



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

FIFTH SECTION

CASE OF WOLTER AND SARFERT v. GERMANY

(Applications nos. 59752/13 and 66277/13)

JUDGMENT
(Merits)

STRASBOURG

23 March 2017

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 Wolter and Sarfert v. Germany,

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

Erik Møse, *President*,

Angelika Nußberger,

André Potocki,

Faris Vehabović,

Yonko Grozev,

Carlo Ranzoni,

Mārtiņš Mits, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 28 February 2017,

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

PROCEDURE

1. The case originated in two applications (nos. 59752/13 and 66277/13) 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 two German nationals, Mr Rolf Wolter (“the first applicant”) and Mr Jürgen Sarfert (“the second applicant”), on 18 September 2013 and 11 October 2013 respectively.

2. The first applicant was represented by Mr P. Krumbiegel, a lawyer practising in Cologne, and the second applicant by Mr F. Steinhoff, a lawyer practising in Lennestadt-Grevenbrück. The German Government (“the Government”) were represented by one of their Agents, Ms K. Behr, of the Federal Ministry of Justice and Consumer Protection.

3. Relying, in particular, on Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, the applicants, who are children born outside marriage, alleged that they had suffered discrimination on the grounds of their birth by the application of the relevant provisions of domestic inheritance law by the national courts.

4. On 26 May 2015 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1943 and lives in Cologne and the second applicant was born in 1940 and lives in Stuttgart.

A. The first applicant's proceedings before the civil courts (application no. 59752/13)

6. The first applicant is the natural son of a Mr H., who recognised paternity several months after his birth. The first applicant had a personal relationship with his father and worked in his business. The father died on 23 October 2007.

7. On 6 November 2007 the first applicant applied for a certificate of inheritance attesting that he was entitled to 100% of the estate.

8. On 7 November 2007 the Cologne District Court granted the certificate, upon which the first applicant took the estate into his possession and disposed of it. However, on 10 December 2007 the Cologne District Court withdrew the certificate, stating that the first applicant, being a child born outside marriage, was not Mr H.'s statutory heir. The first applicant appealed against that decision, but on 25 August 2008 the Cologne Regional Court upheld it.

9. On 23 July 2009 the first applicant again applied for a certificate of inheritance stating that he was entitled to 100% of Mr H.'s estate, referring in particular to the European Court of Human Rights judgment in the case of *Brauer v. Germany* (no. 3545/04, 28 May 2009).

10. In a decision of 3 November 2009 the Cologne District Court dismissed the first applicant's application, holding that the judgment in *Brauer* (cited above) was not applicable to his case. Instead, it granted certificates of partial inheritance to the first applicant's half-sister and to the grandchildren of the deceased's wife.

11. On 16 November 2009 the first applicant appealed to the Cologne Regional Court, arguing that under Article 6 § 5 of the Basic Law, which states that children born outside marriage must be provided by legislation with the same opportunities as are enjoyed by children born within marriage, there were no reasons he should be treated differently from children born within marriage. He stated that if he was refused the certificate the German State would be liable for compensation claims.

12. In a decision of 16 February 2010 the Cologne Regional Court upheld the District Court's decision, holding that the first applicant was not a statutory heir. The Regional Court referred to a decision by the Federal Constitutional Court of 8 December 1976, in which section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act had been found to be in

conformity with the Basic Law. The principles developed in *Brauer* (cited above) were not applicable to the present case. There was a need to protect the legitimate expectations of the deceased and other heirs. The Cologne Regional Court also considered that an interpretation of the relevant provision of the Children Born outside Marriage (Legal Status) Act in conformity with the case-law of the European Court of Human Rights was not possible as the domestic law was clear and therefore not open to any interpretation.

13. On 18 March 2010 the first applicant appealed to the Cologne Court of Appeal, arguing that the application of the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act would discriminate against him and breach his inheritance rights and therefore violate his right to equality before the law under Article 3 and his rights under Article 6 § 5 of the Basic Law. The first applicant stressed that the Regional Court's reasoning disregarded the Court's judgment in *Brauer* (cited above) and was therefore unlawful. The first applicant further noted that he had maintained a close relationship with his father until the latter's death and had even worked in his business. The first applicant's father had assumed that the first applicant would be his sole heir.

14. In a decision of 11 October 2010 the Cologne Court of Appeal dismissed the first applicant's appeal on the grounds that it was bound by the decisions of the Federal Constitutional Court and that it had found that the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act was in conformity with the Basic Law. The European Court of Human Rights judgment in *Brauer* (cited above) did not require a change of position because German courts were not bound by the decisions of that court. The Court of Appeal added that interpreting domestic law in the light of the Convention was restricted when domestic law was clear and therefore not open to interpretation. That was the case with the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act. The Cologne Court of Appeal further noted that the first applicant's appeal had been an appeal on points of law only. The first applicant's argument, therefore, that he had had a close relationship with his father, which was a statement of fact, could not be taken into account when deciding on the appeal because it had been submitted for the first time before the Court of Appeal.

B. The second applicant's proceedings before the civil courts (application no. 66277/13)

15. The second applicant is the natural son of a Mr B. and was born in the former GDR, where he lived until his flight from the country in 1957. In 1949 Mr B. was ordered by the Hamburg-Blankensee District Court to pay maintenance for the applicant. He met his father on four occasions, but was

asked by the latter not to get involved in the lives of his wife and daughter. The father died on 26 June 2006, naming his daughter as sole heir in his will.

16. In 2009, after the European Court of Human Rights had issued its judgment in *Brauer* (cited above), the second applicant brought an action for a compulsory portion of the deceased's estate (*Plichtteilsklage*) with the Hamburg Regional Court.

17. On 21 January 2010 the Hamburg Regional Court dismissed the second applicant's claim, holding that under the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act the second applicant was not a statutory heir. That provision was in conformity with the Basic Law. The Regional Court referred to the Federal Constitutional Court's judgment of 8 December 1976. It noted that *Brauer* (cited above) was not applicable to the case at hand because there had been no regular contact between the second applicant and his father, the deceased had a natural daughter and the second applicant had not lived in the former GDR for most of his life.

18. The second applicant appealed to the Hamburg Court of Appeal, arguing that the European Court of Human Rights judgment in *Brauer* (cited above) obliged the German courts to grant children born outside marriage the same inheritance rights as those born within marriage. The special circumstances of *Brauer* (cited above), which were referred to by the Regional Court, were not conditions that had to be present in order to apply the principles laid down in that judgment.

19. In a decision of 15 June 2010 the Hamburg Court of Appeal upheld the Regional Court's decision, endorsing its reasoning. It referred to the Federal Constitutional Court's case-law, arguing that there was a need to protect the legitimate expectations of the deceased.

20. The second applicant appealed to the Federal Court of Justice, which confirmed the Hamburg Court of Appeal's reasoning in a decision on 26 October 2011. The Federal Court of Justice argued that neither the old nor the amended first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act discriminated against children born outside marriage before 1 July 1949 because the difference in treatment was based on legitimate grounds. Regarding the amended first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act, expanding the retroactive scope of the reform beyond the one adopted was not necessary as the basic principles of legal certainty and legitimate expectations had to be respected. Those principles were also necessarily inherent in the Convention, meaning that even though the inheritance rights of children born outside marriage fell within the scope of the protection of Article 8 of the Convention, a State was dispensed from reopening legal acts or reviewing situations that pre-dated the delivery of a court judgment. The

Federal Court of Justice also noted that the facts at issue did not fall within the ambit of Article 8 or that of Article 14 of the Convention.

C. The proceedings before the Federal Constitutional Court

21. On 18 November 2010 the first applicant lodged a constitutional complaint with the Federal Constitutional Court. He claimed discrimination and therefore a violation of Article 3 and Article 6 § 5 of the Basic Law by applying the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act because there were no reasons why children born outside marriage should be treated differently from those born within marriage. The case-law of the Federal Constitutional Court, which considered that provision to be valid, disregarded the European Court of Human Rights judgment in *Brauer* (cited above) and was therefore unlawful. That led to a violation of Article 8 and Article 14 of the Convention.

22. The second applicant also lodged a constitutional complaint with the Federal Constitutional Court. Relying on the judgment in *Brauer* (cited above), he complained that the application of the amended version of the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act discriminated against him compared to children born within marriage. As a consequence he had been denied his inheritance rights.

23. In a decision of 18 March 2013 the Federal Constitutional Court dismissed both applicants' constitutional complaints (file nos. 1 BvR 2436/11 and 3155/11).

24. The Federal Constitutional Court noted that the judgment in *Brauer* (cited above) had led the German legislature to pass the Second Inheritance Rights Equalisation Act of 12 April 2011 (*Zweites Gesetz zur erbrechtlichen Gleichstellung nichtehelicher Kinder*). The first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act of 19 August 1969 had been changed retroactively, with the effect that the difference between children born outside marriage before and after 1 July 1949 had been set aside in cases of successions after 28 May 2009 (see paragraph 37 below).

25. Even though the first applicant's claim of a close relationship with his father had only been made for the first time in his appeal to the Cologne Court of Appeal, the Federal Constitutional Court noted that that statement of fact was not relevant for the issue before it. It declared both applicants' constitutional complaints admissible.

26. The Federal Constitutional Court confirmed the conformity of the amended first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act with the Basic Law. It reiterated that the cases at hand only needed to be examined under Article 6 § 5 of the Basic Law

and not under Article 14, which contained the right to protection of property. The difference between children born outside marriage before and after 1 July 1949 had been abolished by the Second Inheritance Rights Equalisation Act of 12 April 2011. The general discrimination against children born before and after that date therefore no longer existed. The time-limit in the new provision was not linked to personal characteristics but to a coincidental external event (*zufälliges, von außen kommendes Ereignis*). Any discriminatory treatment was therefore of a lesser degree.

27. Making the reform retroactive was not necessary as the conformity of the relevant provision of the Children Born outside Marriage (Legal Status) Act had been repeatedly confirmed by the Federal Constitutional Court. The *Brauer* case (cited above) had not changed that position because the European Court of Human Rights had clarified in *Marckx v. Belgium* (13 June 1979, Series A no. 31) that the principle of legal certainty, which was necessarily inherent in the law of the Convention as in European Law, dispensed a State from reopening legal acts or reviewing situations that predated the delivery of a judgment by the European Court of Human Rights.

28. The Federal Constitutional Court concluded that the domestic courts in the proceedings at issue had interpreted the relevant provision in accordance with the Basic Law. The European Court of Human Rights' judgment in *Brauer* (cited above) did not necessitate a different interpretation, particularly because the first applicant's submission about a close relationship with his father had been made belatedly while the second applicant had not claimed any relationship with his father at all.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Relevant provisions of the Civil Code

29. Pursuant to Article 195 of the Civil Code the general statutory time-limit for bringing claims is three years.

30. Pursuant to Article 197 § 1 (2) of the Civil Code, unless otherwise provided, claims under Articles 2018 ... are time-barred after thirty years.

31. Pursuant to Article 1922 of the Civil Code, a person's property after death passes as a whole to one or several heirs.

32. Pursuant to Article 2018 of the Civil Code an heir may request that anyone who has acquired something from an inheritance on the basis of a right of succession that he or she does not legally have surrender the item or items acquired.

33. Article 2303 provides that if a descendant of a deceased person is excluded by will from succession, he may claim a compulsory portion from

the heir (*Pflichtteilsanspruch*). A compulsory portion is half the value of the share of the inheritance on intestacy.

B. Rules of succession

34. The Children Born outside Marriage (Legal Status) Act of 19 August 1969, which came into force on 1 July 1970, provided that on the father's death, children born outside marriage after 1 July 1949 – shortly after the entry into force of the Basic Law – were entitled to compensation from the heirs in an amount equivalent to their share of the estate (*Erbersatzanspruch*). In contrast, children born outside marriage before 1 July 1949 were excluded from any statutory entitlement to the estate and from the right to financial compensation under the first sentence of section 12(10)(2) of the Act.

35. During the passing of the Children's Rights Improvement Act (*Kinderrechteverbesserungsgesetz*) of 9 April 2002, the legislature upheld the exception in the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act.

36. In a judgment of 28 May 2009 in the case of *Brauer v. Germany* (cited above) the European Court of Human Rights found a violation of Article 14 of the Convention taken in conjunction with Article 8 by the application of the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act by the domestic courts. The Court reasoned that protecting the legitimate expectations of the deceased and their families must be subordinate to the imperative of equal treatment between children born outside and within marriage.

37. As a result, the German legislature passed the Second Inheritance Rights Equalisation Act of 12 April 2011. The first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act of 19 August 1969 was changed retroactively to the effect that the difference in treatment between children born outside marriage before and after 1 July 1949 was set aside in cases where the deceased had died on or after 28 May 2009. In cases where the deceased had died before 28 May 2009 the difference remained in force.

38. A summary of further relevant domestic law and practice is contained in the Court's judgment in *Brauer* (cited above, §§ 17 to 24).

C. Resolution of the Committee of Ministers of the Council of Europe of 6 June 2012

39. On 6 June 2012 the Committee of Ministers adopted Resolution CM/ResDH(2012)83 in the case of *Brauer v. Germany* and, after examining the general measures taken by Germany in order to prevent similar violations, decided to close its examination of the case.

THE LAW

I. JOINDER OF THE APPLICATIONS

40. Given their similar factual and legal background, the Court decides that the two applications shall be joined by virtue of Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

41. The applicants complained that as children born outside marriage they had been unable to assert their inheritance rights and had thus been discriminated against when compared to children born within marriage. The Court considers that their complaint falls to be examined under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, which read respectively as follows:

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... birth ...”

Article 1 of Protocol No. 1

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

42. The Government contested that argument.

A. Admissibility

1. Exhaustion of domestic remedies by the first applicant

43. The Government submitted that the first applicant had not exhausted domestic remedies in respect of his complaint as he had belatedly presented facts to the Court of Appeal with regard to his relationship to his father and thus to family ties in the meaning of Article 8 of the Convention. Submissions in that regard would also have been relevant for examining

whether his rights under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 were concerned.

44. The first applicant contested that argument.

45. In determining whether the first applicant can be considered to have exhausted domestic remedies, the Court reiterates that the purpose of the requirement under Article 35 § 1 of the Convention that domestic remedies must be exhausted is to afford the Contracting States the opportunity of preventing or putting right – normally through the courts – the violations alleged against them before those allegations are submitted to the Convention institutions (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 48, Series A no. 306-B). If the complaint presented before the Court (for example, unjustified interference with the right of property) has not been put, either explicitly or in substance, to the national courts when it could have been raised in the exercise of a remedy available to the applicant, the national legal order has been denied the opportunity to address the Convention issue which the rule on exhaustion of domestic remedies is intended to give it (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III).

46. In the case of the first applicant the Court notes that on 23 July 2009 he applied for the second time for a certificate of inheritance, arguing that he was entitled to 100% of Mr H.'s estate. He referred in particular to the Court's ruling in *Brauer* (cited above). In his appeal of 16 November 2009 he argued that under Article 6 § 5 of the Basic Law, according to which children born outside marriage are to be provided by legislation with the same opportunities for physical and mental development and for their position in society as those enjoyed by children born within marriage, there were no reasons why children born outside marriage should be treated differently from those born within marriage. If he was refused the certificate the German State would be liable for compensation claims (see paragraphs 9 and 11 above).

47. It is true that the first applicant neither explicitly referred to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 nor to the relevant provision of the Basic Law before the District Court and the Regional Court. Nevertheless, he explicitly stated that a refusal of the inheritance certificate on the grounds of his status as a child born outside marriage would discriminate against him. He further claimed a right to his father's estate and argued that he would have a compensation claim against the German State if he was refused that certificate. Under those circumstances, the Court finds that the first applicant has, at least in substance, raised the complaint before the domestic courts. Furthermore, the Federal Constitutional Court decided in substance on the first applicant's constitutional complaint (see paragraphs 25-28). As a consequence, the first

applicant must be regarded as having complied with the requirements under Article 35 § 1 of the Convention for an exhaustion of domestic remedies.

48. The Government's objection of a failure to exhaust domestic remedies must therefore be dismissed.

2. *Applicability of Article 14 of the Convention*

49. According to its settled case-law, Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts in issue fall within the ambit of one or more of the latter (see, among many other authorities, *Fabris v. France* [GC], no. 16574/08, § 47, ECHR 2013 (extracts); *Brauer*, cited above, § 28).

50. The Court must therefore determine whether the facts at issue in the present cases fall within the ambit of Article 1 of Protocol No. 1 to the Convention.

51. With regard to the general principles as established in this regard by the Court (see, with further references, *Fabris*, cited above, §§ 49-51), the Court reiterates, in particular, that in cases concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular asset on a discriminatory ground covered by Article 14, the relevant test is whether, but for the discriminatory ground about which the applicant complains, he or she would have had a right, enforceable under domestic law, in respect of the asset in question (see *Fabris*, cited above, § 52). That test is satisfied in the present case. It was purely on account of their status as children born outside marriage that the applicants were refused the right to inherit from their fathers' estates.

52. It follows that the applicants' pecuniary interests fall within the scope of Article 1 of Protocol No. 1 to the Convention and the right to the peaceful enjoyment of possessions which it safeguards. This is sufficient to render Article 14 of the Convention applicable.

3. *Conclusion*

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

B. Merits

1. *The parties' submissions*

54. The first applicant submitted that the Second Inheritance Rights Equalisation Act of 12 April 2011 had not been able to prevent unjustified discrimination against him as it had only removed the difference between children born outside marriage before and after 1 July 1949 in cases where the father had died after 28 May 2009. In cases where the father had died before 28 May 2009 the difference remained in force. In the light of the Court's case-law, any legitimate expectation that the deceased and their families might have had was to be subordinate to the imperative of equal treatment between children born outside and within marriage.

55. According to the second applicant, the application of the Second Inheritance Rights Equalisation Act of 12 April 2011 had discriminated against him as it had failed to establish a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. If the German legislature had wanted to maintain the exclusion of children born outside marriage before the cut-off date of 1 July 1949 in cases where the father had died before 28 May 2009 from any statutory inheritance claims, compensation claims against the heirs should have been allowed to ensure conformity of the Act with the Convention.

56. The Government, on the contrary, submitted that the difference in treatment which had persisted after the Second Inheritance Rights Equalisation Act of 12 April 2011 had come into force had been based on an objective and reasonable justification. It had been justified by the overriding concern of protecting the legitimate expectations of people who had already acquired rights in an inheritance case, which themselves were protected by Article 1 of Protocol No. 1 to the Convention. The retroactive extension of the amendment to the date of the Court's judgment in *Brauer* (cited above) had struck a proportionate balance between the interests of descendants affected by that amendment and those of children born outside marriage. The fact that under domestic law an heir acquired the estate upon a decedent's death without any further legal action necessary precluded a more far-reaching change of that legal provision. Furthermore, it would cause legal and practical problems in inheritance cases where the estate had already been divided between the heirs. Proportionality, therefore, had not required a further expansion of the retroactive effect of the law, particularly with regard to the principle of legal certainty and the underlying principles set out in the Court's judgment in *Marckx* (cited above).

2. *The Court's assessment*

(a) **General principles**

57. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against the different treatment of persons in similar situations without an objective and reasonable justification. For the purposes of Article 14, a difference of treatment is discriminatory if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see *Fabris*, cited above, § 56, and *Mazurek v. France*, no. 34406/07, §§ 46 and 48, ECHR 2000-II).

58. The Court considers in this connection that the member States of the Council of Europe attach great importance to the question of equality between children born in and out of wedlock as regards their civil rights. Very weighty reasons would accordingly have to be advanced before a difference of treatment on the grounds of birth outside marriage could be regarded as compatible with the Convention (see, with further references, *Fabris*, cited above, § 59).

59. Therefore, with regard to the question of whether there was a reasonable relationship between the means employed and the legitimate aim pursued, the Court reiterates that the aspect of protecting the “legitimate expectations” of the deceased and their families must be subordinate to the imperative of the equal treatment of children born outside and within marriage (see *Fabris*, § 68, and *Brauer*, § 43, both cited above).

60. Nevertheless, the Court accepts that the protection of acquired rights can serve the interests of legal certainty, which is part of the concept of the rule of law and thus an underlying value of the Convention (see *Fabris*, cited above, § 66; *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 56-57, 20 October 2011; and *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII).

61. Furthermore, the States have the right to enact transitional provisions where they adopt a legislative reform with a view to complying with their obligations under Article 46 § 1 of the Convention (see, for example, *Fabris*, cited above, § 74; and *P.B. and J.S. v. Austria*, no. 18984/02, § 49, 22 July 2010).

62. The Court reiterates that its role is not to rule on which interpretation of the domestic legislation is the most correct one, but to determine whether the manner in which that legislation has been applied has infringed the rights secured to the applicant under Article 14 of the Convention (see *Fabris*, cited above, § 63). In the instant case its task is thus to establish whether the application of an inflexible cut-off date struck a reasonable relationship of proportionality between the means employed and the legitimate aim pursued or whether it constituted an unjustified

discrimination of a child born outside marriage. In this regard, a fair balance has to be struck by the domestic authorities between the various interests involved, namely the interests of the deceased's family on the one hand and those of the children born outside marriage on the other hand, and, in striking such a balance, it is necessary to have regard to the question whether the decision would be in conformity with the domestic constitutional order and the principle of legal certainty (see, *mutatis mutandis Fabris*, cited above, § 75).

63. In the specific circumstances of the *Fabris* case (cited above, § 68) the Court, when balancing the various interests at stake, took into account whether the persons concerned knew or should have known about the existence of a child born outside marriage who might be entitled to a share in the estate and whether the statutory limitation period was still open with the consequence that the heirs' inheritance rights were, under domestic law, liable to be challenged. The Court further found in that case to be important that the action of the applicant was pending before the national courts at the time of the delivery of the Court's judgment in the case of *Mazurek* (cited above).

64. The Court can accept therefore that if the inheritance rights of the deceased's family have acquired legal force and can no longer be changed under national law, it is not necessary to set aside a final decision in the light of a judgment by the Court delivered after such decisions (compare, *mutatis mutandis, Marckx*, cited above, § 58). If, on the contrary, the inheritance rights of the deceased's family are still open to be challenged under national law and thus the legal positions to be protected are only "relative", the rights of children born outside marriage should be enforceable in the same way as any other third-party rights.

65. Therefore, in cases such as the present one, in which different persons' rights protected by the Convention have to be balanced, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court by the "illegitimate" child deprived of inheritance rights under domestic law or by another heir allegedly being deprived of well-acquired rights (compare *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012).

(b) Application in the present case

(i) Whether there was a difference in treatment on the grounds of birth outside marriage

66. The Court notes that the Government did not dispute the fact that the application of the amended version of the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act gave rise to a difference in treatment for a child born outside marriage before the cut-off

date of 1 July 1949, where the deceased had died before 28 May 2009, as compared with other children.

67. It must therefore be determined whether the difference in treatment was justified.

(ii) Justification for the difference in treatment

(a) Pursuit of a legitimate aim

68. The Court notes, at the outset, that Germany amended its legislation following the Court's judgment in the case of *Brauer*, cited above, and reformed the rules of its inheritance law two years after the judgment had been delivered (see paragraph 37 above), as confirmed by the Resolution of the Committee of Ministers of the Council of Europe of 6 June 2012 (see paragraph 39 above), which applied the Court's case-law at the relevant time. The Court welcomes that measure, which was aimed at bringing German law into line with the Convention principle of non-discrimination. It has further regard to the date when the Federal Constitutional Court issued its decision (see paragraph 23 above), 18 March 2013, which coincided with the Court's judgment in *Fabris* (cited above). It notes that the Federal Constitutional Court still applied the case-law that the Court had applied before adopting the Grand Chamber judgment in the case *Fabris* (see paragraphs 24 to 28).

69. Furthermore, the Court considers that the aims pursued by maintaining the difference in treatment between children born outside marriage before and after 1 July 1949 in cases when the father had died before 28 May 2009, namely the preservation of legal certainty and the protection of the will of the deceased and the rights of his family, are legitimate ones (compare *Brauer*, cited above, § 41).

(b) Proportionality between the means employed and the aim pursued

70. The Court takes note of the Government's arguments that a more far-reaching retroactive effect than the one implemented by the Second Inheritance Rights Equalisation Act would cause legal and practical problems in inheritance cases where the estate has already been divided between the heirs. According to German inheritance law, at the time of a legator's death heirs acquire rights by law to a share of the estate under Article 1922 of the Civil Code (see paragraph 31 above).

71. In the present case, the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act, the original version of which had been adopted on 19 August 1969, set aside the difference between children born outside marriage before and after 1 July 1949 in cases where death occurred on or after 28 May 2009 (see paragraph 37 above). The Court notes in this connection the Federal Constitutional Court's reasoning that, in the light of *Brauer* (cited above), more

far-reaching retroactivity would have compromised the principle of legal certainty, which was necessarily inherent in the law of the Convention, as in European Law (see paragraph 27 above). The Court considers that the Federal Constitutional Court thus weighed the rights of the applicants against an underlying value of the Convention (compare paragraph 62 above). The Court further considers that it is true, as argued by the Federal Constitutional Court (see paragraph 26 above), that introducing a cut-off date for the applicability of a new regulation correcting past injustices is not discriminatory as such and is an adequate means for achieving clarity and preserving legal certainty.

72. Nevertheless, with regard to the imperative of the equal treatment of children born outside and within marriage (see *Fabris*, § 68, and *Brauer*, § 43, both cited above), it now needs to be ascertained whether the strict application of the cut-off date by the domestic authorities in the special circumstances of the present cases struck a fair balance between the competing interests involved (see paragraph 62 above). In this regard the Court finds it relevant to take the following elements into account: knowledge of the persons concerned, status of the inheritance rights involved, and the passage of time in bringing complaints.

73. Concerning the first applicant the Court notes that he was not a descendant whose existence was unknown to those who were subsequently designated as heirs. On the contrary, he was initially granted an inheritance certificate by the first-instance court, which was later withdrawn because he had been born outside marriage (see paragraph 9 above). The Court considers that this fact is sufficient to prove that the subsequent heirs' position with regard to their rights to the deceased's estate was known to be controversial. That also seems to be reflected by the fact that the subsequent heirs did not apply for an inheritance certificate themselves, but were only named as heirs after the first applicant had again applied for an inheritance certificate. Furthermore, it has to be taken into account in the first applicant's case that he had already been in possession of the inheritance for a certain period of time (compare paragraph 8 above).

74. As regards the second applicant, the Court notes that the Hamburg-Blankensee District Court had ordered his father in 1949 to pay maintenance for him (see paragraph 15 above). Furthermore, the second applicant met his father four times before the latter's death. As the father asked him not to get involved with his family (see paragraph 15 above) the Court acknowledges that the second applicant's half-sister might not have known of his existence. The deceased had named his daughter sole heir in his will and had thus looked after his and his daughter's interests in a way provided for by domestic law.

75. Having regard to the question of whether the legal position of the heirs in the present two cases were, under domestic law, still open to being challenged, the Court observes that in both cases there was under domestic

law a statutory time-limit for bringing claims which had not yet expired (see paragraphs 29 and 30 above). The legitimate heirs should therefore have known that the event of succession, even though the estate had devolved onto them, did not exclude the right of other heirs to a statutory share of the estate or to bring a claim for a compulsory portion and that such an action was capable of calling into question the rights to the estate as such or the extent of the rights of each of the descendants (compare *Fabris*, cited above, § 68). Thus, in the period before claims for a statutory or compulsory portion of the deceased's estate had become time-barred, their legitimate expectations were in any event no more than relative.

76. Furthermore it has to be taken into account that the applicants brought actions before the domestic courts directly after the delivery of the judgment in *Brauer* (cited above, compare *Fabris*, cited above, § 68). The passage of time is thus not a factor which could be held against them.

77. In conclusion, while in the case of the second applicant the family members of the deceased might not have known of the existence of another potential heir, all the other factors in the proportionality test heavily weigh in favour of the applicants. The only factors which rendered the applicants ineligible to a statutory portion of their fathers' estates were, firstly, that they had been born outside marriage before 1 July 1949 and, secondly, that their fathers had died before 28 May 2009. Having regard to the paramount importance of eliminating all differences in treatment between children born within and outside marriage, the domestic courts' arguments based on legal certainty, though being a weighty factor, were not sufficient to override the applicants' claims to a share in their fathers' estate under the specific circumstances.

78. The newly introduced cut-off date of 28 May 2009 had no impact on the legal position of the applicants with regard to the rights of other heirs to a statutory portion of the estate. It remains precisely the difference in treatment based on the applicants' status as children born outside marriage which excluded them from any entitlement to the estate. The Court has found such a difference in treatment to be contrary to the guarantees of Article 14 of the Convention.

79. Lastly, the Court bears in mind that the application of the amended first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act excluded the applicants from any statutory entitlement to the estate without affording them any financial compensation, as did the former version of the law, which was found to be in violation of Convention rights (see *Brauer*, cited above, § 44).

80. The foregoing considerations are sufficient to enable the Court to conclude that there was no reasonable relationship of proportionality between the means employed and the aim pursued.

81. There has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

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

82. The applicants complained, on the same grounds as those relied on above in connection with the right to the peaceful enjoyment of their possessions, of unjustified discrimination, infringing their right to respect for their family life, as guaranteed by Article 14 of the Convention taken in conjunction with Article 8.

83. However, having regard to the facts of the cases, the submissions of the parties and its findings under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, the Court considers that it has examined the main legal questions raised in the present two applications and that there is no need to give a separate ruling on the remaining complaints (compare *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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. The first applicant

1. Damage

85. The first applicant claimed the sum of 25,000 euros (EUR) in respect of pecuniary damage, a sum he had been liable to pay for two court settlements of inheritance-related actions brought against him. He did not make a claim in respect of non-pecuniary damage.

86. The Government contested this sum. They submitted that the first applicant had concluded the settlements on a voluntary basis and that therefore the Government was not liable for the sum claimed in respect of pecuniary damage.

87. As regards the first applicant's claims in respect of pecuniary loss, the Court's case-law establishes that there must be a clear, causal connection between the damage alleged by the applicant and the violation of the Convention found (see, among other authorities, *Stretch v. the United Kingdom*, no. 44277/98, § 47, 24 June 2003). The Court does not discern any causal link between the violation found and the pecuniary damage the first applicant allegedly suffered and it therefore rejects that claim.

88. As the first applicant did not make any claim in respect of non-pecuniary damage the Court makes no award under that head.

2. *Costs and expenses*

89. The first applicant claimed EUR 28,676.62 for costs for the domestic proceedings and for expenses for legal representation. This sum included EUR 13,193.16 for costs in the first set of proceedings in 2007 with regard to the inheritance certificate; EUR 3,137.80 for costs for the second application for an inheritance certificate; EUR 6,348.06 for costs for proceedings which his half-sister initiated against him before the Regional Court; a net sum of EUR 2,403.80 for lawyers' costs in the proceedings before the Federal Constitutional Court; and EUR 3,593.80 for costs before the Court. The applicant submitted copies of the bills issued to him by his lawyers and the domestic courts.

90. The Government submitted that the amount of statutory reimbursement with regard to the proceedings before the Federal Constitutional Court and this Court would amount to approximately EUR 500 and EUR 600 respectively.

91. 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 are reasonable as to quantum.

92. In the first applicant's case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award him the sum of EUR 5,000 for costs and expenses in the domestic proceedings and before the Court, plus any tax that may be chargeable to him.

3. *Default interest*

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

B. The second applicant

94. The second applicant claimed the sum of EUR 50,000 in respect of pecuniary damage, corresponding to the minimum value of his inheritance as a statutory heir. He submitted a decision by the Hamburg Court of Appeal on costs, which stated that according to the submissions of both parties to the proceedings the value of the inheritance at issue amounted to at least EUR 200,000, of which the second applicant claimed one quarter. He also claimed EUR 15,000 in compensation for non-pecuniary damage.

95. The Government argued that the second applicant's allegation that the sum of EUR 50,000 corresponded to the minimum value of his inheritance as a statutory heir was not supported by any evidence. They also contested his allegation that he had suffered non-pecuniary damage.

96. The second applicant claimed EUR 42,409.51 for costs for the domestic proceedings and legal representation. This sum included EUR 9,916.04 for lawyers' costs and court fees in the proceedings before the Regional Court; EUR 5,867.66 for lawyers' costs and court fees in the proceedings before the Court of Appeal; EUR 17,901.46 for lawyers' costs and court fees in the proceedings before the Federal Court of Justice; a net sum of EUR 2,020 for lawyers' costs in the proceedings before the Federal Constitutional Court; a net sum of EUR 3,520.00 for lawyers' costs in the proceedings before the Court; and EUR 3,284.35 in translation costs. The second applicant also submitted copies of the bills issued to him by his lawyer and the courts.

97. The Government submitted that the amount of statutory reimbursement with regard to the proceedings before the Federal Constitutional Court and the Court would amount to approximately EUR 500 and EUR 600 respectively.

98. With regard to the second applicant, the Court considers, in the circumstances of the case, that the question of the application of Article 41 of the Convention is not ready for decision. Consequently, it must be reserved and the subsequent procedure fixed, taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 75 § 1 of the Rules of Court). The Court allows the parties three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention to submit written observations on the matter and, in particular, to notify the Court of any agreement that they may reach.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications,
2. *Declares* the applicants' complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 admissible;
3. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 in respect of both applicants;
4. *Holds* that there is no need to give a separate ruling on the applicants' complaint under Article 14 of the Convention taken in conjunction with Article 8;

5. *Holds*

(a) that the respondent State is to pay to the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the first 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;

6. *Dismisses* the remainder of the first applicant's claims for just satisfaction.

7. *Holds* that with regard to the second applicant the question of the application of Article 41 is not ready for decision; accordingly,

(a) reserves the said question in whole;

(b) invites the Government and the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, to submit their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

(c) reserves the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 23 March 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Erik Møse
President