CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF SHOFMAN v. RUSSIA

(Application no. 74826/01)

JUDGMENT

STRASBOURG

24 November 2005

FINAL

24/02/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Shofman v. Russia,

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

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 3 November 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 74826/01) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Leonid Mikhaylovich Shofman, on 5 September 2001. The applicant was a Russian national at the time of the events complained of; he subsequently obtained German nationality.

2. The applicant, who had been granted legal aid, was represented before the Court by Mr G. Rixe, a lawyer practising in Bielefeld, Germany. The Russian Government ("the Government") were represented by their Agent, Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, a violation of Article 8 of the Convention, in that proceedings to disclaim his presumed paternity were held to be time-barred under the law in force at the material time.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 25 March 2004, the Court declared the application partly admissible.

6. Neither the applicant nor the Government filed observations on the merits (Rule 59 § 1).

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1957 and lives in Gross-Rohrheim (Germany).

9. On 10 August 1989 the applicant registered his marriage with Ms G. in Novosibirsk. After the marriage they moved to St. Petersburg.

10. On 12 May 1995, during her stay at her parents' home in Novosibirsk, Ms G. gave birth to a son to whom she gave her surname, despite objections from the applicant. Shortly thereafter the birth was registered; the applicant was named as the child's father in the register.

11. In late September 1995 Ms G. and her son returned to St. Petersburg. The applicant believed that he was the boy's father and treated him as his own.

12. On 28 March 1996 the applicant moved to Germany. Until September 1997 he waited for Ms G. and the son to join him there. However, in a letter of September 1997, Ms G. informed him that she had no plans to continue their marriage and would be applying for maintenance for the child. At about that time the applicant's relatives in Novosibirsk advised him that he was not the boy's father.

13. On 16 December 1997 the applicant petitioned for divorce and brought an action contesting paternity. On 12 April 1999 the divorce was granted.

14. On 16 November 2000 the Zheleznodorozhniy District Court of Novosibirsk delivered judgment in the paternity action. It noted that genetic (DNA) tests of 28 June 1999 and 5 June 2000 demonstrated that the applicant could not be the boy's father. Although Ms G. maintained that the applicant was the father, in the absence of any doubts as to the accuracy of the tests, the court established that the applicant was not the father of her son.

The District Court ruled, however, that the case was governed by the RSFSR[1] Marriage and Family Code of 30 July 1969 because the child had been born before 1 March 1996, that is to say before the new Family Code of the Russian Federation came into effect. The RSFSR Marriage and Family Code set a one-year limitation period for an action contesting paternity, the starting point of which was calculated from the date the putative father was informed that he had been registered as the father. As the applicant had not contested paternity when the child was born and had only applied to the courts in December 1997, after the expiry of the time-limit, his action was held to be time-barred. The fact that a new Family

1. RSFSR – Russian Soviet Federalist Socialist Republic.

Code had been introduced which did not lay down a limitation period for paternity actions was irrelevant because it was only applicable to family-law disputes arising after 1 March 1996.

15. On 15 March 2001, on an appeal by the applicant, the Novosibirsk Regional Court upheld the judgment of 16 November 2000.

16. On 20 April and 26 October 2001 the Novosibirsk Regional Court and the Supreme Court of the Russian Federation, respectively, refused requests by the applicant for supervisory review.

17. On 12 September 2002 the Justice of the Peace of the Third Court Circuit of the Zheleznodorozhniy District of Novosibirsk granted Ms G.'s claim for maintenance and made a charging order over the applicant's interest in a flat.

18. On 15 September 2003 the Zheleznodorozhniy District Court of Novosibirsk upheld the maintenance order.

II. RELEVANT DOMESTIC LAW

19. The RSFSR Marriage and Family Code of 30 July 1969 (*Кодекс РСФСР о браке и семье*) provided that a person entered in the birth register as the father of a child could contest the entry within one year of the date he became or should have become aware that the entry had been made (Article 49).

20. The Family Code of the Russian Federation of 29 December 1995 (*Семейный кодекс РФ*, in force from 1 March 1996) provides that a person entered in the birth register as the father of a child may contest the entry by means of judicial proceedings (Article 52 § 1). It does not set any time-limit for bringing an action.

21. Resolution no. 9 of the Plenary Supreme Court of the Russian Federation of 25 October 1996 "On application by courts of the Family Code of the Russian Federation to the cases concerning paternity and maintenance" established that, in respect of children born before 1 March 1996, the RSFSR Marriage and Family Code was applicable and, accordingly, the time-limit for contesting paternity was one year from the date the person became or should have become aware of his registration as the child's parent.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

22. The applicant complained under Article 8 of the Convention that he had been prevented from instituting proceedings to contest paternity by the fact that, for statute-of-limitations purposes, time had started to run from the date the birth was registered. Article 8 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. Arguments by the parties

1. The applicant

23. The applicant submitted, firstly, that even though the paternity proceedings had been aimed at the dissolution of existing family ties, the determination of his legal relations with his child undoubtedly concerned his private life (*Rasmussen v. Denmark*, judgment of 21 November 1984, Series A no. 87, p. 13, § 33). The State had a positive obligation under Article 8 to secure respect for private life even in the sphere of the relations of individuals between themselves (*Botta v. Italy*, judgment of 24 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 422, § 33). In particular, the child had the right under Article 8 to establish a legal relationship with his natural father (*Mikulić v. Croatia*, no. 53176/99, §§ 64-66, ECHR 2002-I) and the husband had the right to contest paternity in order to establish that he was not the biological father. In the applicant's opinion, Article 8 guaranteed the right to dissolve a family tie which was not the result of a biological bond. He concluded on the basis of the *Kroon* judgment that biological and social reality should prevail over legal presumptions and the quest for legal certainty of relations, so that any presumption of paternity had to be effectively capable of being rebutted and not amount to a *de facto* rule (*Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, § 40). The right to contest paternity was accepted in all Contracting States, including the Russian Federation. The applicant contended that the decisions of the domestic courts to declare his action disclaiming paternity time-barred

constituted an interference with his right to respect for his private and family life.

24. The applicant accepted that the judgments of the domestic courts had been based on the law in force at the material time. He stressed, however, that the Government had not advanced any reasons to show that the law in question had pursued a legitimate aim and that the interference had been necessary in a democratic society. The applicant submitted that the interference had not been necessary and was not justified for the following reasons.

25. For the purposes of the limitation period provided for in the national law and applied in the applicant's case, time had started to run irrespective of whether the husband had any doubts concerning his biological paternity at that juncture. A legal father would only disclaim paternity if he was put on notice of facts that showed that he was not the father. Only under these circumstances could he make an informed choice regarding the child: either to disavow it or continue to assume the parental obligations under a form of legalised adoption. Therefore, the legislature should have allowed an appropriate period during which the putative father could make a considered decision. In the applicant's assessment, his rights would be sufficiently safeguarded only if time started to run from the date the husband learnt of the facts suggesting that he might not be the biological father. Furthermore, he contended that such an arrangement would not impair the interests of the child and that it was better psychologically for the child's legal paternity to correspond to the biological reality.

26. The applicant laid emphasis on the fact that the new Family Code (effective from 1 March 1996) contained no time-limit for contesting paternity. An authoritative legal commentary on the new Family Code written by a former Russian Justice Minister acknowledged that the position of the legislature reflected in the new Code "placed an emphasis on the factual descent of the child as opposed to the mere formalism of the civil record which impeded the establishment of the truth". In the applicant's opinion, this change at the domestic level demonstrated that the interests of the child could be safeguarded without preventing a putative father from contesting paternity.

27. The applicant asserted that in most other Contracting States either the limitation period for contesting paternity was relatively long in countries in which time was calculated from the child's birth, or time only started to run once the legal father became aware of facts showing that he was not the biological father. In certain countries there was no time-limit at all or the limitation period was very long.

28. Finally, the applicant submitted that by the time he had discovered that he might not be the biological father the time-limit had already expired. There were no interests of the child that conflicted with his right to disclaim paternity because he had been living permanently in Germany since

28 March 1996 and there had been no actual family bond between him and the child.

2. The Government

29. The Government submitted that the judgments of the domestic courts were fully in compliance with the domestic law, notably the RSFSR Code of Marriage and Family, which was applicable in the applicant's case. The domestic courts established that the applicant had agreed to his registration as the child's father in July 1995 and, accordingly, could have contested the entry before 30 June 1996. However, he had not issued proceedings until December 1997 and his action had therefore been time-barred. The Government concluded that there had been no interference with the applicant's right to respect for his private and family life.

B. The Court's assessment

1. Applicability of Article 8 of the Convention

30. The Court has already examined cases in which a husband wished to institute proceedings to contest the paternity of a child born in wedlock. In those cases the question was left open whether the paternity proceedings aimed at the dissolution in law of existing family ties concerned the applicant's "family life" because of the finding that, in any event, the determination of the father's legal relations with his putative child concerned his "private life" (*Yildirim v. Austria* (dec.), no. 34308/96, 19 October 1999; and *Rasmussen*, cited above, § 33).

31. In the instant case the applicant sought, by means of judicial proceedings, to rebut the legal presumption of his paternity on the basis of biological evidence. The purpose of those proceedings was to determine his legal relationship with Ms G.'s son, who was registered as his own.

32. Accordingly, the facts of the case fall within the ambit of Article 8.

2. General principles

33. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There may in addition be positive obligations inherent in ensuring effective "respect" for private or family life. These 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, with further references).

34. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard

must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, § 49; *Kroon*, cited above, § 31).

35. The Court reiterates that its task is not to substitute itself for the competent domestic authorities in regulating paternity disputes at the national level, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see *Mikulić*, cited above, § 59; *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55). The Court will therefore examine whether the respondent State, in handling the applicant's paternity action, has complied with its positive obligations under Article 8 of the Convention.

3. Compliance with Article 8 of the Convention

36. The applicant does not dispute that the domestic courts' decisions were "in accordance with the law", notably Article 49 of the RSFSR Marriage and Family Code, which applied to disputes involving children born during the period it was in force. It provided a right to contest paternity within one year only after the husband learnt or should have learnt of the registration of the birth. Time began to run under the limitation period irrespective of whether or not the husband had any doubts about his biological paternity.

37. A comparative examination of the Contracting States' legislation on the institution of paternity actions reveals that there is no universally adopted standard. With the notable exception of the small number of States that have no statutory time-limit for bringing proceedings contesting paternity, a limitation period exists which is usually of six months or a year, but may be as long as two years.

38. However, the difference between the various legal systems that is relevant to the present case is not only the length of the limitation period as such, but also its *dies a quo*. In some States the period is calculated from the moment the putative father knew or should have known that he had been registered as the child's father. The other States, which are approximately equal in number, accept as the starting point the date he learnt or should have learnt of circumstances casting doubt on the child's legitimacy. Many States in the latter category have introduced a second time-limit, making it possible to disclaim paternity only when the child is still young. A few States in which time starts to run from the child's birth, irrespective of the father's awareness of any other facts, also fall into the latter category.

39. The Court has previously accepted that the introduction of a time-limit for the institution of paternity proceedings was justified by the desire to ensure legal certainty in family relations and to protect the interests of the

child (*Rasmussen*, cited above, § 41). In the *Yildirim* decision it found that "once the limitation period for the applicant's own claim to contest paternity had expired, greater weight was given to the interests of the child than to the applicant's interest in disproving his paternity" (cited above). However, this finding was made in cases where the applicant had known with certainty, or had had grounds for assuming, that he was not the father from the first day of the child's life but – for reasons unconnected with the law – had taken no steps to contest paternity within the statutory time-limit (see *Yildirim*, cited above; *Rasmussen*, cited above, §§ 8 and 10).

40. The situation in the present case was, however, different. It appears that for some two years after the child's birth the applicant did not suspect that the child was not his and reared him as his own. He was apprised of circumstances casting doubt on his paternity in September 1997, by which time the statutory time-limit had already expired. Once the applicant became aware that the biological reality might be different, he brought a legal action without delay. Within three months of the relevant information being brought to his attention, he filed a petition for divorce and brought an action contesting paternity.

41. The Court notes that the District Court acknowledged on the basis of genetic evidence that the applicant was not the child's father (see paragraph 14 above). It was not therefore the absence of an established biological fact that caused the applicant's paternity action to fail (see, in contrast, *Nylund v. Finland* (dec.), no. 27110/95, 29 June 1999, where the domestic courts rejected the applicant's claim seeking a determination on whether a biological bond existed between him and the child). Indeed, it was common ground between the parties that the applicant would have had a right under domestic law to contest the paternity had he lodged the action within one year after the registration of the birth.

42. The Court notes that the legal systems of the Contracting States have produced different solutions to the problem which arises when the relevant circumstances only become known after the expiry of the time-limit. In some States, in certain exceptional cases a court may grant leave to institute proceedings out of time (*Rasmussen*, cited above, § 24). In others the authority to do so is vested in the public prosecutor (see *Yildirim*, cited above).

43. In the applicant's case, the power of appreciation of the domestic courts was circumscribed by Article 49 of the RSFSR Marriage and Family Code. That provision was capable of adequately securing the interests of a husband who, on learning of a fact or date of birth that suggested that the child was not his, could make an informed choice and either accept the legal presumption of paternity or challenge it in the courts. It made, however, no allowance for husbands in the applicant's situation who did not become aware of the biological reality until more than a year after the registration of the birth. The Government did not give any reasons why it should have been

"necessary in a democratic society" to establish an inflexible time-limit with time running irrespective of the putative father's awareness of the circumstances casting doubt on his paternity and not to make any exceptions to the application of that time-limit.

44. According to the Court's case-law, the situation in which a legal presumption is allowed to prevail over biological and social reality, without regard to both established facts and the wishes of those concerned and without actually benefiting anyone, is not compatible, even having regard to the margin of appreciation left to the State, with the obligation to secure effective "respect" for private and family life (*Kroon*, cited above, § 40).

45. The Court considers that the fact that the applicant was prevented from disclaiming paternity because he did not discover that he might not be the father until more than a year after he learnt of the registration of the birth was not proportionate to the legitimate aims pursued. It follows that a fair balance has not been struck between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence.

46. The Court concludes that, despite the margin of appreciation afforded to the respondent State, it has failed to secure to the applicant the respect for his private life, to which he is entitled under the Convention.

There has therefore been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Non-pecuniary damage

48. The applicant claimed 8,000 euros (EUR) as compensation for non-pecuniary damage. He submitted that the rejection of his action to contest paternity had caused him pain and suffering. He referred to comparable awards in the cases of *McMichael v. the United Kingdom* (judgment of 24 February 1995, Series A no. 307-B, § 103), *Amuur v. France* (judgment of 25 June 1996, *Reports* 1996-III, § 36), and *Nsona v. the Netherlands* (judgment of 28 November 1996, *Reports* 1996-V, § 106).

49. The Government considered that the claim was excessive and unreasonable and that a mere finding of a violation would suffice.

50. The Court accepts that the applicant has suffered damage of a non-pecuniary nature as a result of the State's failure to comply with its positive obligations relating to the right to respect for his private life. The Court considers that the non-pecuniary damage sustained by the applicant is not sufficiently compensated for by the finding of a violation of the Convention. Making an assessment on an equitable basis, the Court awards the applicant EUR 6,000, plus any tax that may be chargeable on that amount.

2. Pecuniary damage

51. The applicant sought an exemption from his obligation to pay child maintenance and reimbursement of the amounts he had already paid.

52. The Government contested this claim, arguing that it was not supported by appropriate evidence.

53. As regards the applicant's claim for injunctive relief in respect of the payment of maintenance for the child, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-..., with further references). The Court is not empowered under the Convention to grant exemptions or declarations of the kind sought by the applicant (see *Dudgeon v. the United Kingdom* (Article 50), judgment of 24 February 1983, Series A no. 59, § 15; *McMichael*, cited above, § 105; *Couez v. France*, judgment of 24 August 1998, *Reports* 1998-V, §§ 32-36).

54. As regards the applicant's claim for the reimbursement of maintenance payments, the Court notes that the applicant did not indicate the amounts that had already been paid or provide any documents in support of his claim. Accordingly, it makes no award under this head.

B. Costs and expenses

55. Relying on documentary evidence, the applicant claimed EUR 1,888.48, less the amount he had received in legal aid, in respect of the proceedings before the Court, comprising his lawyer's fees, postage and copying costs and value-added tax. He claimed EUR 2,116.60 for legal and experts' fees and travel expenses in the domestic proceedings. Finally, he claimed EUR 223.43 for the costs of translation of the domestic judgments.

56. The Government submitted that the applicant had not shown that he had paid Mr Rixe's bill. They also considered it inappropriate to include the

value-added tax because, in their view, it would mean that the Russian authorities were contributing to the German treasury.

57. The Court reiterates that it will award legal costs and expenses only if satisfied that these were necessarily incurred and reasonable as to quantum. It notes that the costs and expenses claimed by the applicant were supported by appropriate evidence and did not appear disproportionate to the amount of work performed in the case. However, a certain reduction is to be applied as some of the applicant's complaints were declared inadmissible. Making its assessment on the basis of the available information, the Court awards the applicant EUR 4,000 less EUR 701 received by way of legal aid from the Council of Europe, plus any tax that may be chargeable on that amount.

C. Default interest

58. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 6,000 (six thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 3,299 (three thousand two hundred and ninety-nine euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN Registrar	Christos ROZAKIS President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Lorenzen is annexed to this judgment.

C.L.*.
S.N.*.

CONCURRING OPINION OF JUDGE LORENZEN

I have agreed with the majority that there has been a violation of Article 8 but only with some hesitation for the following reasons:

The assessment of to what extent and under what conditions a registered paternity may be contested is very difficult involving a number of conflicting interests. Thus the "biological reality" is only one of them, and it may in the circumstances of a given case be outweighed by for instance the interests of the child, the child's mother or the society in preserving the stability of the legal status of persons. An example of that is the Court's decision of 19 October 1999 in *Yildirim v. Austria*. It is therefore not astonishing that a survey of the legislations in the Contracting States on the institution of paternity actions reveals that there is no universally adopted standard, but on the contrary the various legal systems differ considerably according to the political, social and cultural traditions. In my opinion the Court should be careful not to impose a general opinion on how such conflicting interests should be assessed but leave a wide margin of appreciation to national legislators.

The former Russian legislation only made a contestation possible until one year after the birth of the child irrespective of the circumstances of the case. Even if such a limited access to contest a paternity is not unique in the legislations of the Contracting States, it must nevertheless be justified. However, the respondent Government have not advanced any arguments in that respect, and for that reason I can agree to the finding of a violation in the present case.