



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

FIRST SECTION

CASE OF NOVOTNÝ v. THE CZECH REPUBLIC

(Application no. 16314/13)

JUDGMENT

STRASBOURG

7 June 2018

FINAL

07/09/2018

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

In the case of Novotný v. the Czech Republic,

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

Linos-Alexandre Sicilianos, *President*,

Kristina Pardalos,

Aleš Pejchal,

Ksenija Turković,

Armen Harutyunyan,

Pauliine Koskelo,

Tim Eicke, *judges*,

and Abel Campos, *Section Registrar*,

Having deliberated in private on 27 March 2018 and on 7 May 2018,

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

PROCEDURE

1. The case originated in an application (no. 16314/13) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Mr František Novotný (“the applicant”), on 19 February 2013.

2. The applicant was represented by Mr A. Čáp, a lawyer practising in Jihlava. The Czech Government (“the Government”) were represented by their Agent, Mr V. A. Schorm, of the Ministry of Justice.

3. The applicant alleged a violation of Articles 6, 8 and 14 of the Convention.

4. On 19 February 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1942 and lives in Batelov.

6. In 1965 he had a sexual relationship with a woman who gave birth to a daughter, Z., on 2 March 1966.

7. As the applicant denied that he was the father, Z.’s legal guardian brought proceedings on her behalf in the Jihlava District Court (*okresní soud*) for a declaration of paternity.

8. After giving birth to Z., but before initiating the aforementioned proceedings, the mother married another man.

9. On 23 April 1970 the District Court found that the applicant was Z.'s father and ordered him to contribute to her maintenance.

10. The court reached its finding after hearing evidence from several witnesses. It also had regard to documentary evidence and took into consideration the results of a blood test known as a "bio-hereditary test" (*dědicko-biologická zkouška*). In addition, it established that the applicant had had intercourse with the mother sometime between 300 and 180 days before Z.'s birth. In such cases, a presumption of paternity arose under Article 54 of the Family Code, unless there were clear grounds to rebut the presumption. Another man had also had intercourse with the mother at the crucial time, however, the blood test established that he was not the father.

11. The applicant lodged an appeal with the Brno Regional Court (*krajský soud*) and requested another expert opinion. The Regional Court denied the request because the facts had been proved to a sufficient degree. It eventually upheld the judgment of the District Court on 2 June 1970, which became final on 10 June 1970.

12. In 2011 the applicant requested that the Prosecutor General (*Nejvyšší státní zástupce*) challenge his paternity in court. By a letter of 21 June 2011 he was informed that the requirements of Article 62 of the Family Code to initiate such proceedings had not been met. Z., by that time an adult, did not want to challenge paternity, it was not in her interests and the applicant had not produced any expert evidence credibly disproving it.

13. On 29 February 2012 the applicant and Z. underwent a DNA examination. The resulting report of 19 April 2012 unequivocally confirmed that the applicant was not Z.'s father.

14. On 9 May 2012 the applicant submitted a new request to the Prosecutor General to challenge his paternity in court.

15. On 12 September 2012 the Prosecutor General informed the applicant that the determination of his paternity had been decided by the Jihlava District Court under Article 54 of the Family Code and that therefore the prosecution service could not initiate proceedings under Article 62 and 62a of the Family Code. The Prosecutor General only had that specific competence as regards statutory presumptions of paternity under Articles 51 § 1 and 52 of the Family Code. When paternity had been established by a judicial declaration under Article 54 of that Code and the judgment had come into legal force, as in the applicant's case, the law did not provide for any possibility to challenge it.

16. Relying on his rights under Article 6 § 1 of the Convention, the applicant lodged a constitutional complaint (*ústavní stížnost*) against the Prosecutor General's decision of 12 September 2012. He maintained that he had proved that he was not Z.'s biological father and requested that the Constitutional Court (*Ústavní soud*) order the Prosecutor General to initiate

proceedings and challenge his paternity. He also argued that Articles 61 § 1 and 62 § 1 of the Family Code were unconstitutional.

17. On 13 December 2012 the Constitutional Court dismissed the applicant's complaint. It noted that his paternity had been established by a judicial decision which had come into legal force and stated, *inter alia*, that the competence of the Prosecutor General could only apply if all the legal requirements had been fulfilled, which was not, however, the applicant's case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of the Czech Republic

18. The relevant provisions of the Constitution of the Czech Republic (Constitutional Act no. 1/1993) read:

Article 1

“...
2. The Czech Republic shall observe its obligations resulting from international law.”

Article 10

“Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.”

Article 95

“1. In making their decisions, judges are bound by statutes and treaties which form a part of the legal order; they are authorized to judge whether enactments other than statutes are in conformity with statutes or with such treaties.
...”

Article 112

“1. The constitutional order of the Czech Republic is made up of this Constitution, the Charter of Fundamental Rights and Basic Freedoms, constitutional acts adopted pursuant to this Constitution, and those constitutional acts of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic, and the Czech National Council defining the state borders of the Czech Republic, as well as constitutional acts of the Czech National Council adopted after the sixth of June 1992.
...”

B. Charter of Fundamental Rights and Freedoms

19. The relevant provisions of the Charter of Fundamental Rights and Freedoms (Constitutional Act no. 2/1993) read:

Article 10

“ ...

2. Everyone has the right to be protected from any unauthorised intrusion into her private and family life.

...”

Article 36

“1. Everyone may assert, through the prescribed procedure, her rights before an independent and impartial court or, in specified cases, before another body.

...”

C. Family Code

20. At the material time, the relevant provisions of the Family Code (Act no. 94/1963, in force until 31 December 2013), as amended, read:

Article 51 § 1

“If a child was born in the period after the conclusion of a marriage and within three hundred days of its dissolution or annulment, the mother’s husband is presumed to be the father.”

Article 52 § 1

“Otherwise, the father is considered to be the man whom both parents have declared to be the father at a register office or in court.”

Article 54

“1. If paternity has not been established in accordance with previous provisions, the child, the mother or a man who considers himself to be the father can institute proceedings for determination of the matter by a court.

2. A man who has had intercourse with the mother no less than one hundred and eighty and no more than three hundred days before the birth is considered as the father unless there are serious grounds to exclude his paternity.”

Article 57 § 1

“A husband may deny paternity in court within six months of learning of reasonable doubts as to his paternity. He may do so no later than three years after the child’s birth.”

Article 59

“1. A husband has a right to deny paternity to the child and the mother if both are alive. If one of them is no longer alive, he has that right in respect of the other. ...

2. A mother can deny her husband’s paternity within six months of the child’s birth. ...”

Article 61 § 1

“A man whose paternity has been determined by a consent declaration by the parents can deny it before a court within six months of it being established if it is out of the question that he is the father; that period shall not expire within six months of the child’s birth.”

Article 62

“1. If the child’s interests so require and the time limit to challenge paternity by one of the parents has expired, the Prosecutor General submits a request to challenge paternity against the father, mother and the child.

2. If it appears under all the circumstances that a putative father is not a child’s father and the time-limit to challenge paternity by one the parents has expired, the Prosecutor General submits a request to challenge paternity, unless, exceptionally, it is prevented by the child’s interests.”

21. The new Civil Code (Act no. 89/2012, in force since 1 January 2014) reads:

Article 776 § 1

“If a child was born in the period starting on the day of the registration of a marriage and finishing at the end of the three hundredth day after its dissolution or annulment or after the husband of the mother [in question] was pronounced missing, then the husband of the mother is presumed to be the father.”

Article 777 § 1

“If a child was born in the period between the beginning of proceedings on the dissolution of a marriage and [the lapse of] three hundred days after its dissolution, and the husband or the mother’s former husband declares that he is not the father, [but] another man declares his paternity, then it is deemed that [the latter] man is the father, [provided that] the mother supports both declarations.”

Article 778

“If a child is conceived by the artificial insemination of an unmarried woman, the man who gave consent to that insemination is presumed to be the father.”

Article 779 § 1

“If paternity was not established under Articles 776, 777 or 778, it is deemed that the man whose paternity was established by virtue of his and the mother’s agreement [therewith] is the father. ...”

Article 783

“1. If paternity was not established by the principles set out in Articles 776, 777 and 778 (or even 779), the mother, the child or the man claiming to be the father can bring an action for paternity to be established by a court.

2. A man who has had intercourse with the mother no less than one hundred and sixty days and no more than three hundred days before the birth is considered to be the father unless there are serious grounds to exclude his paternity.”

D. Code of Civil Procedure

22. At the material time, the relevant provisions of the Code of Civil Procedure (Act no. 99/1963), as amended, read:

Article 159

“A judgment which has been served and which can no longer be challenged by means of an appeal is final.”

Article 159a

“1. The operative part of a judgment which has become final is binding only on the parties to the proceedings unless the law provides otherwise.

...

3. The operative part of a judgment on personal matters is binding on everyone.

4. To the extent that the operative part of a judgment is binding on the parties to the proceedings and potentially on other persons, it is also binding on all authorities.

5. As soon as a matter has been resolved by force of a final decision, it may not give rise to new proceedings to the extent that the operative part is binding on the parties to the proceedings and, as the case may be, on other persons.”

E. The Constitutional Court Act (Act no. 182/1993)

23. The relevant domestic law regarding a constitutional complaint is set out in the Court’s judgment *Kinský v. the Czech Republic*, no. 42856/06, § 44, 9 February 2012.

F. Case-law of the Constitutional Court*1. Case-law on the application of the Convention by domestic courts*

24. In its judgment no. Pl. ÚS 36/01 of 25 June 2002, published in the Collection of Laws under no. 403/2002, the Constitutional Court stated, *inter alia*:

“... the scope of the concept of constitutional order can be interpreted not only in the light of ... Article § 112 (1) of the Constitution but also in the light of Article § 1 (2)

of the Constitution; within its framework are also included, ratified and proclaimed international treaties on human rights and fundamental freedoms.”

25. In its judgment no. I. ÚS 310/05 of 15 November 2006 the Constitutional Court stated that international human rights treaties had special place among other international treaties and were part of the Czech constitutional order. The European Convention on Human Rights fell, without any doubt, into this category. Furthermore, the court noted that immediate application of international treaties embodied also an obligation on the side of Czech courts and other public authorities to take into account interpretation of these treaties by competent international tribunals. Understandably, this conclusion was applicable also in relation to the European Court of Human Rights and its interpretation of the European Convention, whereas the relevance of its decisions reached in Czech law the level of constitutional quality. Therefore, the courts must take into consideration the case-law of the European Court of Human Rights also in cases against other States if the nature of the matter under consideration is relevant for the interpretation of the European Convention in the Czech legal landscape.

26. In its judgment no. II. ÚS 862/10 of 19 May 2010 the Constitutional Court criticised the general courts for their lack of knowledge or even ignorance of the Court’s case-law. The Constitutional Court found the impugned decisions unlawful on grounds of erroneous interpretation of the State’s liability law, in breach of the European Convention as interpreted by the Court.

2. Case-law concerning the paternity proceedings

27. In its decision nos. III. ÚS 289/07 of 26 April 2007 and III. ÚS 1506/07 of 17 January 2008, the Constitutional Court asked the Prosecutor General, when deciding whether (pursuant to Article 62 of the Family Code) to bring an action challenging paternity to bear in mind the relevant Court case-law, including the judgment in *Paulík v. Slovakia*, no. 10699/05, ECHR 2006 XI (extracts).

28. On 8 July 2010 the Constitutional Court, sitting in plenary session, delivered judgment no. Pl. ÚS 15/09 on Article 57 § 1 of the Family Code, which provided a limited possibility for a husband to deny his paternity in court within six months of his learning that his wife had given birth to a child. The Constitutional Court held that the law could not ignore the fact that an important legal interest in denying paternity could arise even after the lapse of a prolonged period following the birth of a child, and that within that period the putative father’s interest in denying his paternity took precedence. The Constitutional Court referred, *inter alia*, to the *Paulík* judgment.

29. Judgment no. II. ÚS 405/09 of 18 November 2010 concerned the failure of the courts to apply the provisions of the constitutional order

(including the Convention) instead of the provisions of the law (which was in conflict with the former). In this case, the alleged father did not have access to a procedure *via* which to deny his paternity after the expiration of the time-limit of six months after the birth of the child. The Constitutional Court found, in particular, that:

“[t]he right of the applicant to private and family life under section 10(2) of the Charter and Article 8 of the Convention, together with his right of access to a court under Article 36 § 1 of the Charter, were violated by the impugned decisions.”

G. Case-law of the Supreme Administrative Court

30. In its judgment no. 2 Ads 40/2003 of 20 November 2003, the Supreme Administrative Court found in particular that if defected legislation prevented a complainant from accessing a court and if a denial of justice (*denegatio iustitiae*) could not be avoided even by bringing a case before the Constitutional Court (pursuant to Article 95 (2) of the Constitution) proposing that the law be struck down, then the only constitutionally-valid solution was to directly apply the constitutional provision of Article 36 (1) of the Charter.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

31. The applicant complained that he had not been able to challenge the declaration of paternity after discovering in 2012 that he was not Z.’s biological father. He relied on Article 8 of the Convention, the relevant part of which reads as follows:

“1. Everyone has the right to respect for his private and family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

32. The Government argued that the application was inadmissible because of the applicant’s failure to comply with the six-month time-limit. They maintained that the period for filing the application should be calculated from when the applicant had become certain that he was not Z.’s biological father. That had been when he had received the expert opinion

which had been drawn up on 19 April 2012 and delivery of which must have taken place on 9 May 2012 at the latest when the applicant had filed a repeat submission to the Prosecutor General. The application was dated 23 January 2013, more than six months after the delivery of the expert opinion, and should therefore be declared inadmissible under Article 35 § 1 of the Convention.

33. The applicant contested that view, arguing, in essence, that under the Family Code the Prosecutor General was the only authority which could challenge his paternity and he had been under an obligation to use that remedy.

34. The Court reiterates that the purpose of the six-month rule under Article 35 § 1 of the Convention is to promote legal certainty and to ensure that cases raising issues under the Convention are dealt with within a reasonable time (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 135, ECHR 2012). Where it is clear from the outset that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect or prejudice on the applicant (see, among many authorities, *Kulykov and Others v. Ukraine*, no. 5114/09 and 17 others, § 125, 19 January 2017).

35. Turning to the present case, the Court notes that the application was lodged on 19 February 2013 and was thus within six months of the Prosecutor General's letter of 12 September 2012, in reply to the applicant's request to challenge his paternity in court on the basis of the results of the DNA examination (see paragraphs 13-14 above) which clarified that Article 62 of the Family Code was not applicable. It was also within six months of the Constitutional Court's decision of 13 December 2012, which could not be considered, at the outset, as an ineffective remedy in the circumstances of the case (see *Paulík*, cited above, § 35).

36. The Government's objection must therefore be rejected.

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

2. Merits

(a) The parties' arguments

38. The applicant complained of a violation of his right to respect for his family and private life, as protected under Article 8 of the Convention.

39. The Government argued that a final court decision establishing paternity created the obstacle of *res judicata*, which prevented the matter of a final decision being examined again. Such a situation served the purpose

of legal certainty and limited the Prosecutor General's ability to contest paternity.

40. In the Government's opinion, the applicant's paternity had been examined comprehensively and in sufficiently thorough terms in adversarial court proceedings before the Jihlava District Court and the Brno Regional Court in the 1970s and the applicant had been able to use a wide range of procedural safeguards, including the right to adduce his own evidence. The courts had established the facts on the basis of expert opinions and witness statements and the reasoning and decisions had not been arbitrary. The Government concluded by saying that the low risk of error in such cases was outweighed by the interests of society in maintaining established legal relationships, the interests of legal certainty and the protection of parental relationships. Therefore, the necessary fair balance had not been impaired to such an extent that it had led to a violation of Article 8 of the Convention.

(b) The Court's assessment

41. The Court has previously examined cases of men wishing to institute proceedings to contest paternity. It has found on numerous occasions that proceedings concerning the establishment of or a challenge to paternity concerned the right to a private life under Article 8, which encompasses important aspects of personal identity.

42. In particular, the Court found Article 8 applicable when an applicant began to doubt his paternity after the statutory time-limit to bring an action had already expired and the child had been born in wedlock (see *Shofman v. Russia*, no. 74826/01, §§ 30-32, 24 November 2005), or when it was born out of wedlock and the parents had acknowledged paternity (see, for example, *A.L. v. Poland*, no. 28609/08, § 59, 18 February 2014). It was also applicable in a situation where the child had been born in wedlock but the applicant had known for certain, or had had grounds for assuming, that he was not the father but – for reasons unconnected with the law – had taken no steps to contest paternity within the statutory time-limit (see *Rasmussen v. Denmark*, judgment of 21 November 1984, Series A no. 87, p. 13, § 33, and *Yildirim v. Austria* (dec.), no. 34308/96, 19 October 1999). It similarly applied where an applicant had had doubts about his paternity from the beginning but paternity had been established by a judicial declaration after the child had been born in wedlock (see *Tavli v. Turkey*, no. 11449/02, § 26, 9 November 2006), and when an applicant had had a sexual relationship with the mother and had been presumed to be the father (see *Paulík*, cited above, §§ 6-7 and § 42).

43. In the present case, the child was born out of wedlock, the applicant had doubts from the beginning but his paternity was established by a judicial decision on the presumption that he had had a sexual relationship with the mother. As he sought to challenge the declaration of his paternity on the basis of new biological evidence, there is a link between his wish to

have the earlier declaration that he was Z.'s father revoked and his private life (see, *Paulík*, cited above, § 42). The Court notes that the essence of the applicant's claim is not that the State should have refrained from acting but rather that it should have taken steps to ensure adequate measures, in the context of a paternity dispute, to resolve with certainty the question of his relationship with the child (see *Tsvetelin Petkov v. Bulgaria*, no. 2641/06, § 50, 15 July 2014). Accordingly, the facts of the case fall within the ambit of "private life" under Article 8 of the Convention and the Court must review whether the domestic authorities complied with the requirements and spirit of this provision in the exercise of their positive obligations.

44. As regards the requirement of lawfulness and a legitimate aim, it is not disputed between the parties that the conclusions reached by the domestic authorities were "in accordance with the law" (see paragraphs 38-40 above) and that the lack of a legal mechanism to enable the applicant to protect his right to respect for his private life can generally be explained by the "legitimate interest" in ensuring legal certainty and the security of family relationships and by the need to protect the interests of children (see *Paulík*, cited above, § 44). Indeed, it is not the Court's task to substitute itself for the competent national authorities in determining the most appropriate methods for establishing paternity (see *Tsvetelin Petkov*, cited above, § 51). However, it still remains to be seen whether the authorities struck a fair balance between the general interest of protecting the legal certainty of family relationships and the applicant's interests in having his paternity reviewed in the light of the results of the DNA test.

45. In that regard, the Court notes that according to its established case-law Article 8 of the Convention encompasses, subject to permissible limitations, a putative father's right to institute proceedings to deny paternity of a child who, according to scientific evidence, is not his own (see *Shofman*, cited above, § 45; *Mizzi v. Malta*, no. 26111/02, § 112, ECHR 2006-I (extracts); and *A.L.*, cited above, § 78; but contrast *Marinis v. Greece*, no. 3004/10, § 62, 9 October 2014). The Court has previously accepted situations where the applicant had, *via* the prosecutor, access to a court to challenge his paternity and either the prosecutor (see *Kňákal v. Czech Republic* (dec.), no. 39277/06, 8 January 2007, and *Yildirim*, cited above) or the courts examined the conflicting values and interests at stake and carefully balanced those interests and provided detailed reasons for their findings (compare and contrast *Róžański v. Poland*, no. 55339/00, §§ 77-79, 18 May 2006, and see *A.L.*, cited above, § 78). On the other hand, the Court has criticised inflexible time-limits, with time running irrespective of the putative father's awareness of the circumstances casting doubt on his paternity (see *Shofman*, cited above, § 43), and also found a violation of Article 8 of the Convention in cases in which applicants had no possibility to challenge judicial declarations in the light of new biological evidence (see *Paulík*, cited above, § 45; *Tavli*, cited above, § 36; and *Ostace*

v. *Romania*, no. 12547/06, 25 February 2014, § 49) or have not been given an opportunity to take part in hearings and present a DNA evidence (see *Tsvetelin Petkov*, cited above, § 58).

46. Turning to the present case, the Court notes at the outset that Czech law has three presumptions for paternity (see paragraph 20-21 above). The first two are when a child is born in wedlock (see *Andrle* (dec.), no. 38633/08, 22 January 2013), and when paternity of a child born out of wedlock has been established by a joint declaration by the parents (see *Kňákal*, cited above). In such cases, the Court has already observed that applicants can institute proceedings to deny paternity. However, the present case must be distinguished from *Kňákal* and *Andrle* as it concerns the third presumption, which is when paternity of a child born out of wedlock is established by a judicial declaration, which has been considered by the domestic authorities as a non-rebuttable presumption and *res judicata* regardless of new evidence (see paragraphs 15 and 17 above). Thus, just as in *Paulík*, the applicant could not institute proceedings to deny paternity, even though he had presented new biological evidence (see, *a contrario*, *Darmoń v. Poland* (dec.), no. 7802/05, 17 November 2009, and *Klocek v. Poland* (dec.), no. 20674/07, 27 April 2010) which was not known to him at the time of the original paternity proceedings (see *Paulík*, cited above, § 45).

47. In that regard, the Court considers further that the applicant has a legitimate right to at least have the opportunity to deny paternity of a child who, according to scientific evidence, was not his own, and that Z. may also have an interest in knowing the identity of her biological father (see *Tavli*, cited above, § 34). The Court also notes developments in Czech law in the sphere of paternity. In particular, the new civil code is favourable to biological reality prevailing over legal fiction (see paragraph 21 above), for example by providing the presumed father direct access to the courts in cases of the first and second presumptions of paternity (see *Andrle*, cited above). However, those developments did not benefit the applicant.

48. The Court further notes that the Czech Constitutional Court has already decided that national courts should interpret the national law in a manner that is in compliance with the Convention, as interpreted by this Court (see paragraphs 24-26 above). However, the applicant did not benefit from this domestic case-law, as the Czech Constitutional Court appears not to have to take into account not only its own jurisprudence (see paragraphs 24-29 above), but also the Court's judgment in *Paulík*, which concerned a different member state but addressed an identical situation and the application of substantially the same rules (see *Paulík*, cited above, §§ 23-38). The Constitutional Court could have decided the case in line with the Court's case-law and on the basis of its own jurisprudence, even in the absence of legislative changes (see *Topčić-Rosenberg v. Croatia*,

no. 19391/11, § 48, 14 November 2013; *Habulinec and Filipović v. Croatia* (dec.), no. 51166/10, § 30, 4 June 2013).

49. As to the general interest in the present case, the Court further points out that the applicant's putative daughter is currently more than fifty years old and is not dependent on the applicant for maintenance (compare and contrast *Yildirim*, cited above). The general interest in protecting her rights at this stage has therefore lost much of its importance compared to when she was a child. Furthermore, Z. agreed to the DNA test and said that she had no objection to the applicant's disclaiming paternity and apparently did not consider the applicant as her father (see *Paulík*, cited above, § 46, and contrast *Darmon*, cited above). It therefore appears that the lack of a procedure for bringing the legal position into line with the biological reality is inconsistent with the wishes of those concerned and does not in fact benefit anyone (see *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, p. 58, § 40).

50. According to the Court's case-law, a situation in which a legal presumption is allowed to prevail over biological reality might not be compatible with the obligation to secure effective "respect" for private and family life, even having regard to the margin of appreciation left to States (see, *mutatis mutandis*, *Kroon and Others*, cited above, § 40; *Mizzi*, cited above, § 113; *Paulík*, cited above, § 46; and *Tavli*, cited above, § 34). In the light of the foregoing, the Court concludes that a fair balance has not been struck between the interests of the applicant and those of society and that there has, in consequence, been a failure by the domestic legal system to secure the applicant "respect" for his "private life".

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

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

52. The applicant also complained that the lack of any procedure by which he could challenge the declaration of his paternity constituted a separate violation of his right under Article 6 of the Convention, which, in so far as relevant, reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

53. The Court observes that at the heart of this part of the application is the impossibility for the applicant to challenge his legal paternity on the grounds of new biological evidence and his discriminatory treatment in that respect. The Court has examined these issues above under Article 8 of the Convention (see, for example, *Róžański*, cited above, § 63; *Paulík*, cited above, §§ 42 and 62; *Tavli*, cited above, § 25; and *Phinikaridou v. Cyprus*, no. 23890/02, § 71, 20 December 2007), and has found a violation of this

Article. In view of those findings it finds it unnecessary to examine the facts of the case separately under Article 6 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLES 6 AND 8 OF THE CONVENTION

54. The applicant complained that he had been discriminated against in the enjoyment of his right to respect for his family life when compared with the treatment of mothers. He relied on Article 14, read in conjunction with Article 6 and 8 of the Convention.

55. Article 14 of the Convention reads 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.”

56. In the light of all the material in its possession, the Court observes that the applicant failed to assert those rights before the Constitutional Court. He thus failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention.

57. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant submitted that he was not seeking financial gain but rather wanted an acknowledgement of the violation of his Convention rights.

60. The Government contended that the applicant should be regarded as not having formally claimed any pecuniary or non-pecuniary compensation within the time-limit afforded by the Court.

61. In view of the above, the Court considers that the applicant has made no claim in respect of pecuniary or non-pecuniary damage and therefore does not make any such award.

B. Costs and expenses

62. The applicant sought the reimbursement of the costs incurred before the Court. He did not specify the sum.

63. The Government noted that the applicant had neither submitted itemised particulars of his claims for the reimbursement of legal costs, nor provided any documents to support his claims.

64. According to the Court's case-law, an applicant is entitled to reimbursement of his or her 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, the Court notes that no documentary evidence has been submitted by the applicant to establish that the costs and expenses claimed by him in the original application form were actually incurred (see *Vojáčková v. the Czech Republic*, no. 15741/02, § 35, 4 April 2006). The Court, therefore, rejects this claim.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning a violation of Articles 6 and 8 of the Convention admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that there is no need to examine separately the complaint under Article 6 of the Convention;
4. *Declares* the remainder of the application inadmissible;
5. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Koskelo and Eicke is annexed to this judgment.

L.A.S.

A.C.

CONCURRING OPINION OF JUDGES KOSKELO AND EICKE

1. While we agree with the operative part and most of the reasoning of the present judgment we do have some reservations about paragraph 48. In particular, we are unable to subscribe to the final sentence in that paragraph, declaring that the Czech Constitutional Court “could have decided the case in line with the Court’s case-law and on the basis of its own jurisprudence, even in the absence of legislative changes”.

2. Even if this may strike some as quite a small reason for a separate opinion, it is important to us, as a matter of principle, to put on record our disagreement with the language adopted by the majority. In our view, the passage cited above raises a rather fundamental matter of principle, in that it implies a criticism by this Court of the domestic constitutional court’s application of domestic constitutional law. In this regard, we consider that the majority has unduly stepped outside the Court’s proper role.

3. Under the Convention (Articles 19 and 32), the mandate of this Court is to ensure the observance of the Convention (including the Protocols thereto) by the High Contracting Parties, and its jurisdiction extends to all matters concerning the interpretation and application of the Convention and its Protocols. By contrast, it is not, in principle, the Court’s role to pronounce itself on whether the domestic constitutional organs have properly interpreted and applied domestic constitutional law, including whether the constitutional court has erred, as a matter of domestic constitutional law, in adopting a particular position in the impugned judgment. The Contracting States are required to ensure compliance with the Convention in accordance with their domestic constitutional order and the division of competences laid down therein. Whether one or other domestic organ was, in terms of the domestic constitutional order, under a duty to, and as a matter of domestic constitutional law able to ensure compliance with obligations arising from the Convention in a given context is not a matter to be determined by this Court.

4. It is, after all, clear from this Court’s settled case-law that it is primarily for the national authorities to resolve problems in the interpretation of domestic legislation. The Court’s role is limited to verifying whether the effects of such interpretation are compatible with the Convention. That being so, save in the event of evident arbitrariness, it is not for the Court to question the interpretation of the domestic law by the competent national courts (see, *inter alia*, *Károly Nagy v. Hungary* [GC], no. 56665/09, § 62, 14 September 2017).

5. The principle of subsidiarity, which emphasises the responsibility of the domestic authorities to ensure compliance with the requirements of the Convention and which is indeed of vital importance, does not in our view

detract from but in fact underpins the above mentioned fundamentals of the Court's role within the Convention system. The Court is competent for supervising whether the High Contracting parties (acting through their various domestic authorities) have lived up to the requirements and standards imposed by the Convention, but that task does not, nor should it, entail an authority (or ability) to supervise whether the respective constitutional organs have properly observed their functions and responsibilities within the domestic legal order. The issue of compliance with the Convention at the domestic level is distinct from the issue of the domestic division of competences and responsibilities in this regard, such as that between the legislative and the judicial branches. The latter, in principle, remains outside the Court's remit of supervision.

6. Furthermore, it is to be noted that the case of *Habulinec and Filipović v. Croatia*, cited by the majority in paragraph 48, does not support any contrary view. After all, the relevant passage in that case was concerned with the issue of whether the applicants had complied with the admissibility requirement of exhaustion of domestic remedies. In such a context the Court, for obvious reasons, may have to examine quite closely and concretely the available system of remedies under the domestic legal order. The context in the present case, however, is entirely different, as this is a judgment on the merits of the case, thus dealing with the issue of whether the Czech Republic has complied with the requirements of Article 8 of the Convention. The internal attribution or distribution of responsibilities under the domestic legal order is not the object or focus of that determination. In so far as the judgment in *Topčić-Rosenberg v. Croatia*, also cited in the present judgment, may be read as supporting the approach adopted by the majority, we are not inclined, and certainly not bound, to follow the approach adopted by the Court in that judgment.

7. Our reluctance to subscribe to what the majority state at the end of paragraph 48 is, furthermore, not only dictated by reasons of principle. Unlike a national judge well versed in the domestic legal order, this approach is also dictated by the limits of our own expertise. While some elements of domestic law may be sufficiently clear even for outsiders to understand without major difficulty, for instance where they consist of unequivocal statutory provisions, or correspond to generally recognised tenets of common legal principles, or where they consist of directly applicable EU law which is uniform in the whole of the Union, many areas of domestic law, including constitutional law and its interaction with the rest of the domestic legal order, are often complex and subtle, and it is therefore both difficult and inappropriate for outsiders such as ourselves to form or even less express an opinion thereon. While the statement at the end of paragraph 48 may or may not be correct as a matter of Czech constitutional law, as it is neither our task as members of this Court nor within our expertise to enter into those matters, we should not be expected

to join in this kind of a statement, and therefore respectfully decline to do so.