

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

FIFTH SECTION

CASE OF SCHNEIDER v. GERMANY

(Application no. 17080/07)

JUDGMENT

STRASBOURG

15 September 2011

FINAL

15/12/2011

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



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

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

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Isabelle Berro-Lefèvre,
Ann Power,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 23 August 2011,

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

PROCEDURE

1. The case originated in an application (no. 17080/07) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Michael Schneider ("the applicant"), on 4 April 2007.

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

3. The applicant alleged, in particular, that the domestic courts' decision to refuse him access to the boy F., of whom he claimed to be the biological father, and information about the boy's personal circumstances, violated his rights under Article 8 of the Convention.

4. On 4 January 2010 the President of the Fifth Section decided to give notice of the application to the Government. On 8 March 2010 he granted leave, under Article 36 § 2 of the Convention and Rule 44 of the Rules of Court, for Mr and Mrs H., the legal parents of the boy F., to intervene as a third party in the written proceedings before the Court. Mr and Mrs H. were represented by Mr W. Heinz, a lawyer practising in Heidelberg. The Court also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1958 and lives in Fulda.

A. Background to the case

6. From 2001 onwards Mr and Mrs H., a married couple, lived in different places as Mr H. was working in the United Kingdom while Mrs H. remained in Germany. The spouses have a daughter born in 1997. In May 2002 Mrs H. and the applicant entered into a relationship. Mrs H. became pregnant in June 2003.

7. The applicant claimed that he was the father of the child to be born, and that the birth had been planned by Mrs H. and him. This was contested by the Government and the third party interveners.

8. In September 2003 Mrs H. left the applicant and subsequently went to live with her husband in the United Kingdom.

9. On 25 November 2003 the applicant acknowledged paternity of the child to be born before the Heidelberg Youth Office.

10. On 6 March 2004 Mrs H. gave birth to a boy, F., in the United Kingdom. Mr and Mrs H. have been living in the United Kingdom since then; they raise F. together with their daughter. They acknowledged that the applicant might be F.'s biological father. They claimed, however, that it could just as well be Mr H. as they had also had intimate relations at the relevant time. The latter allegation is contested by the applicant. The spouses preferred not to verify paternity in the interest of their family relationship.

B. The proceedings at issue

1. The proceedings before the District Court

11. On 20 October 2005 the Fulda District Court dismissed the applicant's requests of 24 August 2004 for access to F. twice per month and for regular information on the boy's development.

12. The District Court noted that the applicant claimed to be F.'s biological father. The applicant had submitted that he and Mrs H. – who at the time was considering a divorce – had planned to have the child. When Mrs H. had become pregnant, the applicant had accompanied her to her medical consultations as the child's father. Mr and Mrs H., for their part, had not contested that there had been an intimate relationship between the

applicant and Mrs H. at the relevant time. However, Mrs H. had not planned to have a child and Mr H. could equally be F.'s biological father.

13. The District Court found that the applicant, even assuming that he was F.'s biological father, did not fall within the group of persons who had a right of access and information under Article 1684 or Article 1685 of the Civil Code (see paragraphs 32-33 below). He did not have a right of access under Article 1684 of the Civil Code as he was not F.'s legal father. According to Article 1592 of the Civil Code (see paragraph 35 below) the boy's legal father was Mr H., the husband of the child's mother. The applicant's acknowledgement of paternity before the Youth Office was not valid under Article 1594 § 2 of the Civil Code as Mr H.'s paternity prevailed (see paragraph 36 below). Nor was he entitled to challenge Mr H.'s paternity as the conditions of Article 1600 § 2 of the Civil Code (see paragraph 37 below) were not met. He had no right to contest Mr H.'s paternity because there was a social and family relationship between Mr H. and F., who was living with Mr and Mrs H.

14. The District Court further found that the applicant did not have a right of access under Article 1685 § 2 of the Civil Code either. He claimed to be F.'s biological father, but whether this was in fact the case was unclear. Moreover, he was not a person with whom the child had close ties and there was no social and family relationship between them. The fact that in the applicant's submission, Mrs H. and he had planned to have the child and had wanted to live together did not alter that conclusion. The applicant had never lived with Mrs H. or the child. The child had lived with Mr and Mrs H., a married couple, since his birth. During that time there had been no possibility for the applicant to build up a social and family relationship with F.

2. The proceedings before the Court of Appeal

15. On 9 February 2006 the Frankfurt am Main Court of Appeal, without hearing the parties in person, dismissed the applicant's appeal as well as his request to be allowed to offer F. presents on special occasions.

16. The Court of Appeal confirmed the District Court's finding that the applicant did not have a right of access and information under Article 1684 and Article 1686 of the Civil Code (see paragraph 34 below) as those provisions conferred rights only on a child's legal parents. Under Article 1592 no. 1 of the Civil Code it was Mr H., who was married to Mrs H. at the time of F.'s birth, who was F.'s legal father. The applicant's acknowledgement of paternity of F. did not alter that fact as it was not valid (Article 1594 § 2 of the Civil Code).

17. Furthermore, the applicant did not have a right of access and information under Article 1685 of the Civil Code. There was no social and family relationship between the applicant and F. as the applicant had so far never even seen F., let alone built up a relationship with him.

18. The Court of Appeal considered that the fundamental right to respect for one's family life under Article 6 § 1 of the Basic Law (see paragraph 30 below) and Article 8 of the Convention did not afford the applicant more far-reaching rights. It was not even established that the applicant was F.'s biological father. Paternity could, however, only be determined in separate proceedings and under certain conditions, which the applicant was most probably unable to meet. In any event, even assuming that the applicant was F.'s biological father, he would still not have a right of access and information, for lack of a social and family relationship with F. The case of *Keenan v. Ireland*, in which the European Court of Human Rights had strengthened the rights of biological fathers who had not yet built up a social and family relationship with their child, was not comparable to the present case. The facts of that case, in which the child's mother had given up the child for adoption, were not comparable to those of the present case as the interests of all persons concerned had to be weighed in the balance. In the present case, the applicant's right in his position as biological father could not outweigh the protection of the family, the mother and the child under Article 6 § 2 of the Basic Law (see paragraph 30 below). In this conflict of interests, anything which could upset a child's trust in his family had to be prevented. It was preferable that F. grew up in his family without learning about the problematic circumstances of his origin.

19. The Court of Appeal's decision was served on the applicant's counsel on 14 February 2006.

20. On 18 April 2006 the Frankfurt am Main Court of Appeal dismissed the applicant's objection alleging a violation of the right to be heard (*Anhörungsrüge*).

3. The proceedings before the Federal Constitutional Court

21. In his constitutional complaint dated 14 March 2006 the applicant claimed that the decisions of the family courts refusing him contact with and information about the personal circumstances of his child had violated, in particular, his right to respect for his family life under Article 6 of the Basic Law and Article 8 of the Convention and his right to equal treatment under Article 3 §§ 1 and 2 of the Basic Law (see paragraph 29 below) and Articles 8 and 14 of the Convention. He argued that for a biological father to relate closely to his child, so as to have a right of access and information, it was sufficient that the father was willing to take responsibility for the child. Otherwise, the child's mother would have the right to prevent any contact between father and child. Such contact, and knowledge of his own origins, were in the child's best interest. The applicant further claimed that the family courts' refusal to determine whether he was F.'s biological father and their failure to examine, with regard to the circumstances of his case and by taking evidence, whether contact with him would be in F.'s best interest had disproportionately interfered with his right to respect for his

family life. Moreover, the domestic courts' decisions had discriminated against him in his right of access and information compared to fathers of children born in or out of wedlock, mothers, grandparents and siblings.

22. On 20 September 2006 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 1 BvR 1337/06). It held that the complaint had no prospect of success as it was, in any event, ill-founded.

23. In so far as the applicant had complained about the family courts' failure to determine paternity of F., his complaint was inadmissible owing to the subsidiarity of a constitutional complaint. The applicant should have contested Mr H.'s paternity in separate proceedings under Article 1600 § 1 of the Civil Code prior to lodging his constitutional complaint.

24. In so far as the applicant complained about the family courts' refusal to grant him access to and information about F., his rights under Article 6 §§ 1 or 2 and Article 3 § 1 of the Basic Law had not been breached.

25. The parental rights guaranteed by Article 6 § 2 of the Basic Law afforded protection to the person having parental responsibility, irrespective of whether that person was the biological or the legal parent of the child. In the present case, this provision thus protected Mr H. and not the applicant. Neither Article 1684 nor Article 1686 of the Civil Code, which provided for rights of access and information only for legal parents, nor the decisions of the family courts which were based on those provisions, were in breach of Article 6 § 2 of the Basic Law.

26. The family courts' refusal to grant the applicant access under Article 1685 § 2 of the Civil Code had not violated his rights under Article 6 § 1 of the Basic Law either. Article 6 § 1 protected the relationship between a biological, but not legal, father and his child only where there was a social relationship between them which was based on the fact that the father had borne actual responsibility for the child at least for some time. Conversely, the (presumed) biological father's wish to take over responsibility or to build up a social and family relationship with the child was not sufficient to attract the protection of Article 6 § 1. As there had never been a social and family relationship between F. and the applicant, the family courts had complied with Article 6 § 1 of the Basic Law in denying the applicant a right of access pursuant to Article 1685 § 2 of the Civil Code.

27. Furthermore, the fact alone that the presumed biological father, unlike the biological mother, had no right of access to the child did not render the decisions of the family courts arbitrary and thus in breach of Article 3 § 1 of the Basic Law.

28. The decision was served on the applicant's counsel on 4 October 2006.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW

A. Domestic law and practice

1. Provisions of the Basic Law

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

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

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

2. Provisions of the Civil Code

(a) Provisions on access to and information about a child

31. Parental custody includes the right to determine access to the child (Article 1632 § 2 of the Civil Code).

32. According to Article 1684 § 1 of the Civil Code, a child has a right of access to each parent, and each parent in turn has the right and the duty to have contact with the child. The family courts can determine the scope of the right of access and prescribe more specific rules for its exercise, also with regard to third parties (Article 1684 § 3). They may restrict or suspend that right if such a measure is necessary for the child's welfare. A decision restricting or suspending that right for a lengthy period or permanently may only be taken if the child's well-being would otherwise be endangered. The family courts may order that the right of access be exercised in the presence of a third party, such as a Youth Office or an association (Article 1684 § 4).

33. Under Article 1685 § 1 of the Civil Code, grandparents and siblings have a right of access to the child if this serves the child's best interest. Article 1685 § 2 of the Civil Code, in its version applicable at the relevant time, further provides for persons with whom the child has close ties (*enge Bezugspersonen*) to have a right of access to the child if this serves the child's best interest and if they are bearing actual responsibility for the child or have done so in the past (social and family relationship). It is to be assumed, as a rule, that a person who lived with the child in domestic community for a lengthy period of time has borne such actual responsibility. Article 1684 §§ 3 and 4 apply *mutatis mutandis* (see Article 1685 § 3 of the Civil Code).

34. Under Article 1686 of the Civil Code, each parent who has a legitimate interest in obtaining information about the child's personal circumstances may request such information from the other parent in so far as this is not contrary to the child's best interest.

(b) Provisions on paternity

35. According to Article 1592 of the Civil Code, a child's father is either the man who at the date of the child's birth was married to the child's mother (no. 1), or the man who acknowledged paternity (no. 2) or whose paternity is judicially established under Article 1600d of the Civil Code (no. 3).

36. An acknowledgement of paternity is not valid as long as the paternity of another man exists (Article 1594 § 2 of the Civil Code).

37. Paternity may be challenged. Under Article 1600 § 1 of the Civil Code, entitlement to challenge paternity lies with the man whose paternity exists under Article 1592 nos. 1 and 2, with the mother and with the child, and also with the man who makes a statutory declaration that he had sexual intercourse with the child's mother during the period of conception. However, pursuant to § 2 of Article 1600, this last man has a right to challenge the paternity of the man who is the child's legal father under Article 1592 nos. 1 or 2 only if he is the child's biological father and if there is no social and family relationship between the legal father and the child. If there is no paternity under Article 1592 nos. 1 or 2 of the Civil Code, paternity is to be established by the family court (Article 1600d § 1 of the Civil Code).

B. Comparative law

38. Research undertaken by the Court in relation to 23 Council of Europe Member States shows that there is no uniform approach in the Member States of the Council of Europe to the question whether, and if so, under what circumstances, a biological father (who is not only a sperm donor) has a right to contact with his child where a different father exists in law.

39. In a considerable number of States (including Bosnia and Herzegovina, Estonia, France, Ireland, Portugal, Russia, Slovenia, Spain, the United Kingdom and Ukraine), where a child is born to a woman who is living with her husband, a biological father can ensure his contact rights by first challenging the paternity presumption in place, in some cases within a fixed time-limit. In these States, as indeed in all of the countries surveyed, a presumption exists in law to the effect that a child born of a married woman during the subsistence of the marriage is also the child of her husband. Having been recognised as the (legal) father of the child concerned, the

biological father then has a right to contact with his child like any other non-custodial parent, subject to the child's best interest.

40. According to an expert report drawn up in March 2010 by the German Institute for Youth Human Services and Family Law (*Deutsches Institut für Jugendhilfe und Familienrecht e.V.*, a registered association and non-governmental organisation), which was submitted by the Government and covered, in addition to Germany, seventeen other Council of Europe Member States, the same applied in Greece. That report, however, interpreted differently the provisions applicable in France and Spain. The applicant submitted that there were several other countries where a biological father could challenge the legal father's paternity under conditions which were less restrictive than those applicable in Germany, such as Azerbaijan, Lithuania, Moldova, Norway, San Marino and Serbia (see paragraphs 41 and 43 below for the research undertaken by the Court in respect of Azerbaijan). He contested in general terms the comparative law analysis submitted by the Government, arguing that the legal situation in only seventeen of the forty-seven Member States of the Council of Europe was not representative.

41. In a considerable number of Council of Europe Member States, according to the Court's research, the biological father of a child would, on the contrary, not be able to challenge the said paternity presumption in circumstances similar to those in the present application (see, in particular, Azerbaijan, Belgium, Croatia, Finland, Hungary, Italy, Latvia, Luxembourg, Monaco, the Netherlands, Poland, Slovakia and Switzerland). Biological fathers in those countries lack standing to bring an action to challenge that presumption, be it in all circumstances or at least in cases in which the mother is still living with her husband (see in this latter regard the law in force in Belgium and Luxembourg).

42. According to the expert report of the German Institute for Youth Human Services and Family Law submitted by the Government, the same applies in Austria, the Czech Republic, Denmark, Liechtenstein, Sweden and Turkey.

43. In these Member States it is open to the biological father to apply for contact only as a third party, not as a parent. However, in some of these States (Azerbaijan, Croatia, Finland, Hungary, Italy, Luxembourg and Poland) the biological father does not have standing to apply for contact even as a third party, as the law provides a right of contact only to legal parents and (to some extent) to other relatives.

44. According to the same expert report of the German Institute for Youth Human Services and Family Law, the biological father would also not have standing to apply for contact in Liechtenstein and in the Czech Republic.

45. In the remaining Member States surveyed by the Court in which the paternity presumption may not be challenged by a biological father

(Belgium, Latvia, Monaco, the Netherlands, Slovakia and Switzerland), different preconditions apply for that father to be granted contact if such contact is in the child's best interest. According to Article 375 bis of the Belgian Civil Code, there has to be "proof of a tie of special affection with the child"; according to Article 181 § 3 of the Latvian Civil Code, the father must have lived together with the child for a long time in the same household. In Monaco a third person can be granted contact by a judge where that would be in the best interest of the child, without additional preconditions having to be met (compare Article 300 of the Monegasque Civil Code). In the Netherlands, third persons (including mere sperm donors) may be granted contact under Articles 1:377f and 1:377a § 3 of the Civil Code of the Netherlands if they have a close personal relationship with the child, unless contacts run counter to the child's best interest. According to section 25 § 5 of the Slovakian Family Act, the biological father may be granted access if he is regarded as being "close" to the child (according to the expert report submitted by the Government, a similar provision applies in Sweden), and under Article 274a of the Swiss Civil Code, he has a right to contact in exceptional circumstances (according to the expert report submitted by the Government, the same precondition applies in Turkey).

46. According to the report submitted by the Government, Section 20 of the Danish Act on Parental Responsibility provides that access may be granted only to close relatives having close personal ties with the child concerned and only if the parents have no or hardly any contact with the child. The report further states that under Article 148 § 3 of the Austrian Civil Code, a biological father may be granted access to his child if the child's welfare is endangered otherwise.

THE LAW

I. COMPLAINT CONCERNING THE REFUSAL OF ACCESS TO AND INFORMATION ABOUT F.

47. The applicant complained that the domestic courts' decision to refuse him access to his son and information about his personal circumstances violated his right under Article 8 of the Convention to respect for his private and family life. He further submitted that the domestic courts' failure to investigate sufficiently the relevant facts concerning his relationship with his son, in particular his paternity, and the question whether access was in the child's best interest violated Article 8, read in conjunction with Article 6 of the Convention.

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

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

49. The Government contested that argument.

A. Admissibility

1. The Government's submissions

50. The Government took the view that the application was inadmissible. They argued that the applicant lodged a total of five applications with the Court concerning the proceedings here at issue. In his first to fourth applications, dated 1 September 2004, 22 December 2005, 21 March 2006 and 30 May 2006, he had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. The applications had been lodged while proceedings were still pending before the domestic courts and before he had obtained a decision of the Federal Constitutional Court. As to his fifth application, the applicant had failed to demonstrate that he had complied with the six-month time-limit under Article 35 § 1 of the Convention. The original of his application, dated 4 April 2007, had been received at the Court only on 11 April 2007, and he had failed to demonstrate that the application reached the Court by fax in good time. The Federal Constitutional Court's decision having been served on the applicant's counsel on 4 October 2006, the six-month time-limit for lodging an application had expired on 4 April 2007.

51. The Government further submitted that the application was inadmissible in so far as the applicant complained about a breach of his fundamental rights in relation to his knowledge of F.'s descent. In this respect, the applicant had failed to institute separate paternity proceedings under Article 1600 § 2 of the Civil Code (see paragraph 37 above). The Federal Constitutional Court had, accordingly, expressly rejected his complaint as inadmissible on that ground. The applicant also could not claim that such proceedings would have excessively delayed the access proceedings, which he had brought only half a year after F.'s birth. The Government further contested that paternity proceedings had been bound to fail, given that the Federal Constitutional Court had not yet ruled on the amended version of Article 1600 of the Civil Code.

2. The applicant's submissions

52. The applicant submitted that his application dated 4 April 2007 had been received at the Court by fax on that day and thus within the six-month time-limit under Article 35 § 1 of the Convention. In the alternative, he submitted that, having regard to the Federal Constitutional Court's well-established case-law and the applicable provisions of the Civil Code, a complaint to that court and to the Frankfurt am Main Court of Appeal had not been effective remedies he had been obliged to exhaust.

53. As to the Government's allegation that he had failed to exhaust domestic remedies in that he had not contested Mr H.'s paternity in separate proceedings under Article 1600 of the Civil Code, the applicant argued that the Government had not demonstrated that such proceedings were an effective remedy he was obliged to exhaust. As the family courts had convincingly noted, such proceedings were bound to fail as Mr H. was living in a social and family relationship with F. Moreover, according to the explicit reasons given by the domestic courts, it had not been decisive whether or not he was F.'s biological father. His claim for access and information had been rejected for lack of a social and family relationship between him and F., even assuming that he was F.'s biological father. In any event, as F's biological father his proceedings had only been aimed at being granted access to the boy and information about his development. He had not intended to become F.'s legal father by way of separate paternity proceedings, which would, furthermore, have unduly delayed a decision on his request for access to F. Such a course, if successful, would have ended Mr H.'s legal paternity, which might not have been in F.'s best interest.

3. The Court's assessment

54. The Court observes that the application at issue in the present case and communicated to the Government is the application dated 4 April 2007. It concerned the applicant's requests for access to and information about F. and was lodged after the decision of the Federal Constitutional Court was served on the applicant's counsel on 4 October 2006. The application was received at the Court, according to the information in its case-file, by fax on 4 April 2007 (and subsequently, on 11 April 2007, also by normal post). Accordingly, the application was lodged after all domestic remedies had been exhausted in relation to the requests for access and information. It was also lodged within six months from the date on which the final decision of the Federal Constitutional Court was served on the applicant's counsel, in compliance with Article 35 § 1 of the Convention. The Government's objections on those grounds must therefore be dismissed.

55. The Court notes the Government's further objection that the application was inadmissible in so far as the applicant complained about a breach of his fundamental rights in relation to his knowledge of F.'s

descent. In the Government's view, the applicant should have instituted separate paternity proceedings under Article 1600 § 2 of the Civil Code to settle that matter. The Court observes that in the proceedings at issue, the applicant requested access to F. and information about the boy's personal circumstances. It was only in that context that the applicant submitted that the domestic courts, in order to establish the relevant facts and to be able to rule on his requests, had been obliged to determine, *inter alia*, whether he was in fact the biological father of F. He had thus not intended, in the proceedings at issue, to be recognised as F.'s legal father – which is the aim of paternity proceedings under Article 1600 of the Civil Code.

56. The Court considers that the question whether the applicant was nevertheless obliged to institute paternity proceedings prior to his application to be granted access to and information about F. is closely linked to the substance of his complaint under Article 8 and to the scope of his rights under that provision. It therefore joins the objection raised by the Government in this respect to the merits of the case.

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

B. Merits

1. The parties' submissions

(a) The applicant

(i) Submissions on whether there was an interference

58. The applicant took the view that the relationship between F. and him as his biological father amounted to family life within the meaning of Article 8 § 1 of the Convention. He submitted that he had had a lengthy relationship with F.'s mother, Mrs H., from May 2002 until September 2003. He claimed that Mrs H. had informed him that her marriage had broken down and that her husband was living together with a new partner in the United Kingdom. Mrs H. and he had lived alternating between their respective homes. They had planned to have the child F. The applicant had accompanied Mrs H. to four medical examinations relating to her pregnancy and Mrs H. had presented him as the child's father to others, including her parents and her parents-in-law. He had acknowledged paternity of the child to be born as early as 25 November 2003. He had also received some photos of F. at his request.

59. The applicant further argued that, in any event, his intended family life with F. was protected under Article 8, given that the child's legal

parents had prevented him from developing a close personal relationship with the boy. In such circumstances, it was sufficient for him to have shown a genuine interest in the child both before and after his birth by planning a common future with the mother and child, acknowledging paternity before the child's birth and requesting access to and information about the child.

60. The applicant further alleged that the domestic courts had not sufficiently established the nature of the relationship between him and Mrs H. The latter had separated from and wanted to divorce her husband, who had been living with another woman. Moreover, they had failed to determine whether he was the biological father of F. despite the fact that they had considered this element relevant to the question whether there was a family relationship between him and F. This failure had also interfered with his right to respect for his private life as protected by Article 8 (the applicant referred to *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI, and *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I). In his view, it was the domestic courts' duty to determine the biological kinship in access proceedings when it was disputed by the child's legal parents.

(ii) Submissions on whether the interference was justified

61. The applicant argued that the interference with his rights under Article 8 had not been justified under paragraph 2 of that provision. In particular, it had not been "necessary in a democratic society".

62. In the applicant's view, the domestic courts' interpretation and application of Article 1685 § 2 of the Civil Code had been disproportionate in that it had denied him contacts with his child without examining whether such contacts would be in the child's best interest. On this point he referred to the Court's judgment in the case of *Anayo v. Germany* (no. 20578/07, 21 December 2010), in which the Court had found that a biological father had a right to contact with his child if such contact was in the child's best interest. In the applicant's submission, the domestic courts had failed to weigh the different interests at stake in the proceedings and had accorded absolute predominance to the existing family unit, which was disproportionate. They had failed to take into consideration that contacts with the biological father were generally necessary for the child's personal identity and development.

63. Thereby, the domestic courts had also failed to base their decision to deny the applicant access to and information about F. on sufficient grounds. They had taken the view that a biological father who had never seen his child should never be granted contacts with the child, irrespective of the particular circumstances of each case. However, the question of whether access was in the child's best interest had to be determined in the circumstances of the case and could not be replaced by standardised legal assumptions.

64. The applicant further contested the Government's argument that a comparative law analysis confirmed that the provisions of German law duly protected the right of biological fathers to contact with their children and that the children's best interest did not warrant a different solution. He took the view that German law accorded a considerably weaker position to the biological father than the applicable provisions in the majority of the European States (see also paragraph 40 above). He argued that the findings made in a report drawn up in March 2010 at the Government's request by the German Institute for Youth Human Services and Family Law, were not convincing and representative of the legal situation in Europe (see also paragraph 40 above).

65. Furthermore, the applicant contested the Government's argument, based on a general psychological report by expert K. which the Government had commissioned for the proceedings in the *Anayo* case, that contacts with the biological father did not generally have a positive impact on the child's well-being. He took the view that contacts between him and F. would be in F.'s best interest as he took an interest in the boy, who had a right to know his origins. Further concealing his origins might rather lead to a loss of confidence in his legal parents. As F.'s origins were known to both of his legal parents already before his birth, there was no risk that contacts between F. and the applicant would threaten the H. family or its reputation, bearing in mind that both Mr and Mrs H. had had an extra-marital relationship.

(b) The Government

(i) Submissions on whether there was an interference

66. The Government took the view that there had not been a violation of Article 8 of the Convention. The domestic courts' decisions concerning the applicant's access to and information about F. had not interfered with the applicant's right to respect for his family life. Referring to the Court's case-law (they cited, in particular, *L. v. the Netherlands*, no. 45582/99, and *Hülsmann v. Germany* (dec.), no. 33375/03, 18 March 2008), the Government argued that mere biological kinship, without any close personal relationship, was insufficient to attract the protection of Article 8 § 1. In the present case, F. lived together with his mother and his legal father in a stable family unit.

67. Moreover, even though the Court had considered that intended family life might, exceptionally, fall within the ambit of Article 8 (the Government referred to *Nylund*, cited above; *Nekvedavicius v. Germany* (dec.), no. 46165/99, 19 June 2003; and *Hülsmann*, cited above), the Government argued that this was not the case in the circumstances of the present application. They stressed that it had not been proven that the applicant was the biological father of F. and that the child was part of

Mrs H.'s and his plans for a common future. However, even assuming that this was the case, it was not sufficient that he had expressed willingness to take responsibility.

68. The Government further took the view that the domestic courts' failure to establish whether the applicant was F.'s biological father had not interfered with the applicant's right under Article 8 to respect for his family or private life. The domestic courts had assumed for the purposes of the proceedings that the applicant was F.'s biological father and had rejected his request for access to F. for lack of a social and family relationship between them. They had not been obliged to establish the applicant's paternity in the access proceedings at issue because the applicant should have instituted separate paternity proceedings for this purpose (Article 1600 of the Civil Code, see paragraph 37 above).

(ii) Submissions on whether the interference was justified

69. Even assuming that there had been an interference with the applicant's rights under Article 8 § 1 by the refusal of the domestic courts to grant him access to F. and information about the boy's development, that interference had been justified under Article 8 § 2. The alleged interference with the applicant's rights had a legal basis in Articles 1685 and 1686 of the Civil Code. It served the legitimate aim of protecting the rights and freedoms of F. and his legal parents, Mr and Mrs H.

70. That interference was also necessary in a democratic society. The domestic courts had based their decision that the applicant had not established any social ties with F. that might lead to contacts between them being in the child's best interest on relevant and sufficient reasons. They stressed that in the *Anayo* case (cited above) the Court had found that a man whose biological paternity was uncontested had a right to determination, by the domestic courts, whether contacts with his child were in the child's best interest. In the present case, however, the applicant's paternity was contested by the legal parents. To allow every man alleging to be the father of a child born in wedlock to seek to have his paternity established could seriously interfere with the rights of the members of the legal family. Moreover, such requests would not necessarily be based on the child's best interest. It was important to bear in mind that in cases like the present one the fundamental rights of the various persons concerned had to be balanced fairly against one another.

71. The Government further took the view that the German legislator, in Articles 1592, 1594, 1600, 1684 and 1685 of the Civil Code, had balanced the competing interests involved in a manner which complied with the requirements of Article 8. A comparative law analysis confirmed that these provisions, compared to the applicable law in other European countries, duly protected the right of biological fathers to contact with their children and that the children's best interest did not warrant a different approach.

German law – which did not exclude biological fathers in all circumstances from contacts with their children but allowed such contacts only if a social and family relationship existed between biological father and child and if the contacts were in the child's best interest – was in line with the general European standards on the matter.

72. In that connection, the Government relied on the findings of a report drawn up in March 2010 at their request by the German Institute for Youth Human Services and Family Law, analysing the access rights of biological fathers in 17 other Council of Europe Member States (see also paragraphs 40, 42 and 44-46 above; the report had already been submitted in the *Anayo* case, cited above).

73. Moreover, the domestic courts had fairly balanced the fundamental rights of all the individuals involved. It was of the utmost importance for the welfare of children not only to know their origins, but in particular to understand to which family they belonged and who bore responsibility for them as a mother or father. Moreover, it was justified to protect an existing family relationship between legal parents and child and the legal parents' marriage by denying a biological father the right to obtain legal paternity. It fell within the State's margin of appreciation to decide that the interests of the family, the mother and the child had to prevail over the competing interests of the biological father in obtaining access in cases where that father had shown willingness to take responsibility only by expressing his wish to share a future with the child he fathered. The same applied to the biological father's claim to be informed about the child's development.

74. The Government stressed in that context that contacts between a biological father and his children did not generally have a positive impact on the children's welfare; it depended on the individual family situation. They referred to the findings of a general psychological report by expert K. they had commissioned for the proceedings in the *Anayo* case (cited above) on the question whether the provisions of the German Civil Code on contacts between biological fathers and their children were compatible with the children's welfare.

75. The Government submitted that, according to that report, as a rule, contacts between children and the parent they were not living with became a burden for them and were thus not in their best interest if the parents involved were unable to limit their conflicts after separation. Moreover, according to the expert's findings, the total absence of contact with a biological father did not, as a rule, affect a child's social and emotional development. German legislation, which always gave an existing legal family precedence over biological fathers' rights, thus guaranteed stability and was therefore in the children's best interest. If, as the Court found in the *Anayo* case (cited above), the child's best interest had to be examined in the particular circumstances of the case, the proceedings – which the alleged

biological father might actually bring for reasons other than the child's best interest – could be a burden on the legal family .

(c) The third party interveners

76. In her submissions to the Court, Mrs H. contested that she had considered a divorce and had planned a common future with the applicant. She had planned to move to the United Kingdom after having finished her medical training and had met her husband regularly during the time they were living in different places. She had not planned to have a child with the applicant and stressed that her husband could also be F.'s father. She had met the applicant once a week. The applicant had been present, at his request, at two gynaecological examinations but had not been presented as her partner. Her husband had also been present at gynaecological examinations. F. was now six years old and fully integrated into the H. family.

77. Mrs H. took the view that contacts between the applicant and F. would jeopardise F.'s welfare and that of her whole family, including her husband, her daughter and another child born in 2007, and would impair the family's good reputation.

78. The third party interveners endorsed the Government's legal submissions.

2. The Court's assessment

(a) Whether there was an interference

79. The Court reiterates that the notion of "family life" under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that "family" unit from the moment, and by the very fact, of the birth (see *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; *L. v. the Netherlands*, no. 45582/99, § 35, ECHR 2004-IV; and *Znamenskaya v. Russia*, no. 77785/01, § 26, 2 June 2005).

80. However, a mere biological kinship between a natural parent and a child, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of Article 8 (compare *L.* , cited above, § 37). As a rule, cohabitation is a requirement for a relationship amounting to family life. Exceptionally, other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* "family ties" (see *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C, and *L.* , cited above, § 36).

81. Moreover, the Court has considered that intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases where the fact that family life has not yet fully been established is not attributable to the applicant (compare *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 143 and 146, ECHR 2004-V). In particular, where the circumstances warrant it, "family life" must extend to the potential relationship which may develop between a child born out of wedlock and the natural father. Relevant factors which may determine the real existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child both before and after the birth (see *Nylund*; *Nekvedavicius*; *L.* § 36; *Hülsmann*; and *Anayo*, all cited above; and compare *Różański v. Poland*, no. 55339/00, § 64, 18 May 2006).

82. The Court further reiterates that Article 8 protects not only "family" but also "private" life. It has been the Convention organs' traditional approach to accept that close relationships short of "family life" would generally fall within the scope of "private life" (see *Znamenskaya*, cited above, § 27, with further references). The Court thus found in the context of proceedings concerning the establishment or contestation of paternity that the determination of a man's legal relations with his legal or putative child might concern his "family" life but that the question could be left open because the matter undoubtedly concerned that man's private life under Article 8, which encompasses important aspects of one's personal identity (see *Rasmussen v. Denmark*, 28 November 1984, § 33, Series A no. 87; *Nylund*, cited above; *Yildirim v. Austria* (dec.), no. 34308/96, 19 October 1999; and *Backlund v. Finland*, no. 36498/05, § 37, 6 July 2010).

83. In the present case, the Court considers that the domestic courts' decision to refuse the applicant access to F. and information about F.'s personal circumstances did not interfere with any existing "family life" of the applicant and F. within the meaning of Article 8. Unlike, for instance, in the case of *Anayo* (cited above, §§ 10, 59), it is contested and has not been established in the proceedings before the domestic courts whether the applicant is in fact F.'s biological father. In any event, there has never been a close personal relationship between him and F. such as must be regarded as an "established family life". The applicant has never cohabited with F.– or even met him – to date.

84. The Court must therefore determine whether the applicant's intended family life with F. falls within the ambit of Article 8. Under its well-established case-law (see paragraph 81 above), this may, exceptionally, be the case in circumstances in which the fact that family life has not been established is not attributable to the applicant. This applies, in particular, to the relationship between a child born out of wedlock and the child's biological father, who are inalterably linked by a natural bond while their actual relationship may be determined, for practical and legal reasons, by

the child's mother and, if she is married, by her husband (see also *Anayo*, cited above, § 60).

85. In the present case, the Court notes the Government's argument that the applicant failed to institute separate paternity proceedings under Article 1600 § 2 of the Civil Code. In the access proceedings here at issue, the domestic courts did not determine whether the applicant – who, according to the mother, could be F.'s biological father, but so could her husband – was F.'s biological father. They found, however, that, even assuming the applicant's biological paternity, his requests for access to and information about F. had to be rejected for lack of a social and family relationship between him and F. (see paragraphs 13, 18 and 26 above).

86. Moreover, the Court is not convinced that the applicant could have validly acknowledged paternity or have contested Mr H.'s paternity and thus have been recognised not only as F.'s biological, but also as his legal father. In that latter position, he could have claimed access to F. under the (more favourable) conditions of Article 1684 of the Civil Code, and not only, as he did, under Article 1685 of the Civil Code. Under the applicable provisions of the Civil Code, as interpreted by the domestic courts at the relevant time, the applicant's acknowledgement of paternity on 25 November 2003 (see paragraph 9 above) was not valid as Mr H.'s paternity prevailed (Article 1594 § 2 of the Civil Code). The applicant further had no right to contest Mr H.'s paternity as the latter was living with F. (Article 1600 § 2 of the Civil Code). This is confirmed by the findings of the family courts (see paragraphs 13 and 18). In any event, in the proceedings here at issue, the applicant did not intend to take over the legal position as F.'s father from Mr H. – which is the aim of the separate paternity proceedings under Article 1600 of the Civil Code which the applicant did not institute (see on this matter the Federal Constitutional Court's judgment, paragraph 23).

87. Furthermore, the applicant never had any contacts with F. because Mrs and Mr H., his legal parents who were entitled to decide on his contacts with other persons (see Article 1632 § 2 of the Civil Code, paragraph 31 above), refused his requests for access. In these circumstances, the Court considers that the fact that there was not yet any established family relationship between F. and the applicant cannot be held against the latter.

88. In order for the applicant's intended family life with F. to fall within the ambit of Article 8, the Court has to determine whether there were close personal ties in practice between the applicant and F. (see paragraph 81 above). A relevant factor to verify this is the nature of the relationship between the (presumed) biological parents. Even though the applicant and Mrs H. never moved in together, it is uncontested that they had a relationship for one year and four months – which was thus not merely haphazard – at a time when Mr H. resided in the United Kingdom.

89. Moreover, the Court must have regard, in particular, to the interest in and commitment by the applicant to F. both before and after his birth. It notes in this connection that, at least from the applicant's perspective, it was planned by him together with Mrs H. to have a child. He accompanied Mrs H. to at least two medical examinations relating to her pregnancy. He further acknowledged paternity of the child to be born already before the child's birth. After F.'s birth, he received photos of the baby at his request and brought proceedings in which he claimed access to F. and information about his personal circumstances relatively speedily, less than six months after the child's birth. In the circumstances of the case, in which, as shown above, the applicant was prevented from taking any further steps to assume responsibility for F. against the legal parents' will, the Court considers that he sufficiently demonstrated his interest in F.

90. In view of the foregoing, the Court does not exclude that the applicant's intended relationship with F. fell within the ambit of "family life" under Article 8. In any event, the determination of the legal relations between the applicant and F. – that is, whether the applicant had a right of access to F. and information about his personal circumstances –, even if they fell short of family life, concerned an important part of the applicant's identity and thus his "private life" within the meaning of Article 8 § 1. The domestic courts' decision to refuse him contact with and information about F. thus interfered with his right to respect, at least, for his private life (see, *mutatis mutandis*, *Anayo*, cited above, § 62).

(b) Whether the interference was justified

91. Any such interference with the right to respect for one's private life will constitute a violation of Article 8 unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of that provision and can be regarded as "necessary in a democratic society".

92. The domestic courts' decision to refuse the applicant access to and information about F. was based on Article 1684, read in conjunction with Article 1592, Article 1685 and Article 1686 of the Civil Code. It was aimed at pursuing the best interest of a married couple, Mr and Mrs H., and of the (then two) children who were born during their marriage, who were living with them and whom they cared for, and was therefore taken to protect their rights and freedoms.

93. In determining whether the interference was "necessary in a democratic society", the Court refers to the principles established in its case-law. It has to consider whether, in the light of the case as a whole, the reasons adduced to justify that interference were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, *inter alia*, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 70, ECHR 2001-V (extracts), and *Sommerfeld v. Germany* [GC], no. 31871/96, § 62, ECHR 2003-VIII (extracts)). It cannot satisfactorily assess whether these reasons were

"sufficient" without at the same time determining 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, *inter alia*, *T.P. and K.M. v. the United Kingdom*, cited above, § 72, and *Sommerfeld*, cited above, § 66). Consideration of what lies in the best interest of the child concerned is of paramount importance in every case of this kind (see, *inter alia*, *Yousef v. the Netherlands*, no. 33711/96, § 73); depending on their nature and seriousness, the child's best interest may override that of the parents (see *Sommerfeld*, cited above, § 66, and *Görgülü v. Germany*, no. 74969/01, § 43, 26 February 2004).

94. According to the Court's well-established case-law, it must further be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding access issues or issues concerning information about the child's personal development, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see, *inter alia*, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A; *Görgülü*, cited above, § 41; and *Sommerfeld*, cited above, § 62). However, restrictions placed by the domestic authorities on parental rights of access call for strict scrutiny as they entail the danger that the family relations between a young child and a parent will be effectively curtailed (see, *inter alia*, *Elsholz v. Germany* [GC], no. 25735/94, §§ 48-49, ECHR 2000-VIII; *Sommerfeld*, cited above, §§ 62-63; and *Görgülü*, cited above, §§ 41-42). The above-mentioned principles must apply also in a case like the present one, in which the refusal of contact between a biological father and his child and the refusal of information about the boy's personal circumstances is classified, at least, as an interference with "private life" (see, *mutatis mutandis*, *Anayo*, cited above, § 66).

95. In the present case, the Court notes the domestic courts' finding that, even assuming that the applicant was F.'s biological father, he did not fall within the group of persons who had a right of access to F. and to information about the boy's personal circumstances. He was not F.'s legal father, or a person with whom F. had close ties because there had never been a social and family relationship between the two. As F. had lived with Mr and Mrs H. since his birth, there had been no possibility for the applicant to build up such a relationship with F. (see paragraphs 13-14, 16-18 and 24-27 above). The domestic courts thus refused the applicant access to F. – assuming that he was F.'s father – without examining whether contact between F. and him, in the particular circumstances of the case, would be in F.'s best interest. They further refused the applicant's request at least to be given information about F.'s personal development. There again, the domestic courts took their decision without examining in the particular

circumstances of the case whether giving such information would be in the child's best interest (for instance, in order to maintain at least a light bond with the presumed biological father) or whether, at least in this regard, the applicant's interest had to be considered as overriding that of the legal parents.

96. In determining whether the reasons given by the domestic courts for refusing the applicant access to and information about F. were "sufficient" for the purposes of paragraph 2 of Article 8 and the interference with the applicant's private life thus "necessary in a democratic society", the Court refers, first, to the findings in its judgment of 21 December 2010 in the case of *Anayo* (cited above). That case concerned the refusal of the German courts to grant Mr Anayo, who was indisputably the biological father of twins who lived with their mother and her husband, access to his children. The Court observed, in that application, that the Court of Appeal, applying Articles 1684 and 1685 of the Civil Code, had refused the applicant access to his children without giving any consideration to the question whether, in the particular circumstances of the case, contact between the twins and the applicant would be in the children's best interest. The domestic court had argued that the applicant did not fall within the group of persons entitled to claim access as he was not the children's legal father, had not borne any responsibility for them and thus had no social and family relationship with them. The Court accordingly found that the domestic court had failed to fairly balance the competing rights involved. As the reasons given by it for refusing the applicant contact with his children had thus not been "sufficient" for the purposes of paragraph 2 of Article 8, Article 8 had been violated (see ibid., §§ 67-73).

97. The Court further observes that the facts at issue in the present application differ from those in the *Anayo* case mainly in so far as the certainty of the respective applicants' paternity is concerned. It was uncontested in the *Anayo* case that the applicant was the biological father of the children concerned. In the present case, however, the mother of the boy F. acknowledged that the applicant might be F.'s father, but claimed that so might her husband, and it was not established by the domestic courts whether or not the applicant was F.'s father.

98. However, the Court considers that, in the circumstances of the case, this difference is not such as to distinguish the present application from the *Anayo* case. In fact, it becomes clear from the domestic courts' reasoning that it was irrelevant for their decision that the applicant was only presumably and not uncontestedly the biological father of F. In reasoning their decisions, the domestic courts assumed the applicant's paternity for the purposes of the proceedings (see paragraphs 13, 18 and 26). They rejected the applicant's request for contact with (and information about) F. – as did the domestic courts in the *Anayo* case – because the applicant was not F.'s legal father and there had never been a social and family relationship

between him and F. In both cases, the reasons why the biological father had not previously established a "social and family relationship" with the children / child concerned had been irrelevant for the domestic courts' findings. The courts thus did not give any weight to the fact that the respective applicants, for legal and practical reasons, were unable to alter the relationship with the children / child concerned (see *Anayo*, cited above, §§ 67, 69 and paragraphs 14, 17-18 and 26 above).

99. The Court would reiterate in that connection that it is for the domestic courts, who have the benefit of direct contact with all the persons concerned, to exercise their power of appreciation in determining whether or not contacts between a biological father and his child are in the latter's best interest. It has further noted the Government's argument, by reference to the comparative law analysis and the general psychological expert report of expert K. they had submitted to the Court, that the German legislation applied by the courts in the present case was in the best interest of the children concerned. They had further argued that always giving an existing legal family precedence over biological fathers' rights guaranteed stability, whereas examining the child's best interest in the particular circumstances of the case brought the burden of the proceedings to bear on the legal family (see paragraph 75 above).

100. The Court cannot but confirm, however, its approach taken in the *Anayo* judgment (cited above, §§ 67-73), as well as in the case of *Zaunegger v. Germany* (no. 22028/04, §§ 44 et seq., 3 December 2009, which concerned the general exclusion from judicial review of the attribution of sole custody to the mother of a child born out of wedlock; the domestic courts, applying the relevant provisions of the Civil Code, also considered parental rights of a father *prima facie* not to be in the child's best interest, without further examination on the merits). Having regard to the realities of family life in the 21st century, revealed, *inter alia*, in the context of its own comparative law research (see paragraphs 38-46 above), the Court is not convinced that the best interest of children living with their legal father but having a different biological father can be truly determined by a general legal assumption. Consideration of what lies in the best interest of the child concerned is, however, of paramount importance in every case of this kind (see paragraph 93 above). Having regard to the great variety of family situations possibly concerned, the Court therefore considers that a fair balancing of the rights of all persons involved necessitates an examination of the particular circumstances of the case. It further had regard to the Government's argument that this approach involved proceedings which placed a burden on the legal family (see paragraph 75 above). The Court notes, however, that proceedings requesting access to children may be and are in practice already currently instituted by biological fathers.

101. Having regard to the foregoing, the Court further concludes that the Government's objection that the applicant, by failing to institute separate

paternity proceedings, did not exhaust domestic remedies in relation to his complaint that the domestic courts failed to establish his paternity of F. must be rejected for the following reasons.

102. The Court is not convinced that separate paternity proceedings were an effective remedy the applicant had to exhaust in the access and information proceedings here at issue. Not only were such proceedings bound to fail on the basis of the existing domestic law, the applicant having no right to contest Mr H.'s paternity as the latter was living with F. (Article 1600 § 2 of the Civil Code, see paragraph 37 above), but they are aimed at obtaining status as a child's legal parent and terminating another man's legal paternity, and must therefore be considered to have a fundamentally different and more far-reaching objective than the mere establishment of biological paternity for the purposes of having contact with the child concerned and information about that child's development.

103. The Court notes in this connection the Government's argument that there was a danger of abuse in allowing every man alleging to be the father of a child born in wedlock to request to have his paternity established (see paragraph 70 above). It does not consider, however, that its finding that the domestic courts failed to examine, in the particular circumstances of the case, whether contacts between F. and the applicant would have been in F.'s best interest would have led to such a result. The question of establishment, in access proceedings, of biological – as opposed to legal – paternity will only arise if, in the special circumstances of the case, contacts between the alleged biological father – presuming that he is in fact the child's biological parent – and the child are considered to be in the child's best interest.

104. Having regard to the foregoing, the Court, referring, *mutatis mutandis*, to the detailed reasoning in its judgment in the case of *Anayo* (§§ 67-73), therefore considers that the domestic courts did not fairly balance the competing interests involved in the decision-making process and thus failed to provide the applicant with the requisite protection of his interests safeguarded by Article 8. They failed to give any consideration to the question whether, in the particular circumstances of the case, contact between F. and the applicant would be in F.'s best interest. They further did not examine whether, in the particular circumstances of the case, allowing the applicant's request to be given at least information about F.'s personal development would be in the child's best interest or whether, at least in this regard, the applicant's interest should have been considered as overriding that of the legal parents. They thus did not give sufficient reasons to justify their interference for the purposes of paragraph 2 of Article 8. The interference with the applicant's right to respect for his private life was therefore not "necessary in a democratic society".

105. There has accordingly been a violation of Article 8 of the Convention.

II. COMPLAINT CONCERNING DISCRIMINATION

106. The applicant further complained that the domestic courts' decisions discriminated against him in his right of access and information compared to fathers of children born in or out of wedlock, mothers, grandparents and siblings. He relied on Article 8, read in conjunction with Article 14 of the Convention; the latter provides:

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

107. The Government contested that argument.

108. The Court refers to its above findings that the applicant's rights under Article 8 were violated. The domestic courts failed to give any consideration to the question whether, in the particular circumstances of the case, contact between F. and the applicant was in F.'s best interest. They further failed to examine whether allowing the applicant's request at least to be given information about F.'s personal development was in the child's best interest or in the applicant's overriding interest. The interference with the applicant's right to respect for his private life was therefore not "necessary in a democratic society" (see paragraphs 91-105 above). Having regard to this conclusion, it does not consider it necessary to determine whether the domestic courts' decisions thereby discriminated against the applicant in breach of Article 8 read in conjunction with Article 14 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

109. 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

110. The applicant claimed not less than 25,000 euros (EUR) in respect of non-pecuniary damage. He had suffered distress as a result of the domestic courts' refusal of any contacts with his son or information about his development.

111. The Government took the view that there was no room for an award in respect of non-pecuniary damage as it had not been proven that the applicant was F.'s father. In any event, the applicant's claim was excessive.

112. The Court considers that the domestic courts' decision not to grant the applicant access to F. and information about his development without examining the question whether, in the particular circumstances of the case, such contact was in F.'s best interest or in the applicant's overriding interest must have caused the applicant some distress which is not adequately compensated by the finding of a violation alone. Making an assessment on an equitable basis, it therefore awards the applicant EUR 5,000, plus any tax that may be chargeable, under this head.

B. Costs and expenses

113. Submitting documentary evidence (including all bills and agreements as to the fees), the applicant also claimed a total of EUR 12,354.39 (including VAT) for the costs and expenses incurred, including EUR 6,387.18 for the costs and expenses before the domestic courts (Fulda District Court, Frankfurt am Main Court of Appeal and Federal Constitutional Court) and EUR 4,279.89 for those incurred before the Court (that is, a total of EUR 10,667.07).

114. The Government argued that it was not in a position to examine, on the basis of the documents submitted by the applicant, whether the costs and expenses claimed by the applicant had been necessarily incurred and were reasonable as to quantum.

115. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court finds that the costs and expenses for the proceedings before the domestic courts were aimed at redressing the breach of the applicant's rights under Article 8. Having regard also to the documents submitted by the applicant, it considers it reasonable to award the sum of EUR 10,000 (including VAT) covering costs and expenses under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

116. 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. *Joins to the merits* the objection of non-exhaustion raised by the Government in relation to the applicant's failure to institute separate paternity proceedings and *rejects* it;

2. *Declares* the application admissible;

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

4. *Holds* that there is no need to examine the complaint under Article 8, read in conjunction with Article 14 of the Convention;

5. *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,
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 10,000 (ten thousand euros), including VAT, plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (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;

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

Done in English, and notified in writing on 15 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President