

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.19 General Principles – **Margin of appreciation**.
 5.3.32 Fundamental Rights – Civil and political rights
 – **Right to private life**.
 5.3.33.1 Fundamental Rights – Civil and political
 rights – Right to family life – **Descent**.

Keywords of the alphabetical index:

Paternity, judicial recognition.

Headnotes:

Under Article 8 ECHR there is no duty for a State to allow an alleged biological father to establish a relationship with a child living in an intact family under any circumstances.

Summary:

I. Under § 188.2 of the Austrian Civil Code, the court may allow a third person to establish a relationship with a child if such personal contacts are considered to be in the child's best interests. However, such contact rights can only be granted if the third person is, or was, already in a "particular social or familiar relationship" with the child.

In October 2013, the applicant before the Constitutional Court had entered into a relationship with Ms A, who became pregnant. Before the birth Ms A left the applicant and married another man ("Mr A"). In July 2014 she gave birth; according to the Austrian Civil Code, Mr A is the legal father of the child.

Although both the applicant and Ms A assume that the applicant is the biological father of the child, Ms A repeatedly refused requests made by the applicant to be allowed contact with the child.

In March 2015 the applicant filed a request with the civil court seeking access to the child and to receive information about important events in the child's life. The court dismissed this request; it found that the applicant did not fulfil the requirements of § 188.2 of the Civil Code, as he had no (particular) social or familiar relationship with the child. Instead, the applicant, like any other third person, might only "suggest" being allowed contact with the child provided that without this measure the child's best interests would be at risk.



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a) Austria / **b)** Constitutional Court / **c)** / **d)** 13.12.2016 / **e)** G 494/2015 / **f)** / **g)** / **h)** CODICES (German).

The applicant appealed against this decision; at the same time, he filed a normative constitutional complaint with the Constitutional Court, claiming that § 188.2 of the Civil Code infringed his right to respect for his private and family life as well as the child's right to establish a relationship with his parents.

II. The Constitutional Court agreed with the European Court of Human Rights that the notion of "family life" under Article 8 ECHR is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. However, a biological kinship between a natural parent and a child alone, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of Article 8 ECHR. As a rule, cohabitation is a requirement for a relationship amounting to family life.

The Court also accepted that intended family life may, exceptionally, fall within the ambit of Article 8 ECHR, notably in cases in which the fact that family life has not yet fully been established was not attributable to the applicant. In particular, where the circumstances warrant it, "family life" must extend to the potential relationship which may develop between a child born out of wedlock and the natural father. Relevant factors which may determine the real existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child both before and after the birth.

In any event, the determination of the legal relations between the applicant and his putative biological child (namely the question of any right of access he might have to his child), even if it fell short of family life, concerned an important part of the applicant's identity and thus his "private life" within the meaning of Article 8.1 ECHR. The legal provision at issue therefore interfered with the applicant's right to respect, at least, for his private life.

The Constitutional Court found this interference with the biological father's right to respect for his private life was justified.

According to the case-law of the European Court of Human Rights, Article 8 ECHR can be interpreted as imposing on the Member States an obligation to examine whether it was in the child's best interests to allow a biological father to establish a relationship with his child, in particular by granting contact rights. This may imply the establishment, in access proceedings, of biological as opposed to legal

paternity if, in the special circumstances of the case, contact between the alleged biological father (presuming that he was in fact the child's biological parent) and the child were considered to be in the child's best interests. However, this does not imply a duty under the Convention to allow the alleged biological father to challenge the legal father's status or to provide a separate action to establish biological as opposed to legal paternity. The decision whether the established or alleged biological father should be allowed to challenge paternity falls within the State's margin of appreciation.

Against this background the Constitutional Court held that the right to respect for private and family life did not go so far as to allow the alleged biological father to interfere with an intact family under any circumstances. The challenged provision therefore struck a fair balance between the interests of the alleged biological father, the legal parents and the child. It did not violate Article 8 ECHR.

Cross-references:

European Court of Human Rights:

- *Anayo v. Germany*, no. 20578/07, 21.12.2010;
- *Schneider v. Germany*, no. 17080/07, 15.09.2011;
- *Ahrens v. Germany*, no. 45071/09, 22.03.2012;
- *Kautzor v. Germany*, no. 23338/09, 22.03.2012;
- *Koppikar v. Germany*, no. 11858/10, 11.12.2012;
- *Hülsmann v. Germany*, no. 26610/09, 05.11.2013;
- *Adebowale v. Germany*, no. 546/10, 02.12.2014.

Languages:

German.

