FIFTH SECTION

CASE OF KAUTZOR v. GERMANY

(Application no. 23338/09)

JUDGMENT

STRASBOURG

22 March 2012

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

In the case of Kautzor v. Germany,

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

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

Having deliberated in private on 21 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 23338/09) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Heiko Kautzor ("the applicant"), on 30 April 2009.

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

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

4. On 4 May 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1) and to give priority to the application (Rule 41).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1971 and lives in Willich.

6. On 19 December 2003 the applicant married Ms D. The couple separated in June 2004. In July 2004 Ms D. informed the applicant that she was pregnant. The couple divorced on 12 November 2004.

7. On 5 March 2005 Ms D. gave birth to a daughter, M.

8. On 5 May 2006 the applicant wrote a letter to Ms D., indicating that he wished to have access to the child and to acknowledge paternity.

9. On 16 May 2006 Mr E., with the consent of Ms D., acknowledged paternity of the child before the Youth Office. On 20 June 2006 the applicant declared in a document certified by a notary that he acknowledged paternity of the child.

10. On 5 July 2006 the applicant lodged an action with the Bielefeld District Court (*Amtsgericht*) to have his paternity established, submitting that he had had sexual intercourse with the child's mother during the period of conception. Ms D. replied that Mr E. was the biological father and that he lived with the child and herself in a social and family relationship.

11. On 18 August 2006 Mr E. and Ms D. got married. The couple live together with the child M. and with two further children, born in June 2006 and May 2008.

12. On 22 August 2006 the applicant further requested the District Court to establish that Mr E. was not the child's father and submitted a statutory declaration that he had had sexual intercourse with the child's mother during the time of conception.

13. On 24 August 2006, during a first hearing, the District Court informed the parties that a guardian *ad litem* should be appointed to represent the child's interests, as a conflict of interests had arisen due to the fact that Mr E. and Ms D. had married. Ms D. declared that the applicant was not the child's father.

14. On 30 August 2006 the District Court judge submitted the case file to the judicial officer in charge of appointing guardians (*Rechtspfleger*). On 10 October 2006 the judicial officer refused to appoint a guardian.

15. On 31 October 2006 the District Court instituted separate proceedings aimed at appointing a guardian *ad litem*. On 27 November 2006 the Youth Office submitted their comments. On 30 January 2007 the District Court appointed a guardian *ad litem* to represent the child in the pending proceedings and also in case the child should lodge an action in her own right challenging paternity.

16. On 27 February 2007 Mr. E and Ms. D lodged an appeal against the guardian's appointment. On 28 March 2007 they submitted reasons for their

appeal. On 31 May 2007 the applicant requested that the appeal be rejected. On 26 June 2007 the Hamm Court of Appeal (*Oberlandesgericht*) scheduled a hearing for 11 September 2007 which was postponed on the applicant's request to 20 September 2007.

17. On 20 September 2007 the Court of Appeal confirmed the appointment of a guardian, but quashed the District Court's decision insofar as it concerned the child's representation in case she should lodge her own action.

18. On 4 January 2008 the District Court scheduled a hearing for 29 January 2008.

19. On 24 January 2008 the guardian *ad litem* submitted his observations to the Regional Court. Following a visit to the family home, he concluded that there existed a strong social and family relationship between the child and Mr E., and considered that it was most important to assure that the child was allowed to grow up undisturbed within her family. On the same day, the District Court cancelled the hearing and invited the parties to submit comments on the guardian's observations.

20. On 22 February 2008 the District Court ordered an expert opinion on the question whether a social and family relationship existed between the child and Mr E., and requested the applicant to pay an advance of 1,000 euros (EUR). On 28 March 2008 the District Court reminded the applicant to pay the advance.

21. On 14 April 2008 the applicant, referring to the guardian's submissions, conceded that a social and family relationship existed between the child and Mr E. He therefore did not consider it necessary to hear expert opinion in this respect. He contended, however, that his action should be allowed because the applicable legislation did not sufficiently take into account his rights as a parent.

22. On 24 April 2008 the District Court scheduled a hearing for 29 May 2008.

23. On 6 May 2008 the District Court, on the applicant's request, postponed the hearing to 10 June 2008.

24. On 27 May 2008 the applicant, relying on Article 1598a of the Civil Code as in force since 1 April 2008 (see Relevant domestic law, below), lodged an alternative request to order the child to undergo genetic testing in order to establish her descent.

25. On 10 June 2008, during the hearing, the parties unanimously declared that a social and family relationship existed between Mr E. and the child. Following the hearing, the District Court rejected the applicant's request. According to that court, the applicant was precluded from contesting paternity under Article 1600 § 2 of the Civil Code (see Relevant domestic law, below) because a social and family relationship existed between the child and her legal father. He did not have the right to have his

paternity established or to demand genetic testing because the child already had a legal father.

26. On 2 December 2008 the Hamm Court of Appeal rejected the applicant's appeal lodged on 10 July 2008. It noted that it was no more in dispute between the parties that a social and family relationship existed between the child M. and her legal father, who, in the meantime, had married the child's mother and fathered two further children. Confirming the District Court's judgment, that court further considered that the relevant legislation did not violate the applicant's rights under the German constitution and under Articles 8 and 14 of the Convention. Referring to its own constant case-law and to the case-law of the Federal Constitutional Court, the Court of Appeal considered that the legislature had been entitled to let the interests of the child and of her legal parents prevail over the biological father's interest to have his paternity legally established and to preclude the biological father from contesting paternity. There was no room for the court to examine in individual cases whether it was necessary in the child's best interests to allow the presumed biological father to contest paternity. This general approach also protected the concerned families from being forced to reveal intimate details of their family life.

27. The Court of Appeal further confirmed that the applicant's request to have his paternity established was inadmissible as the child already had a legal father. Relying on the case-law of the Federal Constitutional Court, the court considered that Mr E.'s acknowledgment of paternity had been valid and that the relevant legislation did not violate the applicant's constitutional rights. It was, in particular, justifiable to make acknowledgement of paternity dependent on the mother's consent. The legislature was not obliged to make acknowledgment of paternity dependent on a genetic examination of descent. It was acceptable to base the granting of legal status on an assumption which was based on specific factual and social situations. Such an assumption existed if a man declared in a legally binding way and with the express consent of the mother of a child born out of wedlock that he was willing to assume parental responsibility. The Court of Appeal further considered that the child's rights were sufficiently protected by her own right to challenge paternity upon reaching the age of majority.

28. The Court of Appeal further considered that the Constitution protected a man's interest to learn whether a child was his descendant and to have this fact legally established. However, this did not include the right to examine descent in any conceivable case. When developing the procedure for examining a child's true descent, the legislature had to take into account the child's interest in the stability of his legal and social-family affiliation and the mother and child's interest not to have personal data and intimate circumstances revealed, and had done so in an acceptable way. There was, in particular, no right under the Constitution to have biological descent legally established as long as another man's legal paternity persisted.

29. The Court of Appeal finally considered that the applicant's alternative request to order the child to undergo genetic testing was inadmissible, because such a request had to be lodged in separate proceedings.

30. On 20 March 2009, following a complaint by the applicant, the Court of Appeal confirmed its judgment of 2 December 2008 and stated that the alternative request to clarify the child's genetic descent was not inadmissible but unfounded, as Article 1598a of the Civil Code did not entitle the presumed biological father to demand genetic testing. Relying on the Federal Constitutional Court's case-law, the Court of Appeal considered that the applicant did not have the right to have biological paternity established without establishing legal paternity.

31. On 30 June 2009 the Federal Constitutional Court, sitting as a panel of three judges, refused to admit the applicant's constitutional complaint for adjudication. This decision was served on the applicant's counsel on 8 July 2009.

II. RELEVANT DOMESTIC LAW

1. Provisions of the Basic Law

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

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

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

2. Establishment of paternity

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

3. Challenging paternity

35. Paternity may be challenged within a time-limit of two years. The period commences on the date on which the entitled person learns of the

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

4. Examination of paternity in separate proceedings

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

III. RELEVANT COMPARATIVE LAW

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

38. By contrast, in nine Member States (Armenia, Bulgaria, Hungary, Iceland, Latvia, the Netherlands, Poland, Slovakia and Switzerland) the biological father does not have standing to challenge the paternity of the legal father established by acknowledgement. In those nine jurisdictions, the

courts are not entitled to judicially consider (on the grounds of the best interests of the child or otherwise) whether the biological father should be allowed to challenge paternity.

39. None of the Member States examined provide a procedure to establish biological paternity without formally challenging the recognised father's paternity and without changing the child's legal status.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

40. The applicant complained under Articles 6 and 8 of the Convention about the domestic courts' refusal to allow him to challenge Mr E.'s paternity and to have his own paternity legally established. He complained, in particular, that the mother, by giving or refusing her consent, had the exclusive right to determine the child's legal father, and that he had no right to be heard in the proceedings leading to the establishment of paternity. He further complained that the relevant legislation, as construed by the family courts, let the social family's interests generally prevail over the biological father's interests, without allowing for an examination of the specific circumstances of the case. He further complained that the District Court had failed to conduct the proceedings with exceptional diligence and had thus predetermined the outcome of the proceedings.

41. The Government contested these arguments.

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

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

A. Admissibility

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

B. Merits

1. The applicant's submissions

44. Relying on the Court's case-law, the applicant asserted that the relationship between M. and himself as her presumed biological father amounted to family life. He submitted that he and Ms D. had intended to have children when they married and that the child was conceived in wedlock. He had acknowledged paternity and instituted paternity proceedings in order to establish his legal fatherhood and exercise parental responsibility, thus showing a demonstrable interest in and commitment to the child. Ms P. had prevented him from establishing a legal bond with his child and from establishing a factual relationship. By way of alternative, the applicant complained that the domestic courts had failed to establish the child's true descent as an element of family life.

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

46. The domestic authorities had interfered with this right by preventing him from establishing paternity. He pointed out that he had no legal means to challenge the acknowledgment of paternity which had been declared by Mr E. with the mother's consent and without his own participation. In a case in which two men could be the father of a child born out of wedlock, there was no sufficient basis for the presumption that the man who had acknowledged paternity with the mother's consent was indeed the child's father. As had been demonstrated by the *Zaunegger* case (*Zaunegger v. Germany*, no. 22028/04, 3 December 2009), mothers with a legal veto often did not consider their child's bests interests – and even less so the biological father's interests – but rather their own. Under the current legislation as interpreted by the domestic courts, the biological father was completely without legal protection even if the mother acted arbitrarily.

47. The applicant further argued that the interference with his rights under Article 8 had not been justified under paragraph 2 of that provision. In particular, it had not been "necessary in a democratic society". On the basis of the law as it had been applied by the domestic courts, the applicant had practically no possibility of becoming the legal father of his child, as the courts had let the factual and legal situation which had been one-sidedly created by the mother prevail over his interests as a biological father.

48. Moreover, the courts had failed to weigh the competing interests and to examine whether the challenge to paternity would harm or would serve the child's best interests. There was no indication that allowing the applicant

to challenge paternity would run counter to the child's best interests. There was, in particular, no scientific evidence supporting the assumption that it was in the child's best interest to grow up undisturbed in his or her legal and social family. In accordance with current psychological standards, children should be informed about their true descent as early as possible. Furthermore, there was no risk that the establishment of the applicant's paternity would break down the relationship between Ms D., Mr E. and the three children living with them. Ms D. and Mr E. lived in a stable marital relationship and Mr E. had acknowledged paternity in the knowledge that the child had been conceived at a time when the applicant had been married to Ms E. and had had sexual intercourse with her.

49. The approach adopted by the German legislature lacked justification and was contrary to the case-law of the Court (the applicant referred to the cases of *Różański v. Poland*, no. 55339/00, 18 May 2006, and *Zaunegger*, cited above), according to which the competing interests had to be balanced in each individual case. This implied that children necessarily had to bear a certain amount of stress caused by judicial proceedings. In many cases, the taking of an expert's opinion would already be necessary to establish the factual relationship between the child and his or her legal father. In those cases, there would be no further stress if the court examined their welfare with regard to the challenge of paternity. There was, furthermore, no risk that the existing family had to reveal intimate details because the main aspects of the instant case had been known to all.

50. There was, furthermore, no relevant reason for denying the applicant the right of clarifying paternity without changing the child's legal status.

51. In the instant case, it further had to be taken into account that the domestic courts had failed to process the proceedings with "exceptional diligence" as required in cases concerning civil status. The District Court had, in particular, failed to expedite the proceedings relating to the appointment of a guardian *ad litem*. Further delays had been caused by the District Court's and the Court of Appeal's failure to schedule court hearings promptly. The outcome of the instant proceedings had thus been predetermined by their excessive length.

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

2. The Government's submissions

53. The Government took the view that the domestic courts' decisions had not interfered with the applicant's right to respect for his family life. They noted, at the outset, that it had not been proved that the applicant was indeed the biological father of the child M. Even assuming biological kinship, this would not be sufficient to attract the protection of Article 8 of the Convention. In the present case, M. lived together with her mother and her legal father in a stable family unit. No factual family relationship existed between the applicant and the child M. The Government stressed that the marriage between the applicant and Ms D. had ended six months before the child's birth. The applicant had neither been present at the child's birth, nor had he lodged a request to be granted contact rights.

54. Moreover, even though the Court had considered that intended family life might, exceptionally, fall within the ambit of Article 8, the Government argued that this was not the case in the circumstances of the present application, as the applicant had not established that he had made sufficient efforts in support of his alleged interest in building a family relationship with the child.

55. Even assuming that there had been an interference with the applicant's rights under Article 8 § 1 of the Convention, this had a legal basis in Articles 1592 no. 2, 1600 and 1600d of the Civil Code and served the legitimate aim of protecting the rights and freedoms of the child and her legal parents.

56. That interference had also been necessary in a democratic society. The applicant's preclusion from contesting paternity and from having his own paternity established had served the child's best interests. The biological father might have an interest in getting to know and building a relationship with his child. In the instant case, it had, however, to be taken into account that the child lived in a functioning social-legal family. Conversely, no social ties existed between the child and the applicant. It followed that the child's interest in growing up undisturbed in her social-legal family took precedence.

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

the sense of social parentage. The decision to grant precedence to the legal family was in line with the case-law of the Court, which had confirmed that it was justifiable for the domestic courts to give greater weight to the interests of the child and the family in which it lived than to the interest of an applicant in obtaining determination of a biological fact (*Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI).

58. Similar considerations applied with regard to the applicant's alternative request to permit genetic testing to establish biological descent. The mere court finding that the child descended not from her legal father, but from another man could jeopardise stability within the family unit and make it more difficult for the child to be certain in the knowledge of whom she belonged to. From the point of view of the child's welfare, her interest in growing up undisturbed in her legal and social family had to prevail. Likewise, there were relevant grounds to protect mother and child against having to reveal personal information and intimate details. In view of the fact that the legal father and the child's mother had since married and had two further children together, this interest was of considerable significance.

59. Under Article 1598a of the Civil Code, family members (father, mother and child), but not the alleged biological father, had a right to consent to genetic testing to clarify natural parentage. According to the legislature, the biological father's interests were sufficiently safeguarded by the possibility to challenge paternity of the legal father or, in the absence of a legal father, to have kinship determined by a court. By linking the successful challenge against legal paternity to the establishment of the biological father's paternity, the legislature also intended to ensure that the biological father assumed parental responsibility, thus serving the children's interest in the stability of the social and family unit of which they are a part. Where a child had already a legally assigned father and where the alleged biological father's right to contest that paternity was ruled out on account of the existence of a social and family relationship, the alleged biological father did not have a protected interest in having biological paternity established without, at the same time, assuming parental responsibility.

60. The Government finally submitted that the length of the proceedings had not been excessive. The length of the proceedings before the District Court had been mainly due to the fact that the question regarding the child's legal representative had to be clarified before two court instances in separate family court proceedings. In addition, the applicant's own actions such as the extension of his action to the legal father immediately before the first hearing before the District Court and the fact that he had dropped his claim that the child was not living with her legal father in a social and family relationship only after he had been reminded of the advance payment due for expert examination had contributed to the length of proceedings.

3. Assessment by the Court

61. The Court reiterates that the notion of "family life" under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. The Court has further considered that intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases where the fact that family life has not yet fully been established is not attributable to the applicant (compare *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 143 and 146, ECHR 2004-V). In particular, where the circumstances warrant it, "family life" must extend to the potential relationship which may develop between a child born out of wedlock and the biological 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*, cited above; *Nekvedavicius v. Germany* (dec.), no. 46165/99, 19 June 2003; *Lebbink v. the Netherlands*, no. 45582/99, § 36, ECHR 2004-IV; and *Anayo v. Germany*, no. 20578/07, § 57, 21 December 2010).

62. Turning to the circumstances of the instant case, the Court observes that it is contested and has not been established in the proceedings before the domestic courts whether the applicant is in fact M.'s biological father. Even though the child was conceived at a time when the applicant was married to the child's mother, he had never seen the child and there has never been a close personal relationship between him and the child which could amount to established family life.

63. The Court considers that the instant case primarily evolves around the question whether the applicant has a right to have his alleged paternity certified and legally established. The Court has found on numerous occasions that proceedings concerning the establishment of or challenge against paternity concerned that man's private life under Article 8, which encompasses important aspects of one's personal identity (see *Rasmussen v. Denmark*, 28 November 1984, § 33, Series A no. 87; *Nylund*, cited above; *Yildirim v. Austria* (dec.), no. 34308/96, 19 October 1999; *Backlund v. Finland*, no. 36498/05, § 37, 6 July 2010; *Krušković v. Croatia*, no. 46185/08, § 20, 21 June 2011; and *Pascaud v. France*, no. 19535/08, §§ 48-49, 16 June 2011). The Court does not discern any reason to hold otherwise in the present case. The decision to reject the applicant's request to examine and to legally establish his paternity of M. thus falls to be examined as an interference with his right to respect for his private life.

64. In determining whether the interference was "necessary in a democratic society", the Court refers to the principles established in its case-law. It has to consider whether, in the light of the case as a whole, the reasons adduced to justify that interference were relevant and sufficient for

the purposes of paragraph 2 of Article 8 (see, *inter alia*, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 70, ECHR 2001-V, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 62, ECHR 2003-VIII). Consideration of what lies in the best interests of the child concerned is of paramount importance in every case of this kind; depending on their nature and seriousness, the child's best interests may override that of the parents (see *Sommerfeld*, cited above, § 66, and *Görgülü v. Germany*, no. 74969/01, § 43, 26 February 2004).

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

66. The Court further refers to its judgment in the case of *Anayo v. Germany* (no. 20578/07, 21 December 2010), which concerned the refusal of the German courts to grant Mr Anayo, who was the biological father of twins, access to his children on the ground that he had no social and family relationship with the children. The Court observed, in that judgment, that the domestic court had refused the applicant access to his children without giving any consideration to the question whether, in the particular circumstances of the case, contact between the twins and the applicant would be in the children's best interests. The Court accordingly found that the domestic court had failed to fairly balance the competing rights involved. As the reasons given for refusing Mr Anayo contact with his children had thus not been "sufficient" for the purposes of paragraph 2 of Article 8, Article 8 had been violated (see *Anayo*, cited above, §§ 67-73). In a subsequent judgment (*Schneider v. Germany*, no. 17080/07, 15 September 2011), the Court found that similar standards applied in a case in which it had not been established whether the applicant was indeed the biological father of the child.

67. The Court notes that the applicant's complaint concerns three aspects of the German law governing paternity: Firstly, he complained about the fact that the mother of a child born out of wedlock, by giving or refusing her consent, was in a position to determine which one of two potential fathers was granted legal paternity and that the other potential father had no possibility to be heard in these proceedings. Secondly, he complained about having been prevented from challenging paternity thus established on the ground that a social and family relationship had been established between the legal father and the child. Lastly, he complained

about having been denied the possibility to have his alleged paternity certified without changing the child's legal status.

68. The Court observes, at the outset, that it does not appear to be unreasonable to base the original assignment of legal paternity on the assumption that a man who has acknowledged paternity with the mother's consent is indeed the child's father. It further notes that a similar approach has been taken by the vast majority of the Council of Europe Member States examined by the Court who make acknowledgment of paternity of a child born out of wedlock dependent on the mother's consent (compare paragraph 36 above). The Court considers that this regulation falls within the State's margin of appreciation, as long as the potential biological father's rights to have the child's descent legally established are sufficiently safeguarded.

69. The Court further observes that the German domestic law provides two possibilities for the alleged biological father to have paternity legally established: In the absence of a legally established father, he can lodge an action under Article 1600d of the Civil Code. If a legally established father exists, he has the right to challenge the other man's paternity only if no social and family relationship exists between the child and the legal father.

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

71. It appears from the comparative research undertaken by the Court (see paragraphs 37 – 39, above) that a majority of fifteen out of twenty-six Council of Europe Member States would allow a presumed biological father to challenge the legal paternity of a third party established by acknowledgment, even where the legal father lived with the child in a social and family relationship. By contrast, in a substantial minority of nine Member States the presumed biological father does not have the standing to contest the paternity of the legal father. In two further States the presumed biological father may not contest paternity if the child has lived in a social and family relationship with the legal father for a period of at least four or five years, respectively.

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

73. With regard to the conflicting interests to be balanced in the instant case, the Court notes that the applicant had a protected interest in establishing the truth about an important aspect of his private life, namely the alleged fact of his being M.'s father, and having it recognised in law (compare, *mutatis mutandis*, *Pascaud* and *Krušković*, both cited above, § 34 and § 48 respectively).

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

75. The Court observes that German family law, as interpreted by the domestic courts, currently does not provide a judicial examination of the question whether contact between a biological father and his child would be in the child's best interests if another man is the child's legal father and if the biological father has not yet borne any responsibility for the child. The reasons why the biological father has not previously established such a relationship are irrelevant; the provisions thus also cover cases in which the fact that such a relationship has not yet been established is not attributable to the biological father (compare *Anayo*, cited above, § 67). The Court refers to its findings in the *Anayo* case that this legal situation led to a violation of the biological father's right to respect for his private life (see *Anayo*, cited above, §§ 70-73, also compare *Schneider*, cited above, § 104).

76. It follows that Article 8 of the Convention can be interpreted as imposing on the Member States an obligation to examine whether it is in the child's best interests to allow the biological father to establish a relationship with his child, in particular by granting contact rights. This may imply the establishment, in access proceedings, of biological – as opposed to legal – paternity if, in the special circumstances of the case, contact between the alleged biological father – presuming that he was in fact the child's

biological parent – and the child were considered to be in the child's best interests (see *Schneider*, cited above, § 103).

77. Accordingly, the alleged biological father must not be completely precluded from the possibility of having his paternity certified unless there are relevant reasons relating to the child's best interests to do so. However, this does not necessarily imply a duty under the Convention to allow the alleged biological father to challenge the legal father's status or to provide a separate action to establish biological – as opposed to legal – paternity. Neither can such an obligation be deduced from the Court's case-law. The present case has to be distinguished from the *Różański* case relied upon by the applicant, as in the latter case the domestic authorities had refused to deal with Mr Różański's request to establish his paternity by mere reference to the recognition of paternity by another man, without, however, examining the factual background of the case, as for example the question whether the child lived with his legal father in a social and family relationship (see *Różański*, cited above, § 78). In the case of *Mizzi v. Malta* (no. 26111/02, ECHR 2006-I), the Court found a violation of Article 8 of the Convention in that the applicant, who was the legal – but not the biological – father of a child born in wedlock, and had never lived with the child, was never afforded the possibility of bringing, with reasonable prospect of success, an action aimed at contesting paternity (see *Mizzi*, cited above, §§ 108-111). The Court considers that this case falls to be distinguished from the instant case in that Mr Mizzi alleged that the presumption of legal paternity had not been in line with social reality, as he had never entertained any factual relationship to the child (see *Mizzi*, cited above, § 11). Conversely, in the instant case Mr E.'s legal paternity coincided with his factual role as the child's social father.

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

79. The Court further considers that similar considerations apply to the question whether an alleged biological father should be allowed to demand clarification of the child's descent by genetic testing without changing the child's legal status. It notes, in particular, that none of the twenty-six Member States examined by the Court provided a procedure to establish biological paternity without formally challenging the recognised father's paternity and without changing the child's legal status (see paragraph 38, above). Accordingly, the decision not to allow for such a separate examination also has to be considered as falling within the State's margin of appreciation.

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

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

82. Turning to the circumstances of the instant case, the Court notes that the period to be taken into consideration began on 4 July 2006, when the applicant lodged his paternity action and ended on 8 July 2009, when the Federal Constitutional Court's decision was served on the applicant's counsel. It thus lasted two years and eleven months over three levels of jurisdiction; and one year and eleven months before the Bielefeld District Court. The Court notes that there had been certain delays before the District Court - where the case was pending for almost two years - in particular owing to the fact that the appointment of a guardian *ad litem* had to be examined in separate proceedings by two court instances, which lasted almost eleven months. The Court observes, however, that it fell within the domestic authorities' discretion to decide on the procedure to be followed when appointing a guardian and that the delay caused by Mr E. and Ms D.'s lodging of an appeal against this appointment cannot be held imputable on the domestic courts. The Court furthermore considers that any delay which had occurred before the District Court was compensated by the fact that the Court of Appeal very swiftly processed the case within less than five months.

83. Even taking into account what was at stake for the applicant, namely the recognition of his legal status as the alleged biological father, the Court is satisfied that the domestic courts processed the case with the diligence due in cases of this kind and that the procedural requirements implicit in Article 8 of the Convention were thus complied with.

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

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

85. The applicant complained that Article 1600 of the Civil Code as construed by the Berlin Court of Appeal had discriminated against him in

his capacity as a biological father compared to the mother, the legal father and the child. He further complained that the legal parents and the child were allowed to request biological testing of descent outside paternity proceedings, whereas the alleged biological father had no such right. He relied on Article 14, read in conjunction with Article 8 of the Convention; the former provides as follows:

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

86. The Government contested that argument.

A. Admissibility

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

B. Merits

88. The applicant pointed out that both the child's mother and the legal father were entitled to challenge paternity notwithstanding the existence of a social and family relationship between the child and the legal father. Furthermore, the legal parents and the child were allowed to demand an examination of descent by genetic testing without changing the child's legal status. According to the applicant, there were no relevant reasons which justified such different treatment. This discrimination was further exacerbated by the fact that the growing intensity of the social and family relationship between the legal father and the child during the paternity proceedings had not impaired the mother's right to contest paternity. Furthermore, it had to be borne in mind that children, when challenging paternity, did not have to take into account their own social relationship with their mother and legal father. By contrast, the biological father was precluded from challenging paternity even if this would serve the child's best interests.

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

within the State's margin of appreciation when weighing the competing interests.

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

91. Turning to the circumstances of the instant case, the Court observes that the main reason relied upon by the Government in treating the applicant differently from the mother, the legal father and the child with regard to the challenging of paternity and to genetic testing was the aim of protecting the child and her social family from external disturbances. Having regard to the above considerations relating to the proportionality of the interference with the applicant's right to respect for his private life, in particular to the lack of consensus within the Member States (see §§ 70–71 above), the Court considers that the decision to give the existing family relationship between the child and her legal parents precedence over the relationship with the alleged biological father falls, insofar as the legal status is concerned, within the State's margin of appreciation.

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

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

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

94. The Government contested the allegation that the length of the proceedings had been excessive.

95. Having regard to its findings under the procedural aspect of Article 8 of the Convention (see §§ 82-84, above) the Court considers that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

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

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

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

Claudia Westerdiek
Registrar

Dean Spielmann
President