FIRST SECTION

CASE OF KONSTANTIN MARKIN v. RUSSIA

(Application no. 30078/06)

JUDGMENT

STRASBOURG

7 October 2010

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 Konstantin Markin v. Russia,

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

Christos Rozakis, *President*,
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges*,
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 16 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 30078/06) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Konstantin Aleksandrovich Markin ("the applicant"), on 21 May 2006.

2. The Russian Government ("the Government") were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained, in particular, of the domestic authorities' refusal to grant him parental leave because he belonged to the male sex.

4. On 30 August 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1976 and lives in Novgorod. He is a serviceman in military unit no. 41480.

6. On 30 September 2005 his wife Ms M. gave birth to their third child. On the same day a court granted their application for divorce.

7. On 6 October 2005 the applicant and Ms M. entered into an agreement under which their three children would live with the applicant

and Ms M. would pay maintenance for them. Several days later Ms M. left for St Petersburg where she has been living ever since.

8. On 11 October 2005 the applicant asked the head of his military unit for three years' parental leave. On 12 October 2005 the head of the military unit rejected his request because three years' parental leave could be granted only to female military personnel. The applicant was allowed to take three months' leave. However, on 23 November 2005 he was recalled to duty.

9. On 30 November 2005 the applicant brought proceedings against his military unit claiming three years' parental leave. He also challenged the decision of 23 November 2005.

10. On 28 February 2006 the applicant was disciplined for systematic absences from his place of work.

11. On 9 March 2006 the Military Court of the Pushkin Garrison annulled the decision of 23 November 2005 and upheld the applicant's right to the remaining 39 working days of his three months' leave. On 17 April 2006 the Military Court of the Leningradskiy Command quashed the judgment and rejected the applicant's claims.

12. On 14 March 2006 the Military Court of the Pushkin Garrison dismissed his claim for three years' parental leave as having no basis in domestic law. The court held that only female military personnel were entitled to three years' parental leave and that the applicant was entitled to three months' leave, of which he had made use. Moreover, the applicant had failed to prove that he was the sole carer for his children and that they lacked maternal care.

13. In his statement of appeal the applicant complained, in particular, that the refusal to grant him three years' parental leave violated the principle of equality between men and women guaranteed by the Constitution.

14. On 27 April 2006 the Military Court of the Leningradskiy Command upheld the judgment. It endorsed the reasoning of the first-instance court and added that the applicant's "reflections on equality between men and women ... cannot serve as a basis for quashing the first-instance judgment, which is correct in substance".

15. On 18 July 2006 the applicant was for a second time disciplined for being absent from his place of work.

16. By order of 24 October 2006 the head of military unit no. 41480 granted parental leave to the applicant until 30 September 2008, the third birthday of his youngest son. On 25 October 2006 the applicant received financial aid in the amount of 200,000 Russian roubles (RUB), equivalent to approximately 5,900 euros (EUR). By letter of 9 November 2006 the head of military unit no. 41480 informed the applicant that the financial aid was granted to him "in view of [his] difficult family situation, the necessity of taking care of three minor children and the absence of other sources of income".

17. On 8 December 2006 the Military Court of the Pushkin Garrison issued a decision *("частное определение"*) in which it criticised the head

of military unit no. 41480 for granting the applicant three years' parental leave, and thereby disregarding the judgment of 27 April 2006 in which it had been found that the applicant was not entitled to such leave. The court drew the attention of the head of the military unit to the unlawfulness of his order.

18. On 11 August 2008 the applicant applied to the Constitutional Court, claiming that the provisions of the Military Service Act concerning the three-year parental leave were incompatible with the equality clause in the Constitution.

19. On 15 January 2009 the Constitutional Court rejected his application. It held as follows:

> "2.1 ... military service is a special type of public service which ensures the defence of the country and the security of the State, it is therefore performed in the public interest. Persons engaged in military service exercise constitutionally important functions and therefore possess a special legal status which is based on the necessity for a citizen of the Russian Federation to perform his duty and obligation in order to protect the Fatherland.
>
> When establishing a special legal status for military personnel, the federal legislature is entitled, within its discretionary powers, to set up limitations on their civil rights and freedoms and to assign special duties...
>
> ... by signing a military service contract a citizen ... voluntarily chooses a professional activity which entails, firstly, limitations on his civil rights and freedoms inherent in this type of public service, and, secondly, performance of duties to ensure the defence of the country and the security of the State. Accordingly, military personnel undertake to abide by the statutory requirements limiting their rights and freedoms and imposing on them special public obligations.
>
> ... by voluntarily choosing this type of service citizens agree to the conditions and limitations related to the acquired legal status. Therefore, the imposition by the federal legislature of limitations on the rights and freedoms of such citizens is not in itself incompatible with [the Constitution] and is in accordance with ILO Discrimination (Employment and Occupation) Convention no. 111 of 25 June 1958 which provides that any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination (Article 1 § 2).
>
> 2.2 Under section 11 § 13 of [the Military Service Act] parental leave is granted to female military personnel in accordance with the procedure specified in federal laws and regulations of the Russian Federation. A similar provision is contained in section 32 § 2 of the Regulations on military service, which also provides that during parental leave a servicewoman retains her position and military rank.
>
> A serviceman under contract is entitled to leave of up to three months if his wife dies in delivery or if he is bringing up a child or children under 14 years old (handicapped children under 16 years old) left without maternal care (in the event of the mother's death, withdrawal of parental authority, lengthy illness or other situations where his children have no maternal care). The purpose of such leave is to give the serviceman a reasonable opportunity to arrange for the care of his child and, depending on the outcome, to decide whether he wishes to continue the military

service. If the serviceman decides to take care of his child himself, he is entitled to early termination of his service for family reasons...

The law in force does not give a serviceman the right to three years' parental leave. Accordingly, servicemen under contract are prohibited from combining the performance of their military duties with parental leave. This prohibition is based, firstly, on the special legal status of the military, and, secondly, on the constitutionally important aims justifying limitations on human rights and freedoms in connection with the necessity to create appropriate conditions for efficient professional activity of servicemen who are fulfilling their duty to defend the Fatherland.

Owing to the specific demands of military service, non-performance of military duties by military personnel *en masse* must be excluded as it might cause detriment to the public interests protected by law. Therefore, the fact that servicemen under contract are not entitled to parental leave cannot be regarded as a breach of their constitutional rights or freedoms, including their right to take care of, and bring up, children guaranteed by Article 38 § 2 of the Constitution of the Russian Federation. Moreover, this limitation is justified by the voluntary nature of the military service contract.

By granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly, the special social role of women associated with motherhood. [Those considerations] are compatible with Article 38 § 1 of the Constitution of the Russian Federation. Therefore, the legislature's decision cannot be regarded as breaching the principles of equality of human rights and freedoms or equality of rights of men and women, as guaranteed by Article 19 §§ 2 and 3 of the Constitution of the Russian Federation.

It follows from the above that section 11 § 13 of [the Military Service Act], granting the right to parental leave to female military personnel only, does not breach the applicant's constitutional rights ...

2.4 As servicemen having minor children are not entitled to parental leave, they are also not entitled to receive monthly child-care allowances payable to those who take care of children under the age of a year and a half..."

The Constitutional Court concluded that the provisions challenged by the applicant were compatible with the Constitution.

II. RELEVANT DOMESTIC LAW

20. The Russian Constitution guarantees the equality of rights and freedoms of everyone regardless of, in particular, sex, social status or employment position. Men and women shall have equal rights and freedoms and equal opportunities (Article 19 §§ 2 and 3).

21. The Constitution also guarantees protection of motherhood and the family by the State. The care and upbringing of children is an equal right and obligation of both parents (Article 38 §§ 1 and 2).

22. The Labour Code of 30 December 2001 provides that women are entitled to a so-called "pregnancy and delivery leave" (maternity leave) of

70 days before the childbirth and 70 days after it (Article 255). Further, women are entitled to a three-year "child-care leave" (parental leave). Parental leave may be also taken in full or in part by the father of the child, his/her grandmother, grandfather, a guardian or any relative who is actually taking care of the child. The person on parental leave retains his/her employment position. The period of parental leave is counted for seniority purposes (Article 256).

23. The Federal Law on Obligatory Social Insurance of Sick Leave or Maternity Leave (no. 255-FZ of 29 December 2006) provides that during maternity leave the woman receives a maternity allowance, payable by the State Social Insurance Fund, amounting to 100% of the salary (section 11). During the first year and a half of the parental leave the person who is taking care of the child receives monthly child-care allowances, payable by the State Social Insurance Fund, amounting to 40% of the salary, but no less than RUB 1,500 for the first child and RUB 3,000 for each of the subsequent children (section 11.2). During the second year and a half of the parental leave no social-insurance payments or allowances are available.

24. The Federal Law on the Status of Military Personnel (no. 76-FZ of 27 May 1998, "the Military Service Act") provides that female military personnel are entitled to maternity leave and to parental leave in accordance with the Labour Code (section 11 § 13). There is no similar provision in respect of male personnel.

25. Under the Regulations on military service, enacted by Presidential Decree No. 1237 on 16 September 1999, a servicewoman is entitled to maternity leave, to three years' parental leave, and to all related social benefits and allowances. A serviceman under contract is entitled to three months' leave in one of the following cases: (a) his wife has died in childbirth, or (b) he is bringing up a child or children under 14 years old (handicapped children under 16 years old) left without maternal care (in the event of the mother's death, withdrawal of parental authority, lengthy illness or other situations where his children have no maternal care) (section 32).

III. RELEVANT INTERNATIONAL MATERIALS

A. International Labour Organisation materials

26. The relevant parts of the International Labour Organisation (ILO) Report "Maternity at work: A review of national legislation" (2005) read as follows:

> "While maternity leave aims to protect working women during their pregnancy and recovery from childbirth, parental leave refers to a relatively long-term leave available to either parent, allowing them to take care of an infant or young child over a period of time usually following the maternity or paternity leave period.

...

The Workers with Family Responsibilities Recommendation, 1965 (No. 123) and the Maternity Protection Recommendation, 1952 (No. 95) ... only included provisions on maternity leave and only women's need to reconcile work with family responsibilities were considered. One important change in the policy of the ILO with the adoption of the current Recommendations [and the Convention on Workers with Family Responsibilities, 1981 (No. 156)] was the recognition of fathers' involvement in family responsibilities in general and in this case especially with regard to parental leave. This was an important step towards the creation of effective equality of opportunity and treatment for men and women workers...

Contrary to the other regions, all the countries analysed in Europe provide a period of parental leave to take care of a newborn or young child, even if the length of the leave differs from country to country...

A major difference between maternity and parental leave is the scope of the provisions. While maternity leave is available only for women, parental leave provisions normally are also available for men. In some countries, it is a shared entitlement, where either the mother or the father has the right to take parental leave [for example in Estonia]. In other countries, each parent has an individual right to parental leave, which cannot be transferred to the other parent [for example in Belgium and Iceland]. As mentioned above, according to the EU Directive on parental leave [Council Directive 96/34/EC of 3 June 1996], it should be available to both parents as an individual entitlement. To promote equal opportunities and equal treatment between men and women, parental leave should, in principle, be granted on a non-transferable basis (EC, 1996)...

The introduction of parental leave provisions available to both fathers and mothers can be an effective tool for promoting gender equality. It recognizes the fact that fathers also have caring responsibilities. But even if parental leave by definition is available to both mothers and fathers, women are most often the ones who take parental leave, once maternity leave is finished. Generally, men's take-up rates are very low (ILO, 1997). For this reason, some countries have introduced a paternity quota that can only be taken by the father and is lost if he does not use it..."

27. With respect to maternity leave the Report states, in particular, as follows:

"In many countries, various categories of workers are explicitly excluded in the scope of labour legislation and/or social security legislation or of the corresponding law regulating cash maternity benefits...

In the European Union ... the EU Directive applies to workers in all fields and occupations, with no exceptions. Nevertheless, ... in Greece, the armed forces, the police and domestic servants are not covered. In 1999, the Commission of the European Communities noted that the exclusion of these groups is contradictory to Community law, leading to infringement proceedings against [Greece] (Commission of the European Communities, 1999)."

B. Comparative law materials

28. A report entitled "International Review of Leave Policies and Related Research" published in July 2007 by the United Kingdom Department for Business, Enterprise and Regulatory Reform describes leave entitlements for workers with dependent children in twenty-four countries (twenty-one European countries, Australia, Canada and the United States of America). According to that report the United States of America is the only country where there is no statutory right to parental leave. In contrast to maternity and paternity leave, which are by definition gender-related, parental leave can be taken by either parent in all countries under examination except one (in Hungary only the mother is entitled to take parental leave during the child's first year; during the child's second and third years, however, parental leave may be taken by either parent).

29. Parental leave is a family entitlement in ten countries, to be divided between parents as they choose (Australia, Austria, Canada, Denmark, Estonia, France, Germany, Hungary, Poland and Spain); an individual entitlement in another ten countries, with each parent entitled to a certain portion of parental leave (Belgium, the Czech Republic, Greece, Iceland, Ireland, Italy, Portugal, Slovenia, the Netherlands and the United Kingdom); and mixed (part family, part individual entitlement) in three countries (Iceland, Norway and Sweden). Various measures have been introduced to encourage fathers to take parental leave. Mostly these take the form of wholly or partly individualised entitlements, whereby fathers not using their 'quota' will lose it, since unused leave cannot be transferred to a partner. Another approach is to offer bonus leave days to fathers who take some parental leave (as, for example, in Italy, Finland and Germany).

30. Parental leave may be unpaid (as, for example, in Greece, Ireland, Italy, the Netherlands, Spain and the United Kingdom). A majority of countries (16), however, provide some element of payment to the parent on leave. In seven cases (Austria, Belgium, the Czech Republic, Estonia, France, Italy and Poland) the payment is rather low, whether a flat rate or means-tested, or is paid for only part of the leave period, or a combination of these. Only nine countries pay an earnings-related benefit set at more than half of normal earnings. In some cases – notably the Czech Republic, France and Poland – parents on leave receive a general 'child-rearing' benefit that is paid to all parents with young children, not just those taking leave.

THE LAW

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

31. The applicant complained that the refusal to grant him parental leave amounted to discrimination on account of sex. He relied on Article 14 of the Convention taken in conjunction with Article 8 of the Convention. The relevant provisions read as follows:

Article 8

"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."

Article 14

"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."

A. Submissions by the parties

32. The Government submitted that in October 2006 the applicant had been granted parental leave and had received financial aid. They argued that the matter had been resolved at the domestic level and asked the Court to strike the case out of its list under Article 37 § 1 (b) of the Convention.

33. The applicant argued that his case could not be struck out for the following reasons. Firstly, the parental leave had been granted more than a year after the birth of his son and following communication of the case to the Government. Secondly, the Government had never acknowledged a violation of the applicant's rights. The parental leave and financial aid had been granted in connection with a difficult family situation rather than to remedy a violation of his rights under the Convention. The judgment of 14 March 2006, by which his entitlement to parental leave had been denied by reference to his sex, remained in force and on 8 December 2006 the domestic courts had denounced the order granting him parental leave as unlawful. The disciplinary sanctions imposed on him for his frequent

absences from work before the parental leave had been granted also remained in force. Finally, the Constitutional Court had found that the domestic legal provisions excluding male military personnel from the entitlement to parental leave did not breach the non-discrimination clause of the Constitution.

B. The Court's assessment

1. Admissibility

34. In view of the domestic authorities' decision to grant parental leave to the applicant and to give him financial aid, the Court has to consider, firstly, whether the applicant can still claim to be a victim, within the meaning of Article 34, of the alleged violation of the Convention and, secondly, whether the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention.

(a) Victim status

35. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III, and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

36. In the present case no express acknowledgment of a breach of Article 14 taken in conjunction with Article 8 has been made by the national authorities in the domestic proceedings or in the Strasbourg proceedings. Nor could the decision to grant parental leave and to pay financial aid to the applicant be interpreted as acknowledging, in substance, that his right not to be discriminated against on account of sex had been breached. Indeed, both the parental leave and the financial aid were granted by reference to the applicant's difficult family and financial situations (see paragraph 16 above). Moreover, even after the applicant was allowed, exceptionally, to take parental leave, the domestic courts continued to hold that he, being a serviceman, had no statutory entitlement to parental leave and that his ineligibility for such leave did not breach his right to equal treatment (see paragraphs 17 and 19 above).

37. In the absence of an acknowledgment by the national authorities of a breach of the applicant's rights under the Convention, the Court holds that he may claim to be the victim of the alleged discriminatory treatment for the purposes of Article 34 of the Convention.

(b) Application of Article 37 § 1 of the Convention

38. The Court will further examine the Government's argument that, in view of the measures taken by the domestic authorities to redress the applicant's situation, the matter had been effectively resolved and the application should be struck out of the Court's list of cases in accordance with Article 37 § 1 (b) of the Convention. Article 37 § 1 reads:

> "The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

39. Since the applicant gave a clear indication that he intended to pursue his application, sub-paragraph (a) of Article 37 § 1 is not applicable. That does not, however, rule out the possibility of applying sub-paragraphs (b) and (c), the applicant's consent not being a prerequisite for their application (see *Akman v. Turkey* (striking out), no. 37453/97, ECHR 2001-VI, and *Pisano v. Italy* [GC] (striking out), no. 36732/97, § 41, 24 October 2002). However, before taking a decision to strike out a particular case, the Court must verify whether respect for human rights as defined in the Convention requires it to continue the examination of the case. The Court reiterates in this respect that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25; *Guzzardi v. Italy*, 6 November 1980, § 86, Series A no. 39; and *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see *Rantsev v. Cyprus and Russia*, no. 25965/04, § 197, 7 January 2010; *Karner*, cited above, § 26; and *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII (extracts)).

40. The Court takes note of the measures taken by the national authorities to redress the applicant's individual situation, in particular by issuing an order allowing him, on an exceptional basis, to make use of parental leave (see paragraph 16 above). At the same time, it observes that the Military Service Act and the Regulations on military service, which

served as the legal basis for the repeated refusals to grant the applicant parental leave, remain in force. By virtue of that legislation a large group of people (male military personnel) continue to be denied an entitlement to parental leave. The Court considers that the subject matter of the present application – the alleged discrimination under Russian law against male military personnel as regards entitlement to parental leave – involves an important question of general interest which has not yet been examined by the Court. Further examination of the present application would therefore contribute to elucidating, safeguarding and developing the standards of protection under the Convention. Accordingly, the Court does not find it appropriate to strike the application out of its list of cases. It considers that there are special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the further examination of the application on its merits. Accordingly, it rejects the Government's request for the application to be struck out under Article 37 § 1 of the Convention.

(c) Conclusion

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

2. Merits

(a) General principles

42. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of them (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports* 1997-I, and *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II).

43. The Court has also held that not every difference in treatment will amount to a violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory (see *Ünal Tekeli v. Turkey*, no. 29865/96, § 49, ECHR 2004-X (extracts)). A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim

sought to be realised (see *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 51, ECHR 2006-VI).

44. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports* 1996-IV). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background (see *Rasmussen v. Denmark*, 28 November 1984, § 40, Series A no. 87, and *Inze v. Austria*, 28 October 1987, § 41, Series A no. 126), but the final decision as to observance of the Convention's requirements rests with the Court. Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Weller v. Hungary*, no. 44399/05, § 28, 31 March 2009; *Stec and Others*, cited above, §§ 63 and 64; *Ünal Tekeli*, cited above, § 54; and, *mutatis mutandis*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV).

(b) Application of these principles to the present case

45. It was not disputed between the parties that the applicant could rely on Article 14 of the Convention. The Court reiterates in this connection that, by enabling one of the parents to stay at home to look after the children, parental leave and related allowances promote family life and necessarily affect the way in which it is organised. Parental leave and parental allowances therefore come within the scope of Article 8 of the Convention. It follows that Article 14, taken together with Article 8, is applicable. Accordingly, although Article 8 does not include a right to parental leave or impose any positive obligation on States to provide parental leave allowances, if a State does decide to create a parental leave scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see, *mutatis mutandis*, *Petrovic*, cited above, §§ 26 to 29).

46. The Court observes that the applicant, being a serviceman, had no statutory right to parental leave. It is undisputed that civilians, both men and women, as well as servicewomen, are entitled to parental leave. The denial of parental leave to the applicant was accordingly based on a combination of two grounds: military status plus sex. The Court has to examine whether, in relation to parental leave, the difference in treatment between parents depending on their military or civilian status and on their sex is acceptable under Article 14.

47. The Court will first examine whether there is an objective and reasonable justification for the difference in treatment between men and women as regards entitlement to parental leave. It reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would

have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (see *Burghartz v. Switzerland*, 22 February 1994, § 27, Series A no. 280-B, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A no. 263).

48. The Court is not convinced by the Constitutional Court's argument that, as far as parental leave is concerned, the different treatment of male and female military personnel is justified by the special social role of mothers in the upbringing of children (see paragraph 19 above). It observes that in contrast to maternity leave and associated allowances, which are primarily intended to enable the mother to recover from the fatigue of childbirth and to breastfeed her baby if she so wishes, parental leave and the parental leave allowances relate to the subsequent period and are intended to enable the parent to stay at home to look after the infant personally. Whilst being aware of the differences which may exist between mother and father in their relationship with the child, the Court considers that, as far as the role of taking care of the child during this period is concerned, both parents are "similarly placed" (see *Petrovic*, cited above, § 36).

49. The Court notes that, in the *Petrovic v. Austria* case, a distinction on the basis of sex with respect to parental leave allowances was found not to be in violation of Article 14. In that case a broad margin of appreciation was granted to the respondent State because of the great disparity in the 1980s between the legal systems of the Contracting States in the sphere of parental benefits. The Court held that at the material time there was no European consensus in this field, as the majority of Contracting States did not provide for parental leave or related allowances for fathers (see *Petrovic*, cited above, §§ 38 to 42). However, in the more recent case of *Weller v. Hungary* the Court took a step away from the approach adopted in the *Petrovic* case and found that the exclusion of natural fathers from the entitlement to receive parental allowances, when mothers, adoptive parents and guardians were entitled to them, amounted to discrimination on the ground of parental status (see *Weller*, cited above, §§ 30 to 35). It is also significant that since the adoption of the judgment in the *Petrovic* case the legal situation as regards parental leave entitlements in the Contracting States has evolved. In an absolute majority of European countries the legislation now provides that parental leave may be taken by both mothers and fathers (see paragraphs 26 to 30 above). In the Court's opinion, this shows that society has moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition. The Court considers that it cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue (see, *mutatis mutandis*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 104, ECHR 1999-VI). It follows that the respondent State can no longer rely on the absence of a common standard among the Contracting States to justify the difference in treatment between men and women as regards parental

leave. Nor can the reference to the traditional perception of women as primary child-carers provide sufficient justification for the exclusion of the father from the entitlement to take parental leave if he so wishes. Accordingly, the Court concludes that no convincing or weighty reasons have been offered by the Government to justify the difference in treatment between men and women as regards entitlement to parental leave.

50. The Court also notes that under Russian law civilian men and women are both entitled to parental leave. The difference in treatment on account of sex concerns military personnel only. It must therefore be ascertained whether there was an objective and reasonable justification for special treatment of military personnel in that sphere.

51. The Court reiterates that a system of military discipline, by its very nature, implies the possibility of placing limitations on certain of the rights and freedoms of the members of the armed forces which could not be imposed on civilians. Those limitations do not in themselves run counter to the States' obligations under the Convention (see *Engel and Others v. the Netherlands*, 8 June 1976, § 57, Series A no. 22). It follows that each State enjoys a certain margin of appreciation in this respect, the scope of which varies according to the nature of the activities restricted and of the aims pursued by the restriction (see *Smith and Grady*, cited above, § 89). At the same time it must be stressed that military personnel are entitled to Convention protection and it cannot be said that they waive their rights under the Convention when they join the armed forces.

52. The Court has, however, accepted on several occasions that the rights of military personnel under Articles 5, 9, 10 and 11 of the Convention may, in certain circumstances, be restricted to a greater degree than would be permissible in the case of civilians (see *Engel and Others*, cited above, §§ 73 and 103; *Kalaç v. Turkey*, 1 July 1997, § 28, *Reports* 1997-IV; *Larissis and Others v. Greece*, 24 February 1998, §§ 50 and 51, *Reports* 1998-I; *Hadjianastassiou v. Greece*, 16 December 1992, §§ 39 and 46, Series A no. 252; and *Pasko v. Russia*, no. 69519/01, § 86, 22 October 2009). It follows from the case-law cited above that a wide margin of appreciation is open to States wishing to impose restrictions on the rights of military personnel under Articles 5, 9, 10 and 11, taking into account the special conditions attaching to military life and the specific "duties" and "responsibilities" incumbent on members of the armed forces.

53. The situation is however different with respect to restrictions on family and private life protected by Article 8, in the sense that the States have a narrower margin of appreciation in that sphere. Indeed, the Court has found that the State may impose certain restrictions on the rights of military personnel where there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. It has, however, added that the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of

their right to respect for their family or private life, which right applies as much to service personnel as it does to others within the jurisdiction of the State. Moreover, assertions as to a risk for operational effectiveness must be "substantiated by specific examples" (see *Smith and Grady*, cited above, § 89).

54. The gist of the present case is the difference in treatment between servicemen and servicewomen as regards entitlement to parental leave. By enabling the parent to stay at home, parental leave provides an opportunity for that parent to take care of the child in the earliest period of its life and to spend adequate time with it. The Court considers that, in their relations with their children, servicemen and servicewomen are in an analogous situation (see also paragraph 48 above). The Court considers that very weighty reasons are required to justify a difference in treatment between servicemen and servicewomen in this particularly important sphere of family life, which concerns parents' relations with their new-born children**.**

55. The Court observes that the Government have not provided any justification in that connection. It transpires, however, from the ruling by the Constitutional Court (see paragraph 19 above) that the limitation of rights, such as the right to parental leave, imposed on male military personnel has the aim of ensuring the operational effectiveness of the army and, consequently, of protecting national security. Whilst that aim is without doubt legitimate, this does not in itself establish the legitimacy of the special treatment of the male military personnel as regards the parental leave entitlement. It has to be ascertained whether there is a reasonable relationship of proportionality between the means employed and the aim pursued.

56. In assessing the proportionality of the limitation of rights imposed on servicemen the Court has to examine whether the alleged damage to the operational effectiveness of the army is "substantiated by specific examples". Thus, although in the case of *Smith and Grady v. the United Kingdom*, which concerned the dismissal of homosexuals from the armed forces, the Court allowed a certain margin of appreciation to the States as far as the organisation of their own system of military discipline was concerned, it nevertheless found that the applicants' dismissal from the armed forces on the ground of their sexual orientation violated their rights under Article 8 of the Convention. It did not accept the Government's argument that the presence of homosexuals in the army undermined its operational effectiveness, because that argument was not supported by any concrete evidence and the Court was not satisfied that operational-effectiveness problems of the nature and level alleged could be caused by the admission of homosexuals into the armed forces (see *Smith and Grady*, cited above, §§ 89 to 112).

57. In the present case, the core argument of the Constitutional Court in support of the limitation of the rights of servicemen was that military service imposed specific demands in so far as it required uninterrupted

performance of duties by them and that, consequently, the taking of parental leave by servicemen on a large scale would have a negative effect on the fighting power and operational effectiveness of the armed forces. The Court finds that argument unconvincing. It notes the lack of concrete evidence to substantiate the alleged damage to national security. There is no indication that any expert study or statistical research was made to assess the number of servicemen who would be in a position to take three years' parental leave at any given time and would be willing to do so. There is accordingly no evidentiary basis for the assertion that the number of servicemen simultaneously taking parental leave would be so significant as to undermine the fighting capacity of the army. It follows that the Constitutional Court based its decision on a pure assumption, without attempting to probe its validity by checking it against statistical data or by weighing the conflicting interests of maintaining the operational effectiveness of the army, on the one hand, and of protecting servicemen against discrimination in the sphere of family life and promoting the best interests of their children, on the other. Accordingly, it has not been demonstrated to the Court's satisfaction that operational-effectiveness problems of the nature and level alleged would be caused by extending the parental leave entitlement to servicemen.

58. Further, the Court has already found that there was no objective or reasonable justification for the different treatment of men and women in this sphere (see paragraph 49 above). To the extent that the difference was founded on the traditional gender roles, that is on the perception of women as primary child-carers and men as primary breadwinners, these gender prejudices cannot, by themselves, be considered by the Court to amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation. Nor can the fact that in the armed forces women are less numerous than men justify the disadvantaged treatment of the latter as regards entitlement to parental leave. The Court is particularly struck by the Constitutional Court's intimation that a serviceman wishing to take personal care of his children was free to resign from the armed forces. Servicemen are thereby forced to make a difficult choice between nursing their new-born children and pursuing their military career, no such choice being faced by servicewomen. The Court reiterates in this respect the unique nature of the armed forces and, consequently, the difficulty in directly transferring essentially military qualifications and experience to civilian life. It is therefore clear that, if they choose to resign from military service to be able to take care of their new-born children, servicemen would encounter difficulties in obtaining civilian posts in their areas of specialisation which would reflect the seniority and status that they had achieved in the armed forces (see, *mutatis mutandis*, *Smith and Grady*, cited above, § 92). In view of the above consideration, the Court finds that the reasons adduced by the Constitutional Court provide insufficient justification for imposing much stronger restrictions on the

family life of servicemen than on that of servicewomen. Accordingly, convincing and weighty reasons have not been offered by the Government to justify the difference in treatment between male and female military personnel as regards entitlement to parental leave.

59. In view of the foregoing, the Court considers that the exclusion of servicemen from the entitlement to parental leave, while servicewomen are entitled to such leave, cannot be said to be reasonably and objectively justified. The Court concludes that this difference in treatment amounted to discrimination on the ground of sex. There has therefore been a violation of Article 14 taken in conjunction with Article 8.

II. ALLEGED VIOLATION OF ARTICLE 5 OF PROTOCOL NO. 7

60. The applicant complained that the domestic law provisions specifying that three years' parental leave can be taken by servicewomen only violated his right to equality between spouses. He relied on Article 5 of Protocol No. 7 which reads as follows:

> "Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children."

61. The Court observes that in accordance with the Explanatory Report to Protocol No. 7, under the terms of Article 5 equality must be ensured solely in the relations between the spouses themselves, in regard to their person or their property and in their relations with their children. The rights and responsibilities are thus of a private-law character. The Article does not apply to other fields of law, such as administrative, fiscal, criminal, social, ecclesiastical or labour law (see *Klöpper v. Switzerland*, no. 25053/94, Commission decision of 18 January 1996). The right to parental leave undoubtedly belongs to the sphere of labour law and forms part of employment relations, that is relations between the employee and his or her employer, rather than relations between spouses. Moreover, the Russian legislation on parental leave favours servicewomen irrespective of their marital status. Therefore, the case concerns inequality between the sexes rather than inequality between spouses.

62. This complaint is accordingly incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

63. The Court has examined the other complaints submitted by the applicant. However, having regard to all the material in its possession, and in so far as these complaints fall within the Court's competence, it finds that they do not disclose any appearance of a violation of the rights and

freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

64. Before examining the claims for just satisfaction submitted by the applicant under Article 41 of the Convention, and having regard to the circumstances of the case, the Court considers it necessary to determine what consequences may be drawn from Article 46 of the Convention for the respondent State. Article 46 of the Convention reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

65. The Court reiterates that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led to the Court's findings (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 120, ECHR 2002-VI; *Lukenda v. Slovenia*, no. 23032/02, § 94, ECHR 2005-X; and *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 134, ECHR 2008-...). This obligation has been consistently emphasised by the Committee of Ministers in the supervision of the execution of the Court's judgments (see, for example, ResDH(97)336, IntResDH(99)434, IntResDH(2001)65 and ResDH(2006)1). In theory it is not for the Court to determine what measures of redress may be appropriate for a respondent State to take in accordance with its obligations under Article 46 of the Convention. However, the Court's concern is to facilitate the rapid and effective suppression of a shortcoming found in the national system of human-rights protection (see *Driza v. Albania*, no. 33771/02, § 125, ECHR 2007-XII (extracts)).

66. In the present case the Court found a violation under Article 14 in conjunction with Article 8. The violation of the applicant's rights originated in shortcomings in the Russian legislation, namely section 11 § 3 of the Military Service Act and the Regulations on military service, enacted by Presidential Decree No. 1237 on 16 September 1999, by virtue of which the entitlement to parental leave was limited to servicewomen as opposed to servicemen. As a consequence, an entire category of individuals – male military personnel – are discriminated against in the enjoyment of their right

to respect for family and private life. The Court's finding that the legislation in question is not compatible with the Convention discloses a widespread problem in the legal framework concerning a substantial number of people.

67. It has been the Court's practice, when discovering a shortcoming in the national legal system, to identify its source in order to assist the Contracting States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments (see, for example, *Maria Violeta Lăzărescu v. Romania*, no. 10636/06, § 27, 23 February 2010; *Driza*, cited above, §§ 122-126, and *Ürper and Others v. Turkey*, nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, §§ 51 and 52, 20 October 2009). Having regard to the problem disclosed in the present case, the Court is of the opinion that general measures at national level would be desirable to ensure effective protection against discrimination in accordance with the guarantees of Article 14 of the Convention in conjunction with Article 8. In this connection, the Court would recommend that the respondent Government take measures, under the supervision of the Committee of Ministers, with a view to amending section 11 § 3 of the Military Service Act and the Regulations on military service, enacted by Presidential Decree No. 1237 on 16 September 1999, to take account of the principles enunciated in the present judgment with a view to putting an end to the discrimination against male military personnel as far as their entitlement to parental leave is concerned.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant claimed 400,000 euros (EUR) in respect of non-pecuniary damage. In respect of pecuniary damage, he claimed 59,855.12 Russian roubles (RUB) representing the bonuses he would have received if he had not been subjected to disciplinary sanctions for his absence during his parental leave.

70. The Government submitted that the claims were excessive. Given that the applicant had ultimately been granted parental leave and received financial aid, the finding of a violation would constitute sufficient just satisfaction. They further argued that there was no causal link between the violation found and the pecuniary damage alleged.

71. The Court observes that the applicant did not submit any documents to substantiate his claim for pecuniary damage. It therefore rejects that claim.

72. As regards non-pecuniary damage, the Court notes that the applicant was allowed, on an exceptional basis, to take parental leave and received financial aid from the domestic authorities. In these circumstances, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

B. Costs and expenses

73. The applicant also claimed RUB 46,169.93 for the costs and expenses incurred before the domestic courts and the Court, including postal expenses, translation costs, stationery and travel expenses. He submitted vouchers and receipts to confirm his claim.

74. The Government agreed to pay stationery, postal and translation expenses. They submitted that the remaining costs had not been directly connected with the present application.

75. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 200, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

76. 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. *Declares* unanimously the complaint concerning the alleged discrimination in the exercise of the right to respect for family life admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention in conjunction with Article 8 of the Convention;

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

4. *Holds* by six votes to one
(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 200 (two hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Russian roubles at the rate applicable at the date of settlement;
(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;

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

Done in English, and notified in writing on 7 October 2010, 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 Judge Kovler is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE KOVLER

I regret that I am unable to join the majority in finding a violation of Article 14 of the Convention in conjunction with Article 8 on account of the alleged discrimination in the exercise of the right to respect for family life of the applicant, an active serviceman.

First of all, I had serious doubts as to the applicant's victim status, taking into account the specific circumstances of the case (especially the fact that he was eventually granted parental leave until the third birthday of his youngest son and even received financial aid – see paragraph 16 of the judgment). Moreover, the Military Court held that the applicant had failed to prove that he was the sole carer for his children and that they lacked maternal care (see paragraph 12). Accepting the applicant's arguments that the matter was not effectively resolved at the domestic level within the meaning of Article 37 § 1 (b) of the Convention, the Court, in its conclusions on the admissibility of the case, gives the impression that the "issues on public-policy grounds in the common interest" are more important than the specific and delicate nature of the case (see paragraphs 39-40). I agreed with this approach by voting for the admissibility of the case on the basis that it would facilitate the expression of different views on the merits.

My second difficulty is with the application of the general principles of the Court's case-law concerning discrimination. I share the view of some scholars that the concept of non-discrimination is itself rather ambiguous (see, for example, X. Bioy, "L'ambiguité du concept de non-discrimination", in F. Sudre and H. Surrel (eds.), *Le droit à la non-discrimination au sens de la Convention européenne des droits de l'homme*, Brussels, 2008, pp. 51-84). The Court has held on many occasions that not every difference in treatment will amount to a violation of Article 14: "It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory" (see paragraph 43, with relevant references). The question is: does "preferential treatment" of servicewomen in the army as regards entitlement to parental leave amount to discrimination of male military personnel? What about the famous "positive discrimination" in the context of this case? I did not find a clear answer to my question in the present judgment.

"A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised" states the judgment, citing the case of *Stec and Others* (see paragraph 43 for the reference). In my opinion the arguments advanced by the Russian Constitutional Court are more convincing and realistic than those of the Court.

The core argument of the Constitutional Court in support of the limitation of the rights of military personnel was that military service imposed specific demands in so far as it required uninterrupted performance of duties and that, consequently, the taking of parental leave by servicemen on a large scale would have a negative effect on the fighting power and operational effectiveness of the armed forces. Given the special (armed forces) context of the case and the wide margin of appreciation left to States in matters of national security, I am prepared to accept the Constitutional Court's argument as providing objective and reasonable justification for the difference in treatment between military personnel and civilians as regards entitlement to parental leave.

Further, as regards the fact that the exclusion from entitlement to parental leave concerns only servicemen, while servicewomen are entitled to take such leave, I agree that in principle there is no objective or reasonable justification for different treatment of men and women in this sphere in civilian life. However, the conditions and demands of military life are by their very nature different from those of civilian life and certain restrictions on rights which could not be imposed on civilians are acceptable in the army (see the case-law cited in paragraphs 51-52). The Constitutional Court held that women were few in number in the armed forces and that for that reason the taking of parental leave by them would have no impact on the fighting capacity of the army. It was therefore a policy choice, motivated by women's special social role as mothers, to grant them entitlement to parental leave on an exceptional basis. The authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. This is a common meaning of the principle of subsidiarity. In such a case the Court would generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see, *mutatis mutandis*, *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007 XIII). In my opinion it cannot be said that the decision to grant parental leave to servicewomen, while at the same time denying that entitlement to servicemen, is "manifestly without reasonable foundation". I would respect the legislature's decision, which has moreover been approved by the Constitutional Court.

Finally, it is also relevant that it was the applicant's free choice to pursue a military career and that, by signing a military service contract, he accepted a system of military discipline that by its very nature implied the possibility of placing on the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians (see, for similar reasoning, *Kalaç v. Turkey*, 1 July 1997, § 28, *Reports* 1997-IV).

In view of the foregoing, I consider that the difference in treatment between servicemen and all other parents – namely, servicewomen and civilian men and women – as regards entitlement to parental leave was reasonably and objectively justified.

My last observation concerns the application of Article 46 of the Convention. I would suggest that, unlike other structural problems concerning Russia such as the non-enforcement of judgments of national courts, supervisory review or conditions of pre-trial detention, this isolated case does not impose on the respondent State a legal obligation to implement appropriate general measures – even taking into account the fact that the Court merely recommends such measures, as it states in paragraph 67.