CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF RÓŻAŃSKI v. POLAND

(Application no. 55339/00)

JUDGMENT

STRASBOURG

18 May 2006

FINAL

18/08/2006

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

In the case of Różański v. Poland,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mrs E. STEINER,
Mr L. GARLICKI,
Mr K. HAJIYEV,
Mr D. SPIELMANN, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 6 April 2006,

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

PROCEDURE

1. The case originated in an application (no. 55339/00) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Stanisław Różański, on 6 March 1997.

2. The Polish Government ("the Government") were represented by their Agents, Mr K. Drzewicki and, subsequently, by Mr Jakub Wołąsiewicz.

3. The applicant alleged through being prevented from recognising a child of whom he was the biological father, he was the victim of a violation of his right to respect for his "private and family life" guaranteed by Article 8 of the Convention. He was represented before the Court by Mr P. Rybiński, a lawyer practising in Gdańsk.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

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

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

7. By a decision of 10 March 2005 the Court declared the application admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1960 and lives in Gdańsk.

10. From 1990 to 1994 the applicant lived with B.F. On 29 August 1992 B.F. had a baby, a boy D. He was registered at the Birth Register as having "Stanisław F." as father, i.e. a fictitious name, consisting of the applicant's first name and the mother's surname.

11. In April 1994 the relationship ended. B.F. left the child with the applicant and disappeared for over a month. The applicant submits a copy of a letter, in which B.F. states that she leaves him and the boy and that they should now fend for themselves. As the child subsequently fell ill, the applicant took him to a hospital. B.F. took D. from the hospital on 21 May 1994. She then stayed in hiding for several months. Since then the applicant has not had any contacts with the child.

12. Prior to this, on 18 April 1994, the applicant lodged a motion with the Gdańsk District Court, claiming that the paternity of D. be established and submitting that he was his biological father. He was subsequently summoned by the court to submit certain documents in order to have a guardian appointed who would bring a paternity action on the child's behalf as under the domestic law the alleged biological father, not married to the mother, lacked standing in paternity proceedings. The applicant failed to do so.

13. In a note of 20 May 1994 the Gdańsk Social Assistance Centre informed the family court about the situation of D. and requested it to take steps to supervise B.F. in her exercise of parental rights. The social assistance officer also referred in her note to the applicant and stated that, in the light of the information received from his sister, in her view he would be unable to take adequate care of the child.

14. Subsequently the Gdańsk District Court instituted custody proceedings concerning D. By a decision of 26 May 1994 the court ordered that D. be taken into public care. Apparently shortly afterwards this decision was revoked.

15. In August 1994 the Gdańsk District Court requested the prosecuting authorities to investigate whether B.F. had committed a criminal offence by

exposing D. to immediate danger of serious bodily injury. Such investigations were instituted in November 1995.

16. By a decision of 27 January 1995 the District Court gave a new decision on the basis of which D. was taken into public care. The custody rights of B.F. were restricted and she was only allowed to visit him. The applicant was not a party to the proceedings. B.F. refused to give D. away when police officers came to take him to a children's home.

17. On that date the applicant lodged a new motion with the District Court to have a guardian appointed to represent D. for the purposes of the paternity proceedings.

18. Prior to that, on 9 January 1995, the applicant requested the Gdańsk District Prosecutor to institute on his behalf proceedings to have his paternity established in respect of D. In a reply of 5 May 1995, the prosecutor recalled that the applicant, by a motion of 27 January 1995, had requested the civil court to appoint a guardian for the child for the purpose of instituting the paternity proceedings, and that therefore it would not be advisable that the prosecuting authorities considered the applicant's request, which, if successful, would lead to two parallel sets of proceedings pending at the same time, both concerning the determination of the applicant's paternity in respect of D.

19. In July 1995 the Court rejected the applicant's motion of 27 January 1995 because he had failed to pay the court fee. Subsequently, the applicant paid the fee and the proceedings were resumed.

20. At a hearing held on 10 November 1995 the applicant withdrew his motion to have a guardian appointed and the court discontinued the proceedings.

21. On 15 March 1996 B.F. declared before the Gdańsk District Court that her new partner J.M. was D's biological father. On 18 March 1996 she lodged a motion with the District Court to have her full parental rights restored. By a decision of 26 March 1996 the District Court revoked its decision of 27 January 1995 to take D. into public care and ordered that he could stay with her until the termination of the proceedings, considering that since her living conditions had improved, she would be capable of taking adequate care of D. until a final decision on the merits be given.

22. By a decision of 10 July 1996 the District Court restricted B.F.'s parental rights by appointing a guardian to supervise her in the exercise of her rights.

23. On 15 July 1996 the new partner of B.F., J. M., was acknowledged as D.'s legal father, following his recognition of paternity.

24. On 8 August 1996 the applicant lodged with the Gdańsk District Prosecutor a request to institute investigations concerning his parental rights. He alleged that criminal offences had been committed in connection with the relevant proceedings. By a decision of 30 August 1996 the prosecution authorities refused to institute investigations, finding that no

laws had been breached in connection with determination of the applicant's parental rights.

25. On 8 August 1996 the applicant lodged another motion with the District Court, asking again for the appointment of a guardian to represent the child for the purpose of instituting paternity proceedings. By a decision of 15 November 1996 the District Court dismissed it, stating that the applicant had no right of action, since following the declaration of 15 July 1996 it was J.M. who was D.'s legal father.

26. On 12 November 1996 the applicant again requested the prosecutor to institute criminal proceedings, alleging that the birth certificate of D. had been forged. On 20 December 1996 the Gdańsk District Prosecutor refused to do so, finding that the child's birth certificate had been amended following the recognition of the paternity of D. by his mother's new partner J.M. The prosecutor observed that under the applicable laws recognition of a child was only possible if the mother gave her consent thereto. No criminal offence had been committed in that D.'s certificate had been rectified to reflect the recognition of paternity, effected with his mother's consent.

27. The applicant appealed against the prosecutor's decision. On 15 May 1997 the appellate prosecutor dismissed his appeal.

28. On 15 January 1997 the applicant challenged the decision of the Gdańsk District Court of 15 November 1996 by which it had stated that in view of the fact that J.M. had recognised his paternity of D., the applicant had no standing to bring paternity proceedings. On 29 January 1997 the court dismissed his appeal.

29. In a letter of 22 January 1997 the President of the Gdańsk District Court informed the applicant that the paternity proceedings had been discontinued due to the fact that B.F.'s new partner had recognised his paternity in respect of the child.

30. On 30 October 1997 the applicant complained to the Court of Appeal that the Gdańsk District Court failed to take steps in the interest of the child in order to have the applicant's paternity recognised. He submitted that he did not have access to the child, although he was his biological father. He argued that the parental skills of B.F. were inadequate as shown by the fact that her two other children K. and T. had been placed with a foster family; that in 1994 she had left the child with him and disappeared for over a month, and that the man who had recognised D. as his child was a habitual offender. He emphasised that the court relied only on the submissions of the mother, disregarding entirely his interests as a biological father of the child, and failed to take the child's best interests properly into consideration.

31. In a letter of 1 December 1997 of the President of the Gdańsk Court of Appeal, the applicant was informed that a copy of the decision of 15 November 1996 by which the District Court had dismissed the

applicant's request to have a guardian for the child appointed for the institution of paternity proceedings, had been sent to a wrong address. Therefore, the decision should be served again on the applicant. The applicant was further informed that the Gdańsk District Court had, on 18 April 1997, restricted the parental rights of B.F. and J.M. in respect of D. in that a guardian had been appointed to supervise them in the exercise of their parental rights.

32. By letters of 22 December 1997 and 7 January 1998 the President of the Court of Appeal informed the applicant that his further complaints concerning the conduct of the District Court as regards D. were unfounded, and that it was J.M. who was the father of the child.

33. In a letter of 12 January 1998 the Gdańsk Regional Prosecutor recalled that the applicant's request to institute proceedings on his behalf in order to have him recognised as a biological father of D had been refused on 5 May 1995 as it was not in the child's best interest.

34. On 6 November 1998 the Ministry of Justice informed the applicant, in reply to his complaints, that the case-files concerning the child had been reviewed and the applicant's complaints about the failure to examine his position as a biological father of D. were unfounded.

35. The applicant does not have any access to the child.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Provisions of the Constitution

36. Article 47 of the Constitution provides that

> "(e) everyone shall have the right to legal protection of his private and family life, of his honour and good reputation, and to make decisions about his personal life."

37. Pursuant to Article 48, parents shall have the right to educate their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience. Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final judicial decision.

38. Article 72 of the Constitution provides that "the Republic of Poland shall ensure protection of the rights of children."

39. Article 190 of the Constitution, insofar as relevant, provides as follows:

> "1. Judgments of the Constitutional Court shall be universally binding and final.
>
> 2. Judgments of the Constitutional Court, ... shall be published without delay.
>
> 3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for the end of

the binding force of a normative act. Such time-limit may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Court shall specify a date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

4. A judgment of the Constitutional Court on the non-conformity with the Constitution, an international agreement or statute, of a normative act on the basis of which a final judicial decision, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings".

40. Article 401^1 of the Code of Civil Procedure provides that a party to civil proceedings which have terminated with a final judgment on the merits can request that these proceedings be re-opened, if the Constitutional Court has found that the legal provision on the basis of which this judgment was given was incompatible with the Constitution. Such a request can be lodged with the competent court within one month from the judgment of the Constitutional Court.

2. Relevant provisions of the Family and Custody Code (Kodeks Rodzinny i Opiekuńczy)

41. Article 72 of the Code reads:

"If there is no legal presumption in operation that the mother's husband is the father of her child, or if such presumption has been rebutted, the paternity of the child may be established by the recognition of paternity by the father, or by a decision of a court."

42. A declaration recognising paternity of a child can be made before a registrar of a local births, marriages and deaths register office.

43. Article 77 § 1 reads:

"The recognition of paternity in respect of a minor child should be subject to the approval of its mother. On the death of the mother, or if her parental rights have been withdrawn, or if a contact with her is impossible, a court appointed guardian shall give consent to the recognition of paternity."

44. Pursuant to Articles 80 to 83, an action to have the recognition of a child declared null and void can be brought by the mother, by the child and by the man who recognised his paternity. Under Article 86 the prosecutor may also bring an action to have the recognition of a child declared null and void.

45. Under Articles 84 and 86 of the Code, an action to establish paternity may be brought by the mother or by the child, or by the prosecutor.

46. Article 99 of the Code provides that a guardian can be appointed by the family court to represent the child, if neither of the parents can represent it in judicial proceedings.

3. Judgment of the Constitutional Court of 28 April 2003

47. In its judgment of 28 April 2003 (K 18/02) the Constitutional Court ruled on the Ombudsman's request to have Article 77 of the Family and Custody Code and Article 84 § 1 of that Code declared incompatible with the Constitution. The Ombudsman argued that the fact that a biological father did not have standing to lodge himself with a court an action to have his paternity recognised in respect of an out-of-wedlock child and that such action on behalf of a father could be only brought by the public prosecutor, breached the father's right to have access to a court, guaranteed by the Constitution. It was further argued that this restriction on access to a court was in violation of these provisions of the Constitution which guaranteed respect for private and family life.

48. The Constitutional Court observed that the Constitution does not regulate the issue of methods to be applied in order to establish filiation of children to whom a presumption of paternity of the mother's husband did not apply. This matter is left to be regulated by statute. Nevertheless, the constitutional principle of protecting the child's best interest, enshrined in Article 72 of the Constitution, indicated preference as to the manner in which legal procedures to establish filiation should be shaped, namely so as to allow legal filiation to be determined in accordance with child's biological parentage.

49. The Constitutional Court observed that under Article 77 § 1 of the Custody and Family Code the recognition of paternity by way of unilateral declaration of a putative biological father was subject to the mother's consent.

50. The Constitutional Court observed that the decision of the legislature to make the effectiveness of recognition of paternity by a declaration made under this provision conditional on the mother's consent was justified by the need to protect mother's personal rights. Had the requirement of consent been removed, it would create a situation in which a man would be the sole person capable of establishing the child's filiation. This could result in creation of legal bonds inconsistent with biological reality and, also, expose the mother to the risk of harassment by a man claiming to be a biological father of her child. However, the Constitutional Court considered that it would not be justified to introduce a judicial control over the mother's consent. This would ultimately lead to replacing the mother's consent by consent given by a court, which would undermine the very reason for the existence of unilateral declaration of paternity as a special method of establishing legal ties between the father and child.

51. The Constitutional Court further considered that the lack of standing before a court for a man claiming to be the biological father of a child and trying to have his paternity recognised in law in procedure provided for by Article 84 of the Custody and Family Code had to be seen in the light of the

fact that the recognition of paternity by way of declaration was conditional on the mother's consent, referred to above.

52. The necessity of the mother's consent, on the one hand, and the lack of standing before the court to have one's paternity recognised in law on the other resulted in a situation in which, in the absence of such a consent, a biological father would be deprived of any possibility of creating legal ties between himself and his child, either by way of declaration or by instituting paternity proceedings. The Constitutional Court emphasised that a decision of the prosecuting authorities to institute proceedings with a view to creating such ties was left entirely to their discretion. All these factors taken together led the Court to the conclusion that the lack of standing before a court of the biological father in proceedings to have his biological paternity recognised in law were in breach of Article 72 of the Constitution, providing for protection of the children's rights as a constitutional principle. It was further stated that this was also in breach of the father's right to respect for his private and family life, guaranteed by Article 47 of the Constitution. Moreover, these provisions breached Article 45 of the Constitution, guaranteeing the right of access to a court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

53. The applicant alleged that, through being prevented from recognising a child of whom he claims to be the biological father, he was the victim of a violation of his right to respect for his "private and family life". He relied on Article 8 of the Convention, the relevant parts of which provide**:**

> "1. Everyone has the right to respect for his ... 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. Arguments of the parties

1. The Government

54. The Government acknowledged that the domestic law as applicable at the relevant time had not provided for a putative biological father to bring directly a court action in order to have his paternity recognised in law. However, the provisions of the Family and Custody Code provided for a number of legal avenues by which the applicant could have had his paternity confirmed.

55. Firstly, before the legal tie of paternity was established between D. and his mother's partner J.M. who recognised D. as his child with effect from 15 July 1996, it was open to the applicant to request the court, under Article 99 of the Code, to appoint a guardian who could lodge an action on the child's behalf to have the applicant's legal paternity established. On 27 January 1995 the applicant indeed requested the Gdańsk District Court that such a guardian be appointed. However, later on, at the hearing held on 10 November 1995 he withdrew his application and the court subsequently discontinued these proceedings.

56. Secondly, even after J.M. had recognised D. as his son, the applicant could have had recourse to the legal avenue provided for by Article 86 of the Family and Custody Code. Under this provision, the recognition of a child could be challenged by the prosecuting authorities, which were competent to bring an action for annulment of the declaration of recognition made by J.M. The Government argued that the applicant had failed to request the prosecutor to bring such an action.

2. The applicant

57. The applicant argued that, in the absence of the consent of D's mother, he could pursue two paths to have his legal paternity established. The first one was to have a paternity claim lodged on behalf of the child by a court appointed guardian. On 27 January 1995 the applicant had indeed requested the Gdańsk District Court that such guardian be appointed.

The second one had been a request to the prosecutor for a paternity action to be lodged on the applicant's behalf. The applicant had submitted such a request on 9 January 1995. However, on 9 May 1995 the prosecutor had refused to grant his request on the ground that his earlier request to have a guardian appointed had already been pending at that time and therefore it was not advisable for the prosecutor to consider his request to have the parallel proceedings instituted. This showed, in the applicant's submission, that under domestic law these two paths had been mutually exclusive, or at least had been so considered by the prosecution in the present case. The unfettered discretion that the prosecutor enjoyed as regards institution of paternity proceedings on behalf of a putative father had made it possible for

the prosecution authorities to refuse to proceed with the examination of the applicant's request of 9 January 1995 in the light of the other set of proceedings already pending at that time.

58. The applicant further argued that on 8 August 1996 he had renewed his request to have a guardian appointed, but to no avail, because by then J.M. had already become D's. legal father, following his acknowledgment of paternity which became effective on 15 July 1996. The authorities considered that the paternity action could not be have been instituted in respect of a child whose legal parentage had already been established.

59. The applicant submitted that another possibility he had would have been to request the prosecutor to institute an action for annulment of recognition of paternity by J.M. However, this action was not available to him personally and was entirely dependent on the prosecutor's discretionary decision.

B. The Court's assessment

1. General principles

60. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (*Mikulić v. Croatia*, no. 53176/99, § 57, with further references).

61. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (*Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49; *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, p. 56, § 31).

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

2. Compliance with Article 8 of the Convention

63. The Court first recalls that it has already found in the decision of the admissibility of the present case (§ 7 above) that in the present case the applicant's link with the child had a sufficient basis in fact to bring the alleged relationship within the scope of family life within the meaning of Article 8 § 1 of the Convention.

64. The Court reiterates in this respect that D. had been born out of a relationship between the applicant and Ms B. F. that had lasted for about four years. It is also worth noting that immediately after their relationship ended in April 1994, the applicant, as early as 18 April 1994, lodged a motion with the Gdańsk District Court, claiming that the paternity of D. be established and submitting that he was his biological father. Afterwards, after the applicant had lost all contact with the child in May 1994 (§ 11 above), he repeatedly took various steps in order to have his putative biological paternity recognised in law. Hence, it is relevant for the assessment of the case that the applicant has shown, in the Court's opinion, demonstrable interest in and commitment to the child both before and after the birth (see no. 22920/93, dec. 6.4.1994, D.R.77-A, p. 115; *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI).

65. The Court reiterates that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible, as from the moment of birth, the child's integration into his or her family (see *Keegan*, cited above, p. 19, § 50, and *Kroon*, cited above, p. 56, § 32).

66. The Court observes in this connection that in the present case the situation which existed from May 1994 when the applicant lost contact with D. until July 1996 when J.M. recognised his paternity in respect of the boy, differed from the situation which it examined in the Kroon judgment. In the latter case it was impossible for the mother to institute proceedings to deny paternity of her husband because the Dutch law imposed restrictions on her in order to protect legal certainty as to the legal paternity of a child born in wedlock. The Court emphasises that in the present case such a consideration was not involved as there was no presumption of paternity to the benefit of another man until the paternity of D. was recognised by J.M.

67. The Court further recalls that in the *Kroon* case referred to above, it established a principle that respect for family life required that biological and social reality prevail over a legal presumption which in that case flew in the face of both established fact and the wishes of those concerned without actually benefiting anyone (*Kroon*, cited above, § 40).

The Court emphasises that the present case differs in this respect from the situation examined in *Kroon* also in that in the latter the parents' wishes were in agreement, while in the present case it has not been shown that such an agreement existed between the applicant and D's mother since at least

April 1994. Consequently, the Court is of the view that the principle that the biological reality must prevail cannot be said to be fully applicable to the circumstances of the present case.

68. Nonetheless, referring to the situation which obtained in the case until April 1994 when the applicant and D's mother's relationship ended, the Court observes that the right of a putative biological father under Polish law to recognise a child born out of wedlock by way of a simple declaration (see § 42 above) is a reflection of this principle. The Court notes that such a declaration was an ordinary and easily accessible instrument for creating family ties between the applicant and D. It further observes that the possibility of effectively making such declaration was dependent on the mother's consent. It has not been argued or shown that D.'s mother had manifested her lack of consent for his recognition of paternity until they separated in April 1994. However, the Court notes that if the mother had not given such consent throughout this time, it would be impossible for the applicant to challenge her lack of consent in any proceedings.

69. As regards the period after April 1994, the Court observes that under domestic law in force at the material time it was open to the applicant to lodge a motion to have a guardian appointed by the court in order to institute paternity proceedings on the child's behalf. The Court notes that the applicant submitted such a motion on 18 April 1994.

70. The Court further observes that the applicant also attempted to set in motion another procedure provided for by the family law in order to have his paternity recognised. On 9 January 1995 he requested the Gdańsk District Prosecutor to institute on his behalf the proceedings to have his paternity established.

71. Hence, the Court concludes that under domestic law as it stood at the material time there were procedures available in which the applicant's paternity in respect of a child born out of wedlock could be determined and recognised in law.

72. However, the Court notes the applicant's argument that on 9 May 1995 the prosecutor refused to bring the paternity action on his behalf, considering that his earlier request to appoint a guardian for the purpose of bringing an identical action was pending at that time. The prosecuting authorities therefore considered that it was not advisable for them to proceed with his case. Hence, under domestic law these two paths were mutually exclusive, or at least were so considered by the prosecuting authorities in the present case.

73. The Court emphasises that it is a crucial aspect of the present case that neither of these procedures was available to the applicant in that he could not launch them himself. The launching of these procedures depended on a decision of the authorities who enjoyed a discretionary power to decide whether to accede to such a request or to refuse it.

74. In this context the Court also notes the relevance of the case-law of the Constitutional Court of Poland, referred to above (§§ 47 - 52) for the issues examined in the present case. In particular, the latter considered that the necessity of the mother's consent for the recognition of paternity, on the one hand, and the lack of standing before the court to have one's paternity recognised in law on the other resulted in a situation in which, in the absence of such a consent, a biological father would be deprived of any possibility of creating legal ties between himself and his child. It further emphasised that a decision of the authorities to institute proceedings with a view to creating such ties was left entirely to their discretion. All these factors taken together led that Court to the conclusion that relevant provisions were in breach of the putative father's right to respect for his private and family life, guaranteed by the Constitution.

75. As regards the period after 15 July 1996, when D. mother's new partner was recognised as his father following his declaration of 15 March 1996, the Court is of the view that the fact that the authorities enjoyed discretionary powers in deciding whether to institute proceedings in order to challenge the legal paternity established by way of a declaration of paternity by another man is not, in itself, open to criticism. The fact that the authorities had been vested with such discretionary powers was clearly designed to safeguard the best interest of a child in respect of whom paternity had already been recognised and, also, to balance the interests of both the child and the putative biological father.

76. The Court emphasises that when a decision to be given falls within the ambit of discretionary powers of competent authorities, the involvement of a person whose interests are at stake cannot, for obvious reasons, be attended by the same procedural guarantees as those applicable in judicial proceedings, in particular in the area as delicate as establishing a legal filiation with children. However, the Court observes that it has not been either shown or argued by the Government that the domestic law as it stood at the material time contained any guidance as to the way in which the discretion, with which the authorities had been vested by law, should be exercised.

77. In this connection, the Court notes that the prosecuting authorities and the courts reiterated in their decisions given after the child had been recognised by J.M. that the mere fact of this legal recognition by another man was sufficient to refuse the applicant's requests to have his biological paternity recognised (§§ 25, 28, 33 above).

While it was obviously reasonable to take into consideration the fact that the legal paternity of the child had already been established, in the Court's view, there were also other factual elements of the situation which should have been taken into account by the authorities examining the case. In this connection the Court notes that no steps were taken by the authorities to establish the actual circumstances of the child, the mother and the applicant

or that any relevant evidence had been taken. It further observes that on no occasion was the applicant interviewed by the authorities in order to have his parental skills established and assessed by the authorities. The reasoning of the decisions given by the authorities was perfunctory, the mere reference to the recognition of paternity by J.M. being the only justification for their refusals to deal with the applicant's repeated requests.

78. In the Court's view, in the circumstances of the present case it would have been reasonable to expect that the authorities, when responding to the applicant's efforts after July 1996 to have J.M's paternity challenged, would consider the relative weight of, on the one hand, the interests of the applicant as a putative biological father and, on the other, of the child and the family that the recognition by J.M. had created. While the Court acknowledges that it can be surmised that that the authorities, when giving their decisions after the child had been recognised by J. M. might not have wanted to disturb the legal relationship between the child and his mother's new partner, it is open to criticism that no examination of these interests against the factual background of a particular case has been effected or even considered. Moreover, it was not examined at all whether in the circumstances of the case the examination of the applicant's paternity would harm the child's interests or not.

Hence, in the Court's view, the manner in which the discretionary powers of the authorities were exercised in deciding whether to challenge legal paternity established by the declaration made by J.M. in July 1996 i.e. the absence of any steps taken to establish the actual circumstances of the case does not seem to have ensured that the rights and interests of the applicant have been given due consideration.

79. To sum up, when making the assessment of the case the Court had regard to the circumstances of the case seen as a whole. Hence, it has taken into consideration, firstly, the lack of any directly accessible procedure by which the applicant could claim to have his legal paternity established (see § 73 above). Secondly, the Court noted the absence, in the domestic law, of any guidance as to the manner in which discretionary powers vested on the authorities in deciding whether to challenge legal paternity established by way of a declaration made by another man should be exercised (see § 76 above). Thirdly, the Court considered the perfunctory manner in which the authorities exercised their powers when dealing with the applicant's requests to challenge this paternity (see § 77 above). Having examined the manner in which all these elements taken together affected the applicant's situation, the Court concludes that, even having regard to the margin of appreciation left to the State, it failed to secure to the applicant the respect for his family life to which he is entitled under the Convention (*Mizzi v. Malta*, no. 26111/02 § 114, *mutatis mutandis*).

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. 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

82. Under the head of non-pecuniary damage the applicant claimed a sum of 100,000 Polish zlotys (PLN) [approx. EUR 25,000] for moral suffering and distress resulting from a violation of his Convention rights. In that regard, the applicant in particular referred to the anxiety and stress he suffered on account of his unsuccessful efforts to have his paternity recognised in respect of a child of whom he considers to be the biological father.

83. The Government considered that the sum in question was excessive. They requested the Court to rule that the finding of a violation would constitute in itself sufficient just satisfaction. In the alternative, they invited the Court to make an award of just satisfaction on the basis of its case-law in similar cases and national economic circumstances.

84. The Court considers that the applicant must have sustained non-pecuniary damage and that sufficient just satisfaction would not be provided solely by a finding of a violation of the Convention. Having regard to the circumstances of the case and making its assessment on an equitable basis as required by Article 41, it awards the applicant EUR 8,000 under this head.

B. Costs and expenses

85. The applicant who received legal aid from the Council of Europe in connection with the presentation of his case in the proceedings before the Court did not seek reimbursement of the relevant costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been a violation of Article 8 of the Convention;

2. *Holds* by five votes to two
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 18 May 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Garlicki joined by Mrs Steiner is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE GARLICKI JOINED BY JUDGE STEINER

1. It is with regret that we cannot accept the majority's position in this case. The majority adopted a position finding that a violation of the applicant's rights had resulted from the legislative framework in which no "paternity procedures" had been directly available to him. However, in *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI, and later in *Yousef v. the Netherlands*, no. 33711/96, ECHR 2002-VIII, the Court took a different approach and found that some limitations on paternity claims might be compatible with the Convention. It is not clear to us whether the judgment in the present case is meant to overrule *Nylund* and *Yousef* (and, if so, on what grounds) or whether it can be distinguished from those two cases (and, if so, on what basis).

2. Nevertheless, we are inclined to agree that the legislative framework for paternity recognition, as adopted in Poland at the material time, was defective. We do not think, however, that this conclusion can be drawn from any general requirement to provide "direct remedies"; that would not fit with the case law as established in *Nylund* and *Yousef* cases. We would rather attach more weight to the fact that, already three years ago, the Polish Constitutional Court declared that legislation unconstitutional (see paragraphs 47-52 of our judgment). That finding should be conclusive also for our assessments, and we are glad that the Strasbourg Court decided to follow it. We can only observe that it would be very much in line with the idea of the dialogue between judges if the reasoning of the Polish Constitutional Court were cited also in the "Law" part of our judgment.

That could also be useful because it might encourage our Court to expand its reasoning. While it is true that, under both the European Convention and the Polish Constitution, a putative father should not be deprived of access to the courts to raise his paternity claim, it is also true that such access need not be unlimited. Where there is a loving and loyal union between man and woman, the mother has no reason to refuse consent for recognition of paternity. Refusal of consent presupposes a conflict and it is the child, and not the putative father, who should be protected in such a situation. There is always a risk that paternity claims might be raised in a frivolous or vexatious way and be used to harass mother and child. That could have a disastrous effect upon the psychological development of the child. Hence, the legislature can and should establish such limitations and restrictions as are necessary for protection of the welfare of the child. Those considerations were expounded in the 2003 judgment of the Polish Constitutional Court. We regret that they have not been included in the 2006

judgment of the Strasbourg Court. In its present form, our judgment may appear to be rather one-sided.

3. We would be more ready to find a violation had the applicant duly exhausted all available remedies. However, he failed to do so. In January 1995 he lodged a motion with the District Court to have a guardian appointed for the purposes of the paternity proceedings. Almost simultaneously, he requested the Public Prosecutor to institute the paternity proceedings on his behalf. In May 1995 he was advised by the Prosecutor that it was unwise to pursue two parallel sets of proceedings in the same matter. Six months later the applicant withdrew his motion before the District Court. Later he focused on futile attempts to institute a criminal investigation against the mother. It must not be forgotten that, in March 1996, another putative father claimed paternity and that his claim was confirmed by the mother. All those facts lead us to the conclusion that the applicant's paternity request was not a clear and convincing one, nor did he show the required degree of diligence in pursuing his case.

We are not sure whether the Court was correct when, in its admissibility decision of 10 March 2005, it observed that since neither of the above-mentioned procedures had been available to the applicant in that he could not launch them himself, they could not be considered as remedies to be exhausted before bringing the case to the Court. The existing remedies may have not been perfect, but they were in place and did work in the case of the second candidate to paternity, and it is not for the Court to speculate on how they would have worked in the case of the applicant. The applicant was a victim of his own indecisiveness. The State cannot be held responsible for his lack of action.