of the Civil Code, which stated "without prejudice to any evidence that may be produced by the parties", which would result in a situation where the applicant could not defend himself at all. He considered that had the test been ordered after he had been allowed to submit evidence, then his defence rights would have been respected. Similarly, the judge would have been able to take a decision as to the necessity of the test on the basis of the evidence submitted by both parties. In his view, he had been coerced into adducing evidence against himself, contrary to the principle against self-incrimination, and had thereafter been denied his right to defend himself, while X had been freed from her legal burden to adduce evidence

in support of her civil claim, which was a cardinal rule of evidence. On the basis of the above, the applicant considered that the measure had not been in accordance with the law, since the implication arising from the application of the law itself were in themselves problematic in terms of natural justice.

46. The applicant further submitted that a reading of Article 100A at face value appeared to indicate that the court had had discretion to order the test. However, when read in combination with Article 70A(2) of the Civil Code this became mandatory. Relying on *Malone v. the United Kingdom* (2 August 1984, Series A no. 82) and *Silver and Others v. the United Kingdom* (25 March 1983, Series A no. 61), he noted that a law which conferred discretion had to indicate the scope of that discretion, which in the applicant's view implied that a law which did not cater for the exercise of discretion, should not be deemed to be in accordance with the law.

47. Furthermore, he considered that such legislation did not pursue any legitimate aim within the meaning of Article 8 § 2. The applicant took the view that the mere fact that a law was enacted in pursuance of a State's positive obligations did not mean that any resulting measure was automatically proportionate. Indeed, the domestic courts had not specified any pressing social need. In the light of the fact that the law provided for a burden of proof in civil cases (consisting of a balance of probabilities), in the applicant's view, ordering the test could not have been considered "necessary" as the same result could be achieved by less restrictive means. The State's positive obligation could have been fulfilled by allowing the court to invite a party to a filiation suit to submit to a genetic test, or allowing for inferences to be drawn from a refusal to undergo the test, which would have allowed the applicant to present his defence nonetheless.

48. The applicant also complained about the findings of the constitutional jurisdictions, specifically their failure to look in detail into the proportionality of the measure. On the contrary they had made a superficial analysis and failed to conduct a thorough and correct assessment of the relationship between the conflicting interests at stake. In the present case, those interests had concerned each party's individual human rights, and both deserved protection. It was even more necessary for the constitutional jurisdictions to carry out such an assessment given that the law did not allow for a judge in filiation proceedings to consider the interests at play before ordering such tests, unless the person in question was a minor. He noted that while relying on the Court's case-law, the domestic court had failed to draw a distinction between the facts of the cases already decided by the ECtHR and those in the present case, which were intrinsically different. He also noted that the case of *Canonne v. France* ((dec.), no. 22037/13, 2 June 2015) as relied on by the Government was not comparable to the present case, given that in that case, Mr Canonne had refused to undergo the test.

(b) The Government

49. The Government acknowledged that the mandatory taking of the genetic sample in the context of the paternity suit could constitute an interference with the applicant's Article 8 rights, but argued that it was justified. However, they also argued that in the present case there had been no interference, given that the applicant had not shown that he had been adversely affected. They noted that while the DNA testing had established his paternity, the applicant had continued to reside abroad with his family.

50. The Government submitted that the measure at issue had had a basis in domestic law, namely Article 100A of the Civil Code, which also allowed parties to produce additional evidence. The provision was clear and left no room for interpretation as to whether the court could order such a test. Article 70A was even clearer, in that it set out a step-by step-procedure to be followed and also provided for an appeal.

51. The Government noted that the Court had established in a number of cases that the right to identity (which includes the right to know one's parents) was an integral notion of private life and that the State must have an appropriate and adequate mechanism in order to establish the parentage with certainty. They referred to *Mikulić v. Croatia* (no. 53176/99, ECHR 2002-I), *Jäggi v. Switzerland* (no. 58757/00, ECHR 2006-X) and *Pascaud v. France* (no. 19535/08, § 62, 16 June 2011). Thus, according to the Government, the measure had been necessary to establish X's paternity, as X had a vital interest protected by the Convention in receiving the information enabling her to uncover the truth about an important aspect of her identity. Under Maltese law, the Civil Code had compelled the father to submit to the DNA test in order to secure X's right. Nevertheless, the domestic courts were vested with discretionary powers in deciding whether to order the DNA test, in the child's best interests. This allowed them to examine each case on its own merits and to strike a fair balance between the competing rights. They referred to *Canonne* (cited above).

52. The Government further submitted that the applicant had had the opportunity to produce evidence and rebut the allegation. They also noted that in its judgment of 21 June 2007 the domestic court had examined all the evidence before it, including the genetic test, but also the fact that it had transpired from the witness testimony that the applicant and his family had met X and her family, and that the applicant had helped X and her family to settle both in Malta and in the United Kingdom. The applicant had been aware that X was his daughter, and there had been numerous occasions when he had resided with her and her family. Thus, the domestic court had relied on a plurality of elements, as had also been the case in *Canonne* (cited above).

53. The Government further noted that the applicant could have challenged the DNA test by producing an *ex parte* report to do so. Indeed the fact that the test had been ordered at the evidence-gathering stage did

not mean that the applicant could not have produced any evidence in support of his pleas. On the contrary, had the DNA test been negative, it would have been the best means for the applicant of challenging the allegation of his paternity. The mere fact that the result did not corroborate his arguments did not mean that there had been a violation of his rights. Moreover, the applicant could have appealed against the decree ordering the test result as provided by Article 70A(5) of the Civil Code. However, he had failed to so.

2. The Court's assessment

(a) General principles

54. The Court has previously held that the taking of cellular material and its retention and the determination and retention of DNA profiles extracted from cellular samples constitute an interference with the right to respect for private life within the meaning of Article 8 § 1 of the Convention (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 71 to 77, ECHR 2008).

55. Such interference will be in breach of Article 8 of the Convention unless it can be justified under its paragraph 2 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned (see *Peruzzo and Martens v. Germany* (dec.), no. 7841/08 and 1 other, § 34, 4 June 2013).

56. While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for private or family life. These positive obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *Mikulić*, cited above, § 57 and *S.H. and Others v. Austria* [GC], no. 57813/00, § 87, ECHR 2011). Further, respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality. This includes obtaining the information needed to uncover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see, for example, *Călin and Others v. Romania*, nos. 25057/11 and 2 others, § 83, 19 July 2016, with further references).

57. The Court has already found violations of Article 8 in cases where the domestic system failed to provide for measures to compel a putative parent to comply with a court order to undergo genetic testing (see *A.M.M. v. Romania*, no. 2151/10, § 61, 14 February 2012 and *Mikulić*, cited above, § 61) or governing the consequences of such non-compliance (ibid.).

Nevertheless, while the Court opined that putative sons and daughters have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity, it also considered that it must be borne in mind that the protection of third persons (like the applicant in the present case) may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing (see *Mikulić*, cited above, § 64 and *Pascaud*, cited above, § 62).

58. However, in *Pascaud* (cited above, §§ 63-69), the Court held that the protection of the interest of the putative father does not on its own suffice to deprive the applicant (the putative son) of his Article 8 rights. In that case, the fact that the domestic courts had annulled the results of a DNA test (on the basis of a procedural error – namely the lack of explicit consent of the donor of the sample), thus giving precedence to the right of the putative father as opposed to the right of the son to know his origins, gave rise to a breach of Article 8.

59. In *Tsvetelin Petkov v. Bulgaria* (no. 2641/06, § 55, 15 July 2014), where the applicant had been declared the father of the child in proceedings in which he had not participated, and thus in the absence of a DNA test, the Court considered that a DNA test was the scientific method available at the time for accurately determining paternity of a child and its probative value substantially outweighed any other evidence presented by the parties to prove or disprove the biological paternity. Consequently, had the applicant been given an opportunity personally to participate in the court proceedings, he would have been able definitively to settle the matter of paternity by undergoing a DNA test. That would have been in the interest of all parties concerned. Thus, his absence from the proceedings was in breach of his Article 8 rights. This shows that, even in paternity cases, the Court must assess 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 *Ahrens v. Germany*, no. 45071/09, § 40, 22 March 2012; *Kautzor v. Germany*, no. 23338/09, § 80, 22 March 2012 and *Tsvetelin Petkov*, cited above, § 49 et seq.).

60. In the context of the use of time-limits for the institution of paternity proceedings, the Court has acknowledged that a putative father's interest in being protected from claims concerning facts that go back many years cannot be denied, and in addition to that conflict of interest between putative father and child, other interests may come into play, such as those of third parties, essentially the putative father's family, and the general interest of legal certainty (see *Laakso v. Finland*, no. 7361/05, § 46, 15 January 2013; see also *Konstantinidis v. Greece*, no. 58809/09, § 52, 3 April 2014). However, in the context of DNA testing in paternity proceedings, the Court has held that an individual's interest in discovering

his parentage does not disappear with age, quite the reverse (see *Pascaud*, cited above, § 65, and *Jäggi*, cited above, § 40).

(b) Application to the present case

61. Turning to the circumstances of the present case, the Court considers that the order to undergo the DNA test, and the actual testing despite the applicant's objections, constitute interference with the applicant's private life (contrast *Cakicisoy and Others v. Cyprus* (dec.), no. 6523/12, § 51, 23 September 2014 – where the Court found that there was no interference given that the applicants consented voluntarily to give the samples).

62. As to whether the measure was lawful, the Court reiterates that according to the Court's established case-law, the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law, and also refers to the quality of the law in question, requiring it to be accessible to the person concerned and foreseeable as to its effects (see *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V).

63. The applicant argued that the measure was not in accordance with a law of sufficient quality (see paragraph 44 above), because (i) it breached the equality-of-arms principle by making it compulsory for a party to filiation proceedings to adduce evidence against himself, despite the opposing party having been unable to fulfil the burden of proof necessary in civil proceedings, (ii) it was mandatory and therefore not subject to any assessment or discretion by the domestic courts, and (iii) it was unforeseeable as to its consequences where a person refused to submit to the test in question.

64. The Court notes that it is not disputed that the interference was ordered pursuant to Article 100A of the Civil Code. In the Court's view, the remaining questions related to the measure's lawfulness, such as the consequences of the measure for the proceedings, the automatic nature of the rule and the alleged unforeseeability in certain cases, are closely linked to the issue of proportionality and fall to be examined as an aspect thereof, under paragraph 2 of Article 8 (see, *mutatis mutandis*, *Maskhadova and Others v. Russia*, no. 18071/05, § 216, 6 June 2013; *T.P. and K.M. v. the United Kingdom*, [GC], no. 28945/95, § 72, ECHR 2001-V, and *Chapman v. the United Kingdom* [GC], no. 27238/95, § 92, ECHR 2001-I). Without prejudice to those considerations, the Court is satisfied that the impugned measure was "in accordance with the law" within the meaning of Article 8 of the Convention.

65. The Court further considers that the interference pursued a "legitimate aim" – namely the protection of the rights and freedoms of others, in the instant case X's rights and freedoms. As held by the Constitutional Court in the present case, according to the Court's case-law, respect for private life requires that everyone should be able to establish details of one's identity as an individual human being and that an

individual's entitlement to such information is of importance because of its formative implications for his or her personality. This includes obtaining the information needed to uncover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see, for example, *Călin and Others*, cited above, § 83). Thus, by providing for such testing, the State was attempting to fulfil its positive obligations towards X

66. Nevertheless, the Court must examine whether the required balance was reached in the light of the applicant's Article 8 rights.

67. The Court would note at the outset, as regards the applicant's criticism of the law, that in cases arising from an individual petition its task is usually not to review the relevant legislation or a particular practice in the abstract. Instead, it must confine itself as far as possible, without losing sight of the general context, to examining the issues raised by the case before it. Here, therefore, the Court's task is not to review, *in abstracto*, the compatibility with the Convention of the law at issue, but to determine, *in concreto*, the effect of the interference on the applicant's right to private life (see *Maskhadova and Others*, cited above, § 227 and *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 69-70, 20 October 2011).

68. In the present case, the applicant complained that the law failed to respect the equality-of-arms principle, both because of the timing of the order and on account of the weight accorded to such evidence.

69. The Court cannot agree that, as claimed by the applicant, the order was made at a stage when he had not yet been authorised to submit evidence. The Court notes that the Director of the Public Registry made his request to the court to order the relevant test on 11 February 2013. This was followed by the same request by X on 13 May 2013, after she had submitted all her evidence. At that stage the applicant had already filed his submissions in reply and put forward his defence – there was no procedural impediment on his putting forward his own affidavit, or any other relevant evidence. Nor was this a case where he had asked to submit evidence and been refused. On 22 May 2013 he objected to the test and some days later Y was cross-examined. It follows that both parties had had the opportunity to submit their evidence on equal grounds before the Civil Court (Family Section) until that point in the procedure. Moreover, in the present case, the Civil Court (Family Section) refrained from issuing the order at that stage, precisely in view of the applicant's arguments and his request to refer the matter to the constitutional jurisdictions – which request it upheld. Indeed, it was only after fully-fledged proceedings before the constitutional jurisdictions, at two instances, that the Civil Court (Family Section) ordered the test (on 18 October 2015), and as argued by the Government (see paragraph 53 above) and as appears from the facts (see paragraph 29 above), at that stage the applicant could still adduce other evidence or challenge the outcome of the test.

70. The applicant also complained about the weight given to such evidence and its "self-incriminatory" nature. Firstly, the Court reiterates that a DNA test is the scientific method available (at the time – in the early 2000s – and still today) for accurately determining paternity of a child, and its probative value substantially outweighs any other evidence presented by parties to prove or disprove biological paternity (see *Tsvetelin Petkov*, cited above, § 55). The Court considers that this in itself does not undermine the rights of the parties to the proceedings; what is of importance is that they are given an opportunity personally to participate in the court proceedings (see, by implication, *Tsvetelin Petkov*, cited above, § 55). In the present case the applicant had had the opportunity to be personally present, as well as to submit evidence and cross-examine witnesses, although it appeared that he preferred to be represented at the hearings by the lawyer of his choice (contrast, *Tsvetelin Petkov*, § 12, where the applicant had not participated in the proceedings and was not aware of the judicial pronouncement and the decision not to appeal against it was taken by a lawyer appointed *ex-officio*). Thus, in the present case, it cannot be said that the applicant had not been involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests.

71. Secondly, the Court observes that, in the criminal sphere Article 8 of the Convention does not as such prohibit recourse to a medical procedure in defiance of the will of a suspect, or in defiance of the will of a witness, in order to obtain evidence (see, respectively, *Jalloh v. Germany* [GC], no. 54810/00, § 70, ECHR 2006-IX and *Caruana v. Malta*, (dec.), no. 41079/16, 15 May 2018). What is of paramount importance is that the measure is in accordance with the relevant Convention requirements (ibid.). Thus, such methods, including in the civil sphere, are not in themselves contrary to the rule of law and natural justice. The Court notes that in such an assessment the legitimate aim is of particular importance and that in the present case, the impugned action was aimed at fulfilling the State's positive obligations arising under Article 8 of the Convention *vis-à-vis* X.

72. The applicant further argued that the order to submit to the test was mandatory, and that the law did not provide for what consequences would arise in the event that a person refused to submit to the test.

73. Primarily, the Court reiterates that it is for the national authorities, notably the courts, to interpret and apply domestic law. It is not its function to interpret domestic law, nor to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (*Leyla Şahin v. Turkey* [GC], no. 44774/98, § 94, ECHR 2005-XI and *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 184, 8 November 2016). The Court notes that under Article 100A the court "may" order such tests. However, when read in connection with

Article 70A, it could appear that such courts have no discretion as to whether or not to order the test, save in the case of minors. Indeed, the Constitutional Court, in the present case, admitted that in certain cases an issue may arise as to the compatibility of such an imposed measure with the Convention. It is therefore true that on paper the measure appears to be mandatory; however, the Court is not convinced that in practice a court would order such a test without regard to any other consideration, such as, for example, that a *prima facie* case was made out. Similarly, the Court cannot ignore that once an order is made, the individual concerned may appeal against such an order. Admittedly, the scope of such an appeal has not been debated before this Court, and thus begs the question as to whether a court hearing such an appeal would be competent to perform a balancing exercise, which would provide a relevant procedural safeguard in circumstances such as those of the present case. Nevertheless, while noting that the law may require fine-tuning, the Court will confine itself to its application in the present case.

74. As mentioned previously, in the instant case, the Civil Court (Family Section) refrained from ordering the test when it had been requested to so. Instead it held a hearing to examine the applicant's objections in this respect. After hearing submissions, it considered that the applicant's concerns were neither frivolous nor vexatious and referred the applicant's concerns to the constitutional jurisdictions, which, at two instances, proceeded with an assessment of the interests at stake. They found that the interests of X in determining her paternity outweighed those of the applicant, in the circumstances of the present case (see paragraphs 24 and 25 above). Moreover, the Court finds nothing arbitrary in those decisions, which were taken in the light of this Court's case-law. Indeed, it was only after fully-fledged constitutional proceedings – undertaken at the applicant's request – that the test was ordered. This was an avenue open to the applicant (since under Maltese law an individual can also complain of breaches of the Convention which are about to occur), and of which he availed himself in full knowledge of his procedural rights and available safeguards at the domestic level. Thus, while the procedure might be cumbersome (for both the parties and the judicial system) and certainly prolonged the outcome of the civil case, it cannot be said that it did not serve the purpose of examining the interests at stake and determining whether ordering the test would have been in breach of the applicant's Article 8 rights. It follows that the order to undergo the test in the present case was not made on the basis of its mandatory nature.

75. It follows that, in the circumstances of the present case, beyond the parties' submissions during the civil proceedings, the Civil Court (Family Section) ordering such measure had also had the benefit of two judgments by the constitutional jurisdictions, which balanced the interests of both the party subject to the measure and that of X, who had requested it. The Court

consequently finds that the decision-making process, taken as a whole, was fair and provided the applicant with the requisite protection of his interests safeguarded by Article 8. In line with its above-mentioned case-law, the Court is also satisfied that the measure was necessary in a democratic society in order to protects X's rights.

76. Lastly, the applicant claimed that the consequences of a refusal to submit to the test were not foreseeable. The Court notes, however, that the applicant submitted to the test a few days after it was ordered. The applicant has not claimed that the sample had been taken in a manner contrary to the relevant procedure (see, *a contrario, Yuriy Volkov v. Ukraine*, no. 45872/06, § 87, 19 December 2013) or, in particular by using excessive use of force. In view of the fact that the applicant complied with the order, it cannot be said that he was the victim of any unforeseeable consequences which did not apply to his case.

77. In conclusion, the Court finds that, in the present case, by ordering the applicant to undergo a DNA test, after having carried out the requisite balancing exercise of the interests at stake, in judicial proceedings in which the applicant participated through counsel of his own choosing and in which his defence rights were respected on a par with those of his adversary, the domestic courts struck a fair balance between the interests of X to have paternity established and that of the applicant not to undergo the DNA tests.

78. Accordingly, there has been no violation of Article 8.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that Mr Mifsud's heir, Ms Margaret Mifsud, can pursue his application;

2. *Declares* the application admissible;

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

Done in English, and notified in writing on 29 January 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Branko Lubarda
Deputy Registrar	President