



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

SECOND SECTION

CASE OF R.L AND OTHERS v. DENMARK

(Application no. 52629/11)

JUDGMENT

STRASBOURG

7 March 2017

FINAL

07/06/2017

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

In the case of R.L. and Others v. Denmark,

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

Işıl Karakaş, *President*,

Julia Laffranque,

Nebojša Vučinić,

Paul Lemmens,

Valeriu Griţco,

Ksenija Turković,

Jon Fridrik Kjølbro, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 31 January 2017,

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

PROCEDURE

1. The case originated in an application (no. 52629/11) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 22 July 2011 by four Danish nationals, M (the first applicant) and F (the second applicant), born in 1965 and 1951. The first applicant lodged the application on behalf of her two children, L. and S., born in 2004 and 2006. The applicants live in Copenhagen and are represented before the Court by Mr Tyge Trier, a lawyer practising in Copenhagen. The Danish Government (“the Government”) were represented by their former Agent, Mr Jonas Bering Liisberg, from the Ministry of Foreign Affairs, and their Co-agent, Ms Nina Holst-Christensen, from the Ministry of Justice.

2. The applicants alleged that a refusal by the Danish courts to reopen paternity cases was in breach of their rights under Article 8 of the Convention.

3. On 9 September 2013 that complaint was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court. On 31 January 2017 the Chamber decided not to disclose the applicants’ identity to the public (Rule 47 § 4 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The first applicant was born in Tanzania. She moved to Denmark in 2001 after marrying the second applicant.

5. On 7 January 2004 the first applicant gave birth to a boy, L. Because of their marriage, by virtue of section 1, subsection 1, of the Children Act (*Børneloven*), the second applicant was considered to be L.'s father, and this was recorded by the civil registrar in connection with the child's birth.

6. The applicants legally separated on 16 June 2005, but they continued to cohabit until June 2006.

7. On 12 October 2006 the first applicant gave birth to a boy, S.

8. Although he no longer lived with the first applicant, and had had no sexual contact with her since 2004, the second applicant nevertheless submitted to the State Administration for Greater Copenhagen (*Statsforvaltningen Hovedstaden*) (now the State Administration) a declaration, co-signed by the first applicant, stating that together they would take care of and be responsible for S. The declaration was dated 21 December 2006 and received in mid-January 2007. Consequently, the second applicant was registered as S.'s father under section 2, subsection 1, of the Children Act.

9. Without the knowledge of the second applicant, during the period from 2003 to 2008, the first applicant had also had a relationship with a man called E. When that relationship ended in October 2008, the first applicant told the second applicant that E. was the biological father of S. and probably also of L.

10. On 29 November 2008, the applicants requested that both paternity cases be reopened in order to establish formally E.'s fatherhood of L. and S. The first applicant submitted, in English, that E. was the children's biological father and that he "had warned me not to tell the truth about the fatherhood of the children". Their request was refused by the State Administration on 30 April 2009.

11. The applicants brought the cases before the City Court (*Københavns Byret*) before which E. opposed their reopening. The children L. and S., represented by counsel, also objected to the reopening of the paternity cases, finding that the conditions set out in sections 22 and 24 of the Children Act had not been met.

12. The first applicant explained that she had met the second applicant in Tanzania in 2001. They had married in December 2001 and she had moved to Denmark in 2002. In March 2003, she had met E. on a dating site and they had commenced a relationship and had sexual relations twice a week, on a few occasions without protection. She had become pregnant and informed E., but he had been in a dilemma because he was married at the

time. In November 2003 she had been diagnosed as HIV-positive. When L. was born in January 2004 the second applicant was considered to be the father. They had separated in 2005 but had continued to live together until the beginning of 2006. After she and the second applicant had stopped having sexual relations, she had only had sexual relations with E. The latter had said that he would provide support for her and L, but he had never given her any money. He had said that everything would fall into place once he divorced. E. had seen L. several times and taken him swimming or to play in a park. She wanted L. to be introduced to E.'s other children, but E. did not want that. Instead they had agreed that L. should have a sibling and they had planned their sexual activities according to her ovulation cycle in order for her to become pregnant. When S. was born in December 2006, the second applicant had wanted to help her and had therefore acknowledged fatherhood. E. had come to see her at the hospital after she had given birth to S. He knew that he was the biological father of both boys. He had also acknowledged that in several emails and text messages to her. Moreover, E.'s mother had met the boys and had said that L. reminded her of E. when he was a child. E. had never contributed financially to the care of the children. In 2008 she had told E. that he would have to take care of the children soon and that she would report to the authorities that he was the biological father. He had replied that he did not want any responsibility for the children and ended their relationship. She wanted the boys to know their true identity while she was alive. L. was confused about the situation and had said "my father is uncle E., but my old father is [the second applicant]".

13. The second applicant confirmed that he and the first applicant had not had a sexual relationship since L.'s birth. He believed that L. was his son. He was aware that S. was not his son, but since the boys would grow up together he felt it important to treat them equally and he also wanted to help and support the first applicant. In the autumn of 2008 he had been told about E. At the beginning of 2009 he had overheard a telephone conversation between the first applicant and E., during which E. had talked about the boys as "our children" both in Danish and English. E. had stated that he did not want to take financial responsibility for the boys. The second applicant still saw the boys regularly and would continue to do so after the case had been settled. He felt that the biological father should take responsibility, including financial responsibility, and that the boys should know their identity.

14. E. explained that he had two adult children from a previous marriage. He had met the first applicant in April or May 2003 but at the time they could not meet very often, because they were both married. The relationship was purely sexual, and he had no feelings for the first applicant. Their relationship had continued until 2008. They had met in the first applicant's home or in swinger clubs or in hotels. They had had sexual relations in swinger clubs from spring 2003 until 2007. He and another man

had had sexual relations with her at the same time, but he could not recall when. The first applicant had given him the impression that she protected herself. He had chosen to use a condom. He might be L.'s father, but they had not as such discussed the matter at the time. He had not wanted a child, whereas the first applicant had. She had told him that she would take care of the child herself. In December 2004, due to the applicants' separation, the first applicant had taken an apartment on her own and E. had visited her and L. there. L. called him "uncle E". Their sexual relationship had continued in 2005 but the first applicant had told him that she had also met other men on a dating site. In 2006 they had had sexual relations regularly, including in a swinger club once or twice. They had made a plan for the first applicant to become pregnant again and thought that it would be good for L. to have a sibling. He could not remember whether they had had sexual relations in the fertile period between December 2005 and 26 February 2006 and they had not discussed whether he was the biological father. He had visited the first applicant in hospital in connection with the birth. He had found it natural that the second applicant should be father to the children since he was married to the first applicant. He had never behaved like a father to the children: he was still "uncle E". It was true that he had gone swimming with L. once in October 2008 and that he had told his mother that he might be the children's father. The relationship between him and the first applicant had ended because she had not told him that she was HIV-positive.

15. By decision of 11 February 2010, the City Court in Copenhagen decided to reopen the paternity cases.

16. Regarding L., the City Court noted that both the second applicant and E. had had a sexual relationship with the first applicant during the fertile period and that the request for reopening the cases had been lodged more than three years after L.'s birth.

17. Regarding S., the City Court noted that E. and the first applicant had had sexual relations in the relevant fertile period. The Court did not find it established that the first applicant had had sexual relations with other men during that period. The request for a reopening had been lodged less than three years after S.'s birth.

18. The court took into account the disadvantage to which the children might be subject in case of a reopening, including the risk that paternity might not be established. It found it established that the first applicant had allowed both men to treat the children as theirs; that E. had taken on a paternal role; that E. had had frequent and regular contact with both children; that E. had taken L. swimming; that E. had taken the children with him on trips, to birthday parties and so on; and that E. was spoken of in familiar terms by the children.

19. In respect of S. new information and circumstances in the case gave reason to believe that a mistake might have been made when registering

paternity and that there might be a different outcome. Accordingly, that case was to be reopened.

20. Moreover, having assessed overall the interests of the children and the union of the family, and the fact that the children would not be subjected to unnecessary inconvenience by a reopening, and since it was expected that paternity would be established, the court found that, exceptionally, both cases should be reopened.

21. E. appealed against the decision to the High Court of Eastern Denmark (*Østre Landsret*), before which the applicants and E. were heard anew. E. added that he had moved to Sweden in August 2008 and thereafter had had no contact with the first applicant or the children. From 2004 to 2008 he had visited the first applicant for two to four hours, once or twice every month. He had become a sort of uncle for the children. He could not rule out that he was the father of the children but he would not voluntarily submit to a DNA test, since he would never be able take on the role of being their father.

22. The first applicant added, amongst other things, that E. had given the children presents. They had both received a teddy bear when they were born. They had also received a book with 100 Danish kroner (DKK) (approximately 13 euros (EUR)). When L. had turned two years old, he had received a birthday card with the text: "Dear L., happy birthday, love daddy". The children were still in contact with the second applicant.

23. The second applicant added that he would keep in contact with the children but that he had withdrawn after learning that he was not their father. He mainly took care of the children when the first applicant needed help due to her illness.

24. By decision of 26 November 2010 the High Court refused to reopen the paternity cases.

25. The majority (two judges) noted that it was not until the proceedings on paternity that the applicants had informed the authorities that they had not had sexual contact in the fertile period as regards S. Moreover, despite giving the children the impression that E. was their biological father, the second applicant had continued to treat the children as his own, at least until the end of 2008. In these circumstances, and since it was uncertain whether paternity would be established for the children if the paternity cases were to be reopened, they did not find a basis for reopening the case regarding S. under section 24 the Children Act. By the same line of reasoning, they did not find a basis for reopening the paternity case regarding L. under the stricter conditions set out in section 25 taken in conjunction with section 24 of the Children Act.

26. The minority (one judge) agreed with the decision by the City Court, mainly with the same reasoning. In addition he pointed out that the second applicant had not been aware until autumn 2008 that the first applicant and E. had had a long relationship, and that he was probably not L.'s father.

Furthermore, the second applicant had withdrawn from the children after learning about E. and he saw them mainly in order to help the first applicant. Finally, the minority took into account that both children openly stated that it was E., and not the second applicant, who was their father.

27. Subsequently, the second applicant took a DNA paternity test regarding both children which turned out negative with 0% compatibility, thus proving that he was not the father of L. or S.

28. The applicants submitted this result to the Appeals Permission Board (*Procesbevillingsnævnet*) and requested leave to appeal to the Supreme Court (*Højesteret*), which was refused on 28 January 2011.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. At the relevant time the rules on paternity were laid down in the Children Act (*Børneloven*), Act no. 460 of 7 June 2001, as amended. The rules were amended on 1 December 2013 because of the introduction of co-maternity, but the amendments did not change the substantial rules relevant to this case. The purpose of the paternity rules is to ensure the mutual rights of the child and the father. The most important legal effects of paternity are that the father has a duty to maintain the child, that the father and the child have a right to inherit from each other, that the child may take the father's surname and that the child may have the same nationality as the father if the relevant conditions are met. In addition, paternity is generally a condition for allowing the father to share the custody of the child and a condition for the right to contact for a man whose child does not live with him.

30. The Children Act is based on Report No. 1350/1997 on the legal rights of children issued by the Children Act Committee of the Danish Ministry of Justice. The Children Act Committee was appointed by the Ministry of Justice in 1992 and was to make proposals for a revision of the Children Act, including the consideration of new paternity rules. In 1997, the Committee issued an interim report on paternity. According to the interim report, the Committee had worked on the basis of the fundamental assumption that a child should be entitled to have both a mother and a legal father to the widest extent possible. The report also states that the Committee found that an attempt should be made to design the rules on reopening paternity proceedings so that permanent stability concerning the child's situation could be provided as rapidly as possible. This particularly implied that a paternity case would only qualify for reopening when certain conditions were met. Apart from reopening shortly after the child's birth (section 5), and reopening due to an error in recording of paternity (section 23) the leading principle of the reopening rules is that a paternity case will only be reopened if it is proved on the balance of probabilities that another man can become the child's father. The Children Act Committee also

proposed enactment of the non-statutory doctrine of acknowledgement on which case-law had been based prior to the Act. The doctrine of acknowledgement implies that a party can be barred from instituting paternity proceedings even when the statutory time-limits have not expired. This is the case if the father or mother has treated the child as being the father's even though they know or suspect that the father is not the genetic father of the child. Application of the doctrine is based on a specific assessment of the individual case.

31. The relevant provisions on institution and reopening of paternity proceedings are laid down in sections 5, 22, 24 and 25 of the Children Act. Section 5 reads as follows:

Section 5

“Where paternity has been recorded by or acknowledged before the Regional State Administration, proceedings may be instituted by the mother, the father or the child's guardian within six months of the child's birth.”

The preparatory notes set out that the reason behind section 5 was to give the mother and the father a “cooling-off” possibility. Recordings and acknowledgements covered by the provision are therefore not final until six months after the child's birth. This fairly short period was laid down in order to provide stability concerning the child's situation. The right to institute paternity proceedings within the six months is free and is thus not conditional upon proof on a balance of probabilities that another man can be the child's father, and the doctrine of acknowledgement is not applied either.

If the six-month time-limit set out in section 5 has expired, paternity proceedings, other than in the case of erroneous recording (section 23), can only be reopened if the following conditions, set out in sections 22 or 24 of the Children Act, are met.

Section 22

“1. If the paternity of a child has been registered, or established by acknowledgment or by judgment, proceedings will be reopened if the mother or her estate, the guardian or the child's estate and the father or his estate agree to make such a request.

2. Reopening will only be allowed if it is proved on a balance of probabilities that another man can become the child's father.”

Section 24

“1. If the fatherhood of a child is registered, or established by acknowledgment or by judgment, the mother or her estate, the guardian or the child's estate, the father or his estate may, within three years after the child's birth, request that the paternity case be reopened, provided that facts have come to light which may result in another outcome, or that in other respects there is a special reason to believe that the paternity case may turn out differently.

2. When deciding under subsection 1, importance should be attached in particular to the following:

- i) the length of time elapsed since the child's birth;
- ii) whether the father, with actual or presumed knowledge of the circumstances which raise doubts as to his fatherhood, has [nevertheless] acknowledged the child by treating it as his own;
- iii) whether the mother, with actual or presumed knowledge of the circumstances mentioned under ii) has let the father treat the child as his own;
- iv) whether a party, with actual or presumed knowledge of the circumstances which raise doubts as to who is the child's father, failed within a reasonable time to request a reopening of the case; and
- v) whether in the case of a reopening, it can be expected that fatherhood of the child will be established."

It appears from the preparatory notes that it is a condition for reopening the proceedings under section 24 that information has come to light about circumstances that will presumably result in another outcome to the proceedings, or that there is otherwise a special reason to assume that the proceedings will now have another outcome. This is particularly aimed at cases where another potential father appears. Moreover, the provision does not confer a right of reopening even if the said conditions have been met. The decision to reopen the proceedings thus depends on an overall assessment, particularly including the circumstances listed in subsection 2.

If the three-year time-limit set out in section 24 has expired, the proceedings can only be reopened if exceptional reasons exist: see section 25 of the Children Act:

Section 25

"Reopening of proceedings under sections 23 and 24 may be permitted after the expiry of the time-limit stipulated by those provisions if exceptional reasons for not making the request earlier can be given, if the circumstances otherwise make reopening of the proceedings appropriate to a high degree, and if a renewed review of the proceedings will presumably not imply material nuisance to the child."

When a paternity case is reopened, it follows from section 26, subsection 3, of the Children Act that the case must be processed in the same way as cases in which no paternity is registered in connection with the child's birth. If nobody has acknowledged paternity, evidence will typically be provided through statements from parties, witnesses and forensic DNA analyses.

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

32. The applicants complained that the refusal to reopen the paternity cases was in breach of their rights under Article 8 of the Convention, which reads:

“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.”

33. The Government submitted that the application should be declared inadmissible as being manifestly ill-founded.

34. The applicants disagreed.

A. Admissibility

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

B. Merits

36. The applicants contended that all the evidence submitted before the domestic courts showed that E. was the biological father of L. and S., and that therefore the paternity cases should have been reopened, as found by the City Court. To hold otherwise would be a distortion of facts and against the best interests of the children.

37. The Government pointed out that it is not *per se* incompatible with the Convention to limit access to reopening of paternity cases, in particular when the rules are reasonable and flexible like those in the Danish legislation and they pursue the legitimate aim of safeguarding the interest of the child, including providing stability and legal rights deriving from having a father registered. In the present case, all those concerned were heard and the cases were thoroughly examined by the domestic courts. The High Court’s final decision that the requirements set out in sections 24 and 25 for a reopening had not been fulfilled was taken in what it considered to be the best interests of the children. In these circumstances, and having regard to the margin of appreciation and the principle of subsidiarity, the Government

maintained that the refusal to reopen the paternity cases was not in violation of Article 8 of the Convention.

38. It is not in dispute between the parties that Article 8 is applicable in the present case. The Court agrees and observes that it has on many occasions found that an attempt by a putative father to officially disavow his paternity concerned his private life under the said provision (see, among others, *A. L. v. Poland*, no. 28609/08, § 59, 18 February 2014). Likewise, for the mother and the children in the present case, the Court finds it established that their private and family lives were at issue.

39. The essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective “respect” for private and family life. However, the boundaries between the State’s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. The Court does not find it necessary to determine whether in the present case the impugned decision, to refuse to reopen the paternity cases, constitutes an interference with the applicants’ exercise of the right to respect for their private and family life or is to be seen as involving an allegation of failure on the part of the respondent State to comply with a positive obligation. In the context of both positive and negative obligations the State must strike a fair balance between the competing rights and interests at stake. Apart from weighing the interests of the individual vis-à-vis the general interest of the community as a whole, a balancing exercise is also required with regard to competing private interests. The Court reiterates that in this respect the national authorities have the benefit of direct contact with all the persons concerned and that it is not for the Court to substitute itself for the competent domestic authorities in regulating paternity disputes at the national level, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see, *inter alia*, *Laakso v. Finland*, no. 7361/05, § 41, 15 January 2013; *Röman v. Finland*, no. 13072/05, § 46, 29 January 2013; and *A. L. v. Poland*, cited above, § 66).

40. The Court has previously accepted that the introduction of a time-limit or other limitations on the institution of paternity proceedings may be justified by the desire to ensure legal certainty and finality in family relations and to protect the interests of the child (see, for example, *Rasmussen v. Denmark*, 28 November 1984, § 41, Series A no. 87; *Mizzi v. Malta*, no. 26111/02, § 88, ECHR 2006-I (extracts); *Phinikaridou v. Cyprus*, no. 23890/02, § 51, 20 December 2007; and *A. L. v. Poland*, cited above, § 64).

41. In the present case, however, the applicants were not barred from introducing reopening proceedings due to absolute or allegedly inflexible time-limits (see, *a contrario*, *inter alia*, *Shofman v. Russia*, no. 74826/01,

§ 30, 24 November 2005; *Mizzi v. Malta*, cited above; and *Wulff v. Denmark* (dec.), no. 35016/07, 9 March 2010). Their requests were refused because the High Court made a concrete assessment that the conditions set out in the Children Act for a reopening of the paternity cases were not fulfilled.

42. In respect of S., regarding whom the request was submitted within the time-limit of three years after his birth, the High Court found that the conditions in section 24 of the Children Act were not fulfilled, namely that “facts have come to light which may result in another outcome, or in other respects there is a special reason to believe that the paternity case may turn out differently”. In that assessment, according to subsection 2 of the said provision, importance should be attached in particular to the following: i) the length of time elapsed since the child’s birth; ii) whether the father, with actual or presumed knowledge of the circumstances which raise doubts as to his fatherhood, has [nevertheless] acknowledged the child by treating it as his own; iii) whether the mother, with actual or presumed knowledge of the circumstances mentioned under ii) has let the father treat the child as his own; iv) whether a party, with actual or presumed knowledge of the circumstances which raise doubts as to who is the child’s father, failed to request a reopening of the case within a reasonable time; and v) whether in case of a reopening, it can be expected that fatherhood of the child will be established.

43. In respect of L., the request for a reopening could be permitted under section 25 taken in conjunction with section 24 of the Children Act, after the time-limits set out in sections 23 and 24, “if exceptional reasons for not making the request earlier can be given, if the circumstances otherwise make reopening of the proceedings appropriate to a high degree, and if a renewed review of the proceedings will presumably not imply material nuisance to the child”. The High Court did not find that those conditions were fulfilled.

44. More concretely, in its decisions of 26 November 2010, the High Court noted that it was not until November 2008, when lodging the proceedings on paternity, that the applicants had informed the authorities that they had not had sexual contact in the fertile period as regards S., born in 2006. Moreover, despite giving the children the impression that E. was their biological father, the second applicant had continued to treat the children as his own, at least until the end of 2008. In these circumstances, and since it was uncertain whether paternity would be established for the children if the paternity cases were to be reopened, the High Court refused the applicants’ requests.

45. One of the elements relied on by the High Court for not finding in favour of the second applicant, who wanted to contest paternity of the children, was the particular point in time when he became aware of the biological reality. As regards L., born in January 2004, it appears that it was only in October 2008 that the second applicant learnt that he might not be

the biological father. As regards S., born on 12 October 2006, the High Court noted that the applicants had not informed the authorities that they had not had sexual contact in the fertile period until they lodged their request in November 2008. In other words, the second applicant had been aware all along that he could not be S.'s biological father. The Court points out in this respect that in various cases in which men have acknowledged paternity in full awareness that they may not be the biological father, but subsequently, after the expiry of the limitation period, wish to seek annulment of such recognition, it has accepted that it is open to the domestic courts to give greater weight to the interests of the child rather than to the applicant's interest in disproving his freely-acknowledged paternity (see, for example, *Yildirim v. Austria* (dec.), no. 34308/96, 19 October 1999; *Kňákal v. Czech Republic* (dec.), no. 39277/06, 8 January 2007; *Wulff*, cited above; and *A.L.*, cited above, § 78).

46. The High Court also gave weight to the fact that the second applicant had continued to treat both children as his own, at least until the end of 2008, when L. had reached the age of almost five and S. the age of two. Finally, the High Court took into account that in the case of a reopening of the paternity cases, there was a risk that paternity would not be established, and that the children might thus become fatherless.

47. In these circumstances, and although the reasoning is rather brief and could be more developed, the Court accepts that the High Court, in its decision of 26 November 2010, took the various interests into account and gave weight to what it believed to be the best interests of the children, and notably their interest in maintaining the family unit. The Court points out in this connection that when domestic authorities carefully assess the best interests of the child, the Court should not, in principle, contradict their findings, in particular if they are made by an independent court in judicial proceedings (see, *A.L.*, cited above, § 72).

48. The Court is mindful of the first applicant's assertion that it was in the best interests of her children to find their true identity. It also notes that it has acknowledged that a person has a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of his or her personal identity and to eliminate any uncertainty in this respect (see, for example, *Mikulić v. Croatia*, no. 53176/99, § 54, ECHR 2002-I, and *Odièvre v. France* [GC], no. 42326/98, § 42, ECHR 2003-III). In the present case, however, the first applicant's views on what would be in the best interests of the children not only opposed those of the High Court, but also those of the children's counsel, who pleaded that the paternity cases should not be reopened (see paragraph 11 above). The Court cannot ignore, either, that the first applicant, being the best placed person to know about any uncertainty as to the fatherhood of her children, did not take any initiative to establish their biological identity until 29 November 2008.

49. Finally, the Court notes that before the domestic courts E. opposed the reopening of the paternity cases and that there was no conclusive evidence that he was the biological father of L. or S. (see, *a contrario*, *Mandet v. France*, no. 30955/12, § 59, 14 January 2016).

50. In the light of the foregoing, the Court considers that the High Court gave relevant and sufficient reasons, and struck a fair balance between the interests of the applicants and other individuals concerned and the general interest in ensuring legal certainty of family relationships.

51. There has accordingly been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 7 March 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Işıl Karakaş
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Lemmens;
- (b) joint dissenting opinion of Judge Laffranque and Judge Turković.

A.I.K.
S.H.N.

CONCURRING OPINION OF JUDGE LEMMENS

1. I voted with the majority for a finding of no violation of Article 8 of the Convention.

I must admit, however, that I did so with considerable hesitation. There are indeed a number of troubling elements.

First of all, both applicants, that is to say the mother of both children and the man who was considered to be their father, applied for a reopening of the paternity proceedings. They both agreed that the second applicant was not the children's biological father.

Secondly, the first applicant kept the fact hidden for years that she had had sexual relations with other men, in particular with E. Although the children were born in 2004 and 2006 respectively, the first applicant informed the second applicant (only) in October 2008 that she had these relations, between 2003 and 2008 (see paragraph 9 of the judgment). This new development prompted both applicants to file their request, in November 2008 (paragraph 10 of the judgment).¹

Thirdly, while the second applicant was unaware of what exactly had happened behind his back, he fully assumed the role of father of L., and even accepted that role with respect to S., although by that time he knew that, because there had been no sexual contact between him and the first applicant, he could not have been the biological father of S. He nevertheless accepted to be registered as the father of S., because at that time he believed that L. was his son and he wanted the two boys to grow up together and to be treated equally; he also wanted to help and support the first applicant (see paragraph 13 of the judgment). When he learned the true facts, including about L., he — understandably — no longer wished to continue supporting the mother and the two children who were not his (see paragraph 23 of the judgment). The refusal to reopen the proceedings has the effect of keeping him locked in a father-child relationship which he had accepted without being informed of the true situation.

Fourthly, E., who could well be the biological father of both children (see paragraph 9 of the judgment), but who refused to accept parental responsibility, is left completely off the hook.

1. In paragraph 48 of the judgment, the first applicant is blamed for not having acted before November 2008. I do not find this reproach very realistic, given that she was hiding her sexual activities from the second applicant.

Fifthly, what is in the best interests of the children, in the long run? It is hard to imagine that there will be a loving relationship with the man who had thought he was the father of one of them, but later found out that he is the father of neither. I would not rule out the possibility that at some point the children will themselves take the initiative of contesting the paternity of the second applicant and trying to establish the paternity of the real, biological father (or fathers).

2. If I had been a national judge in the case brought by the applicants before the domestic courts, I might very well have taken the same decision as the City Court of Copenhagen and ordered a reopening of the paternity issue. The biological reality is an important guiding principle. In this respect I would like to refer to the Court's case-law to the effect that a situation in which a legal presumption is allowed to prevail over biological reality might not be compatible, even having regard to the margin of appreciation left to the State, with the obligation to secure effective "respect" for private and family life (see, among others, *Kroon and Others v. the Netherlands*, 27 October 1994, § 40, Series A no. 297-C, and *Mizzi v. Malta*, no. 26111/02, § 113, ECHR 2006-I [extracts]).

3. However, I must admit that different views on this issue are reasonably possible, as is illustrated by the decision taken by the High Court of Eastern Denmark.

In such a situation, I am mindful of the limits of the supervisory power of our Court. The Court's task is not to take the place of the national courts, which have, *inter alia*, the benefit of direct contact with the interested parties, but rather to review whether the decisions the courts have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see, among many others, *X v. Latvia* [GC], no. 27853/09, § 101, ECHR 2013, and *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 90, ECHR 2015 [extracts]).²

2. This does not mean that "when domestic authorities carefully assess the best interests of the child, the Court should not, in principle, contradict their findings, in particular if they are made by an independent court in judicial proceedings" (see paragraph 47 of the judgment, referring to *A.L. v. Poland*, no. 28609/08, § 72, 18 February 2014). Such a standard of review would result in too much deference by the Court to the domestic courts. I prefer to adhere to the standard according to which, "where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts" (see, among others, *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012, and *Couderc and Hachette Filipacchi Associés*, cited above, § 92).

That is why in the end, without any enthusiasm at all, I felt compelled to conclude that, having due regard to the margin of appreciation enjoyed by the domestic courts and the reasons given by the High Court³, the latter had struck a fair balance between the various interests involved.

3. The majority acknowledge that the High Court's reasoning "is rather brief and could be more developed" (see paragraph 47 of the judgment). This is something of an understatement. By not thoroughly discussing the children's best interests, the reasoning barely meets the minimum requirement.

JOINT DISSENTING OPINION OF JUDGES LAFFRANQUE AND TURKOVIĆ

1. Unfortunately, we are unable to agree with the majority for the following reasons.

2. What is of primary importance in the present case is of course the best interests of the children. In its case-law on Article 8 the Court has on numerous occasions acknowledged that, where children are involved, their best interests must be taken into account and significant weight must be attached to those interests whenever a judicial or administrative decision, or legislation, directly concerns children or has an impact on them, thus including legal proceedings for the establishment of paternity (see, for example, *Mandet v. France*, no. 30955/12, § 53, 14 January 2016).

3. It is true that in Article 8 cases where it is necessary to assess the best interests of a child, the Court does not propose to substitute its own assessment for that of the domestic courts (see, *mutatis mutandis*, *X v. Latvia* [GC], no. 27853/09, § 102, 26 November 2013). This task falls in the first instance to the national authorities, which have, *inter alia*, the benefit of direct contact with the interested parties.

4. However, despite the fact that in fulfilling their task under Article 8 the domestic courts enjoy a margin of appreciation, the process remains subject to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power (see, *mutatis mutandis*, *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A; see also *Maumousseau and Washington v. France*, no. 39388/05, § 62, 6 December 2007, and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 141, ECHR 2010). The margin of appreciation to be afforded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake (see *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-1).

5. The Court has laid down certain criteria to be taken into account when assessing the best interests of the child. It insists on flexibility, consideration of all relevant factors and the application of various procedural safeguards. It requires appropriate weight (primary or paramount considerations) to be given to the best interests of the child, which it tends to interpret as a dynamic concept requiring context-specific and individualised assessment, and recognises the importance of those best interests in ensuring the full and effective enjoyment of children's rights as well as their holistic development.¹

¹ For further elaboration see K. Turković and A. Grgić, "Best Interests of the Child in the Context of Article 8 of the ECHR" in *Essays in Honour of Dean Spielmann* (2015), pp. 629-42.

6. In our view, the relevant provisions of the Children Act on the institution and reopening of paternity proceedings (see paragraph 31 of the judgment) fail to give due regard to the right of children to know their own origin. Furthermore, the reasoning of the decision of the majority judges of the High Court of Eastern Denmark does not demonstrate that the High Court paid any attention to the right of children to express their views freely or that it carried out a sufficiently detailed analysis of the various interests at stake, especially of the best interests of the children involved.

7. Under the Children Act, the right to bring a paternity suit after six months is conditional upon proof, on a balance of probabilities, that another man is the child's father. In the present case, it was established that the second applicant was not the father of L. or S., and there was a high probability that the biological father was E. However, he opposed the reopening of the paternity suit and did not want to subject himself voluntarily to DNA testing. In making its decision not to allow the reopening of the paternity proceedings, one of the decisive elements for the High Court was that reopening carried a slight risk that paternity would not be established, with the result that the children might become fatherless. Apparently, Danish law does not give the courts the possibility of subjecting an alleged father to DNA testing prior to the reopening of a paternity suit. Thus the law obliges children who want to find out their true identity to bear the risk of becoming fatherless. In this way Danish law, instead of giving priority to the interest of children in establishing their true identity, actually protects the interests of alleged fathers who are afraid of having to assume their responsibilities.

8. Proceedings for the establishment of paternity require a careful balancing exercise, weighing the child's interest in knowing his or her identity against the interests of the putative or alleged father and the general interest. However, in that exercise the best interests of the child should be given priority. This is especially important in such sensitive cases as the present one, where the discovery of the truth concerning the identity of a child's parents (see *Odièvre v. France* [GC], no. 42326/98, § 29, ECHR 2003-III) is highly relevant for his or her personal development. If the question of paternity is at stake and a potential biological father known to the mother, there should be some means guaranteed by the authorities whereby that person is obliged to undergo a DNA test, in order to ensure, as a prerequisite for the reopening of a paternity suit, that the biological father has already been established before the proceedings are finally resumed. As it failed to guarantee that possibility, we find Danish law to be contrary to the best interests of the child and overly protective of the interests of the putative or alleged father.

9. The majority in the Chamber correctly point out in paragraph 47 of the judgment that the reasoning of the High Court is rather laconic and could have been more developed; but then in contradiction with this

statement, the majority nevertheless, to our mind wrongly, accept that the High Court took the various interests into account.

10. It is noteworthy that in the present case the domestic authorities were not unanimous as to the outcome. Firstly, the City Court in Copenhagen, having assessed as a whole the interests of the children and the union of the family, finding that the children would not be subjected to unnecessary inconvenience by the reopening of the proceedings, and considering it expected that paternity would be established, decided that, exceptionally, both paternity suits should be reopened. Secondly, the judgment of the High Court, which unlike the City Court refused to reopen the paternity suits, was not unanimous, the minority (one judge out of three) agreeing with the decision by the City Court, mainly with the same reasoning as at first instance.

11. Furthermore, it is significant that in the present case the first and second applicants were both in agreement and wanted the paternity suits to be reopened.

12. Nevertheless, the wishes of the children, who by the time of the High Court proceedings were around seven and four years old respectively, were not discussed in the majority judgment of the High Court. The minority judge pointed out that both boys had said that it was not the second applicant but E. who was their father. The Court has on several occasions emphasised the importance of the right of children to be heard and the need to take their views into consideration on matters which concern them in accordance with their age and maturity (see, for example, *M. and M. v. Croatia*, no. 10161/13, § 171, ECHR 2015; see also *Mandet*, cited above, § 55). The children were not parties to the proceedings before the High Court. The present judgment refers in this connection to the proceedings in the City Court, where the children's counsel pleaded that the paternity suits should not be reopened (see paragraph 11), but does not elaborate on that point.

13. Another important factor is time, which often plays a crucial role in cases concerning the interests of children. Unfortunately, just under ten years have already elapsed since the first and second applicants requested in November 2008 that both paternity suits be reopened and a not insignificant part of that time has regrettably been spent before this Court. Yet, in the present case, the first applicant has been reproached by the majority for not having taken any initiative to establish the biological identity of the father of her children any earlier than 2008. In the circumstances as they were in the case at hand we find this criticism inappropriate, as it appears to have been delicate for the first applicant to reveal the situation about the alleged true biological father of her first son, L., any earlier.

Instead, what is relevant is that in the autumn of 2008, when this situation was made known, the second applicant withdrew from the children and has seen them only occasionally since then. They were no longer living

together so that in reopening the paternity suits there would have been no risk of breaking up a family because it, in any event, no longer existed. Unfortunately, the analysis as to whether the second applicant had treated the children as his own and would continue to take care of them as a father after the end of 2008 is rather weak in the High Court's judgment.

14. It is regrettable that the issue of the children's interest in discovering their true identity has been left unanswered in this case. As even the majority have also pointed out, this Court has indeed acknowledged that a person has a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of his or her personal identity and to eliminate any uncertainty in this respect (see paragraph 48 of the judgment, with further references to *Mikulic v. Croatia*, no. 53176/99, § 54, ECHR 2002-I, and *Odièvre*, cited above, § 42).

A child's identity and right to know the truth as to his/her biological father is an important aspect that should not be overlooked in assessing the overall situation (see also the dissenting opinion of Judges Laffranque and Pinto de Albuquerque in *Marinis v. Greece*, no. 3004/10, 9 October 2014). Unfortunately, this aspect was not given appropriate attention either by the domestic authorities (legislative or judicial) or by the majority in the Chamber.

15. Having regard to the shortcomings that we have identified in the legislation and judicial proceedings, we find that there has been a violation of Article 8 of the Convention in the present case.