20578/07 (Case of Anayo v. Germany)

European Court of Human Rights, Fifth Section
Judgment
Strasbourg
21 December 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 Anayo v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:
Peer Lorenzen, President,
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, judges,
and Claudia Westerdiek, Section Registrar,

Having deliberated in private on 30 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 20578/07) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Nigerian national, Mr Frank Eze Anayo ("the applicant"), on 10 May 2007.

2. The applicant was represented by Mr R. Schmid, a lawyer practising in Nagold. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, Ministerialdirigentin, of the Federal Ministry of Justice, and by their Deputy Agent, Mr H.-J. Behrens, Ministerialrat, of the Federal Ministry of Justice.

3. The applicant alleged that the decisions of the German courts, which had refused him access to his children, violated his right to respect for his family life under Article 8 of the Convention.

4. On 26 September 2007 the President of the Fifth 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 § 3, in its version then in force).

5. On 2 March 2010 the Court discontinued the application of Article 29 § 3 and declared the application admissible.

6. On 29 April 2010 the President of the Fifth Section granted leave to Mr H. Baro and Mrs D. Baro, the legal parents of the children concerned, to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court, in its version then in force). The third-party interveners were represented by Mr M. Kleine-Cosack, a lawyer practising in Freiburg.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1967 and lived in Achern, Germany, before moving to Spain in 2008.

1. Background to the case

8. The applicant, who was born in Nigeria, entered Germany in 2003 and applied for asylum. His asylum request was dismissed, a decision which became final in February 2006.

9. Starting in June 2003 the applicant had a relationship with Mrs B. who was married to Mr B.; the spouses have three children born in 1996, 1998 and 2000. Although she initially considered a divorce, Mrs B., who never lived with the applicant, left the applicant in August 2005 and lived with her husband, Mr B., and the children again.

10. In December 2005 Mrs B. gave birth to twins. The applicant is the biological father of the twins. Mr and Mrs B. are bringing up the twins together. According to Article 1592 no. 1 of the Civil Code (see paragraph 28 below), Mr B. is their legal father. Mr and Mrs B. repeatedly refused requests made by the applicant, both before and after the twins' birth, to be allowed contact with the twins.

2. Proceedings before the District Court

11. On 27 September 2006 the Baden-Baden District Court, having heard the applicant and Mr and Mrs B. in three hearings, granted the applicant contact with the twins once per month for one hour, initially in the presence of a third person and of either Mr or Mrs B. if they wished to be present.

12. The District Court found that the applicant was entitled to access under Article 1685 § 2 of the Civil Code (see paragraph 27 below) as he was a person with whom the children had close ties. The fact that he had not yet borne any responsibility for the children did not hinder that entitlement, as the applicant had had no possibility to take such responsibility since the twins had been born in December 2005. Hence his access rights could not be denied.

13. The District Court further considered that contact between the applicant and the twins was in the children's best interest. It agreed with the findings of the psychological expert it had consulted, who, having heard Mr and Mrs B. and the applicant, had concluded that contact with the applicant was beneficial for the children's welfare. Particularly in view of their African-German origins, a relationship with the applicant, their natural father, would be essential for them to get to know their roots, to build up their identity, to understand why they were different and to develop normal self-esteem. The District Court also found that the applicant's access rights could not be delayed any further as they were being increasingly contested by Mr and Mrs B. The applicant's access to the twins would not adversely affect Mr and Mrs B.'s other three children because, as the psychologist had convincingly argued, dealing frankly with the realities would be in the best interest of all concerned.

14. In coming to its decision, the District Court took into consideration that when Mrs B. and the applicant had separated in August 2005, the applicant had agreed that the twins could stay with the B. family but had stated that “he wanted to have a chance in the asylum proceedings”. He had subsequently asked to be granted access to the twins after their birth, which Mr and Mrs B. had refused. He had argued that if he did not stay in Germany, it would be impossible in practice for him to have any contact with his children and build up a relationship with them. In Mr and Mrs B.'s submission, the applicant wanted access to his children only in order to obtain a residence permit in Germany. The psychological expert, for her part, stated that it appeared that Mr and Mrs B. were now interpreting the applicant's relationship with Mrs B. – wrongly and in accordance with common prejudices – as a mere attempt to obtain a residence permit, in order to blame him for their own difficult situation.

3. Proceedings before the Court of Appeal

15. On 12 December 2006 the Karlsruhe Court of Appeal allowed an appeal lodged by Mr and Mrs B., quashed the decision of the District Court and dismissed the applicant's request for access to the twins.

16. The Court of Appeal found that the applicant was not entitled to access to the children under Article 1684 of the Civil Code (see paragraph 26 below) because the provision only referred to the entitlement of the legal father (as opposed to the biological father), who in the present case was Mr B. (Article 1592 no. 1 of the Civil Code, see paragraph 28 below). As the children were living with their legal father, the applicant was also not entitled to acknowledge paternity (Article 1594 § 2 of the Civil Code, see paragraph 29 below) nor could he contest Mr B.'s paternity (Article 1600 § 2 of the Civil Code, see paragraph 30 below).

17. The Court of Appeal further found that the applicant was not entitled to access under Article 1685 of the Civil Code. Being the biological father of the twins, he was, in principle, considered a person with whom the children had close ties (enge Bezugsperson) within the meaning of that provision. He nevertheless had not fulfilled the remaining requirements of Article 1685 of the Civil Code, as he had not borne any responsibility for the children in the past and thus had no social and family relationship with them.

18. As the applicant was therefore not entitled to claim access, it was irrelevant whether contact between him and the twins was in the children's best interests.

19. The fundamental right to respect for one's family life and one's parental rights under Article 6 of the Basic Law (see paragraph 24 below) and Article 8 of the Convention did not require a different interpretation of the provisions of the Civil Code. With regard to Article 6 of the Basic Law, the Court of Appeal found that the applicant, being the biological, but not the legal father of the twins, was not a “parent” within the meaning of paragraph 2 of that provision, in particular because the coexistence of two fathers was not consistent with the notion of parental responsibility. Moreover, Article 6 § 1 of the Basic Law protected the access of the biological father to his child only where a social and family relationship between them had already existed in the past; it did not protect the wish to build up a relationship with the child in the future. The reasons why there was no relationship between the biological father and the child were irrelevant.

20. The Court of Appeal noted that the refusal to grant the applicant access to the children would mean that he would be unable to build up a relationship with them and would be expelled to Nigeria. Therefore, the children would most probably never be able to get to know their biological father. However, that was because the twins lived in a family together with their legal father who was actually assuming the father's role. It was the legislator's evaluation, expressed in Article 1600 § 2 of the Civil Code, that the existing relationship between legal father and child took precedence over the relationship between biological father and child.

21. With regard to Article 8 of the Convention, the Court of Appeal observed that there had never been a family bond between the applicant and the twins. It also distinguished the present case from the case

of Görgülü v. Germany (no. 74969/01, 26 February 2004) inasmuch as the applicant in that case had also been the legal father of his child and had obtained the right to custody.

4. Proceedings before the Federal Constitutional Court

22. On 29 March 2007, without giving reasons, the Federal Constitutional Court declined to consider the applicant's constitutional complaint, in which he had claimed that the refusal to grant him access to the twins had violated his right to respect for his family life (file no. 1 BvR 183/07).

5. Subsequent developments

23. On 15 May 2007 the Freiburg Administrative Court dismissed the applicant's request for an interim order suspending his expulsion until the European Court of Human Rights had decided upon his application. The applicant did not appeal against that decision. The main proceedings before the Freiburg Administrative Court, in which the applicant again applied for a residence permit, are apparently still pending. The applicant moved to Spain in 2008.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW

1. Domestic law and practice

a. Provisions of the Basic Law

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

(1) Marriage and the family shall enjoy the special protection of the state.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

b. Provisions of the Civil Code

(i) Provisions on access to a child

25. Parental custody includes the right to determine access to the child (Article 1632 § 2 of the Civil Code).

26. According to Article 1684 § 1 of the Civil Code, a child has a right of access to each parent, and each parent in turn has the right and the duty to have contact with the child. The family courts can

determine the scope of the right of access and prescribe more specific rules for its exercise, also with regard to third parties (Article 1684 § 3). They may restrict or suspend that right if such a measure is necessary for the child's welfare. A decision restricting or suspending that right for a lengthy period or permanently may only be taken if the child's well-being would otherwise be endangered. The family courts may order that the right of access be exercised in the presence of a third party, such as a Youth Office or an association (Article 1684 § 4).

27. Article 1685 § 2 of the Civil Code, in its version applicable at the relevant time, provides for persons with whom the child has close ties (enge Bezugspersonen) to have a right of access to the child if this serves the child's best interest and if they are bearing actual responsibility for the child or have done so in the past (social and family relationship). It is to be assumed, as a rule, that a person who lived with the child in domestic community for a lengthy period of time has borne such actual responsibility. Article 1684 §§ 3 and 4 apply mutatis mutandis.

(ii) Provisions on paternity

28. According to Article 1592 of the Civil Code, a child's father is either the man who at the date of the child's birth was married to the child's mother (no. 1), or the man who acknowledged paternity (no. 2) or whose paternity is judicially established under Article 1600d of the Civil Code (no. 3).

29. An acknowledgement of paternity is not valid as long as the paternity of another man exists (Article 1594 § 2 of the Civil Code).

30. Paternity may be challenged. Under Article 1600 § 1 of the Civil Code, entitlement to challenge paternity lies with the man whose paternity exists under Article 1592 nos. 1 and 2, with the mother and with the child, and also with the man who makes a statutory declaration that he had sexual intercourse with the child's mother during the period of conception. However, pursuant to § 2 of Article 1600, this last man has a right to challenge the paternity of the man who is the child's legal father under Article 1592 nos. 1 or 2 only if he is the child's biological father and if there is no social and family relationship between the legal father and the child.

31. If there is no paternity under Article 1592 nos. 1 or 2 of the Civil Code, it is to be established by the family court (Article 1600d § 1 of the Civil Code).

2. Comparative law

32. Research undertaken by the Court in relation to 23 Council of Europe Member States shows that there is no uniform approach in the Member States of the Council of Europe to the question whether,

and if so, under what circumstances, a biological father (who is not only a sperm donor) has a right to contact with his child where a different father exists in law.

33. In a considerable number of States (comprising, in particular, Bosnia and Herzegovina, Estonia, France, Ireland, Portugal, Russia, Slovenia, Spain, the United Kingdom and Ukraine), where a child is born to a woman who is living with her husband, a biological father can ensure his contact rights by challenging, first, the paternity presumption in place, partly within a fixed time-limit. In these States, as indeed in all of the countries surveyed, a presumption exists in law to the effect that a child born of a married woman during the subsistence of the marriage is presumed also to be the child of her husband. Having been recognised as the (legal) father of the child concerned, the biological father then has a right to contact with his child like any other non-custodial parent, subject to the child's best interests.

34. According to an expert report drawn up in March 2010 by the German Institute for Youth Human Services and Family Law (Deutsches Institut für Jugendhilfe und Familienrecht e.V., a registered association and non-governmental organisation), which has been submitted by the Government, the same applies in Greece. That report, however, interprets differently the provisions applicable in France and Spain. Research undertaken by the applicant confirms the Court's research notably in respect of the legal situation in France and Spain. The applicant submits that a biological father may also challenge the legal father's paternity in circumstances similar to those in the present application in several further countries, inter alia, in Norway.

35. In a considerable number of Council of Europe Member States, according to the Court's research, the biological father of a child would, on the contrary, not be able to challenge the said paternity presumption in circumstances similar to those in the present application (see, in particular, Azerbaijan, Belgium, Croatia, Finland, Hungary, Italy, Latvia, Luxembourg, Monaco, the Netherlands, Poland, Slovakia and Switzerland). Biological fathers in those countries lack standing to bring an action to challenge that presumption either in all circumstances or at least in cases in which the mother is still living with her husband (see in this latter respect the law in force in Belgium and Luxembourg).

36. According to the expert report drawn up by the German Institute for Youth Human Services and Family Law submitted by the Government, the same applies in Austria, the Czech Republic, Denmark, Liechtenstein, Sweden and Turkey. The applicant interprets differently the provisions applicable in Italy and Switzerland; the report submitted by the Government, however, confirms the Court's findings in respect of the legal situation in these countries.

37. In those latter Member States, it is thus only open to the biological father to apply for contact as a third party, not as a parent. However, in some of these States (Azerbaijan, Croatia, Finland, Hungary, Italy, Luxembourg and Poland) the biological father does not have standing to apply for contact as a

third party either as the law provides a right of contact only to legal parents and (partly) to other relatives.

38. According to the expert report of the German Institute for Youth Human Services and Family Law submitted by the Government, the biological father would also not have standing to apply for contact in Liechtenstein and in the Czech Republic.

39. In the remaining Member States surveyed by the Court in which the paternity presumption may not be challenged by a biological father (Belgium, Latvia, Monaco, the Netherlands, Slovakia and Switzerland), different pre-conditions apply for that father to be granted contact if such contact is in the child's best interests. According to Article 375 bis of the Belgian Civil Code, there has to be "proof of a tie of special affection with the child"; according to Article 181 § 3 of the Latvian Civil Code, the father must have lived together with the child for a long time in the same household. In Monaco a third person can be granted contact by a judge where that would be in the best interests of the child, without additional pre-conditions having to be met (compare Article 300 of the Monegasque Civil Code). In the Netherlands, third persons (including mere sperm donors) may be granted contact under Articles 1:377f and 1:377a § 3 of the Civil Code of the Netherlands if they have a close personal relationship with the child unless contacts run counter to the child's best interests. According to Section 25 § 5 of the Slovakian Family Act, the biological father may be granted access if he is to be regarded as a "close person" to the child (according to the expert report submitted by the Government, a similar provision applies in Sweden) and according to Article 274a of the Swiss Civil Code, he has a right to contact in exceptional circumstances (according to the expert report submitted by the Government, the same precondition applies in Turkey).

40. According to the report submitted by the Government, Section 20 of the Danish Act on Parental Responsibility provides that access may only be granted to close relatives having close personal ties with the child concerned if the parents have no or hardly any contact with the child. That report further states that under Article 148 § 3 of the Austrian Civil Code, a biological father may be granted access to his child if the child's welfare is endangered otherwise.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicant complained that the refusal to grant him access to his children violated his right to respect for his family life under Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

42. The Government contested that argument.

A. The parties' submissions

1. The applicant

43. The applicant argued that there was "family life" between him and the twins within the meaning of Article 8 § 1. It was decisive that he was interested in the children and ready to take responsibility for them. He underlined that it was only natural for him as the biological father to wish to participate in their upbringing and to take responsibility for them. He had had a serious relationship with Mrs B., who had planned to divorce her husband, for more than two years. He had intended to live with Mrs B. and the children and they had already looked for a flat and had gone to the ultrasound examination together before Mrs B. left him. Since the children's birth, he had attempted to have access to them and had initiated access proceedings in court. He had not been in a position to establish contact with his children and to bear actual responsibility for them as Mr and Mrs B. had refused him access. By doing so, Mr and Mrs B. also wanted to prevent him from residing in Germany. He rejected allegations that he only wanted to profit from the children's existence in order to obtain a residence permit and underlined that these allegations had already been examined and rejected by the Baden-Baden District Court and by the psychological expert consulted by that court which alone, as has been stressed in the Court's case-law many times, has – and had here – the benefit of contact with all the persons concerned. Moreover, being an asylum seeker, he had not been in a position to bear financial responsibility for the children. He was now living in Spain and had no reason to seek to obtain a residence permit in Germany if not for being able to see his children.

44. In the applicant's submission, the interference with his family life by the decisions of the domestic courts had not been justified under Article 8 § 2. German legislation, which allowed contact of biological parents with their children only if there was already a social and family relationship between them and refused access if contact was aimed at establishing such a relationship, failed to comply with Article 8 as it did not balance the interests involved in a fair manner and had thus led to a disproportionate interference with his family life in his case. As was illustrated by the present case, it depended on the legal parents' free will whether or not the biological father could build up a social and family relationship with his children. If the legal parents arbitrarily prevented him from doing so, the biological father could not be granted access under Article 1685 § 2 of the Civil Code even if an

independent expert confirmed that this would be in the children's best interest. The question of access therefore had to be determined in each individual case in accordance with the best interest of the child concerned – which alone was decisive under Article 8 for the question whether a biological father should be granted access – and could not be predetermined by a legal presumption of when contacts would under no circumstances be in a child's best interest. As the Court of Appeal had expressly stated that it had been irrelevant whether contacts between him and his children would be in the children's best interest, it had therefore failed to give relevant and sufficient reasons to justify the interference with Article 8.

45. The applicant objected to the findings in a general psychological expert report commissioned by the Government for the present proceedings on the question whether the provisions of the German Civil Code on contacts between biological fathers and their children were compatible with children's welfare (see paragraph 51 below) and to the Government's interpretation of those findings. In particular, it had not been proven by psychological research that contacts of biological fathers with their children against the legal parents' will would endanger the children's welfare in all circumstances. He stressed that the Federal Constitutional Court itself had considered that it was of utmost importance for a child to get to know both parents in order to develop his or her personality. He further underlined that it was nothing unusual for families today to deal with two fathers as many children, following separation of their parents, lived together with their mother and stepfather while having contacts with their father.

46. The applicant also contested that the provisions on contacts between biological fathers and children were as restrictive as in Germany in most other European States. He argued that there was nothing to indicate that the access rights of biological fathers in only 17 of the 47 Council of Europe Member States surveyed in the report the Government had obtained from the German Institute for Youth Human Services and Family Law (see paragraph 52 below) were representative for the legal situation in all of the Council's Member States.

47. The applicant further emphasised that contact between the children and him, their biological father, was in the children's best interest in the circumstances of the case. The independent expert consulted in the proceedings before the District Court had confirmed this and found that contact with him was important for the children to develop their own identity, in particular because it was visible that Mr B. was not the twins' biological father. Being African-German, they needed their father in order to understand why they were different. The applicant underlined that Mr and Mrs B. had not challenged the expert for bias in the proceedings before the domestic courts and that the family courts had not considered the expert biased. The denial of access to his children would result in his expulsion from Germany, which in turn would render impossible any future contact between him and the children.

2. The Government

48. The Government argued that there had been no interference with the applicant's rights under Article 8 § 1 as there had not been any “family life” between the applicant and the twins. It was not sufficient that the applicant was the natural father of the children. There were no close bonds between him and the twins. The relationship between the applicant and Mrs B. had ended four months before the twins were born and the applicant had neither been present at their birth nor had any contact with them. At no point in time had he lived with Mrs B. and he had not borne any financial responsibility for the children. On the contrary, the children had been living in a different family unit since their birth. The mere wish of the applicant, who had moved to Spain in the meantime, to establish a relationship with the twins did not fall within the ambit of “family life” under Article 8 § 1. The Government further submitted that it appeared that the applicant was interested in Mrs B. and the twins only in order to obtain a residence permit in Germany and that it was questionable whether the real motive for the applicant's attempts to be granted access to the twins was his desire to built up a relationship with his children.

49. The Government submitted that, should the Court find that there had been an interference with the applicant's family life, that interference was justified under Article 8 § 2. The interference had been in accordance with Articles 1592 no. 1, 1684 and 1685 of the Civil Code and Article 6 of the Basic Law (see paragraphs 24 and 26-28 above).

50. The interference had been necessary for the protection of the rights and freedoms of others, in particular for the protection of the legal/social family and the best interest of the children. There had been a fair balancing of the interests involved, that is, those of the biological father, the legal parents and the children.

51. The Government took the view that, in the first place, the German legislator, in Articles 1592, 1594, 1684 and 1685 of the Civil Code, had balanced the competing interests involved in a manner which complied with the requirements of Article 8. It was of utmost importance for the welfare of children not only to know their origins, but in particular to understand to which family they belonged and who bore responsibility for them as a mother or father. The Government referred to the findings of a general psychological expert report they had commissioned for the present proceedings on the question whether the provisions of the German Civil Code on contacts between biological fathers and their children were compatible with children's welfare. They submitted that, according to that report, as a rule, contacts of children with the parent they were not living with became a burden for them and were thus not in their best interests if the parents involved – as was the case here – were unable to limit their conflicts after separation. Moreover, according to the expert's findings, the total absence of contact with a natural father did not, as a rule, affect a child's social and emotional development.

52. The Government further considered that a comparative law analysis confirmed that the provisions of Article 1684 and Article 1685 of the Civil Code, compared to the applicable law in other European countries, duly protected the right of biological fathers to contact with their children and that the children's best interests did not warrant a different solution. They referred to the findings in a report drawn up in March 2010 on their request by the German Institute for Youth Human Services and Family Law (Deutsches Institut für Jugendhilfe und Familienrecht e.V.), a registered association and non-governmental organisation, in which the access rights of biological fathers in 17 other Council of Europe Member States had been analysed (see also paragraphs 34-40 above). They argued that German law, which did not exclude biological fathers in all circumstances from contacts with their children, but allowed contacts only if a social and family relationship existed between biological father and child and if contacts were in the child's best interests, was in line with the general European standards on that subject-matter.

53. The Government submitted that the provisions of German law on contacts between biological father and child had also led to a fair outcome in the best interest of the children concerned in the instant case. Even though a biological parent could have an interest in getting to know his children and in building up a relationship with them, the children in the present case were living in a functioning legal and social family whereas the applicant had never lived with them. As the twins had fair skin and fair hair, they would not be able to understand what connected them with the applicant. The legal parents knew best when to inform the twins of their origins. Therefore, it was in the children's best interest and in that of the legal/social family to be protected from outside interference. As regards the findings of the psychological expert in the proceedings before the District Court, they submitted that Mr and Mrs B. considered that the expert had been biased.

3. The third-party interveners

54. The third-party interveners took the view that in the circumstances of the present case, in which the children were living in their legal family and had never had any contacts with their biological father, it should be for them as the children's legal parents to decide if and when there should be contacts between their children and the biological father. They feared that the children's welfare and that of their whole family would be endangered if they were forced to allow contacts between the twins and the applicant. They underlined that it had been very difficult to keep their big family together. They took the view that the expert report obtained by the District Court could not be taken into consideration in the proceedings before the Court because the Court of Appeal, which had considered the report as irrelevant for determining the case, had not examined their objections to it. They further considered that the applicant had abused Mrs. B.'s trust in him and now wanted to use the children exclusively in order to obtain a residence permit in Germany.

B. The Court's assessment

1. Whether there was an interference

55. The Court reiterates that the notion of “family life” under Article 8 of the Convention is not confined to marriage-based relationships and may encompass other de facto “family” ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso jure part of that “family” unit from the moment, and by the very fact, of the birth
(see Keegan v. Ireland, 26 May 1994, § 44, Series A no. 290; Lebbink v. the Netherlands, no. 45582/99, § 35, ECHR 2004-IV; and Znamenskaya v. Russia, no. 77785/01, § 26, 2 June 2005).

56. 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 (compare Lebbink, cited above, § 37). As a rule, cohabitation is a requirement for a relationship amounting to family life. Exceptionally, other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto “family ties” (see Kroon and Others v. the Netherlands, 27 October 1994, § 30, Series A no. 297-C; and Lebbink, cited above, § 36).

57. Moreover, the Court has considered that intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases in which the fact that family life has not yet fully been established was not attributable to the applicant (compare Pini and Others v. Romania, nos. 78028/01 and 78030/01, §§ 143 and 146, ECHR 2004-V). In particular, where the circumstances warrant it, “family life” must extend to the potential relationship which may develop between a child born out of wedlock and the 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 (see Nylund v. Finland (dec.), no. 27110/95, ECHR 1999-VI; Nekvedavicius v. Germany (dec.), no. 46165/99, 19 June 2003; Lebbink, cited above, § 36; and Hülsmann v. Germany (dec.), no. 33375/03, 18 March 2008; compare also Różański v. Poland, no. 55339/00, § 64,
18 May 2006).

58. The Court further reiterates that Article 8 protects not only “family” but also “private” life. It has been the Convention organs' traditional approach to accept that close relationships short of “family life” would generally fall within the scope of “private life” (see Znamenskaya, cited above, § 27 with further references). The Court thus found in the context of proceedings concerning the establishment or contestation of paternity that the determination of a man's legal relations with his legal or putative child might concern his “family” life but that the question could be left open because the matter undoubtedly concerned that man's private life under Article 8, which encompasses important aspects of one's personal identity (see Rasmussen v. Denmark, 28 November 1984, § 33, Series A no. 87;

Nylund, cited above; Yildirim v. Austria (dec.), no. 34308/96, 19 October 1999, and Backlund v. Finland, no. 36498/05, § 37, 6 July 2010).

59. In the present case, the Court must determine in the first place whether the decision of the Court of Appeal, upheld by the Federal Constitutional Court, to refuse the applicant access to the twins disregarded the applicant's existing "family life" with his children within the meaning of Article 8. It notes at the outset that (as, for instance, in the cases of Yousef v. the Netherlands, no. 33711/96, § 51, ECHR 2002-VIII, and Lebbink, cited above, §§ 12, 37, but other than, for instance, in the cases of Nylund, cited above, and Hülsmann, cited above) it is uncontested that the applicant is the biological father of the twins. In examining whether there is, in addition, a close personal relationship between him and the children which must be regarded as an established "family life" for the purposes of Article 8, the Court observes that the applicant has never cohabited with the twins or with their mother and has to date never met the children. In these circumstances, their relationship does not have sufficient constancy to be qualified as existing "family life".

60. However, the Court has found that intended family life may, exceptionally, fall within the ambit of Article 8 in cases in which the fact that family life has not been established is not attributable to the applicant (see paragraph 57 above). This applies, in particular, to the relationship between a child born out of wedlock and the child's biological father, who are inalterably linked by a natural bond while their actual relationship may be determined, for practical and legal reasons, by the child's mother and, if married, by her husband. In the present case, the applicant did not yet have any contact with his biological children because their mother and their legal father, who were entitled to decide on the twins' contacts with other persons (Article 1632 § 2 of the Civil Code, see paragraph 25 above), refused his requests to allow contact with them. Moreover, under the provisions of German law (Article 1594 § 2 and Article 1600 § 2 of the Civil Code, see paragraphs 16, 29 and 30 above), the applicant could neither acknowledge paternity nor contest Mr B.'s paternity so as to become the twins' legal father. Therefore, the fact that there was not yet any established family relationship between him and his children cannot be held against him.

61. In determining whether, in addition, there were close personal ties in practice between the applicant and his children for their relationship to attract the protection of Article 8 (see paragraph 57 above), the Court must have regard, in the first place, to the interest in and commitment by the father to the children concerned. It notes that the applicant expressed his wish to have contacts with his children even before their birth and repeatedly asked Mr and Mrs B. to be allowed access afterwards. He further pursued his attempt to have contacts with the twins by bringing access proceedings in the domestic courts speedily after their birth. In the circumstances of the case, in which the applicant was prevented from taking any further steps to assume responsibility for the twins, the Court considers that this conduct was sufficient to demonstrate the applicant's interest in his children. As a result, the Court, in particular, does not consider it established that the applicant lacked genuine interest in his

offspring and wanted to have contact with the twins exclusively in order to obtain a residence permit. Furthermore, as to the nature of the relationship between the twins' natural parents, the Court notes that, even though the applicant and Mrs B. never cohabited, the children emanated from a relationship which lasted some two years and was, therefore, not merely haphazard.

62. Having regard to the foregoing, the Court does not exclude that the applicant's intended relationship with his biological children attracts the protection of "family life" under Article 8. In any event, the determination of the legal relations between the applicant and his biological children here at issue – namely the question whether the applicant had a right of access to his children – even if they 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. The domestic courts' decision to refuse him contact with his children thus interfered with his right to respect, at least, for his private life.

2. Whether the interference was justified

63. Any such interference with the right to respect for one's private life will constitute a violation of Article 8 unless it is "in accordance with the law", pursued an aim or aims that are legitimate under paragraph 2 of this provision and can be regarded as "necessary in a democratic society".

64. The decision on access taken by the Court of Appeal, as upheld by the Federal Constitutional Court, was based on Articles 1684 and 1685, read in conjunction with Article 1592 no. 1 of the Civil Code (see paragraphs 26-28 above). It was aimed at pursuing the best interest of a married couple, Mr and Mrs B., and of the children who were born during their marriage, who were living with them and whom they cared for, and was therefore taken for the protection of their rights and freedoms.

65. In determining whether the interference was "necessary in a democratic society", the Court refers to the principles established in its case-law. It has to consider whether, in the light of the case as a whole, the reasons adduced to justify that interference were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, inter alia, T.P. and K.M. v. the United Kingdom [GC], no. 28945/95, § 70, ECHR 2001-V (extracts), and Sommerfeld v. Germany [GC], no. 31871/96, § 62, ECHR 2003-VIII (extracts)). It cannot satisfactorily assess whether these reasons were "sufficient" without at the same time determining whether the decision-making process, seen as a whole, was fair and provided the applicant with the requisite protection of his interests safeguarded by Article 8 (see, inter alia, T.P. and K.M. v. the United Kingdom, cited above, § 72, and Sommerfeld, cited above, § 66). Consideration of what lies in the best interest of the child concerned is of paramount importance in every case of this kind (see, inter alia, Yousef v. the Netherlands, no. 33711/96, § 73); depending on their nature and seriousness, the child's best interests may override those of the parents (see Sommerfeld, cited above, § 66; and Görgülü v. Germany, no. 74969/01, § 43, 26 February 2004).

66. According to the Court's well-established case-law, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see, inter alia, Hokkanen v. Finland, 23 September 1994, § 55, Series A no. 299-A; Görgülü, cited above, § 41; and Sommerfeld, cited above, § 62). However, restrictions placed by the domestic authorities on parental rights of access call for a strict scrutiny as they entail the danger that the family relations between a young child and a parent would be effectively curtailed (see, inter alia, Elsholz v. Germany [GC], no. 25735/94, §§ 48-49, ECHR 2000-VIII; Sommerfeld, cited above, §§ 62-63; and Görgülü, cited above, §§ 41-42). The above-mentioned principles must apply also in a case like the present one, in which the refusal of contact between a biological father and his children is classified as an interference, at least, with "private life".

67. In the present case, the Court of Appeal refused the applicant, the natural father, access to his two children without examining the question whether contact between them would be in the twins' best interest. Applying the relevant provisions of the Civil Code (Articles 1684 and 1685), that court argued that the applicant did not fall within the group of persons entitled to claim access as he was not the children's legal father and had not borne any responsibility for them (see paragraphs 17-18 above). German law, as interpreted by the Court of Appeal, therefore did not provide for a judicial examination of the question whether contacts between a biological father and his children would be in the children's best interest if another man was the children's legal father and if the biological father had not yet borne any responsibility for the children ("social and family relationship"). Such a "social and family relationship" will notably be assumed if that father lived with the children in domestic community for a lengthy period of time (see, mutatis mutandis, for a further case in which parental rights of a father were, without a further examination on the merits, prima facie not considered to be in the child's best interest, Zaunegger v. Germany, no. 22028/04, §§ 44 and 46, 3 December 2009, concerning the general exclusion of judicial review of the attribution of sole custody to the mother of a child born out of wedlock). The reasons why the biological father had not previously established a "social and family relationship" with his children were irrelevant (compare paragraph 19 above); the provisions thus also covered cases in which the fact that such a relationship has not yet been established was not attributable to the biological father.

68. The Court would also note in that connection that a comparative law analysis revealed that there is no uniform approach in the Member States of the Council of Europe to the question whether, and if so, under what circumstances, a biological father has a right to contact with his child where a different father exists in law. However, in a considerable number of European States the domestic courts would be in a position to examine on the merits whether contact of a biological father in the applicant's

situation with his child would be in the latter's interest and could grant that father access if that was the case (see paragraphs 32-40 above).

69. The Court reiterates that in cases arising from individual applications it is not its task to examine the domestic legislation in the abstract, but it must examine the manner in which that legislation was applied to the applicant in the particular circumstances (see, for instance, Sommerfeld, cited above, § 86, and Zaunegger, cited above, § 45). It notes that the approach taken by the Court of Appeal and its interpretation of the domestic legislation led to the applicant being denied any contact with his children, irrespective of the question whether such contact was beneficial for the children's well-being. In taking that approach the Court of Appeal did not give weight to the fact that the applicant, for legal and practical reasons, was not himself in a position to alter the relationship with his children. Under the applicable provisions of the Civil Code (Articles 1592 no. 1, 1594 § 2 and 1600 § 2), he could not become the legal father of the twins. Likewise, he could not obtain a right of access for having borne responsibility for the children because the legal parents, Mr and Mrs B., had the right to decide what contact the twins should have with third persons (Article 1632 § 2 of the Civil Code, see paragraph 25 above) and were therefore in a position to prevent the applicant from assuming any responsibility for them. The legal parents' motives for refusing contact did not necessarily have to be based on considerations relating to the children's best interest.

70. The Court is aware of the fact that the decision of the Court of Appeal was aimed at complying with the legislator's will to give an existing family relationship between a legal father and a child, who are actually living together with their wife and mother respectively, precedence over the relationship between a biological father and a child (see paragraph 20 above). It further notes that the twins in the present case were living with their legal father and their mother and accepts that the existing family ties between the spouses and the children they actually cared for equally warranted protection. In fact, the case before it differs from many previous applications before the Court concerning questions of access to children in that a fair balance has to be struck by the domestic authorities between the competing rights under Article 8 not only of two parents and a child, but of several individuals concerned – the mother, the legal father, the biological father, the married couples' biological children and the children which emanated from the relationship of the mother and the biological father.

71. Nevertheless, the Court is not satisfied that, in according protection to the existing family ties between Mr and Mrs B. and the children, the domestic court fairly balanced the competing interests involved in a decision-making process which provided the applicant with the requisite protection of his interests safeguarded by Article 8 and gave sufficient reasons to justify their interference for the purposes of paragraph 2 of Article 8. It would reiterate in that connection that it is for the domestic courts, who have the benefit of direct contact with all the persons concerned, to exercise their power of appreciation in determining whether or not contacts between a biological father and his children are in the latter's best interest. In the present case, however, the Court of Appeal failed to give any

consideration to the question whether, in the particular circumstances of the case, contact between the twins and the applicant would be in the children's best interest.

72. Having regard to the foregoing, the Court concludes that the reasons given by the domestic courts for refusing the applicant contact with his children were not "sufficient" for the purposes of paragraph 2 of Article 8. The interference with his right to respect for his private life was therefore not "necessary in a democratic society".

73. There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The applicant claimed 10,000 euros (EUR) in respect of
non-pecuniary damage. He submitted that he had suffered considerable distress by the refusal to allow him to care for his children.

76. The Government did not comment on the applicant's claim.

77. The Court considers that the Court of Appeal's denial of any contact between the applicant and his children without examining the question whether such contact would be in the children's best interest must have caused the applicant some distress which is not adequately compensated by the finding of a violation alone. Making an assessment on an equitable basis, it therefore awards the applicant EUR 5,000, plus any tax that may be chargeable, under this head.

B. Costs and expenses

78. The applicant also claimed EUR 1,685.27 for the costs and expenses of the proceedings before the administrative courts which he had initiated in order to obtain a residence permit in Germany and thus to be able to see his children. He further claimed EUR 2,262.39 for the costs and expenses of the proceedings before the civil courts. These costs were currently covered by legal aid which he had been granted, but the applicant claimed that he might have to reimburse them. Moreover, he requested

reimbursement of EUR 2,015.38 for costs and expenses incurred in the proceedings before the Federal Constitutional Court and another EUR 2,015.38 for those incurred in the proceedings before the Court. All amounts claimed include VAT.

79. The Government did not comment on this issue.

80. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings in so far as they concern the proceedings in the civil and the administrative courts as the applicant, who had been granted legal aid, failed to demonstrate that he had actually incurred those costs. On the other hand, the costs and expenses for the proceedings before the Federal Constitutional Court, which were aimed at redressing the breach of the applicant's right under Article 8, and for the proceedings before this Court were actually and necessarily incurred and were reasonable as to quantum. It therefore awards the sum of EUR 4,030.76 (including VAT) for costs and expenses incurred both in the domestic proceedings and in the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

81. 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 UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds

(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,

(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 4,030.76 (four thousand and thirty euros and seventy-six cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 21 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.