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Articles

Unplanned fatherhood is not sperm donation: The unduly moralistic approach to natural fathers in European Convention case law

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Draghici, Carmen: Unplanned fatherhood is not sperm donation\: The unduly moralistic approach to natural fathers in European Convention case law

Private and family life – natural fathers – discrimination – adulterous children – presumption of paternity – genetic tests

Example3Begin

This article criticises the Strasbourg Court's reluctance to recognise the familial association between a natural father and a child with whom he had no opportunity to establish effective bonds, unless the child was the product of a committed relationship (by analogy with marriage) and planned conception, whilst downgrading family aspirations to a (less protected) privacy interest if the birth resulted from an extra-marital or fleeting relationship. The author also laments the Court's readiness to accept superficial justifications for interferences with the father's private or 'potential' family life (where it finds it engaged), such as the refusal to order genetic tests or contact. The Court allows the 'child's best interests' façade to accommodate the mother's choice of partner (especially in the case of children conceived in adultery) and remains oblivious to the modern plural fatherhood (whereby the husband continues his parental role qua stepfather, without obliterating the natural father's family life with the child). It is further argued that, to end the gender-based double standard in the treatment of natural parents, the case law must de-couple the father's family life with the child from the quality of the adults' relationship and the circumstances surrounding conception (save for narrow exceptions) and acknowledge that currently pater certus est.

Example3End

Introduction

Whilst the Strasbourg Court's interpretation of the notion of 'respect for family life' under Article 8 of the European Convention for the Protection of Human Rights and Fundamental

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Freedoms 1950 (the European Convention) has been notoriously expansive,[1] one area of undue conservatism in its case law remains the treatment of natural fathers whom mothers prevent from establishing effective ties with their children. This article criticises what it perceives to be the Court's moralistic approach to the relationship between natural fathers and their children in such circumstances. This translates into varying degrees of protection depending on whether the father's relationship with the mother was akin to marriage (that is, an exclusive and stable romantic relationship, based on cohabitation and family plans) or an extra-marital affair/a fleeting relationship superseded by the mother's marriage to a third party, registered as the father on the child's birth certificate. The article laments the limited recognition of the relationship of putative fathers with their children under the 'private life' limb of Article 8 in the latter situation, even where the lack of contact was not imputable to the father's disinterest and the father is an unimpeachable candidate for parenthood. It also queries the Court's readiness to accept superficial justifications for interferences under Article 8(2) with either the *potential* family life between the father and the child (where found to be engaged) or with the right to establishing parenthood as a matter of identity rights. In particular, it calls into question the acceptance as proportionate of virtually irrebuttable presumptions of paternity and the support that the judicial endorsement of mothers' fraudulent registration of another man on the birth certificate lends to the phenomenon of parental alienation. The main argument propounded is that the protection of the family life between fathers and children should not be contingent upon the quality of the relationship between the adults and the circumstances surrounding the children's conception. De-coupling these two aspects is necessary, not only to safeguard the father's rights against excessive interference, but also to equalise the position of natural mothers and fathers in respect of Article 8 protection; in fact, the family links between a natural mother and her child are recognised since birth and by the mere fact of it without the additional hurdles set for natural fathers (all the more unreasonable since they are outside the father's control). The current Strasbourg approach arguably perpetuates discriminatory and stereotypical views of fatherhood, as well as an attachment to marriage and legitimacy that is out of step with the realities of present-day family life.

Unless accompanied by a qualifier (for example '*social* father' or '*legal* father'), the term 'father' is used in this article to designate the genetic father, ie the man whose gametes resulted in conception, according to the ordinary meaning of the word in the English language[2] and the dominant paradigm in Western culture.[3] In fact, the term 'father' is only exceptionally prefixed by 'birth'/'biological'/'genetic', in the limited contexts of adoption (to contrast the 'birth family' with the 'adoptive family') and third-party assisted reproduction (to signal a deviation from the principle that the genetic father is the legal father);[4] when

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[1] See, for example, Lord Sumption, 'The Limits of Law', 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, available at: www.supremecourt.uk/docs/speech-131120.pdf (last accessed 4 October 2021) 7–8; C Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Hart, 2017), 26–30.

[2] The Oxford Encyclopedic English Dictionary defines 'father' as '**1 a** a man in relation to a child or children born from his fertilization of an ovum'. **b** (in full **adoptive father**) a man who has continuous care of a child, esp. by adoption. **2** any male animal in relation to its offspring' (emphasis in original).

[3] According to Andrew Bainham, '[l]eaving aside adoption, legislation worldwide has traditionally defined parenthood as genetic parenthood'; see A Bainham, 'Parentage, Parenthood and Parental Responsibility' in A Bainham, S Day Sclater, and M Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart, 1999) 25, 37–38.

[4] This is corroborated in English law by the narrow construction of any departure from the default principle according to which the genetic father is 'the father' in the eyes of the law; see *Leeds Teaching Hospitals NHS*

employed *tout court*, the reference to biological fathers is implied. The term 'paternity' also denotes genetic fatherhood by implication: 'paternity tests', relying on DNA evidence, allow a man to establish or disavow genetic affiliation, and expressions such as 'genetic paternity' or 'biological paternity' would be regarded as bizarre tautologies. Whilst legal parenthood can be modified (for example, by an adoption order or a parental order), paternity is an objective biological datum and can be scientifically ascertained; to that extent, the term 'paternity' defines the child's genetic identity.

Strasbourg case law has also recognised the centrality of genetic makeup in defining parenthood in Europe. Significantly, in *Evans v United Kingdom*, the Grand Chamber upheld the 'right to respect for the decision to become a parent in a genetic sense', whilst noting that nothing precluded the applicant from adopting.[5] It thus acknowledged that genetic parenthood is distinguishable from broader understandings of parenthood and that Article 8 protects the aspiration to have biologically related children. The Court's approach to the recognition of the legal effects of foreign surrogacy arrangements has consolidated the emphasis on respecting genetic affiliation, even where the practice of surrogacy contravenes domestic law: in a 2019 advisory opinion, the Grand Chamber noted that, whilst the genetic father of a child born as a result of an overseas surrogacy arrangement must be recognised as a parent, the non-biological intended mother's rights are adequately protected through the adoption route (even if she is designated as the legal mother on the foreign birth certificate).[6] Respect for genetic links is further evinced (*a fortiori*) by the Grand Chamber's stance in *Parrillo v Italy* on a person's right to decide the fate of embryos created with their gametes: 'the embryos … represent a constituent part of that person's genetic material and biological identity'.[7] To put it simply, whatever the value assigned to social care, kinship matters.

For the same reason, case law under the European Convention has indicated that adoption is a measure of last resort and that care measures should be, in principle, temporary and pursue the aim of reuniting the family.[8] As Andrew Bainham observed, '[h]uman rights obligations … militate against [adoption] and towards some less drastic alternative which can preserve the child's existing kinship links and contacts'.[9] The assumption underlying this position is that the child is best cared for by his natural parents,[10] because of the unconditional love of a

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Trust v A [2003] EWHC 259 (QB), [2003] 1 FLR 1091, requiring strict adherence to the statutory rules for a legal fiction of parenthood to arise under human fertilisation legislation.

[5] *Evans v United Kingdom* (Application No 6339/05) [2007] 1 FLR 1990, [72]; see also *Dickson v United Kingdom* (Application No 44362/04) [2008] 1 FLR 1315, [66] on the 'right to respect for [the] decision to become genetic parents'.

[6] European Court of Human Rights, *Advisory opinion concerning the recognition in domestic law of a legal parent–child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, 10 April 2019, issued upon Request No P16-2018-001 (French Court of Cassation).

[7] *Parrillo v Italy* (Application No 46470/11) (2015) 62 EHRR 300, [158].

[8] See *Olsson v Sweden (No 1)* (Application No 10465/83) (1988) 11 EHRR 259, [81]; *L v Finland* (Application No 25651/94) [2000] 2 FLR 118, [122]. The limits on State intervention apply equally to the removal of babies from their birth families soon after the birth; in such cases, the objection to permanent removal and adoption by strangers is clearly based on importance of preserving natural ties rather than any existing social ties.

[9] A Bainham, 'Arguments about Parentage' (2008) 67(2) *Cambridge Law Journal* 322, 350.

[10] English child law also recognises the 'natural parent presumption', in the context of disputes over residence or care proceedings (see, for example, *Re D (A Minor: Natural Parent: Presumption of Care*) [1999] 1 FLR 134) as well as adoption (the philosophy of the Adoption and Child Act 2002 is that, where possible, it is best for the child to be raised by his or her natural parents, and birth relatives are considered as potential carers before entrusting the child to strangers). The presumption is only weakened in special circumstances, when the welfare of child clearly requires a different solution (see, for example, *Re H (A Child) (Appeal)* [2015] EWCA Civ 1284,

parent towards his child. There is, in fact, something special about biological parenthood: the inborn instinct, shared by virtually all species, to care for, and protect, the offspring. The Appellate Committee of the House of Lords (now the UK Supreme Court) highlighted the psychological significance of genetic parenthood and its influence on the child's welfare: 'For the parent, perhaps particularly for a father, the knowledge that this is "his" child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child'.[11]

In principle, in European jurisdictions birth registers are intended as a record of biological reality; where it transpires that the father's name on the birth certificate does not accurately reflect the child's paternity, the law permits the correction of said registers, at least in certain circumstances.[12] Importantly, the European Court of Human Rights has also upheld a person's right to have knowledge of their genetic origins.[13] Indeed, it has recognised that an individual never loses the interest in knowing their genetic affiliation, regardless of their advanced age.[14] The need to align birth records with biological truth was also acknowledged as part of a man's right to repudiate paternity on the basis of genetic evidence; the Strasbourg Court has found 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'.[15] It has been convincingly suggested that '[a]dvances in technology have made it increasingly difficult for the law to justify an approach to establishing paternity which is characterised by fiction and presumption'.[16] Notwithstanding the recognition of social parenthood based on effective care, the importance of kinship remains undiminished, both for the parent's family life and the child's identity rights.

The emphasis in this article on the need adequately to protect genetic parenthood does not detract from the value of social parenthood. The man who raises the child plays a distinctive role in his or her family life, but one that ought to supplement, rather than erase, original (birth) fatherhood. In fact, biological parenthood and social parenthood need not be seen in competition. The relationship between a child and a person acting *in loco parentis* can be promoted through legal mechanisms that allow a stable and secure relationship (for example, in England, a child arrangements order and a parental responsibility order for the stepfather),

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[2016] 2 FLR 1173, *Re E-R (Child Arrangements Order)* [2015] EWCA Civ 405, [2016] 1 FLR 521). See also *Re G (Residence: Same-sex partner)* [2005] EWCA Civ 462, [2005] 2 FLR 957 and *Re G (Shared Residence Order: Biological Mother of Donor Egg)* [2014] EWCA Civ 336, [2014] 2 FLR 897, suggesting a preference for natural parenthood over social parenthood where in competition.

[11] *Re G (Children) (Residence: Same-sex Partner)* [2006] UKHL 43, [2006] 1 WLR 2305, [33].

[12] For instance, in England, this can be achieved through a declaration of parentage under s 55A of the Family Law Act 1986 and re-registration under s 14A of the Births and Deaths Registration Act 1953. The prevalent view of English courts is that, where paternity is disputed, genetic tests ought to be carried out to establish genetic truth, unless there is clear evidence to show that the child would be harmed; see, for example, *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190, *Re D (Paternity)* [2006] EWHC 3545 (Fam), [2007] 2 FLR 26. The importance of genetic parentage can also be seen in the increased access to information about the donor for children conceived through assisted reproduction, per s 2 of the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004/1511) and s 24 of the Human Fertilisation and Embryology Act 2008.

[13] See *Mikulic v Croatia* (Application No 53176/99) [2002] 1 FCR 720.

[14] See *Jäggi v Switzerland* (Application No 58757/00) (2006) 47 EHRR 702 (the refusal to authorise a DNA test on a deceased person, whereby an elderly applicant could ascertain his parentage, interfered with Art 8 rights).

[15] *Mizzi v Malta* (Application No 26111/02) [2006] 1 FLR 1048, [113].

[16] Bainham, above n 9, 324.

without falsifying genetic truth or sacrificing the child's ties with the genetic father and the paternal birth family. Adoption can also be contemplated where the natural parent is not a willing or capable parent (that is, where the birth father is a donor, is deceased, or has forfeited his rights by rejecting the child), and therefore the substitution does not result in a loss for either the parent or the child; the original birth certificate would continue to provide an accurate account of the child's genetic parentage, and the change in legal fatherhood would fill in a void, as opposed to displacing the birth father.

The doctrinal stance inspiring the critique of Strasbourg case law in this article is that a genetic father is not a 'nothing' in relation to his child, unless he chooses to be such. Consequently, the social parent ought to acquire rights through a legal status that does not cover up biological truth and does not deprive father and child of their genetic and (potential) family bonds. It is argued that this should be the minimum common denominator promoted by European Convention jurisprudence, whereas the detailed regulation of parenthood would remain the province of domestic laws.

Effective and 'potential' family life: misplaced emphasis on the circumstances surrounding conception

The legal bonds between parents and children born within a marital union have received unreserved support in the case law of the European Court irrespective of social reality. *Gül v Switzerland* established that, 'from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life" … which subsequent events cannot break save in exceptional circumstances'.[17] In *Berrehab v The Netherlands*, the Court confirmed that there is also 'family life' between a father and a child born after the parents' divorce, even where they never lived together in the same household.[18] By analogy, the legal relationship between adoptive parents and their children also attracts the protection of Article 8 of the European Convention, as seen in *Pini and Bertani v Romania*, even if the adopters have not yet established effective ties with the adoptees.[19]

Effective family ties are therefore not an absolute pre-requisite for the recognition and protection of family life as long as there are legal ties, created by marriage or adoption. By contrast, numerous authorities (for example, *Yousef v The Netherlands*, *Söderback v Sweden*, *Lebbink v The Netherlands*) indicate that, for the Court, mere biological ties between fathers and children born out of wedlock are not constitutive of 'family life' for the purposes of Article 8, unless they are corroborated by close personal ties.[20] This can indirectly penalise

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[17] *Gül v Switzerland* (Application No 23218/94) (1996) 22 EHRR 93, [32].

[18] *Berrehab v The Netherlands* (Application No 10730/84) (1988) 11 EHRR 322, [21].

[19] *Pini and Bertani v Romania* (Application No 78028/01) [2005] 2 FLR 596, [146]–[148]. The Art 8 protection of 'intended parenthood' in the case of married and adoptive fathers is immediately triggered by the legal relationship with the child, without any additional hurdles; as discussed below, intention alone does not suffice for natural fathers.

[20] *Yousef v The Netherlands* (Application No 33711/96) [2003] 1 FLR 210, *Söderback v Sweden* (Application No 24484/97) [1999] 1 FLR 250, *Lebbink v The Netherlands* (Application No 45582/99) [2004] 2 FLR 463. In all these cases, the existence of family life was acknowledged, insofar as there had been some contact between the fathers and the children, but the extreme interferences with the fathers' rights (refusal to recognise the biological father as the legal father in *Yousef* and non-consensual adoption by the stepfather in *Söderback*) were deemed to be necessary and proportionate due to the feeble *de facto* ties between the fathers and their children. In *Lebbink*, the refusal of domestic courts to even examine the application for access to the child was found in breach of Art 8, but this can be viewed as a response to an access to justice issue more than as a conclusive attempt to protect potential family life.

natural fathers for the breakdown of their relationship with the children's mothers, on whose cooperation their legal recognition of parenthood and effective access to the children depends, especially during the period immediately after the children's birth and prior to the activation of court proceedings (sometimes delayed as a result of secretive births).

The European Convention case law is somewhat erratic on the issue of whether family life exists between a man and a child with whom he did not have an opportunity to develop effective ties through no fault of his own (typically, where the parents' relationship ended before the birth and the mother does not allow the father to register himself on the birth certificate). In fact, the prospect of future social ties, supported by the father's manifest intention to act as a parent, is not always deemed sufficient to corroborate genetic ties. The general approach seems to be that, if the father and the child did not enjoy an actual relationship, the protection of Article 8 is largely confined to cases of planned pregnancy within the context of marriage-like cohabitation. This was the narrow set of circumstances in which *Keegan v Ireland* recognised the existence of 'family life' between father and child:

> '… the notion of the "family" in this provision is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage. A child born out of such a relationship is *ipso iure* part of that "family" unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended.'[21]

The Court unhelpfully emphasised the marriage-like traits of the parents' relationship, in particular the fact that the child had been born to affianced parents and was not the product of accidental pregnancy; the planned marriage and the planned parenthood were flagged out as hallmarks of 'family life', which has an exclusionary effect on other biological relationships:

> 'In the present case, the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, *the conception of their child was the result of a deliberate decision and they had also planned to get married* … . Their relationship at this time had thus the hallmark of family life for the purposes of Article 8 (art 8). The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation.'[22]

Importantly, the Court accepted in *Keegan* that family life existed between the natural father and his child despite the lack of actual contact insofar as this was attributable to the mother's actions and the applicant's position was no different from that of a divorced father whose marriage broke down before the birth. However, the father's commitment to the mother before the birth and the planned nature of the pregnancy should not have been the decisive factors for the purposes of finding Article 8 applicable to the father–child relationship. This narrow understanding of fatherhood devalues the social relevance of kinship and the intrinsic worth of the father's interest in caring for his child, whether planned or otherwise. Although it may appear reasonable for the Court to allow the father–child relationship to acquire Article 8 relevance in different ways, two of them – a committed relationship with the mother and an effective social relationship with the child – depend on the mother, and therefore are false alternatives. The father's motivation to act as a parent, evidenced by his seeking access

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[21] *Keegan v Ireland* (Application No 16969/90) (1994) 18 EHRR 342, [44].

[22] Ibid, [45] (emphasis added).

to the child, is the only route to recognition within the father's reach; therefore, a motivated father should always be allowed to rely on Article 8, not only in exceptional circumstances, such as those of the *Anayo v Germany* case (biracial twins born to a Nigerian father and a German mother).[23] Regrettably, subsequent case law confirms the centrality of aforesaid factors in the Strasbourg approach to natural fathers' rights.[24]

In *MB v United Kingdom*, the former European Commission on Human Rights accepted that Article 8 'cannot be interpreted as only protecting "family life" which has already been established but, where the circumstances warrant it, must extend to *the potential relationship which may develop* between a natural father and a child born out of wedlock'.[25] It found, however, that family life did not exist between the applicant and the child on account of the poor quality of the relationship between the parents. Three problematic factors were treated as decisive in *MB*. Firstly, 'the pregnancy was not planned'.[26] Since purposeful conception is not a threshold criterion for family life with a child born to a (formerly) married or cohabiting couple, it appears arbitrary to treat it as a circumstance precluding the existence of family life of unmarried non-cohabiting parents with their biological children.[27] Secondly, the Commission attached considerable weight to the fact that 'the applicant in this case did not see the child or form any emotional bond with her'.[28] The emphasis on the absence of parent–child bonds as a justification for preventing the future formation of bonds goes against the principle that the potentiality of family life should be safeguarded when the lack of contact was not imputable to the father's disinterest but to the mother's actions (as recognised in *Keegan*). This stance fails to correct the imbalance of power between natural parents, stemming from the mother's ability to give birth unbeknownst to the father or even secretively (which is expressly permitted in a number of jurisdictions)[29] and/or name another

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[23] See *Anayo v Germany* (Application No 20578/07) [2011] 1 FLR 1883, discussed below.

[24] See also the Strasbourg approach to parental responsibility in *McMichael v United Kingdom* (Application No 16424/90) (1995) 20 EHRR 205, [98]: 'it is axiomatic that … the nature of the relationships of natural fathers with their children will inevitably vary, from ignorance and indifference … to a close stable relationship indistinguishable from the conventional matrimonial-based family unit … the aim of the relevant legislation … is to provide a mechanism for identifying "meritorious" fathers who might be accorded parental rights, thereby protecting the interests of the child and the mother …'. One may concede that the lack of automatic attribution of parental responsibility, with a judicial mechanism for acquiring it that is not onerous for the applicant, is a proportionate interference with natural fathers' Art 8 rights, provided that fathers are alerted to the consequences of their position and given an opportunity to apply. (As *B v United Kingdom* (Application No 39067/97) [2000] 1 FLR 1 demonstrates, a father enjoying regular visitation with the child is inadequately protected in case of international parental child abduction, since for the purposes of summary return proceedings contact is not treated as 'custody rights' within the meaning of the Hague Convention 1980.) Conversely, the absence of a mechanism to demonstrate genetic ties and gain access to the child is an extreme interference; the endorsement of laws allowing such interference cannot be justified in Strasbourg decisions merely by an 'axiomatic' scepticism towards natural fathers.

[25] *MB v United Kingdom* (Application No 22920/93) 6 April 1994 (EComHR), [2] (emphasis added).

[26] Ibid.

[27] Although having different rules for the recognition of 'family life' of married and unmarried parents, respectively, is not in itself problematic, raising a factor deemed irrelevant in the case of married parents to the rank of threshold criterion for unmarried parents, without a chance for the latter to compensate in some other respect, is arguably disproportionate and discriminatory.

[28] *MB*, above n 25, [2].

[29] See *Odièvre v France* (Application No 42326/98) (2003) EHRR 871, where the European Court of Human Rights ruled that French legislation on anonymous birthing was not in breach of Art 8 of the European Convention. For a critical analysis see E Steiner, '*Odièvre v France* – Desperately Seeking Mother – Anonymous Births in the European Court of Human Rights' [2003] CFLQ 425.

man on the birth certificate.[30] Thirdly, the Commission stressed that 'the mother of the child asserts that the father of the child is her husband, not the applicant'.[31] The mother's statement, considered against the background of an undisputed intimate relationship with the applicant around the time of conception and the availability of scientific tests to ascertain the truth, should have been given marginal, if any, weight, since her intention was to raise the child with her husband and she had no interest in acknowledging the applicant's paternity.

The test for 'family life' appeared to be marginally relaxed in *Anayo v Germany*, where the twin children subject of the proceedings had been born shortly after the end of the applicant's two-year relationship with a married woman, who raised them with her husband, the latter being also declared the legal father.[32] The natural parents had thus had a lengthy relationship, but without cohabiting, and, although the woman initially considered a divorce, the conception was not the result of plans to marry and start a family. In those circumstances, the Court was hesitant as to the existence of family life, but it 'd[id] not exclude that the applicant's intended relationship with his biological children attracts the protection of "family life"', and was satisfied that Article 8 was engaged at least in respect of private life.[33] In particular, the Court recognised that a child born out of wedlock and his or her biological father 'are inalterably linked by a natural bond',[34] and conceded that the lack of contact between the biological father and the children could not be held against him, insofar as he had consistently expressed interest in seeing the children, even before the birth, and contact was denied by the mother and her husband; moreover, it was not open to him under the relevant legislation to either acknowledge paternity or contest the husband's paternity.[35] Despite the notable differences when compared to the test set forth in *Keegan* for 'family life' between fathers and children they never met (stable cohabitation, commitment, plans to start a family), the Court noted that 'the children emanated from a relationship which lasted some two years and was, therefore, not merely haphazard'.[36] The judgment was unhelpfully ambiguous on when the 'family life' limb of Article 8 is applicable; critically, it continued to leave fatherhood flowing from short-term cohabitation and non-committed intimate relationships vulnerable, regardless of the father's interest in the child and readiness to assume responsibility.

The restrictive approach to the latter situation was, indeed, confirmed in *Ahrens v Germany*, where the Court emphasised that the 'family life' limb of Art 8 does not apply when the child's birth resulted from a casual relationship between the parents and no plans to found a family.[37] For the Court, the decisive elements of the case were the non-planned nature of the pregnancy, the purely sexual relationship resulting in pregnancy, without the intention to found a family, and the father's lack of commitment before the birth. The outcome of the case

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[30] Although the law may, in principle, prohibit inaccurate registrations (making it an offence to knowingly register a man other than the father on the birth certificate), in practice, unless registration requires genetic proof, the record can be falsified (for example, in England, s 10 of the Births and Deaths Registration Act 1953 only requires declarations from both the mother and the alleged father, without any proof of genetic affiliation; if the mother is married, the *pater est* presumption applies).

[31] *MB*, above n 25, [2].

[32] *Anayo*, above n 23, [8]–[13].

[33] Ibid, [62].

[34] Ibid, [60].

[35] Ibid, [59]–[62].

[36] Ibid, [61].

[37] *Ahrens v Germany* (Application No 45071/09) [2012] 2 FLR 483, [58]–[59].

appears to be influenced by the fact that it concerned the absence of an opportunity to challenge another man's paternity, by contrast with *Anayo*, where the father merely sought access based on 'close ties' with the children (as permitted under the relevant legislation) rather than recognition as a legal parent.[38] Understandably, the Court allows a wider margin of appreciation in relation to the determination of parental status, as opposed to contact; however, in jurisdictions where a successful contact application requires the demonstration of links with the child, and the mother denies the existence of any such links, denying paternity proceedings is tantamount to denying contact. Moreover, there is no attempt in the judgment to explain why mothers are always entitled to respect for their family life with children, whether or not they were planned, whereas fathers' rights are not protected in case of unplanned pregnancy resulting from non-committed intimate relationships. Jonathan Herring has argued that 'parenthood must be earned', and that, while 'the mother, through pregnancy, has demonstrated her commitment to the child', 'the unmarried father has not earned the parenthood, as he has not shown the commitment to the mother and the child by marrying the mother'.[39] Even accepting the premise that parenthood needs to be earned, the expressions of commitment to the child cannot be reduced to marrying the mother. The genetic father is not merely instrumental to the mother's reproduction, and marriage depends on the mother's consent rather than being a unilateral decision. This approach also unjustly penalises the father for gender differences: biologically, he does not have the mother's option to show pre-natal commitment by carrying the pregnancy to term. It follows that an opportunity to show commitment towards the child must be afforded to the man after the birth, in particular through the voluntary recognition of the child.

Equally questionable is the Court's inconsistent approach to the absence of existing ties and the meaning of 'intended' family life. In *Tóth v Hungary*, the Court conceded that the lack of contact owing to the mother's hostility cannot be held against the father:

> 'Intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases in which the fact that family life has not yet fully been established was not attributable to the applicant. In particular, where the circumstances warrant it, "family life" must extend to the potential relationship which may develop between a child born out of wedlock and the natural father.'[40]

Disappointingly, however, the Court held that the applicant's attempt to have his paternity recognised after he learnt about the adoption 'cannot outweigh the absence of emotional ties'.[41] This is not sufficiently explained, nor distinguished from *Keegan*, which is factually identical on this point; the only ostensible difference is the intention to procreate, which thus acquires disproportionate weight when compared to the intention to discharge a parental role towards one's genetic child. Apparently, the 'intention' to create family life must exist at the time of conception, whereas the focus ought to be not so much on the intention to *become* a parent, but on the intention to *act as* a parent, once the father is aware of the conception or birth (which are not within his control). But *Tóth* is also hard to reconcile with *Anayo*, where the children were the product of an extra-marital affair, not of a cohabiting couple's decision to start a family, and the father had not met the children. One is hard pressed not to find the

[38] See *Anayo*, above n 23, [12], [27].

[39] J Herring, *Family Law* (Pearson, 10th edn, 2021), 423–424.

[40] *Tóth v Hungary* (Application No 48494/06) 12 February 2013, [27].

[41] Ibid, [28].

Court's discussion of whether 'family life' is at stake often reverse-engineered.[42] Although it can be conceded that, as established elsewhere in Strasbourg jurisprudence, the mere biological link may not be sufficient to constitute family life,[43] the father's interest in being part of the child's life should give rise to protection in all cases where the mother's antagonism prevented the development of effective family life. Indeed, a man can be said to have waived his parental rights by not showing interest in the child, but the mother's successful efforts to frustrate contact and the development of personal ties between the child and the father should not be construed as such.

The case law has added a further controversial layer to the assessment of putative fathers' rights in Strasbourg proceedings: not only does the applicability of 'family life' between the putative father and the child hinge on the circumstances of conception (unlike for maternal affiliation), but even in the presence of a consistent relationship between the child's parents and interest towards the mother and the child during the pregnancy, it may be precluded by the mother's interest in raising the child with her husband. In *Schneider v Germany*,[44] as in *MB v United Kingdom*, the applicant had been involved in a relationship with a married woman and he wished to be declared the father of her son, so as to gain contact with the child and access to regular information about his development. It was conceded by the parties that the applicant might be the biological father of the child; however, the mother and her husband were opposed to paternity tests for the protection of their family unit. The Court held that the applicant had not been able to develop an effective family relationship with the child because he had been prevented from taking the steps required to establish himself as a parent. It also noted that he had shown interest in the child both before and after the birth (for example, the applicant had accompanied the mother to medical examinations relating to her pregnancy and he had acknowledged his paternity before the birth). The scenario thus met the criteria for 'family life' established in previous case law (*Keegan*, *MB*, *Anayo*, *Ahrens*): the applicant had had a significant intimate relationship with the mother (lasting over a year) and the child had been planned. However, despite these premises, the Court paradoxically found that the relationship between the applicant and the child fell short of family life, albeit recognising that it concerned an important part of his identity and hence his 'private life' under Article 8. This inconsistency might be better explained by an undeclared policy agenda, namely the Court's concern to uphold the presumption of paternity, discussed further below.

The case law might seem to have mitigated the restrictive approach to putative fathers' rights by finding that the 'privacy' limb of Article 8 applies to relationships falling short of 'family life'. This principle, articulated by the Commission in *MB* and replicated in Court decisions such as *Schneider v Germany* and *Ahrens v Germany*,[45] was more recently restated in *Tóth v Hungary*: 'the establishment of or challenge of paternity concerned that man's private life under Article 8, which encompasses important aspects of one's personal identity'.[46] David Harris et al have suggested that it does not matter which limb of Article 8 is engaged by a paternity dispute: 'the ramifications of failing to show that there is family life may not be significant: the Court accepts that proceedings concerning the establishment of paternity and

[42] See the discussion below of the outcome in *Anayo*, arguably influenced by the impossibility to cover up the biological truth due to the children's race and by the fact that the putative father merely sought visitation rights, not recognition as a father.

[43] *Lebbink*, above n 20, [37].

[44] *Schneider v Germany* (Application No 17080/07) (2011) 54 EHRR 407.

[45] Ibid, [82]; *Ahrens*, above n 37, [60].

[46] *Tóth*, above n 40, [28]. On the facts, the interference was found necessary and proportionate.

access to biological children tend to concern private life'.[47] Nonetheless, the qualification of the relationship as 'private life' is not inconsequential under Article 8, paragraph 2. It seems, in fact, that, once the 'family life' limb is found inapplicable, the court more readily accepts the justification offered by the respondent Government for the interference. The proportionality test applied is significantly skewed in favour of the State, the Court granting a wider margin of appreciation when compared to contact cases. As the Court stressed in *Ahrens*, 'the margin of appreciation enjoyed by the Member States in respect of the determination of a child's legal status must be a wider one than that enjoyed by the States regarding questions of contact and information rights', as the latter 'entail the danger that the family relations between a young child and a parent would be effectively curtailed'.[48] The distinction is, however, spurious if, in the jurisdiction concerned, the right to contact and information is predicated on having established paternity. Brian Sloan has aptly noted that, in *Anayo*, albeit ambivalent on the applicability of the 'family life' limb of Article 8, the Court 'was willing to undertake the strict scrutiny usually applied to the termination of parental contact'.[49] This judgment confirms that interferences with family life are treated differently, and the exact categorisation under Article 8 affects the applicant's prospects of success in the Strasbourg proceeding.

Indeed, restrictions in relation to paternity challenges are analysed as unlawful interferences with the right to respect for private life only in situations of blank refusal by domestic courts to entertain the father's application or in case of patent arbitrariness. In *Schneider*, the European Court was extremely critical of the domestic courts' treatment of the putative father's application:

> '[They] took their decision without examining in the particular circumstances of the case whether giving such information would be in the child's best interest (for instance, in order to maintain at least a light bond with the presumed biological father) or whether, at least in this regard, the applicant's interest had to be considered as overriding that of the legal parents.'[50]

Conversely, as detailed below, as long as there is some consideration of the circumstances at hand, the Court accepts that the balancing exercise satisfied Article 8(2) requirements, even if for the natural father the refusal to order tests amounts to the most drastic interference.

To treat paternity disputes only as a privacy matter if the child is not born to a stable couple is to ignore the independent parent–child relationship, which is an eminently familial one, based not on the adults' relationship leading to procreation, but on genetic and hardwired emotional ties between an individual and their offspring. The objective genetic link, corroborated by the father's commitment towards the child, as demonstrated by the steps taken to establish paternity and the willingness to assume the responsibility of the child's upbringing, should suffice to find 'family life' engaged. The current Strasbourg stance reduces the parent–child relationship to a mere extension of the couple's relationship, instead of recognising its autonomous existence and value. Not only does this approach differentiate between natural parents based on their gender (as further discussed in the next section), but it also treats fathers differently depending on whether they were married to, or committed to, the mother.

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[47] D Harris, M O'Boyle, E Bates and C Buckley (eds), *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, 3rd edn, 2014), 527.

[48] *Ahrens*, above n 37, [70].

[49] B Sloan, 'Unmarried Fathers and the Frustration of Family Life' (2011) 70(2) *Cambridge Law Journal* 314, 316.

[50] *Schneider*, above n 44, [95].

As noted above, in cases such as *Gül* and *Berrehab*, the Court has accepted that family life exists between a man and a child born to him within wedlock since birth and for the mere fact of it, without any additional qualifying criteria. The inflexible linkage between fatherhood and wedlock is highly problematic.

In a different context, the *JRM v The Netherlands* ruling indicated that sperm donation does not create family life within the meaning of the Convention.[51] The aforementioned decisions on putative fathers' rights unjustifiably equate unplanned fatherhood with mere sperm donation. In fact, one can reasonably infer that the sperm donor has relinquished the right to family life with the future child from the outset: gamete donation is expressly intended to enable others to reproduce, and can be construed as lack of interest in acting as a parent. By contrast, unplanned pregnancy carries with it no such (explicit or implicit) waiver of parental rights, and the genetic contribution ought to presumptively give rise to 'family life' expectations (until/unless the father's subsequent conduct shows disinterest in assuming a parental role). At best, family plans with the mother could be seen as buttressing a putative father's claim, but they cannot be treated as the decisive factor bringing the case within the purview of 'family life'.

An unwarranted difference in treatment between natural motherhood and natural fatherhood

The Strasbourg bodies' evaluation of the existence of potential family life between an unmarried father and his child not only discloses questionable assumptions about what constitutes familial ties, but is also inconsistent with their approach to natural motherhood, and in particular its disconnection from any notions of legitimacy for the purposes of Article 8 safeguards.

In fact, in *Marckx v Belgium* the Court established that family life exists between a woman and her child since the moment of birth and by the mere fact of it, and that so-called 'illegitimate' families are equally entitled to protection.[52] Whilst that case regarded a mother and her child born out of wedlock, there is no cogent justification for treating relationships between unmarried parents and their children differently depending on the parent's gender. Presumptively, the principle ought to apply to any *person* and their biological child. In addition, according to the *Marckx* decision, domestic legislation must be designed in such a way as to allow the child to be fully integrated into his or her natural family since the moment of birth; the reference here included not only the immediate nuclear family, but also the extended family.[53] The concern in *Marckx* was with the legal ties between the child and the maternal grandmother, but second-degree ascendents cannot be deemed more important than parents, nor can there be a logical differentiation between the extended maternal and paternal families. The judgment also made it clear that respect for Article 8 presupposes the conferral to the child of the full set of rights flowing from recognition of affiliation within wedlock,

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[51] In *JRM v The Netherlands* (Application No 16944/90) 8 February 1993, the fact that the applicant had agreed to act as sperm donor for a lesbian couple and his lack of contribution to the child's upbringing removed the case from the scope of Art 8.

[52] *Marckx v Belgium* (Application No 6833/74) (1979–80) 2 EHRR 330.

[53] The impugned law established that the mother's act of recognition of the child – by contrast with the automatic recognition of children born within wedlock – did not have the effect of creating a legal bond between the child and the maternal grandmother (including, but not limited to, inheritance rights); to achieve the same result, the mother had to adopt her own biological child.

including patrimonial rights;[54] depriving the child of such rights on the paternal side of the family does not appear appropriate or congruous.

The troubling implication of *Keegan v Ireland* was that the *Marckx* principles only apply to father–child relationships if, at the time of conception, the parents constituted a *de facto* family unit. That judgment did not explain why a mother's family ties with the baby emerge and have intrinsic value since the moment of birth, whereas for fathers any such ties are predicated on the analogy between cohabitation and marriage, thus triggering the application of the principle set forth in *Berrehab v The Netherlands* (a child born to a divorced father is automatically and irreversibly a part of his family). This ultimately means that, for natural fathers (and not for any other category of parents – married fathers, married mothers or unmarried mothers), there is an additional obstacle to the enjoyment of Article 8 safeguards, ie, proof of family life between the parents prior to the child's birth. Since the European Convention case law has established that natural affiliation is covered by Article 8, and that everyone is entitled to the protection of their family rights irrespective of their gender,[55] the decisive weight attached to the circumstances of conception in the case of natural fathers cannot be satisfactorily explained. The protection of the future family life with a biological child should be governed by the Court's reasoning in *Markin v Russia*, where the Grand Chamber found that the refusal to grant servicemen parental leave, on the basis that mothers are usually the primary carers, constituted sex discrimination:

> 'The Court further reiterates that the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention … . In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex.'[56]

'Traditions, general assumptions or prevailing social attitudes' – most notably the assumption that a man who accidentally fathers a child with a casual partner will not embrace parenthood – should be equally repudiated as a justification for gender-based differences in the protection of anticipated family life at the time of the child's birth. Moreover, since the relationship of single unmarried fathers and their children is covered by Article 8 (as per *Kroon v The Netherlands* and other authorities),[57] in cases where that relationship has not yet been established at the time of the proceedings, a scrutiny of the quality of the intimate relationship resulting in conception is a poor substitute for the assessment of the potential family life between father and child. In fact, a non-committed partner may well be a committed father; indeed, the mere fact that the putative father brought proceedings to establish his legal parenthood, with all the ensuing responsibilities – thus demonstrating readiness to financially support the child and to bestow inheritance rights at the expense of other children or family

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[54] Under the relevant legislation, a natural mother, despite having recognised the child, was not free to pass on her estate to the child upon her death according to her own wishes.

[55] See, for example, *Salgueiro da Silva Mouta v Portugal* (Application No 33290/96) (2001) 31 EHRR 47, [35]–[36] (Arts 8 and 14 did not permit discrimination in custody proceedings based on the father's sexual orientation).

[56] *Markin v Russia* (Application No 30078/06) (2013) 56 EHRR 8, [127].

[57] See *Kroon v The Netherlands* (Application No 18535/91) (1994) 19 EHRR 263, [31]–[33] (emphasising the biological ties and longstanding relationship between the natural father and the child, despite not living together).

members[58] – is indicative of commitment towards the child, albeit not towards the child's mother.[59]

Admittedly, there are objective differences between mothers and fathers in terms of ascertaining biological ties, which may justify different procedures for establishing parenthood, but they do not warrant a different evaluation of the potential for family life with a new-born baby. Whilst *mater semper certa est*, by virtue of the birth, the child's paternity remains to be verified (save for cases where the mother's husband is presumed to be the father). In *Marckx*, the finding of violation of Article 8 was based precisely on the certainty of maternal filiation, permitting the automatic recognition of legal motherhood from the moment of the child's birth without further legal enactments.[60] Conversely, the biological father does not have immediate proof of parentage, and the option to unilaterally register his name on the child's birth certificate is likely to be unavailable.[61] Unsurprisingly, Article 3 of the European Convention on the Legal Status of Children Born out of Wedlock 1975 did not require the automatic recognition of paternal affiliation by virtue of the sole fact of birth, allowing the contracting parties to require declaratory or judicial recognition, subject to blood tests where fatherhood is contested.[62]

Critically, however, according to the European Convention jurisprudence, the alleged father does not have a *right* to request DNA testing to demonstrate his parentage, or any such right is qualified to the point of making it illusory (as discussed further under the next heading below). Historically, covering up the biological truth may have had its *raison d'être* in the need to protect adulterine children against the social stigma and the deprivation of (maintenance, inheritance and other) rights attached to illegitimacy. In present-day Europe, a man's ability to establish his parenthood should arguably be subordinated only to genetic tests, which should be used to resolve paternity disputes as a matter of course (any exceptions

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[58] English case law suggests that it is never entirely possible to disinherit a biological child once legally recognised, even an adult child. See *Ilott v Blue Cross* [2017] UKSC 17, [2018] AC 545.

[59] Regrettably, in *Ahrens*, the institution of paternity proceedings was not deemed to qualify as proof of interest in/commitment to the child, albeit without any elaboration; the Court simply '[wa]s not convinced that the applicant's decision to demand a paternity test and to bring an action aimed at establishing his paternity were sufficient to bring the relationship … within the scope of family life' (*Ahrens*, above n 37, [59]). In principle, the Court had accepted that the 'family life' between a man and his natural child can be established through a number of factors, including '*a demonstrable interest in and commitment by the father to the child both before and after the birth*' (ibid, [58], emphasis added); however, what amounts to a demonstration of interest after the birth – in circumstances where all the father can possibly do without the mother's cooperation is apply to the courts – was left unclear.

[60] See *Marckx*, above n 52, [41]: 'the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "*mater semper certa est*"'. The Court also cited soft law instruments adopted by the Council of Europe; see ibid, [31]: 'the Court notes that the Committee of Ministers of the Council of Europe regards the single woman and her child as one form of family no less than others (Resolution (70)15 of 15 May 1970 on the social protection of unmarried mothers and their children, para I-10, para II-5, etc)'. The Belgian law's requirement for unmarried mothers to formally recognise the child in order to establish legal parenthood was found incompatible with the right to respect for family life of those concerned, as well as discriminatory on the ground of birth; in fact, it ran counter to the principle *mater semper certa* (a feature of many European Convention States' laws) and deprived the child of protection if the mother failed to act or died before registration.

[61] This is not necessarily the case in all jurisdictions. French law allows paternal recognition without the agreement of the mother; see Bainham, above n 9, 326.

[62] By contrast, Art 2 of the European Convention on the Legal Status of Children Born Out of Wedlock 1975 reads: 'Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child'.

ought to be limited to extreme cases, such as incest or rape). The historical rationale of the principle *mater certa est* but *pater incertus* lies in biology, not morality, and scientific tests should be allowed to narrow the gap between the respective positions of natural parents.[63] To recognise only the gestational parent's affiliation as worthy of protection in all circumstances is out of step with a modern, equalitarian and unprejudiced society.

Admittedly, the putative father's objectionable conduct towards the child may warrant a more restrictive approach to the recognition of legal fatherhood. According to *Yousef v The Netherlands*, if the natural father chooses not to maintain regular contact with the child during the first few years of her life, he forfeits the right to recognise her.[64] Nevertheless, even making allowance for the relevance of blameworthy conduct in the allocation of parenthood and for States' margin of appreciation, one might doubt the proportionality of a law falsifying biological reality instead of merely assigning the child's care and parental responsibility to a non-parent if the father has not shown commitment. In addition, the comparison with the mothers' position in identical circumstances can, again, be problematic; if, for mothers, the lack of commitment does not attract the termination of parental status (and the consequent deprivation of all rights, including contact), save for the case of legal adoption of the child by another woman, the same ought to apply to the father. The equality of natural parents in the eyes of the law, regardless of their gender, entails that the same standard should govern the loss of parental status. The Strasbourg interpretation of Articles 8 and 14 should require internal consistency in a domestic law's response to a parent's failure to discharge his or her parental duties (for example care proceedings, a change in residence, custody arrangements falling short of adoption such as special guardianship in English law etc). More questionably yet, even where the father did show commitment, other circumstances have been allowed to prevail upon his right to establish parenthood and be involved in the child's life, most notably the mother's desire for her husband or new partner to be recognised as the child's father. That stream of case law is considered next.

The refusal to support a right to establish fatherhood through DNA tests

The European Court's assessment of the availability of avenues for an unmarried father to establish his paternity in circumstances where this displaces another man's paternity (rather than filling a void) is arguably superficial and over-deferential. As discussed in the previous section, because of objective evidentiary difficulties, the requirement for unmarried fathers to undergo a formal procedure to establish paternal affiliation cannot be deemed incompatible with the Convention. This was addressed in *De Mot and Others v Belgium*, where the European Commission on Human Rights found that the voluntary recognition of the child by the unmarried father or the judicial declaration of parentage are normal and reasonable

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[63] Traditionally, the gestational mother was by necessity the genetic mother, and therefore the mere fact of birth confirmed biological affiliation. At present, advances in reproductive technology have made possible the dissociation between genetic and gestational motherhood in two limited circumstances: where ova donation was used for *in vitro* fertilisation treatment and where embryos were created with the intended mother's eggs under a gestational surrogacy arrangement.

[64] See *Yousef*, above n 20, [65]: 'The applicant had never taken care of his daughter before, had never previously given any indication of wishing to do so, and had not established convincingly that he actually could do so in a responsible manner'. Although, as argued above, legal parenthood should follow genetic parenthood, if the father is uninterested in contact, the parenthood of an absentee father is purely nominal; consequently, if the law permits a form of substitute parenthood in favour of a *de facto* carer – which would not falsify the original birth records, but merely change legal parenthood – this would not constitute a loss for either father or child.

requirements, since the absence of marital bonds between the mother and the father render necessary a formal procedure to establish paternity.[65] By contrast, the complete absence of *any avenue* to establish paternity and, in particular, to rebut the *pater est quem nuptiae demonstrant* presumption operating in favour of the mother's husband, either as a result of a statutory bar or due to the refusal of domestic courts to order genetic tests, ought to be seen as a disproportionate interference with Article 8 rights.

In fact, the natural father's ability to acquire legal standing to apply for contact and decision-making powers depends on establishing legal ties with the child, and so the refusal to order paternity tests ends any involvement in the child's life and is one of the most extreme interferences with a person's family (or at least private) life. Consequently, where domestic law entrusts this to a judge's decision, the refusal to order genetic tests to determine who the father is could only be deemed proportionate in extraordinary circumstances, when the welfare of the child would be compromised if the natural father gained parental status,[66] in particular if this was likely to cause significant harm to the child and/or the mother (for example, in cases of rape or incestuous relations resulting in conception).[67] Regrettably, the European Convention case law governing the refusal to order genetic tests fails to recognise the magnitude of the interference.

In *MB v United Kingdom*, the Commission supported the domestic courts' assessment that the 'child's best interests' principle justified the refusal to direct blood tests to establish the paternity of a child born out of the applicant's relationship with a married woman: 'the child's welfare was bound up inextricably with the family unit in which she was being brought up and the risk of disturbing the stability of that family by a blood test would be to her detriment'.[68] The Commission accepted that allowing the presumption of paternity to prevail over biological reality better served the child's interests: 'there are sound reasons of legal certainty and security of family relationships for States to apply a general presumption according to which a married man is regarded as the father of his wife's children and to require good cause before allowing the presumption to be disturbed'.[69] Arguably, the reverse test is more consistent with parents' and children's Article 8 rights, and thus the respondent should have the burden of demonstrating that, in the particular case at hand, there was good cause for allowing the presumption to prevail. Vincent Coussirat-Coustère suggested that the presumption of legitimacy contributes to the legal security of the child and of family relationships, and hence placing a positive obligation on States to allow genetic tests to displace that presumption would weaken the protection afforded to the family.[70] Such a

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[65] See *De Mot and Others v Belgium* (Application No 10961/84), 13 May 1986, [5].

[66] In jurisdictions distinguishing between parental status and parental responsibility, the natural father could be granted status, but not parental responsibility/contact where there is a risk to the child. As discussed in relation to the *McMichael* case (above n 24), this is a lesser and possibly proportionate restriction. If, however, in identical factual circumstances, the courts do not have the authority to restrict the mother's parental responsibility, the approach remains potentially discriminatory.

[67] It is worth noting the failed attempt in England to reform the law on the registration of births (s 56 and Sch 6 of the Welfare Reform Act 2009, unimplemented), which would have required the mother to disclose the identity of the natural father, with very limited exceptions, including 'that the mother has reason to fear for her safety or that of the child if the father is contacted in relation to the registration of the birth' (s 4 of Sch 6, inserting new s 2B(4)(f) into the Births and Deaths Registrations Act 1953).

[68] *MB*, above n 25, [2].

[69] Ibid.

[70] V Coussirat-Coustère, 'Famille et Convention européenne des Droits de l'Homme' in P Mahoney et al (eds), *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdl* (Carl

perspective is, however, shaped by the traditional understanding of the family as tightly connected with legitimacy, whereas today's society and law accommodate and protect various forms of family ties, for example parents and children born out of wedlock, single-parent families, cohabitants raising children from previous relationships, same-sex couples raising children together, second families with stepchildren, etc.[71] The stigma of illegitimacy and the practical disadvantages for illegitimate children are no longer features of modern-day European societies. The approach to the notions of family and child welfare based on the superior value of legitimacy therefore needs be abandoned.

Indeed, maintaining a legal fiction of parenthood in favour of the mother's husband (or cohabiting partner) – who is perfectly able to continue to discharge a parental role without the 'father' title – is a substantial benefit to the child only if one believes that social engineering is preferable to giving the child two carers (a father and a stepfather), and hence a wider structure of family support and affection, as well as respecting the child's interest in having a relationship with both biological parents and knowing the truth about his or her genetic origins. The Strasbourg Court's jurisprudence ought to promote what Alice Margaria described as the tendency of European family laws to recognise the fragmentation of fatherhood:

> 'While it remains the case that a child can have no more than one legal father registered on the birth certificate, legal systems have, at least in part, responded to the demographic changes noted earlier by accepting that a child can nonetheless have a legal connection with more than one man and that, accordingly, the rights and responsibilities of fatherhood can be shared or fragmented through the allocation of parental responsibility and/or contact rights.'[72]

In addition, unwittingly perhaps, the *MB v United Kingdom* decision seemed to suggest that a non-residential parent is not an equally worthy parent in a child's life.[73] The Commission 'f[ound] nothing arbitrary or unreasonable in this assessment of the child's interests, *given that the applicant was making no claim for custody*.'[74] This proviso potentially affects all applications brought by putative fathers; for very young children, courts would be unlikely to transfer the primary care to the father, and for slightly older children, the importance of maintaining the status quo in circumstances where the child has lived with the mother all his or her life suggests that the father's application to change residence arrangements would not succeed.[75] What a putative father can realistically seek to achieve is contact with the child and an opportunity to be informed of, and contribute to, major decisions in the child's life. A father who does not apply to become the residential parent, but who accepts all the other responsibilities descending from legal parenthood, is not an uninterested, nor a useless parent. The fact that a man only applies for a declaration of parentage and contact with a biological

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Heymanns Verlag KG, 2000), 294.

[71] One can cite as clear evidence of this trend in English family law the fact that the notion of 'child of the family' has been expressly extended by statute to include the child of a cohabitant for the purposes of inheritance claims (see Inheritance Act 1975, s 1, as amended by the Inheritance and Trustees' Powers Act 2014).

[72] A Margaria, *The Construction of Fatherhood. The Jurisprudence of the European Court of Human Rights* (CUP, 2019), 10.

[73] This is precisely the type of hierarchy that the Children and Families Act 2014 sought to dismiss in England and Wales, by replacing 'contact orders' and 'residence orders' with 'child arrangements orders' in s 8 of the Children Act 1989.

[74] *MB*, above n 25, [2] (emphasis added).

[75] See, for example, s 1(3) of the Children Act 1989.

child does not justify a conclusion that the child is better off not having any ties with him at all, and being raised solely by the social father with no input from the biological father.

The endorsement by Strasbourg authorities of domestic legislation and judicial decisions excluding the natural father from the child's life without compelling reasons is inconsistent with Article 7(1) of the United Nations Convention on the Rights of the Child 1989 (UN Convention): 'The child … shall have …, as far as possible, the right to know and be cared for by his or her parents'. Albeit not expressly defined, the term 'parent' in the UN Convention must be read to denote the biological parent, in light of the reference to the child's '*right to know* … his or her parents' in Article 7 (a reference to knowledge of genetic origins) and the Article 8 right 'to *preserve* his or her *identity*, including … *family relations*'.[76] This interpretation, based on 'context' and 'purpose', as required by the general rule of treaty interpretation,[77] is further corroborated by the practice of the international body monitoring compliance with the UN Convention. In its concluding observations on a periodic report submitted by the UK, the Committee on the Rights of the Child, recalling Article 7 obligations, recommended that the State should 'take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible'.[78] The concern inspiring this recommendation is unambiguous; the Committee lamented the fact 'that children born out of wedlock, adopted children, or children born in the context of a medically assisted fertilisation do not have the *right to know the identity of their biological parents*'.[79] *Ad abundantiam*, the drafting history of Articles 7 and 8 has been shown to indicate concerns about the removal of children from their birth parents.[80] The alienation of natural fathers also runs counter to Article 9(3) of the UN Convention: 'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'.

Additionally, the Strasbourg authorities' stance does not give adequate consideration to the principle of proportionality. If the protection of the child's welfare so requires, the courts have the ability to limit the natural father's contact time, to exclude him from the exercise of parental responsibility altogether (in jurisdictions where parenthood and parental responsibility are distinct concepts), or to restrict his exercise of parental responsibility (for example in the general terms of the parental responsibility order[81] or through a prohibited steps order). The restrictions upon the biological father's family life with the child need not

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[76] Emphasis added.

[77] See Art 31(1) of the Vienna Convention on the Law of the Treaties 1969: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

[78] *Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, CRC/C/15/Add.188, 9 October 2002, [32], discussed in R Macmillan Moon, 'An examination of UK law as it pertains to the unmarried father: current legal thinking in an international context' (2010) 6(1) *Cambridge Student Law Review* 259, 268.

[79] CRC/C/15/Add.188, above n 78, [31] (emphasis added).

[80] See Bainham, above n 3, 37.

[81] Note, in England and Wales, the court's power to dispense with a parent's consent (if unreasonably withheld) through a specific issue order, as well as to regulate the exercise of parental responsibility where appropriate (see, for example, *Re D (Lesbian Mothers and Known Father)* [2006] EWHC 2 (Fam), [2006] 1 FCR 556, where the court included certain conditions in the parental responsibility order, in particular requiring the father not to visit the child's school or doctor without prior consent from the mother).

be so extreme as to entirely oust him from his child's life (the refusal to order tests being tantamount to a refusal to allow any relationship to develop), unless he has engaged in particularly blameworthy conduct (for example domestic violence). Even in those circumstances, the law may more appropriately decide that he is unfit to parent the child, but not necessarily that he ought to lose parental status.[82] Stereotypical family life is no longer a good reason to deny respect for family life outside marriage or stable cohabitation or indeed in adulterous circumstances. A modern, inclusive and open-minded society, one that values effective 'family-like' practices, is incompatible with the judgementalism seen in *X and Y v Switzerland*, where an adulterous couple was not treated as a 'family', despite an enduring relationship and the presence of children: 'the relationship between a father and his illegitimate children is always included in the concept of family life within the meaning of Article 8 of the Convention while this is not necessarily the case with extra-marital relationships even if they have led to the birth of children'.[83] This moralistic approach to family life is intrusive and fails to recognise the importance of genetic affiliation.[84] Since blood tests have been replaced by DNA testing, the procedure is only a minor inconvenience to the mother and the child. A requirement of *prima facie* evidence of a romantic relationship possibly resulting in conception would suffice to exclude vexatious applications.

Consequently, the refusal to uphold a putative father's right to have his paternity verified through DNA tests is of questionable benefit to the child and has deleterious effects on the father's position, whereas ordering tests and rebutting the *pater est* presumption would not have a disproportionate impact on the mother's family life or that of the stepfather. Unfortunately, Strasbourg case law does not sufficiently recognise the social importance of kinship, stepfamilies, and plural fatherhood; in fact, it hastily accepts the respondent States' justification for upholding presumptions of paternity in less than exceptional circumstances. This will be considered in further detail in the following section.

The endorsement of virtually irrebuttable presumptions of paternity

Not only do Strasbourg authorities fail to establish a right to request genetic testing when the alleged father has *prima facie* evidence, but in practice they sanction virtually irrebuttable presumptions of paternity, whether out of deference to the margin of appreciation enjoyed by

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[82] In English law, a care order removing the child from an unfit parent does not attract the loss of parenthood (or even parental responsibility). If one agrees that parenthood should reflect genetic heritage, and that it is an immutable status, care proceedings need not have an impact on filiation.

[83] *X and Y v Switzerland* (Application Nos 7289/75, 7349/76) 14 July 1977 (EComHR), [4]. For the Commission, the fact that the parties did not share a residence on a continuous basis meant that they could only rely on the 'private life' limb of Art 8, which made them indistinguishable from transient, childless sexual relationships.

[84] Another example of a moralistic approach to Art 8 can be found in the Grand Chamber's decision in *Paradiso and Campanelli v Italy* (Application No 25358/12) (2017) 65 EHRR 96, [149], where the analysis of the relationship between the intended parents and a child born through surrogacy arrangements abroad was excessively coloured by the 'illegality' of the couple's conduct, ie the circumvention of adoption rules. This unfortunate departure from *Moretti and Benedetti v Italy* (Application No 16318/07) 27 April 2010, [48]–[52], *Kopf and Liberda v Austria* (Application No 1598/06) [2012] 1 FLR 1199, [37], and *Wagner and JMWL v Luxembourg* (Application No 76240/01) 28 June 2007, [117], where Art 8 was found applicable to the relationship between young children and their long-term carers in the absence of biological ties (foster parents/adopters pursuant to non-recognised foreign decrees) is explained by the intention to chastise the couple's unlawful conduct according to Italian law.

domestic legislatures or to avoid challenging the fact-finding exercise of domestic courts.[85]

The *Nylund v Finland* decision is a vivid illustration of this unambitious European scrutiny, which ultimately sacrifices the Article 8 interests of natural fathers.[86] The applicant complained about the domestic courts' refusal to allow him to establish his paternity in relation to a child conceived during a period of cohabitation with a woman and born after the woman's marriage to another man, who was thereby declared to be the father. The Court rejected the applicant's submission that, by giving the mother unilateral power to decide who is registered as the father on the child's birth certificate, the law breached his rights under Articles 8 and 14 of the European Convention, as well as the child's right to know his 'real' father, enshrined in Article 7 UN Convention. Interestingly, although the application was declared inadmissible, the factual matrix of the case was quite similar to *Keegan v Ireland*, in that the child had not been born out of a fleeting relationship, nor an adulterous one, which suggests that the natural father's potential family life with the child should have received adequate protection. What distinguished the two cases was that in *Nylund* the mother married another man before giving birth to the child and the couple wished to raise the child together (whereas in *Keegan* the mother had entrusted the child to adoptive parents). The mother's and her husband's opposition to the recognition of the natural father's paternity played a central role in the Court's analysis; this was showcased by the disquieting contrast drawn by the Court with *Kroon v The Netherlands*, where both natural parents sought to rebut the *pater est* presumption:

> 'The Court notes that, in comparison to the *Kroon and Others* case, in which the obstacle to bringing paternity proceedings ran counter to the wishes of those concerned, in the instant case it accords with the wishes of the married couple in whose wedlock the child was born. In fact, the obstacle is a result of their opposition.'[87]

Moreover, the married couple's desire to have the husband treated as the legal father – failing which he would not have been prevented from raising the child with his wife as a stepfather – was given such a disproportionate weight that, instead of examining the 'potential family life' between the natural father and the child, the Court downgraded the father's Article 8 interest to a mere 'biological fact', without any recognition of the future family life that hinges upon the determination of that fact:

> 'There are reasons of legal certainty and security of family relationships for States to apply a general presumption according to which a married man is regarded as the father of his wife's children. It is justifiable for domestic courts to give greater weight to the interests of the child and the family in which it lives than to the interest of an applicant in obtaining determination of a biological fact.'[88]

The approach in *Nylund* not only privileges the mother's choices over the father's and the

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[85] As discussed above, the position in this article is that biological parenthood has intrinsic worth, and the default position of the law (subject to narrow exceptions, for example in the sphere of assisted reproduction) should be that legal parenthood mirrors biological parenthood. In fact, the regulation of parenthood affects core procreative rights and the right to respect for (planned/potential) family life. Moreover, recognising and safeguarding biological ties is a right of the child (expressly enshrined in Arts 7, 8 and 9 of the UN Convention). Therefore, an absolute barrier to the use of scientific tests to determine paternity (by contrast with the exceptional refusal to require such tests) can hardly ever be justified.

[86] *Nylund v Finland* (Application No 27110/95) 29 June 1999.

[87] Ibid, [2].

[88] Ibid.

child's right to protection of their biological ties and family life prospects, but it can lead to paradoxical results. If the mother's marriage breaks down, the law will have denied the child the chance of a relationship with his or her biological father in order to accommodate the mother's short-lived marriage.[89]

As regards the standards governing paternity disputes under Article 6 and the procedural aspect of Article 8, the European Court sets a very low bar on the level of procedural justice expected of national authorities: as long as a formal procedure for challenging paternity is available, the Court will not query the legitimacy of legal restrictions or the domestic courts' assessment of the facts. A violation of Article 8 is only found in the extreme case in which there is no legal avenue available in domestic law for the alleged father to rebut the presumption of paternity in favour of the man registered on the child's birth certificate.

The latter point is illuminated by the *Rozanski v Poland* case, which, like *Nylund*, concerned the paternity of a child born out of wedlock, whose mother did not support the biological father's wish to be declared the legal father and allowed her new partner to recognise the child.[90] The Court found in this case that the complete impossibility for the alleged genetic father of a child born out of wedlock to establish his paternity in circumstances where the mother's new partner had already recognised the child breached Article 8, whatever weight was assigned to the interests of the new family unit formed by the mother, the child and the mother's new partner. Three factors led the Court to conclude that the respondent State had overstepped its margin of appreciation: 'the lack of any directly accessible procedure by which the applicant could claim to have his legal paternity established'; 'the absence, in the domestic law, of any guidance as to the manner in which discretionary powers vested on the authorities in deciding whether to challenge legal paternity established by way of a declaration made by another man should be exercised'; and 'the perfunctory manner in which the authorities exercised their powers when dealing with the applicant's requests to challenge this paternity'.[91] One can only speculate that the successful outcome of the application was influenced by the fact that the alleged father sought to contest the registration on the birth certificate of 'another man' rather than the mother's husband; it is quite possible that the *pater est* presumption associated with marital status would have commanded greater deference, as seen in *Nylund*.[92]

In addition to the glaring situation of regulatory void (ie no legal avenue to bring paternity proceedings), the Court was willing to find a violation of Article 8 in the niche case where the ability of a legally incompetent father to petition to acquire legal parenthood was hindered by procedural rules and the inaction of the relevant authorities. In *Krušković v Croatia*, a natural father declared legally incompetent had not been able to bring proceedings to establish his paternity, insofar as this was only open to a specified social welfare authority, which was not legally bound to do so, and thus the applicant's request had been left unanswered for over two years. The Court concluded that the respondent State had failed in its positive obligation

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[89] Although the divorce does not impact the social father's status, the whole rationale for denying the natural father's rights – the mother's marriage and the stability of the new family unit, said to benefit the child – can lapse very soon. This calls into question the proportionality of the interference with the natural father's rights.

[90] *Rozanski v Poland* (Application No 55339/00) [2006] 2 FLR 1163.

[91] Ibid, [79].

[92] Similarly, in *Ahrens* the unsuccessful biological father was contesting the legal parenthood of a man who enjoyed legal ties with the mother through marriage (in addition to social ties with the child). This reinforces the impression that the Court is more protective of marriage than social parenthood per se, since the outcome of the case differs depending on whether the man registered on the birth certificate is the mother's spouse or cohabitant.

to ensure effective respect for private and family life.[93]

By contrast, as long as some formal route to recognition as the legal father exists, the European Court readily accepts the domestic rulings supporting the mother's family plans with another man, however biased against putative fathers. *Chavdarov v Bulgaria* is a perplexing example of this trend.[94] In this case, the Court dismissed the application brought by a man who had allegedly fathered three children with a married woman during a period of cohabitation outside the marriage, even though in practice he had been the only caregiver for the children. The Court's justification for an ostensibly illogical outcome was threefold. First, the regulation of the attribution of legal parenthood fell within the State's margin of appreciation, because this was an area engaging moral, ethical, social and religious considerations. Second, a comparative review of the laws of 24 States Parties suggested that there was no consensus on whether the biological father should be permitted to challenge the presumption of paternity operating in favour of the husband. It is worth noting that the survey covered approximately half of the European Convention membership and that the comparative analysis is (and should be) less weighty in discrimination cases. For instance, in *Mazurek v France* the Court noted, without any specific comparative law analysis, 'a distinct tendency in favour of eradicating discrimination against adulterine children';[95] in *Marckx* the Court relied on an international treaty having received few ratifications as evidence of a trend towards the automatic recognition of maternal affiliation for children born out of wedlock.[96] *Chavdarov* was arguably a case of discrimination on the grounds of civil status/birth,[97] and the Court should have taken the same progressive approach, that is not wait for overwhelming consensus to find a breach of Article 8. Third, although the biological father had also acted as the social father (an important feature distinguishing this case from those previously considered), the Court found that there was no positive obligation on the State to align legal parenthood with genetic and effective parenthood; there had been no active interference from the State and therefore no violation had occurred. For the Court, the existence of the single-parent family unit formed by the applicant and the three children had not been threatened (either by public authorities or private parties, for example the mother or her husband, seeking to remove the children from the applicant). It is not clear what purpose legal parenthood serves for the Court as an empty fiction, rather than a reflection of social and genetic ties; the judgment does not sit well with the well-established case law on the important symbolic function of surnames as 'a means of personal identification and of linking to a family'.[98]

The *Chavdarov* judgment is decisively not the Court's most commendable ruling. It

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[93] *Krušković v Croatia* (Application No 46185/08) 21 June 2011. The fact that a social welfare authority had that power was not in itself seen as problematic; the breach stemmed from the fact that the father depended on the authority's action and the authority had no statutory obligation to act, hence the unreasonable delay.

[94] *Chavdarov v Bulgaria* (Application No 3465/03) 21 December 2010.

[95] *Mazurek v France* (Application No 34406/97) (2000) 42 EHRR 170, [52].

[96] *Marckx*, above n 52, [41], downplaying the small number of ratifications of the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children 1962 and of the European Convention on the Legal Status of Children Born Out of Wedlock 1975.

[97] Arguably, in *Chavdarov* the father was discriminated against on the basis of his civil status, whereas the children were also indirectly penalised in a discriminatory fashion on the grounds of birth (outside wedlock); in fact, they were treated differently in relation to the law's – at least symbolic – recognition of familial association.

[98] *Burghartz v Switzerland* (Application No 16213/90) (1994) 18 EHRR 101, [24]. On the Art 8 implications of domestic rules on the choice of surname for married couples and children see Draghici, above n 1, 256–261.

diminishes the welcome emphasis in previous landmark cases, such as *Marckx*, *Keegan* and *Kroon*, on States' positive obligation to facilitate the child's integration into his or her natural family, inter alia by making it possible for the natural father to establish his legal paternity. Strikingly, like in *Kroon* and by contrast with *Nylund*, in *Chavdarov* there was no conflict of interest between the natural parents or two possible father figures, and not allowing the natural father to recognise the children benefitted no one. Moreover, it is astonishing that the Court should find the proportionality of the impugned law satisfied by the existence of alternative means to consolidate the natural father's legal status, such as adoption or a residence order in relation to abandoned minors. (Ironically perhaps, the alternative of a residence order is never considered for the mother's husband in cases where he opposes the declaration of the biological father as the legal father.) *Marckx v Belgium* had more convincingly found that the natural mother should not have to adopt her own child in order to integrate her into the extended family (including the establishment of legal ties with the maternal grandmother). This distortion of the reality of family ties was, conversely, deemed acceptable in *Chavdarov*. Harris et al noted that 'the Court effectively gave its blessing to a presumption of paternity of the husband which operated as a *de facto* rule'.[99] Allowing absolute presumptions is not only inconsistent with *Kroon* (and *Nyland a contrario)*, but also at odds with the principle in *Rozanski v Poland* that there must be at least an opportunity to bring paternity proceedings, whether or not the courts decide to order genetic tests. Presumably, as suggested earlier, the *Rozanski* principle is confined to paternity challenges brought against the mother's new cohabiting partner registered as the father; if this interpretation is correct, this would be further indication of undue conservatism in the Court's approach to parenthood and marital status. In *Chavdarov*, the Court also appears to be paying lip service to the 'best interests of the child' principle; indeed, on any view the children would be better protected if the law allowed the genetic and social father to be recognised as the legal father. An inflexible presumption of paternity, incapable of accommodating biological and social reality where appropriate,[100] should have been treated as a disproportionate interference with the applicant's and his children's family life.

It is also worth recalling the principle, upheld in *Shofman v Russia*, according to which a fair balance needs to be struck between the certainty of family relations and the right of a husband to challenge the presumption of paternity based on new evidence at his disposal (even where no other man was available to take over the child's paternity, and hence responsibility for the child).[101] The applicant in that case complained that the legislation did not allow the husband/ legal father to challenge the presumption of paternity if the child was over one year old; an inflexible time bar on the institution of proceedings aimed at disavowing paternity was found to be incompatible with Article 8 of the European Convention. The same fair balance should be required when the presumption is challenged by the biological father. An absolute bar on applications or a balance tipping invariably in favour of the mother and her husband in the judicial treatment of such applications, with scarce, if any, prospects of success for genetic

[99] Harris et al, above n 47, 566.

[100] Interestingly, in *Chavdarov* two of the three traditional European Convention criteria for parenthood (social and biological) were met, and the applicant merely sought to align the third (legal parenthood) accordingly; this makes the ruling particularly contentious. Where social and biological parenthood rest with different men, there may be some scope to justify the refusal to align biological and legal reality. As explained in the Introduction, the position in this article is that, legally, such a situation should be resolved by recognising two complementary father figures: a father (biological) and a stepfather (social). This is a more inclusive solution as regards the adults' rights, in that it does not oust one man from the child's life, as well as benefiting the child's welfare by allowing the child to enjoy the care, affection and economic support of two individuals.

[101] *Shofman v Russia* (Application No 74826/01) [2006] 1 FLR 680, [39]–[45].

fathers, are inconsistent with that principle.

The exceptional protection of adulterine children's relationship with natural fathers

The most hesitant protection afforded to the relationship between a natural father and his child in Strasbourg case law can be observed in situations where the legal recognition of the child's true genetic parentage would expose the mother's adultery, or cast an appearance of adultery, where the mother was already pregnant at the time of the marriage and the child would become illegitimate, albeit not technically adulterous (insofar as conception did not take place during the marriage).

As discussed in the previous section, in cases where the child's mother was married to another man at the time of conception or she conceived the child out of wedlock but married another man sometime between conception and birth, the Court tends to allow domestic authorities to take the view that the presumption of paternity benefiting the mother's husband ought to triumph over the father's Article 8 rights. There is, however, one exceptional circumstance in which the European Court showed readiness to uphold the natural father's right to rebut the presumption of paternity and assert his biological ties and parental rights. This is where, although the mother is legally married, in practice there is no other candidate to the child's paternity, because her husband is estranged and uninterested in raising the child, and thus there is no competition between two possible father figures/*de facto* carers.

This observation is supported by the comparison between the case law examined above and the landmark decision in *Kroon and Others v The Netherlands*. Herein the Court accepted that the circumstances of the family were entirely inconsistent with the attribution of paternity to the mother's husband, already estranged at the time of the child's birth, whereas, by contrast, the natural father contributed to the child's upbringing and had had three further children with the same woman. The law of the respondent State permitted a married man to institute proceedings for the disavowal of his paternity in relation to children born under the *pater est* presumption, but offered no course of action to an alleged father wishing to rebut the presumption in order to establish his paternity. The natural father in *Kroon* was therefore unable to legally recognise his own child, despite the existence of both genetic ties and effective social parenthood. The Court rightly found the remedy suggested by the respondent government (marriage to the child's mother and stepparent adoption) unsatisfactory: 'A solution which only allows a father to create a legal tie with a child with whom he has a bond amounting to family life if he marries the child's mother cannot be regarded as compatible with the notion of "respect" for family life'.[102] A similar solution is even less satisfactory where the natural parents are no longer in an intimate relationship, and so offering a sole route to legal fatherhood that is entirely dependent on the mother's interest in marrying the father is a deceptive remedy.

It would seem, however, that in *Kroon* actual social parenthood was an important factor in finding that there had been a violation of Article 8.[103] Equally key were the overlapping wishes and interests of all parties: the mother, the natural father, the child, the absentee

[102] *Kroon*, above n 57, [38].

[103] The Court's identification of parenthood at the intersection of genetic, social and legal ties, albeit in principle judicious, fails to cater for situations where *the mother prevents the formation of social and legal ties*, and hence the biological father can only rely on genetic ties and 'intentional parenthood'. In such situations, European Convention law ought to promote the development of social and legal ties, rather than treating them as a prerequisite for safeguarding genetic ties.

husband. These circumstances led the Court to famously conclude: '"respect" for "family life" requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone'.[104] Conversely, where the mother is opposed to uncovering the biological truth and the Court has to choose between the mother's and the father's irreconcilable claims, the case law shows that the mother's wish to exclude the father from the child's life prevails over the father's wish to co-parent (*MB v United Kingdom*, *Nylund v Finland*). This gives the mother a veto right on the declaration of parentage, depending on whether she wishes to end the affair or decides to leave her husband and set up a family with her new partner. Excessive weight is thus placed, in balancing Article 8 rights, on the mother's romantic preferences, at the expense of the father's right to respect for his private and family life with his biological child.

Curiously, in *Chavdarov*, where the mother and her husband did not wish to raise the children together and they were happy for them to be cared for by the natural father, the Court refused to uphold the complaint. The only factual distinction between the *Kroon* and *Chavdarov* scenarios appears to be the fact that in *Kroon* the husband's whereabouts were unknown, so the mother was single for all effects and purposes, whereas in *Chavdarov* the mother and her husband were still a couple, and the declaration of parentage would have publicly acknowledged the extra-marital affair. It may seem far-fetched to assume that the Court would be concerned with protecting the appearance of conjugal fidelity and the child's legitimacy as superior to other interests; however, in *Ahrens* it justified its refusal to uphold the complaint by distinguishing it from the earlier (successful) *Anayo* application on the basis that, in that case, the natural father merely sought contact and not to establish his parental status at the expense of the husband's:

> 'It can be deduced from the *Anayo* judgment that Article 8 of the Convention can be interpreted as imposing on the member States an obligation to examine whether it is in the child's best interests to allow the biological father to establish a relationship with his child, for example by granting contact rights. Accordingly, the biological father must not be completely excluded from his child's life unless there are relevant reasons relating to the child's best interests to do so. However, this does not necessarily imply a duty under the Convention to allow the biological father to challenge the legal father's status. Neither can such an obligation be deduced from the Court's case-law.'[105]

The Court does not clarify whether the European Convention would require a State to allow the putative father to challenge the legal father's parental status if this was a prerequisite for obtaining contact rights. It would seem indeed that, if the biological father remains a stranger to the child in the eyes of the law, any further claims based on parenthood might be precluded by his lack of legal standing. For the above-mentioned principle in *Ahrens* to make practical sense, Article 8 would have to require States to establish a legal avenue whereby a man can be granted contact with his biological child without having to obtain legal parenthood (for example, by entitling the alleged father to rely on DNA tests to obtain visitation rights but not to re-register himself as the father on the birth certificate). The Court's failure to explore the ramifications of its findings is unsatisfactory.

The *Anayo* case remains an idiosyncratic exception from the Strasbourg authorities' tendency to protect the *pater est* presumption despite the consequential exclusion of the natural father

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[104] *Kroon*, above n 57, [40].

[105] *Ahrens*, above n 37, [74].

from the child's life. Although the Court struggled to justify why it treated that instance of unplanned adulterous conception outside cohabitation more favourably, one would be hard-pressed not to note that, in that case, it would have been impossible to cover up the biological truth: in fact, the father was Nigerian and the children raised by the German married couple were biracial. The judgment cites an independent expert report on which the applicant relied: 'it was visible that Mr B was not the twins' biological father. Being African–German, they needed their father in order to understand why they were different'.[106] The Court does not reference this specifically in the *ratio decidendi*, but this is quite conceivably what it envisaged when concluding: 'the Court of Appeal failed to give any consideration to the question whether, in the particular circumstances of the case, contact between the twins and the applicant would be in the children's best interest'.[107] It is highly unlikely that, had it not been for the children's mixed racial heritage, not shared by the legal parents, the Court would have been willing to disturb the marriage-based, socially acceptable, legal fiction of fatherhood.

Although the European Court's moralistic approach to extra-marital conception, privileging the child's legitimacy and the protection of the mother's social life, is usually disguised under the 'best interests of the child' principle, it cannot be said to benefit the child. The child has a right to know the truth about his or her genetic origins, as part of their right to identity, protected under Article 8,[108] as well as a right to develop normal family relationships with both biological parents, save for wholly exceptional circumstances (under both the European Convention and the UN Convention, as detailed above). If the mother's husband is willing to continue to provide for the child irrespective of whether or not they are biologically related (and this is what the unwillingness to undergo genetic tests, once paternity proceedings instituted by the former lover cast doubt on parentage, suggests), the family unit is not endangered, and the stepfather can formalise his relationship through other means (for example, in England and Wales, a child arrangements order naming him as a person with whom the child is to live under section 8 of the Children Act 1989 and a parental responsibility order under section 4A of the Act). The existence of alternative routes to cementing the legal ties between a social father and a child speaks to the unnecessary and disproportionate interference with the natural father's and the child's Article 8 rights in cases of adulterous procreation.

Conclusions

To some extent, Strasbourg case law has advanced the protection of natural fathers' Article 8 rights, in particular by recognising the need to safeguard the *potential* family life with biological children in circumstances where effective ties have not yet been established, and by deriving an identity-related interest from the right to privacy in paternity proceedings. Regrettably, however, the progress made in this direction is undermined by numerous caveats, such as making Article 8 protection contingent upon the quality of the man's relationship with the child's mother at the time of conception, upon the planned nature of the pregnancy, and upon whether the mother remarried after the child was conceived and her husband wishes to raise the child as his own. Overall, this approach fails fully to reflect the

[106] *Anayo*, above n 23, [47].

[107] Ibid, [71]. It is worth distinguishing this situation from *Odièvre* (above n 29), where the child's identity rights had to be balanced against the mother's rights; in disputed paternity cases, the child's 'right to know' and the natural father's right to respect for private and family life are aligned.

[108] See *Mikulic v Croatia*, above n 13.

magnitude of the interference with the father's Article 8 rights when he is not permitted to establish legal parenthood, on which all other proceedings affecting the enjoyment of family life with a child depend, most notably contact and decision-making powers.

Whether as a result of deference to the European Convention Contracting Parties or of stereotypical understandings of fatherhood, the Court has refused to stipulate that biological reality must be allowed to prevail in most circumstances, so as to avoid the obliteration of the family life of natural fathers with their children. Indeed, Strasbourg case law has mitigated the legal position of natural fathers in a very limited set of circumstances: pre-existing commitment to the mother at the time of conception and during the pregnancy, and hence 'intended' family life with the future child, and grave procedural concerns, such as the absence of legal routes to establishing parentage or the patent arbitrariness of domestic authorities' examination of applications. Since it has been recognised that Article 8 protects potential family life, natural fathers should arguably have a right to prove their parenthood by requesting genetic tests, save for narrowly construed exceptions: likelihood of harm to the child and the mother (domestic abuse, pregnancy resulting from incestuous or non-consensual intercourse) and enduring indifference toward the newborn child, in which case the father (if aware of the birth) might be said to have forfeited his parental rights.

Additionally, in situations other than pre-birth commitment to the mother and planned pregnancy, by moving the inspection of domestic courts' refusal to order genetic tests from the province of 'family life' to that of 'privacy' and 'identity rights', the Court has avoided the application of the more stringent test for interferences, typical of termination of contact and involuntary adoption cases. In *Johansen v Norway*, the Court had held that, notwithstanding the wide margin of appreciation that State authorities enjoy in assessing the need for a child to be taken into care, 'a stricter scrutiny is called for … restrictions placed by those authorities on parental rights and access' insofar as '[s]uch further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed'.[109] It thus concluded that '[t]he deprivation of the applicant's parental rights and access had a permanent character and could only be considered "necessary" within the meaning of Article 8(2) if supported by particularly strong reasons'.[110] Given the identical stakes, applications regarding the putative father's ability to establish his parenthood should be governed by the same principles, with interferences being exceptionally permitted in extreme circumstances. Instead, the Court is satisfied with the mere availability of a procedure to challenge paternity, regardless of its realistic prospects of success.

A major obstacle to furthering the natural father's rights is the perceived competition between recognising a role for him in the child's life and weakening the position of the social father (the mother's husband). Instead of perpetuating a marriage-centric approach to fatherhood, no longer consistent with the increase in cohabitation and the availability of DNA testing, which render the marital presumption obsolete, the Court ought to modernise its understanding of family life between biological fathers and their children. Its case law should reflect the more complex texture of family realities in 21st century Europe and accommodate plural fatherhood, moving away from the idea that a sole father figure is the only family structure beneficial to the child.

The understanding of fatherhood in European Convention proceedings is not least an equality issue. The Strasbourg approach to paternity proceedings has been to subordinate the very existence of potential family life, worthy of protection, between an unmarried father and a

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[109] *Johansen v Norway* (Application No 17383/90) (1996) 23 EHRR 33, [64].

[110] Ibid, [74].

new-born child to the quality of the man's relationship with the child's mother at the time of conception, whereas for the mother and the married father there is no such requirement for the activation of Article 8 rights. Moreover, equality in respect of Article 8 means that the mother should not have a superior right to decide who the legal father of the child is. She should certainly be able to re-partner if the relationship breaks down before birth (or decide to stay married, in cases of adulterous conception) and to support the social father's input in the child's life through other routes, such as a court order acknowledging the stepfather (or the mother's cohabitant) as the person with whom the child is to live and granting him parental authority; unlike the registration of the husband or another man on the child's birth certificate, these do not affect the natural father's rights disproportionately. Conversely, the mother should not have the ability to exclude the natural father's involvement in the child's life altogether, by allowing another man to be deceitfully registered as the father on the birth certificate and by exercising *de facto* veto powers in paternity proceedings. Indeed, the female parent does not have (or should not have) greater rights in relation to the child, insofar as everyone has an equal entitlement to the enjoyment of Article 8 rights regardless of their gender. These anomalies in the development of Article 8 jurisprudence, which are discriminatory and facilitate parental alienation, ought to be revisited at the next opportunity.