

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

FOURTH SECTION

CASE OF BOLJEVIĆ v. SERBIA

(Application no. 47443/14)

JUDGMENT

Art 8 • Positive obligations • Time-bar precluding DNA test of deceased man and review of final judgment approving his disavowal of paternity, without applicant's knowledge, before such tests became available • Absence of arbitrariness in the domestic courts' reasoning • Applicant's vital and overriding interest in establishing the identity of his biological father • Disavowal of paternity discovered many years after the expiry of the five-year time-limit for the re-opening of proceedings • Domestic law not allowing for the applicant's specific situation to be taken into account • Private life of the deceased purported father not affected by a request for DNA testing • Preservation of legal certainty not sufficient in itself for depriving the applicant of the right to ascertain his parentage

STRASBOURG

16 June 2020

FINAL

16/09/2020

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



In the case of Boljević v. Serbia,

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

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Branko Lubarda,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Jolien Schukking,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 47443/14) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Peđa Boljević ("the applicant"), on 20 June 2014;

the decision to give notice of the application to the Serbian Government ("the Government");

the parties' observations;

Having deliberated in private on 3 March, 5 May and 26 May 2020,

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

INTRODUCTION

The application concerns the applicant's request for the establishment of his purported father's paternity based on DNA testing methods which only became available many years after the domestic courts had already ruled on the issue.

THE FACTS

1. The applicant was born in 1969 and lives in Ečka. The applicant was represented by Mr A. Mandić, a lawyer practising in Belgrade.

2. The Government were represented by their Agent, Ms Zorana Jadrijević Mladar.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE PATERNITY PROCEEDINGS

4. On 23 November 1971 the Zrenjanin District Court (*Okružni sud u Zrenjaninu*) held that a certain Mr A was not the applicant's biological father. Furthermore, the Titograd Municipal Registrar (*matičar SO*

Titograd) was ordered by the court to amend the official register of births accordingly. At the time, Titograd (now called Podgorica) was the capital of Montenegro, which was, like Serbia, a constituent part of the Socialist Federal Republic of Yugoslavia.

5. The case had been brought by Mr A against the applicant and his mother and concerned only the paternity issue. The applicant, who was a minor, was represented by a guardian, a lawyer from Zrenjanin, who had been appointed by the local social care centre (*organ starateljstva*) in order to protect his interests. In its reasoning, the District Court held that Mr A and the applicant's mother had met between 10 and 13 July 1969. It further noted that they had got married on 11 August 1969 and that the applicant had been born on 25 December 1969, some four months later. Since the available medical documentation did not indicate that the birth had been premature, it followed, according to the District Court, that Mr A could not have been the applicant's biological father. The court essentially reached that conclusion on the basis of witness testimony as to when the applicant's mother and Mr A had met. The applicant's mother, for her part, maintained throughout the proceedings that she had had sexual relations with Mr A from the spring of 1969 onwards, that is before they were married. A number of other witnesses were also examined by the court, but their statements were deemed irrelevant. Lastly, although blood tests were carried out, they were ultimately considered inconclusive in terms of establishing whether Mr A was the applicant's biological father.

6. Following an appeal lodged by the applicant and his mother, on 31 August 1972 the Vojvodina Supreme Court (*Vrhovni sud Vojvodine*) upheld the District Court's judgment, as well as its reasoning, and it thereby became final. The Supreme Court also noted, *inter alia*, that it had not been necessary to examine one witness, even though she had apparently been invited to the wedding of Mr A and the applicant's mother, which had allegedly been initially planned for 1 May 1969. In the Supreme Court's view, this witness's testimony would have been irrelevant as her statement would have had no bearing on when the sexual relations between Mr A and the applicant's mother might have taken place. The applicant was again represented by the same appointed guardian in the course of the appeal proceedings.

7. The applicant alleges that he only found out about the above-mentioned judgments in the course of the inheritance-related proceedings brought following the death of Mr A (in 2011 or 2012 according to the case file). Up until that point in time, the applicant considered it undisputed that Mr A was his biological father. The latter, according to the applicant, never did anything that might have cast any doubt on this.

II. THE APPLICANT'S ATTEMPTS TO REOPEN THE PATERNITY PROCEEDINGS

8. On 4 January 2012 the applicant and his mother requested the reopening of the proceedings (*podneli predlog za ponavljanje postupka*) concluded by the judgment of the Vojvodina Supreme Court of 31 August 1972 (see paragraph 6 above). Since the applicant's purported father had died, the request was directed against his legal heirs. The applicant and his mother informed the court as to when and how the applicant had learned of the existence of that judgment and of the Zrenjanin District Court's judgment of 23 November 1971 (see paragraphs 4 and 7 above), and noted that notwithstanding those judgments, Mr A had always been recognised as the applicant's father in the official register of births (*matična knjiga rođenih*). Neither Mr A nor the applicant's mother had ever informed the applicant of the judgments. Finally, the applicant and his mother observed that DNA testing had not been possible in the 1970s, but that such a test could now be carried out on the basis of a court order. All of the above, according to them, warranted the reopening of the civil proceedings in question in order to confirm that Mr A was the applicant's biological father.

9. On 9 January 2012 the Zrenjanin High Court (*Viši sud u Zrenjaninu*) rejected the applicant's request for reopening on procedural grounds. It stated, *inter alia*, that: (i) the impugned judgments had been adopted in 1971 and 1972, hence many years ago; (ii) the applicant as a minor had, in any event, had a guardian appointed to represent him in the proceedings before the Zrenjanin District Court; (iii) the guardian had also subsequently lodged an appeal with the Vojvodina Supreme Court; (iv) there was no evidence to the effect that the courts in question had acted unlawfully or had otherwise restricted the participation of the applicant through his guardian in the course of the proceedings; and (v) the claim that the applicant's mother had failed to inform him of the judgments in question at the relevant time was not in and of itself sufficient to justify the reopening sought by the applicant. In those circumstances, the Zrenjanin High Court concluded that the applicant had failed to prove that his request had been lodged in compliance with the deadline set out in the Civil Procedure Act.

10. On 18 January 2012 the applicant and his mother lodged an appeal against that decision. In their appeal, they reiterated, *inter alia*, the arguments set out in their request of 4 January 2012 (see paragraph 8 above), adding that the applicant's mother had never tried to conceal the truth from the applicant to his detriment but did not want to "burden him with the judicial injustice" in question. Admittedly, as a lay person, she had not fully understood the legal consequences of such a decision. In any event, the original proceedings had been deeply flawed, the facts had not been established properly, the forensic science at the time (involving a blood test)

had been inconclusive, witnesses who had been heard had perjured themselves in court and the applicant's mother had not been given an opportunity to put questions to them. Finally, the applicant and his mother noted that Mr A had never attempted to amend the information contained in the official register of births, in which he was still recognised as the applicant's father, and that the applicant's State-appointed guardian himself had also failed to inform the applicant subsequently of his rights regarding the establishment of Mr A's paternity.

11. On 31 January 2012 the Novi Sad Court of Appeal (*Apelacioni sud u Novom Sadu*) upheld the Zrenjanin High Court's decision of 9 January 2012 (see paragraph 9 above), as well as its reasoning. The appellate court noted, in particular, that the applicant's claim that he had been informed of the impugned judgments only recently was irrelevant since in the original proceedings he had been represented by an appointed guardian at two levels of jurisdiction.

III. THE PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

12. On 21 March 2012 the applicant lodged an appeal with the Constitutional Court (*Ustavni sud*). In the appeal, he essentially reiterated his earlier arguments and alleged that he had been denied the right to establish the true identity of his biological father by means of a DNA test, in breach of the European Convention on Human Rights and the Protocols thereto. The applicant also maintained that he had suffered a violation of his right to a fair trial and a breach of his rights to a legal remedy and equal protection before the courts, as enshrined in the Constitution (see paragraphs 16-17 below).

13. On 23 January 2014 the Constitutional Court ruled against the applicant. In so doing, it rejected, firstly, the applicant's procedural-fairness complaint as incompatible *ratione materiae* with the provisions of the Constitution since the impugned decisions of the ordinary courts had merely concerned their refusal to reopen proceedings which had already been terminated by means of a final court judgment. Secondly, the Constitutional Court noted that the applicant's request for the reopening of the proceedings in question had been considered at two levels of jurisdiction and that the Constitution did not guarantee a favourable outcome in each and every case. Thirdly, as regards the applicant's complaint with respect to the equal protection of his rights before the courts and the right of a child to know the identity of his or her father, the Constitutional Court held that these rights could not, considered constitutionally, be deemed to have been impacted in any way by the impugned court decisions, given both their content and their legal nature.

IV. OTHER RELEVANT FACTS

14. In its judgment of 23 November 1971 (see paragraph 4 above) the District Court noted, *inter alia*, that following the applicant's birth, Mr A had been recorded as his father. The applicant's birth certificates (*izvodi iz matičnog registra rođenih*) issued by the Montenegrin authorities on 2 September 2014 and 14 June 2019 both still identified Mr A as the applicant's father.

RELEVANT LEGAL FRAMEWORK

I. THE CONSTITUTION OF THE REPUBLIC OF SERBIA (*USTAV REPUBLIKE SRBIJE*; PUBLISHED IN THE OFFICIAL GAZETTE OF THE REPUBLIC OF SERBIA – OG RS – no. 98/06)

15. Article 18 provides, *inter alia*, that "human and minority rights guaranteed by the Constitution shall be implemented directly", as are rights that are "secured by the generally accepted rules of international law ... [and] ratified international treaties". Human and minority rights are also to "be interpreted ... pursuant to valid international standards on human and minority rights, as well as the practice of international institutions which supervise their implementation".

16. Article 32 provides, *inter alia*, for a right to a fair trial in civil and criminal proceedings.

17. Article 36 enshrines, *inter alia*, the principle of equal protection of rights before the courts, as well as the right of everyone to an appeal or another legal remedy in respect of any decision involving the determination of his or her rights, obligations or lawful interests.

18. Article 170 provides that "a constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers that violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies [for the protection of those rights or freedoms] have already been exhausted or have not been prescribed".

II. THE 2004 CIVIL PROCEDURE ACT (*ZAKON O PARNIČNOM POSTUPKU*, PUBLISHED IN OG RS nos. 125/04 AND 111/09)

19. At the material time Article 279 § 1 of the Civil Procedure Act provided, *inter alia*, that a civil court would reject a claim as inadmissible were it to conclude that the matter before it had already been adjudicated by means of a final decision.

20. Article 422 provided, *inter alia*, that a case concluded by means of a final court decision could be reopened: (i) if a party to the proceedings in

question had unlawfully been denied an opportunity to participate in them; (ii) if a person who did not have standing to be a party to the proceedings had in fact participated as such, or if there were other relevant issues in terms of the parties' authorisation and/or legal representation; (iii) if the impugned final decision was based on false testimony of a witness or a forensic expert, or on forged documents; (iv) if the decision had been adopted as a result of a crime committed by a judge, a lay judge, a party to the proceedings, a party's legal guardian and/or legal representative or indeed by any third person; (v) if subsequently an opportunity arose for a party to the proceedings to rely on another final court decision adopted on the same issue and between the same parties but on an earlier date; (vi) if the impugned final decision was based on another decision adopted by a court of law or an administrative body that had in the meantime been overturned, quashed or annulled; (vii) if the impugned final decision was based on the determination of a preliminary legal issue which itself had subsequently been adjudicated differently by another authority; (viii) if a party to the proceedings had subsequently learned of new facts or evidence which could have resulted in a more favourable outcome of the proceedings had they been known before; (ix) if the European Court of Human Rights had subsequently rendered a decision pertaining to the same or a similar legal issue in respect of the respondent State; and (x) if the Constitutional Court had subsequently found, in connection with the proceedings in question, a violation of the rights and/or freedoms guaranteed by the Constitution.

21. Article 424 provided, *inter alia*, that with regard to the grounds referred to under (i) and (viii) above, a request could be lodged within a period of thirty days from when the party seeking the reopening had been served with the final decision in question or could have informed the court of the new facts or evidence. In any event, once five years had elapsed after the impugned decision had become final no reopening could be sought, except in respect of the grounds referred to under (i), (ii), (ix) and (x) above.

III. THE 2011 CIVIL PROCEDURE ACT (*ZAKON O PARNIČNOM POSTUPKU* – PUBLISHED IN OG RS nos. 72/11, 49/13, 74/13, 55/14, 87/18 AND 18/20)

22. Article 426 provides, *inter alia*, that civil proceedings concluded by means of a final court decision may be reopened, following an application by a party thereto, if a judgment of the European Court of Human Rights has been delivered "in which a violation of human rights, relevant to the more favourable outcome of the proceedings in question, has been established".

23. This legislation repealed and replaced the 2004 Civil Procedure Act on 1 February 2012.

IV. THE FAMILY ACT (*PORODIČNI ZAKON*, PUBLISHED IN OG RS nos. 18/05 AND 72/11)

24. Article 55 § 1 and Article 251 § 1 of the Family Act provide, *inter alia*, that if need be, a child may at any time bring paternity proceedings, that is without any deadlines being applicable. Article 255 of the same Act provides that if a child lodges a paternity claim after his or her purported father's death, it is the latter's heirs who would be the defendants in the proceedings or, if there are no such persons, that the defendant would be the Republic of Serbia itself.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that he should have had the opportunity to establish the identity of his biological father by means of a DNA test, and in so doing referred to the Convention as well as a number of the Protocols thereto.

26. The Court, being the master of the characterisation to be given in law to the facts of the cases before it (see, among many other authorities, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018), considers that the above complaint falls to be examined under Article 8 of the Convention, which provision, in so far as relevant reads as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests 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

1. The Court's jurisdiction ratione materiae

27. As the question of applicability is an issue of the Court's jurisdiction *ratione materiae*, the general rule of dealing with applications should be respected and the relevant analysis should be carried out at the admissibility stage unless there is a particular reason to join this question to the merits. No such particular reason exists in the present case and the issue of the applicability of Article 8 of the Convention falls therefore to be examined at the admissibility stage (see, *mutatis mutandis*, *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018).

28. The Court has held on numerous occasions that paternity-related proceedings fall within the scope of Article 8 (see, for example, *Mikulić v. Croatia*, no. 53176/99, § 51, ECHR 2002-I; *Jäggi v. Switzerland*, no. 58757/00, § 25, ECHR 2006-X; and *Backlund v. Finland*, no. 36498/05, § 37, 6 July 2010). In the instant case the Court is not called upon to determine whether the proceedings to establish parental ties between the applicant and his biological father concern "family life" within the meaning of Article 8, since in any event the right to know one's ascendants falls within the scope of the concept of "private life", which encompasses important aspects of one's personal identity, such as the identity of one's parents (see *Odièvre v. France* [GC], no. 42326/98, § 29, ECHR 2003-III, and *Backlund*, cited above, § 37). Accordingly, the facts of the case fall within the ambit of Article 8 of the Convention and the Court has jurisdiction *ratione materiae* to examine them.

2. The Government's objection regarding the non-exhaustion of domestic remedies

(a) Submissions by the parties

29. The Government maintained that the applicant had not made use of an existing and effective domestic remedy. In particular, he should have lodged a new paternity claim based on Article 55 of the Family Act (see paragraph 24 above) and then, as part of those proceedings, proposed that a DNA test be carried out in order to establish the identity of his biological father. Such a claim could have been lodged at any time, there being no legal deadline for doing so. It would also not have been rejected as *res judicata* given the applicant's own pressing interest and the need to have the paternity issue finally resolved. In support of their arguments, the Government also referred to what they considered to be the relevant case-law of the Court in respect of Serbia (see *Jevremović v. Serbia*, no. 3150/05, § 101, 17 July 2007).

30. The Government furthermore submitted that, in any event, the applicant had not made proper use of the constitutional appeal procedure given that his complaints, as raised in the constitutional appeal itself, had been of a "very general nature" and had not been adequately substantiated. The Government therefore fully endorsed the Constitutional Court's decision, as well as its reasoning (see paragraph 13 above). They also maintained that the Constitutional Court could not have exceeded the scope of the applicant's complaints, which were essentially procedural in nature, concerning, as they did, the refusal of the ordinary courts to grant his request for the reopening of the proceedings concluded in the 1970s.

31. The applicant maintained that he had complied with the exhaustion requirement and, in particular, that he had properly raised his complaints before the Constitutional Court but had obtained no redress. Regarding the

civil claim under Article 55 of the Family Act, referred to by the Government, he submitted that such a claim would have been precluded because there had already been a final judgment on the same issue adopted by courts of law in the 1970s (see paragraphs 4-6 above).

(b) The Court's assessment

(i) General principles

32. The Court reiterates that States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system (see, among many authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV, and *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 70, 25 March 2014). Where there are constitutional mechanisms designed for the protection of fundamental human rights and freedoms, as in Serbia, it is incumbent on the aggrieved individual to test the extent of that protection (see, *inter alia*, *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, § 51, 1 December 2009).

33. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others*, cited above, § 66, and *Vučković and Others*, cited above, § 71).

34. Article 35 § 1 also requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance (see, for instance, *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236; *Gäfgen v. Germany* [GC], no. 22978/05, §§ 144 and 146, ECHR 2010; and *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I) and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see *Vučković and Others*, cited above, § 72).

35. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II). The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Akdivar and Others*, cited above, § 71; *Scoppola v. Italy (no. 2)*

[GC], no. 10249/03, § 70, 17 September 2009; and *Vučković and Others*, cited above, § 74).

36. The Court has, however, also frequently emphasised the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13; *Akdivar and Others*, cited above, § 69; and *Vučković and Others*, cited above, § 76). Where, for example, more than one potentially effective remedy is available, the applicant is only required to use one remedy of his or her own choosing (see, among many other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009; *Nada v. Switzerland* [GC], no. 10593/08, § 142, ECHR 2012; *Göthlin v. Sweden*, no. 8307/11, § 45, 16 October 2014; and *O'Keeffe v. Ireland* [GC], no. 35810/09, §§ 109-11, ECHR 2014 (extracts)).

37. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact pursued, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Akdivar and Others*, cited above, § 68; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 69, ECHR 2010; *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010; and *Vučković and Others*, cited above, § 77).

(ii) Application of these principles to the present case

38. Turning to the present case, the Court notes that, even though the Family Act has been in force since 2005, the Government have failed to provide it with any domestic case-law to the effect that a new paternity claim based on Article 55 § 1, Article 251 § 1 and Article 255 of the Family Act (see paragraph 24 above) could in fact have afforded the kind of redress sought by the applicant, that is, to have the identity of his biological father established by means of a DNA testing procedure irrespective of the existence of a final court decision on the same paternity issue adopted in the 1970s (see, notably, the case-law concerning the burden of proof cited in paragraph 37 above). The judgment in *Jevremević*, referred to by the Government (see paragraph 29 above), and where the Court found that the only avenue by which one of the applicants could have established whether or not the respondent was her biological father was through a civil suit is likewise of no relevance to the present case since it concerned regular paternity proceedings where there was no prior final court ruling on the matter. Furthermore, Article 279 § 1 of the Civil Procedure Act, which was in force at the time when the applicant would have brought his new paternity suit, provided that a civil court would reject a claim as

inadmissible were it to conclude that the matter before it had already been adjudicated by means of a final court decision (see paragraph 19 above). In those circumstances, the Court cannot but conclude that the applicant was not obliged to make use of the avenue of redress indicated by the Government, which, at best, could be described as merely theoretical (see the case-law cited in paragraph 33 above). The Court might, however, reconsider its position on this issue in any future cases should it transpire that the domestic courts have in the meantime started providing effective redress to persons in a situation similar to that of the applicant.

39. It is lastly noted that in his appeal lodged with the Constitutional Court the applicant complained, *inter alia*, that he had been denied the right to establish the true identity of his biological father by means of a DNA test, in breach of the Convention (see paragraph 12 above). With this in mind, and in view of Article 18 of the Constitution, which provides, *inter alia*, for "direct implementation" of human rights secured by "ratified international treaties" (see paragraph 15 above), the Court is of the opinion that the applicant did in fact raise at domestic level the substance of the complaint which he subsequently brought before it (see the case-law cited in paragraph 34 above).

40. In view of the foregoing, the Government's two-pronged objection as regards the exhaustion of domestic remedies must be rejected in its entirety.

3. Other grounds of inadmissibility

41. The Court notes that the applicant's complaint is also not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

42. The applicant reaffirmed his complaint, adding that the domestic courts in the proceedings for the reopening of the earlier civil suit had not properly taken into account the fact that he had only learnt of the final judgment concerning his purported father's paternity in the course of the inheritance-related proceedings following the latter's death (see paragraph 7 above). Denying the right of a child to know who his real father was, and denying him access to modern DNA testing methods in order to find out, was in the applicant's view unacceptable from the standpoint of the Convention. Also, a child's interest in having the identity of his biological parent established did not diminish with the passage of time. Ultimately, the applicant maintained that there was clearly no system in place at the

domestic level which could have provided him with the comprehensive redress needed in his case.

43. The Government acknowledged that the applicant had been unaware of the existence of the 1971 judgment until after his purported father's death. He also had a legitimate interest in ascertaining the true identity of his biological father now that new DNA testing methods had made this possible. In the Government's opinion, however, the domestic courts in the present case had been unable to deal with the substantive issue of whether Mr A was indeed the applicant's biological father given the existing temporal limitations concerning the reopening of the earlier proceedings concluded in the 1970s. In fact, since the applicable statutory deadlines had all long since expired, the courts had had no choice but to reject the request for reopening as time-barred, the deadlines in question having themselves been both reasonable in terms of their duration and necessary in order to preserve legal certainty. According to the Government, the applicant should instead have lodged a new civil claim based on Article 55 of the Family Act (see paragraph 29 above). Had he used this avenue of redress and subsequently been denied the opportunity to have the identity of his biological father established by means of a DNA test, it would then have been reasonable to discuss whether the respondent State had failed to comply with the requirements of Article 8 of the Convention. In the specific circumstances of the present case and in the absence of such proceedings, the Government maintained that there had been no violation of that provision.

2. The Court's assessment

(a) Whether the case involves a positive obligation or an interference

44. 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 *Kroon and Others v. the Netherlands*, 27 October 1994, § 31, Series A no. 297-C; *Mikulić*, cited above, § 57; *Jäggi*, cited above, § 33; and *Backlund*, cited above, § 39). 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*, 26 May 1994, § 49, Series A no. 290, and *Backlund*, cited above, § 39).

45. 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, *inter alia*, *Różański v. Poland*, no. 55339/00, § 62, 18 May 2006, and *Mikulić*, cited above, § 59). The Court will therefore examine whether the respondent State, in dealing with the applicant's attempt to establish the identity of his biological father by means of DNA testing, has complied with its positive obligations under Article 8 of the Convention (see, *mutatis mutandis*, *Backlund*, cited above, § 40).

(b) Whether the refusal to reopen the earlier civil proceedings was in accordance with the law and pursued a legitimate aim

46. The Court notes that Article 422 of the Civil Procedure Act provided, *inter alia*, that a case concluded by means of a final court decision could be reopened if a party to the proceedings in question had subsequently learned of new facts or evidence which could have resulted in a more favourable outcome of the proceedings had they been known before (see paragraph 20 above, under point (viii)). However, in accordance with Article 424 of the same Act a request to that effect could only be lodged within a period of five years from when the impugned decision had become final (see paragraph 21 above). In those circumstances, the Court considers that while this particular ground for reopening might have offered redress to the applicant, it was quite clear that the five-year deadline made this impossible after 1977, when the applicant was eight years old and, according to his version of facts, accepted by the Government (see paragraph 43 above), was still unaware of the judgments excluding that Mr A was his biological father (see paragraph 7 above).

47. Article 422 of the Civil Procedure Act also provided for the possibility of having proceedings reopened if a party to such proceedings had unlawfully been denied an opportunity to participate in them (see paragraph 20 above, under point (i)). Moreover, Article 424 of the Civil Procedure Act stated that a request to that effect could be lodged within a period of thirty days from when the party seeking the reopening had been served with the final decision in question (see paragraph 21 above). In this connection, however, the Court would note that in its decision of 9 January 2012, the Zrenjanin High Court held that the applicant's participation in the proceedings in question had been secured through the appointment of a legal guardian, as he had been a minor at the time, and that there was also no other evidence that the courts in the 1970s had acted unlawfully in the course of those proceedings (see paragraph 9 above). On 31 January 2012 the Novi Sad Court of Appeal endorsed that reasoning and added that the applicant's assertion that he had been informed of the impugned judgments only recently was irrelevant since in the original

proceedings his rights had been properly secured through the appointment of a legal guardian (see paragraph 11 above). In those circumstances, the Court cannot but conclude that there is no evidence of arbitrariness in the reasoning of the Zrenjanin High Court or indeed of the Novi Sad Court of Appeal.

48. The Court further notes that when it comes to the reopening of proceedings already concluded by means of a final court judgment, in a paternity context or otherwise, there are, by the nature of things, serious potential implications in terms of legal certainty, among other considerations. The Court has also already held that time-limits in paternity-related proceedings, in particular, have a legitimate aim and are intended to protect the interests of purported fathers from stale claims, thus preventing possible injustices if courts were required to make findings of fact that went back many years (see *Backlund*, cited above, § 43). In addition to that, it is of course possible that domestic courts may legitimately refuse to reopen proceedings on other grounds, unrelated to time-limits, if those grounds are properly deemed as unsubstantiated.

49. In view of the foregoing, the Court finds that the Serbian judicial authorities' refusal to reopen the civil proceedings concluded in the 1970s was both in accordance with the law and pursued the legitimate aims of ensuring legal certainty and protecting of the rights of others. The Court must therefore ascertain whether the refusal was proportionate within the meaning of Article 8 of the Convention.

(c) Whether a fair balance has been struck

(i) General principles

50. When deciding whether or not there has been compliance with Article 8 of the Convention, the Court must determine whether, on the facts of the case, a fair balance was struck by the State between the competing rights and interests at stake. Apart from weighing the interests of the individual *vis-à-vis* the general interest of the community as a whole, a balancing exercise is also required with regard to competing private interests. In this connection, it should be observed that the expression "everyone" in Article 8 of the Convention applies to both the child and the putative father. On the one hand, people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life (see *Odièvre*, cited above, § 42). Indeed, persons seeking to establish the identity of their ascendants 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 and eliminate any uncertainty in this respect (see *Mikulić*, cited above, §§ 64-65, and *Jäggi*, cited above, § 38). On the other hand, a putative father's interest in being protected from claims concerning facts that go back many years cannot be

denied. In addition to that conflict of interest, 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 *Backlund*, cited above, § 46). Finally, with regard to the deceased's own right to respect for his private life, the Court would reiterate that the private life of a deceased person from whom a DNA sample is to be taken cannot be adversely affected by a request to that effect made after his death (see, for example, *Jäggi*, cited above, § 42).

51. While performing the "balancing of interests test" in the examination of cases concerning, for example, limitations on the institution of paternity claims, the Court has taken a number of factors into consideration. For instance, the particular point in time when an applicant becomes aware of the biological reality is pertinent. The Court will therefore examine whether the circumstances substantiating a particular paternity claim are met before or after the expiry of the applicable time-limit (see, for instance, *Mizzi v. Malta*, no. 26111/02, §§ 109-11, ECHR 2006-I (extracts), and *Shofman v. Russia*, no. 74826/01, §§ 40 and 43, 24 November 2005, concerning disavowal of paternity claims). Furthermore, the Court will examine whether or not an alternative means of redress exists in the event the proceedings in question are time-barred. This would include, for example, the availability of effective domestic remedies to secure the reopening of the time-limit (see, for example, *Mizzi*, cited above, § 111) or exceptions to the application of a time-limit in situations where a person becomes aware of the biological reality after the time-limit has expired (see *Shofman*, cited above, § 43, and *Backlund*, cited above, § 47).

52. The yardstick against which the above factors are measured is whether a legal presumption has been allowed to prevail over biological and social reality and if so whether, in the circumstances, this is compatible, having regard to the margin of appreciation left to the State, with the obligation to secure effective "respect" for private and family life, taking into account the established facts and the wishes of those concerned (see *Kroon and Others*, cited above, § 40). For example, the Court has found that rigid limitation periods or other obstacles to actions contesting paternity that apply irrespective of a putative father's awareness of the circumstances casting doubt on his paternity, without allowing for any exceptions, violated Article 8 of the Convention (see *Shofman*, cited above, §§ 43-45; *Mizzi*, cited above, §§ 80 and 111-13; and *Backlund*, cited above, § 48).

53. The Court deems the above considerations also broadly applicable, *mutatis mutandis*, to the context of positive obligations in the present case, where the applicant sought to reopen earlier proceedings rather than bring a new paternity claim (see, *mutatis mutandis*, *Paulík v. Slovakia*, no. 10699/05, §§ 44-47, ECHR 2006-XI (extracts); *Tavlı v. Turkey*, no. 11449/02, §§ 32-38, 9 November 2006; and *Jäggi*, cited above, § 36-44). The Court further reiterates that, in any event, the choice of the

means calculated 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, of course, 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*, cited above, § 46; *X and Y v. the Netherlands*, 26 March 1985, § 24, Series A no. 91; and *Backlund*, cited above, § 49).

(ii) Application of these principles to the present case

54. Turning to the present case and in view of the above, the Court notes, firstly, that the applicant attempted to establish the identity of his biological father, which has been recognised as a vital interest protected by the Convention and one which does not disappear with age (see *Jäggi*, cited above, § 40, and *Mifsud v. Malta*, no. 62257/15, § 60 *in fine*, 29 January 2019). Secondly, the applicant became aware of the final judgment regarding his parentage in 2011 or 2012, decades after the applicable deadline for the reopening of the proceedings in question had already expired (see paragraphs 7 and 46 above) but had then, on 4 January 2012, within a year at the most and possibly much sooner, lodged his request for reopening (see paragraphs 7-8 above; compare and contrast to, for example and *mutatis mutandis*, *Silva and Mondim Correia v. Portugal*, nos. 72105/14 and 20415/15, § 68, 3 October 2017, where the applicants had waited fifty and twenty-six years respectively, after reaching the age of majority, to bring their paternity suits). There was also no legal way for the applicant in the present case, notwithstanding his very specific situation, to have the deadline for the submission of his request for reopening extended (see paragraphs 20-21 and the case-law cited in paragraph 51 above). After the expiry of the deadline in question, domestic law did not therefore allow for the relevant elements of the applicant's specific situation to be taken into account or for a balancing of the relevant interests to be carried out. Thirdly, as already noted above, the private life of a deceased person – that is, the applicant's purported biological father in the present case – from whom a DNA sample would have had to be taken could not have been adversely affected by a request to that effect made following his death (see the case-law cited in paragraph 50 *in fine* above). Fourthly, there is no indication in the case file as to what the position of the deceased's family would have been in respect of a DNA test and the Court does not wish to speculate on this specific point. In any event, the applicant's complaint in the present case concerned his being denied the opportunity to prove that Mr A was indeed his biological father. After all, as far as he knew, that fact was not in doubt until 2011 or 2012 and he has continued to seek certainty in terms of his personal identity ever since. In fact, while it is understandable that Mr A was recorded as the applicant's father immediately after his birth, since he was at that time married to the applicant's mother, even in birth certificates

issued much later, in 2014 and 2019, Mr A was still identified as the applicant's father (see paragraphs 5 and 14 above). Finally, for the reasons mentioned in the ambit of the examination of the non-exhaustion plea (see paragraph 38 above), the Court is unable to accept the Government's argument that the applicant should have lodged a new civil claim based on Article 55 of the Family Act (see paragraph 43 above).

55. In the light of the foregoing, the Court is of the opinion that the preservation of legal certainty cannot suffice in itself as a ground for depriving the applicant of the right to ascertain his parentage (see, *mutatis mutandis*, *Jäggi*, cited above, § 43). Indeed, the Government themselves acknowledged, in their observations, that the domestic courts in the present case had been unable to deal with the substantive issue of whether Mr A was indeed the applicant's biological father given the existing temporal limitations concerning the attempted reopening of the earlier proceedings (see paragraph 43 above). It follows that, having regard to the circumstances of the case and the overriding interest at stake for the applicant, the Serbian authorities did not, regardless of the margin of appreciation afforded to them in this context, secure to him respect for his private life as guaranteed under the Convention (compare and contrast, for example and *mutatis mutandis*, *A.L. v. Poland*, no. 28609/08, 18 February 2014, and *R.L. and Others v. Denmark*, no. 52629/11, 7 March 2017, where the finding of no violation of Article 8 was largely based on an analysis of what was in the best interests of the children who were not the applicants in those cases).

56. There has accordingly, in the very specific circumstances of the present case, been a violation of Article 8 of the Convention. It is, of course, understood that, in respect of applications involving sensitive and important issues such as the ones raised by the applicant in this case, various competing interests will be involved and a balancing exercise will have to be carried out. This in turn may, depending on the specific circumstances, lead the Court to adopt different conclusions in those cases, provided that they are consistent with the general principles outlined in paragraphs 50-53 above.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed compensation for the non-pecuniary damage suffered, but left it to the Court's discretion as to what should be the appropriate amount.

59. The Government contested this claim.

60. Having regard, *inter alia*, to Article 426 of the 2011 Civil Procedure Act, according to which civil proceedings may be reopened if the Court delivers a judgment "in which a violation of human rights, relevant to the more favourable outcome of the proceedings ... has been established" (see paragraph 22 above), the Court considers that in the circumstances of the present case the finding of a violation of Article 8 of the Convention constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant (see, also, *Jäggi*, cited above, § 55).

B. Costs and expenses

61. Since the applicant made no claim in respect of costs and expenses incurred either domestically or before the Court, the Court is not called upon to make an award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

Done in English, and notified in writing on 16 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Jon Fridrik Kjølbro
President