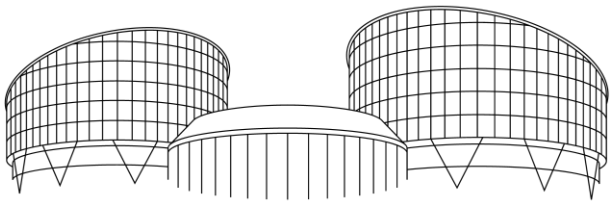

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF KONSTANTIN MARKIN v. RUSSIA

(Application no. 30078/06)

JUDGMENT

STRASBOURG

22 March 2012

This judgment is final but may be subject to editorial revision.

In the case of Konstantin Markin v. Russia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President,*
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Ján Šikuta,
Dragoljub Popović,
Päivi Hirvelä,
Nona Tsotsoria,
Ann Power-Forde,
Zdravka Kalaydjieva,
Işıl Karakaş,
Mihai Poalelungi,
Kristina Pardalos,
Guido Raimondi,
Angelika Nußberger,
Paulo Pinto de Albuquerque, *judges,*
Olga Fedorova, ad hoc *judge,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 8 June 2011 and on 1 February 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 30078/06) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Konstantin Aleksandrovich Markin ("the applicant"), on 21 May 2006.

2. The applicant, who had been granted legal aid, was represented by Ms K. Moskalenko and Ms I. Gerasimova, lawyers practising in Moscow, and Ms N. Lisman, lawyer practising in Boston (the United States of America). The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights, and Ms O. Sirotkina, counsel.

3. The applicant complained of the domestic authorities' refusal to grant him parental leave because he belonged to the male sex.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 7 October 2010 a Chamber of that Section composed of the following judges: Christos Rozakis, Nina Vajić,

Anatoly Kovler, Elisabeth Steiner, Khanlar Hajiyev, Dean Spielmann, Sverre Erik Jebens, and also of Søren Nielsen, Section Registrar, examined the admissibility and merits of the case (former Article 29 § 3 of the Convention, now Article 29 § 1). It declared the application partly admissible and found, by six votes to one, that there had been a violation of Article 14 of the Convention in conjunction with Article 8.

5. On 21 February 2011 the panel of five judges of the Grand Chamber decided to accept the Government's request that the case be referred to the Grand Chamber (Article 43 of the Convention and Rule 73).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed written observations (Rule 59 § 1) on the merits. In addition, third-party comments were received from the Human Rights Centre of the University of Ghent (Article 36 § 1 of the Convention and Rule 44 § 1 (b)).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 8 June 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights, *Agent*,
Ms O. Sirotkina, *Counsel*,
Ms I. Korieva,
Mr A. Shemet, *Advisers*;

(b) *for the applicant*

Ms K. Moskalenko,
Ms N. Lisman,
Ms I. Gerasimova, *Counsel*.

The Court heard addresses by Ms Sirotkina, Ms Moskalenko, Ms Gerasimova and Ms Lisman.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1976 and lives in Velikiy Novgorod.

10. On 27 March 2004 he signed a military service contract. The contract signed by the applicant was a standard two-page form stating, in particular, that he "undertook to serve under the conditions provided for by law".

11. At the material time the applicant was serving as a radio intelligence operator (*оперативный дежурный группы боевого управления в составе оперативной группы радиоэлектронной разведки*) in military unit no. 41480. Equivalent posts in his unit were held by servicewomen and he was often replaced in his duties by female personnel.

A. Parental leave proceedings

12. On 30 September 2005 the applicant's wife, Ms Z., gave birth to their third child. On the same day a court granted her petition for divorce.

13. On 6 October 2005 the applicant and Ms Z. entered into an agreement under which their three children would live with the applicant and Ms Z. would pay maintenance for them. The agreement was certified by a notary.

14. According to the applicant, several days later Ms Z. left for St Petersburg.

15. On 11 October 2005 the applicant asked the head of his military unit for three years' parental leave. On 12 October 2005 the head of the military unit rejected his request because three years' parental leave could be granted only to female military personnel. The applicant was allowed to take three months' leave. However, on 23 November 2005 he was recalled to duty.

16. The applicant challenged the decision of 23 November 2005 before a court. On 9 March 2006 the Military Court of the Pushkin Garrison annulled the decision and upheld the applicant's right to the remaining 39 working days of his three months' leave. On 17 April 2006 the Military Court of the Leningradskiy Command quashed the judgment and rejected the applicant's claims.

17. Meanwhile, on 30 November 2005, the applicant brought proceedings against his military unit claiming three years' parental leave. He submitted that he was the sole carer for his three children. He referred, in particular, to section 10(9) of the Military Service Act (see paragraph 47 below).

18. During the hearing before the Military Court of the Pushkin Garrison the representatives of the military unit submitted that the applicant had not proved that he was the sole carer for his children. It was impossible for the applicant, who was serving in the army, studying at a University and participating in several sets of judicial proceedings, to take care of his children alone. There was evidence that Ms Z. and other people were helping him. The children were therefore not left without maternal care. The military unit's representatives also drew the court's attention to some inconsistencies in the applicant's submissions and the documents produced by him. For example, the children's address indicated in the notarial agreement was incorrect, Ms Z.'s employment contract was not registered as required by law, there was no divorce stamp in Ms Z.'s passport, and the

applicant had not applied for child allowances or sued Ms Z. for her failure to pay child maintenance. In their opinion, the applicant's divorce was a sham with the aim of evading military service and receiving additional benefits from his military unit.

19. The court examined Ms Z.'s petition for divorce in which she stated that she had been living separately from the applicant since September 2005 and that she considered any further marital relationship impossible. It also examined the judicial decision confirming the divorce, the notarial agreement according to which the children were to live with the applicant and Ms Z.'s employment contract signed in St Petersburg. It also studied the record of a hearing held on 27 February 2006 in an unrelated civil case, from which it appeared that Ms Z. had represented the applicant.

20. The applicant stated that he and his children lived in Novgorod together with Ms Z.'s parents. Although Ms Z. helped him occasionally with the children (for example she had done babysitting for the youngest child on 31 January 2006 while he attended a hearing), it was he who took everyday care of them. Ms Z. did not pay child maintenance because her income was too low. Ms Z. had indeed represented him at the hearing of 27 February 2006, which concerned a claim lodged jointly by the couple before the divorce. Ms Z. had agreed to continue her assistance until the end of the proceedings.

21. Ms Z. testified that she lived in St Petersburg, while the children lived with the applicant in Novgorod. She did not participate in the care of the children. She did not pay child maintenance because her salary was minimal.

22. Ms Z.'s father stated that after the divorce his daughter had left for St Petersburg, while the applicant and the children continued to live together with him and his wife in the flat belonging to them. Although his daughter occasionally talked to the children over the phone, she did not participate in their care. The applicant was the sole carer for the children. He took them to school and to the doctor's, cooked for them, took them for walks and supervised their education.

23. Ms Z.'s employer testified that Ms Z. worked for her in St Petersburg. She knew that employment contracts had to be registered. She had attempted to register Ms Z.'s employment contract with the Tax Authority. The Tax Authority had refused to register the contract, informing her that she had to register it with the Town Administration. However, at the Town Administration she had been told that it was the Tax Authority which was responsible for registering employment contracts. As she had found herself in a vicious circle, she had stopped her fruitless attempts to register the contract. Ms Z. had returned to work two weeks after the childbirth. She knew that Ms Z.'s children lived with their father in Novgorod, but she did not know further details about Ms Z.'s relations with her ex-husband or her

children. A couple of times she had heard Ms Z. talking to her eldest child over the phone.

24. The teacher of the applicant's second child stated that in September 2005 both the applicant and Ms Z. would take the child to school. However, after the birth of the third child and the divorce it was always the applicant who had brought the child to school in the morning and picked him up in the evening. It was the applicant who had come to the school parties. In reply to her questions about his mother, the child had said that his mother had left for St Petersburg where she was working. She thought that the applicant was a good father; the child evidently loved him. At the same time, he never spoke about his mother.

25. The children's doctor testified that on 6 October 2005 Ms Z. had brought the youngest child for an examination. From 1 November 2005 onwards it was always the applicant who had taken the children to the doctor's. The children were healthy and good care was taken of them.

26. On 14 March 2006 the Military Court of the Pushkin Garrison dismissed the applicant's claim for three years' parental leave as having no basis in domestic law. The court held that only female military personnel were entitled to three years' parental leave, while male military personnel had no such entitlement even in those cases where their children were left without maternal care. In such cases a serviceman was entitled either to an early termination of his service for family reasons, or to three months' leave. The applicant had made use of the second opportunity.

27. The court further held that, in any event, the applicant had failed to prove that he was the sole carer for his children and that they lacked maternal care. It followed from the evidence examined at the hearing that even after the divorce the applicant and Ms Z. had continued their marital relationship. They lived together, both took care of their children and defended the interests of their family. The applicant's allegations to the contrary were therefore false and aimed at misleading the court. It was essential that Ms Z. had not been deprived of parental authority. She was not in any other way prevented from taking care of her children and it was irrelevant whether they lived with her or not.

28. The applicant appealed, alleging that the refusal to grant him three years' parental leave had violated the principle of equality between men and women guaranteed by the Constitution. He further submitted that the factual findings made by the first-instance court were irreconcilable with the evidence examined at the hearing.

29. On 27 April 2006 the Military Court of the Leningradskiy Command upheld the judgment on appeal. It did not examine the applicant's allegation that the factual findings made by the first-instance court had been incorrect. Instead it held that under domestic law "male military personnel were not in any circumstances entitled to parental leave". It further added that the applicant's "reflections on equality between men and women ... [could] not

serve as a basis for quashing the first-instance judgment, which [was] correct in substance".

30. While the court proceedings were pending the applicant was disciplined several times for systematic absences from his place of work.

31. By order of 24 October 2006 the head of military unit no. 41480 granted parental leave to the applicant until 30 September 2008, the third birthday of his youngest son. On 25 October 2006 the applicant received financial aid in the amount of 200,000 Russian roubles (RUB), equivalent to approximately 5,900 euros (EUR). In a letter of 9 November 2006 the head of military unit no. 41480 informed the applicant that the financial aid was granted to him "in view of [his] difficult family situation, the necessity of taking care of three minor children and the absence of other sources of income".

32. On 8 December 2006 the Military Court of the Pushkin Garrison issued a decision in which it criticised the head of military unit no. 41480 for granting the applicant three years' parental leave and thereby disregarding the judgment of 27 April 2006 in which it had been found that the applicant was not entitled to such leave. The court drew the attention of the head of the military unit to the unlawfulness of his order.

B. The Constitutional Court's judgment

33. On 11 August 2008 the applicant applied to the Constitutional Court, claiming that the provisions of the Military Service Act concerning the three-year parental leave were incompatible with the equality clause in the Constitution.

34. On 15 January 2009 the Constitutional Court rejected his application. The relevant parts of its judgment read as follows:

> "2.1 ... military service is a special type of public service which ensures the defence of the country and the security of the State, it is therefore performed in the public interest. Persons engaged in military service exercise constitutionally important functions and therefore possess a special legal status which is based on the necessity for a citizen of the Russian Federation to perform his duty and obligation in order to protect the Fatherland.
>
> When establishing a special legal status for military personnel, the federal legislature is entitled, within its discretionary powers, to set up limitations on their civil rights and freedoms and to assign special duties...
>
> ... by signing a military service contract a citizen ... voluntarily chooses a professional activity which entails, firstly, limitations on his civil rights and freedoms inherent in this type of public service, and, secondly, performance of duties to ensure the defence of the country and the security of the State. Accordingly, military personnel undertake to abide by the statutory requirements limiting their rights and freedoms and imposing on them special public obligations.

... by voluntarily choosing this type of service citizens agree to the conditions and limitations related to the acquired legal status. Therefore, the imposition by the federal legislature of limitations on the rights and freedoms of such citizens is not in itself incompatible with [the Constitution] and is in accordance with ILO Discrimination (Employment and Occupation) Convention no. 111 of 25 June 1958, which provides that any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination (Article 1 § 2).

2.2 Under section 11(13) of [the Military Service Act] parental leave is granted to female military personnel in accordance with the procedure specified in federal laws and regulations of the Russian Federation. A similar provision is contained in Article 32 § 5 of the Regulations on military service, which also provides that during parental leave a servicewoman retains her position and military rank.

A serviceman under contract is entitled to leave of up to three months if his wife dies in delivery or if he is bringing up a child or children under 14 years old (handicapped children under 16 years old) left without maternal care (in the event of the mother's death, withdrawal of parental authority, lengthy illness or other situations where his children have no maternal care). The purpose of such leave is to give the serviceman a reasonable opportunity to arrange for the care of his child and, depending on the outcome, to decide whether he wishes to continue the military service. If the serviceman decides to take care of his child himself, he is entitled to early termination of his service for family reasons...

The law in force does not give a serviceman the right to three years' parental leave. Accordingly, servicemen under contract are prohibited from combining the performance of their military duties with parental leave. This prohibition is based, firstly, on the special legal status of the military, and, secondly, on the constitutionally important aims justifying limitations on human rights and freedoms in connection with the necessity to create appropriate conditions for efficient professional activity of servicemen who are fulfilling their duty to defend the Fatherland.

Owing to the specific demands of military service, non-performance of military duties by military personnel *en masse* must be excluded as it might cause detriment to the public interests protected by law. Therefore, the fact that servicemen under contract are not entitled to parental leave cannot be regarded as a breach of their constitutional rights or freedoms, including their right to take care of, and bring up, children guaranteed by Article 38 § 2 of the Constitution of the Russian Federation. Moreover, this limitation is justified by the voluntary nature of the military service contract.

By granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly, the special social role of women associated with motherhood. [Those considerations] are compatible with Article 38 § 1 of the Constitution of the Russian Federation. Therefore, the legislature's decision cannot be regarded as breaching the principles of equality of human rights and freedoms or equality of rights of men and women, as guaranteed by Article 19 §§ 2 and 3 of the Constitution of the Russian Federation.

It follows from the above that section 11(13) of [the Military Service Act], granting the right to parental leave to female military personnel only, does not breach the applicant's constitutional rights ...

> 2.4 As servicemen having minor children are not entitled to parental leave, they are also not entitled to receive monthly child-care allowances payable to those who take care of children under the age of a year and a half...”

The Constitutional Court concluded that the provisions challenged by the applicant were compatible with the Constitution.

C. Prosecutor’s visit on 31 March 2011

35. On an unspecified date in March 2011 the Representative of Russia at the European Court of Human Rights asked the local military prosecutor’s office to conduct an inquiry into the applicant’s family situation. In particular, he asked the prosecutor to find out where the applicant, Ms Z. and their children were currently living and whether Ms Z. paid child maintenance.

36. According to the Government, the applicant was summoned to the prosecutor’s office for 30 or 31 March 2011. The applicant stated that he had not received any summons.

37. As the applicant had failed to be present at the appointed time, the prosecutor decided to visit him at home. According to the applicant, the prosecutor arrived at his flat at 10 p.m. on 31 March 2011, waking up and frightening his children. The Government submitted that the prosecutor had visited the applicant at 9 p.m. and had remained for an hour.

38. The prosecutor informed the applicant that he was conducting an inquiry at the request of the Representative of Russia at the European Court of Human Rights. He noted the residents of the flat. He then requested the applicant to produce a court judgment concerning child maintenance in respect of his youngest son. After the applicant had explained that the child maintenance had been fixed by a notarial agreement, the prosecutor requested a copy of that agreement. He warned the applicant that if he refused to produce the requested documents, his neighbours would be questioned.

39. The applicant called his representative before the Court and, following her advice, refused to comply with the prosecutor’s orders or answer his further questions. He signed a written statement to that effect. The prosecutor immediately left.

40. The prosecutor also questioned the applicant’s neighbours, who testified that the applicant and Ms Z. were living together.

41. According to the Government, the inquiry established that the applicant and Ms Z. had remarried on 1 April 2008 and had had a fourth child on 5 August 2010. In December 2008 the applicant had terminated his military service for health reasons. The applicant and Ms Z. were currently living together with their four children and Ms Z.’s parents.

II. RELEVANT DOMESTIC LAW

42. The Russian Constitution guarantees equality of rights and freedoms of everyone regardless of, in particular, sex, social status or employment position. Men and women have equal rights and freedoms and equal opportunities (Article 19 §§ 2-3).

43. The Constitution also guarantees protection of motherhood and the family by the State. The care and upbringing of children is an equal right and obligation of both parents (Article 38 §§ 1-2).

44. The Labour Code of 30 December 2001 provides that women are entitled to a so-called "pregnancy and delivery leave" (maternity leave) of 70 days before the childbirth and 70 days after it (Article 255). Further, women are entitled to a three-year "child-care leave" (parental leave). Parental leave may also be taken in full or in part by the father of the child, his/her grandmother, grandfather, a guardian or any relative who is actually taking care of the child. The person on parental leave retains his/her employment position. The period of parental leave is counted for seniority purposes (Article 256).

45. The Federal Law on Obligatory Social Insurance of Sick Leave or Maternity Leave (no. 255-FZ of 29 December 2006) provides that during maternity leave the woman receives a maternity allowance, payable by the State Social Insurance Fund, amounting to 100% of her salary (section 11). During the first year and a half of the parental leave the person who is taking care of the child receives monthly child-care allowances, payable by the State Social Insurance Fund, amounting to 40% of the salary, but no less than RUB 1,500 (approximately EUR 37.5) for the first child and RUB 3,000 (approximately EUR 75) for each of the subsequent children (section 11(2)). During the second year and a half of the parental leave no social-insurance payments or allowances are available.

46. The Federal Law on the Status of Military Personnel (no. 76-FZ of 27 May 1998, "the Military Service Act") provides that female military personnel are entitled to maternity leave and to parental leave in accordance with the Labour Code (section 11(13)). There is no similar provision in respect of male personnel.

47. The Act also provides that female military personnel, as well as military personnel bringing up children left without maternal/paternal care, are entitled to social benefits in accordance with federal laws and other legal acts concerning protection of family, motherhood and childhood (section 10(9)).

48. Under the Regulations on military service, enacted by Presidential Decree no. 1237 of 16 September 1999, a servicewoman is entitled to maternity leave, to three years' parental leave, and to all related social benefits and allowances. A serviceman under contract is entitled to three months' leave in one of the following cases: (a) his wife has died in childbirth, or (b) he is bringing up a child or children under 14 years old

(handicapped children under 16 years old) left without maternal care (in the event of the mother's death, withdrawal of parental authority, lengthy illness or other situations where his children have no maternal care) (Article 32).

III. RELEVANT INTERNATIONAL AND COMPARATIVE MATERIAL

A. United Nations documents

1. The Convention on the Elimination of All Forms of Discrimination against Women

49. Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly and ratified by Russia in 1981, provides as follows:

> "States Parties shall take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
>
> (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

50. Its Article 16 § 1 provides, as far as relevant, as follows:

> "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> ...
>
> (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;..."

51. In its Concluding Observations on the periodic reports submitted by the Russian Federation, adopted on 30 July 2010, the CEDAW Committee stated, in particular, as follows:

> "20. The Committee reiterates its concern at the persistence of practices, traditions, patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life. In this respect, the Committee is concerned at the State party's repeated emphasis on the role of women as mothers and caregivers. The Committee is concerned ... that, thus far, the State party has not

taken effective and systematic action to modify or eliminate stereotypes and negative traditional values and practices.

21. The Committee urges the State party to put in place without delay a comprehensive strategy, including the review and formulation of legislation and the establishment of goals and timetables, to modify or eliminate traditional practices and stereotypes that discriminate against women... The Committee notes that a shift from a focus on women primarily as wives and mothers to individuals and actors equal to men in society is required for the full implementation of the Convention and the achievement of equality of women and men...”

2. International Labour Organisation documents

52. Article 1 of International Labour Organisation (ILO) Convention No. C111 concerning Discrimination in Respect of Employment and Occupation, adopted in 1958 and ratified by the Russian Federation in 1961, reads as follows:

“1. For the purpose of this Convention the term *discrimination* includes--

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination...”

53. Article 3 § 1 of ILO Convention No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, adopted in 1981 and ratified by the Russian Federation in 1998, reads as follows:

“With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.”

54. Article 22 of Recommendation No. 165 supplementing that Convention provides as follows:

“(1) Either parent should have the possibility, within a period immediately following maternity leave, of obtaining leave of absence (parental leave), without relinquishing employment and with rights resulting from employment being safeguarded.

(2) The length of the period following maternity leave and the duration and conditions of the leave of absence referred to in subparagraph (1) of this Paragraph should be determined in each country by one of the means referred to in Paragraph 3 of this Recommendation.

(3) The leave of absence referred to in subparagraph (1) of this Paragraph may be introduced gradually."

B. Council of Europe documents

1. The Social Charter

55. The revised European Social Charter was ratified by the Russian Federation in 2009. The Russian Federation declared that it considered itself bound, among others, by Article 27 which reads as follows:

"With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake:

...

2. to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice."

2. Resolutions and recommendations by the Parliamentary Assembly

56. In its Resolution 1274(2002) on Parental leave, the Parliamentary Assembly stated as follows:

"1. Parental leave was first introduced in Europe more than a century ago as a key element of social and employment policies for women in work at the time of childbirth. Its purpose was to protect the health of mothers and to enable them to look after their children.

2. Parental leave has since been adapted to meet the needs not only of women but also of men who wish to balance work and family life and ensure their children's well-being.

3. The issue of parental leave is closely linked to that of the role of men in family life, since it permits a genuine partnership in the sharing of responsibilities between women and men in both the private and public sphere..."

57. The Parliamentary Assembly further noted that parental leave was not applied equally in all member States. It therefore urged the Member States, in particular:

"i. to take the necessary steps to ensure that their legislation recognises different types of family structures, if they have not already done so, and, accordingly, to introduce the principle of paid parental leave including adoption leave;

ii. to set up suitable structures for the implementation of parental leave, including adoption leave...”

58. In its Recommendation 1769(2006) on the need to reconcile work and family life the Parliamentary Assembly noted that the aim of reconciling work and family life was far from being achieved in many Council of Europe member States and that this situation primarily penalised women, since they still carried most of the responsibility for running the home, bringing up young children and very often looking after their dependent parents or other elderly dependants. It therefore invited the Committee of Ministers to address a recommendation to the member States asking them, in particular:

“8.3. to take measures making it easier to reconcile work and family life which target women and men, including:

...

8.3.5. providing adequate remuneration/compensation during maternity leave;

8.3.6. introducing, if they have not yet done so, paid paternity leave and encouraging men to take it;

...

8.3.8. introducing paid, socially-covered parental leave, which may be used flexibly by the father and mother, taking special care to ensure that men are actually able to use it”.

3. Recommendations by the Committee of Ministers

59. In its Recommendation No. R (96) 5 on reconciling work and family life, the Committee of Ministers, acknowledging the need for innovative measures to reconcile working life and family life, recommended that member States

“I. Take action, within the framework of a general policy promoting equal opportunities and equal treatment, to enable women and men, without discrimination, to better reconcile their working and family lives;

II. Adopt and implement the measures and general principles described in the appendix to this recommendation in the manner they consider the most appropriate to achieve this goal in the light of national circumstances and preferences.”

60. In respect of maternity, paternity and parental leave the appendix to the aforementioned Recommendation explains as follows:

“12. Women should be entitled to legal protection in the event of pregnancy, and, in particular, an adequate period of maternity leave, adequate pay or allowance during this period and job protection.

13. The fathers of newly born children should also be allowed a short period of leave to be with their families. In addition, both the father and the mother should have the right to take parental leave during a period to be determined by the national authorities without losing either their employment or any related rights provided for in social protection or employment regulations. The possibility should exist for such parental leave to be taken part-time and to be shared between parents.

14. The measures described in paragraph 13 should apply equally for the benefit of persons adopting a child.

15. The return to work at the end of a period of parental leave should be facilitated by, for example, vocational guidance and training facilities".

61. Recommendation Rec(2007)17 of the Committee of Ministers to member States on gender equality standards and mechanisms recommended, in particular, that

"...the governments of member states take or reinforce necessary measures to implement gender equality in practice, taking fully into account the following principles and standards:

...

B. Standards in specific areas:

...

5. Reconciliation of private/family life and professional/public life

34. Gender stereotypes and a strong division of gender roles influence social models that tend to see women as mainly responsible for family and private life (in the area of unpaid work) and men in the public sphere and professional work (in the area of paid work). Such division leads to the persistence of unequally shared domestic and family responsibilities, being one of the major reasons for discrimination against women in the labour market and for their limited social and political participation.

35. The balanced participation of women and men in professional/public life and in private/family life is, therefore, a key area for gender equality and is essential for the development of society. On the other hand, reconciliation of work and public life with family and private life, promoting self-fulfilment in public, professional, social and family life, is a precondition for a meaningful quality of life for all, women and men, girls and boys, and for the full enjoyment of human rights in the political, economic, cultural and social spheres.

36. Elements indicating states' political will and commitment to gender equality in this regard include the following:

...

iii. Adoption/existence and enforcement of legislation on maternity and paternity protection, including provisions on paid maternity leave, paid parental leave equally accessible to both parents, and paid non-transferable paternity

> leave, as well as specific measures addressed equally to women and men workers, to allow the fulfilment of family responsibilities, including care and assistance to sick or disabled children or dependants".

62. Finally, in Recommendation Rec(2010)4 on the human rights of members of the armed forces, the Committee of Ministers recommended that the Governments of the member States should ensure, in particular, that "the principles set out in the appendix to this recommendation [were] complied with in national legislation and practice relating to members of the armed forces". Principle 39 of the appendix to that Recommendation provides that "members of the armed forces who are parents of young children should enjoy maternity or paternity leave, appropriate childcare benefits, access to nursery schools and to adequate children's health and education systems".

C. European Union documents

1. The Council Directives

63. Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE [Union of Industrial and Employers' Confederations of Europe], CEEP [European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest] and the ETUC [European Trade Union Confederation] gave effect to that agreement, which had been entered into on 14 December 1995 between those cross-industry representative organisations and which provided, in particular, as follows:

> "Clause 2: Parental leave
>
> 1. This agreement grants, subject to clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.
>
> 2. To promote equal opportunities and equal treatment between men and women, the parties to this agreement consider that the right to parental leave provided for under clause 2.1 should, in principle, be granted on a non-transferable basis..."

64. Council Directive 2010/18/EU of 8 March 2010 on the application of the revised Framework Agreement on parental leave between BUSINESSEUROPE, UEAPME, CEEP and the ETUC replaced Directive 96/34/EC. The revised Framework Agreement provides as follows:

> "Clause 2: Parental leave
>
> 1. This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that

child until a given age up to eight years to be defined by Member States and/or social partners.

2. The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States."

2. Case-law of the European Court of Justice

65. The case of *Joseph Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie, Ministre de la Fonction publique, de la Réforme de l'Etat et de la Démocratisation*, deals with the issue of service credit for children being awarded only to female civil servants in accordance with the French civil and military retirement pension scheme. In its judgment of 29 November 2001 the European Court of Justice (ECJ) observed that the grant of that credit was not linked to maternity leave or to the disadvantages which a female civil servant incurred in her career as a result of being absent from work during the period following the birth of a child. This credit was linked to a separate period, namely that devoted to bringing up the children. In this connection, the ECJ found that the situations of a male civil servant and a female civil servant were comparable as regard the bringing-up of children. In particular, the fact that female civil servants were more affected by the occupational disadvantages entailed in bringing up children, because this was a task generally carried out by women, did not prevent their situation from being comparable to that of a male civil servant who had assumed the task of bringing up his children and had thereby been exposed to the same career-related disadvantages.

66. Further, the ECJ noted that French legislation introduced a difference in treatment on grounds of sex in regard to male civil servants who had in fact assumed the task of bringing up their children. That measure was not justified because it was not of a nature such as to offset the disadvantages to which the careers of female civil servants were exposed by helping those women conduct their professional life on an equal footing with men. On the contrary, that measure was limited to granting female civil servants who were mothers a service credit at the date of their retirement, without providing a remedy for the problems which they might encounter in the course of their professional career. The French legislation therefore infringed the principle of equal pay inasmuch as it excluded male civil servants who were able to prove that they had assumed the task of bringing up their children from entitlement to the credit.

67. The judgment adopted by the ECJ on 30 September 2010 in the case of *Roca Álvarez v. Sesa Start España ETT* deals with the question whether

the denial of "breast-feeding leave" (a half-hour reduction in the working day for the purpose of feeding a baby) to employed fathers, while employed mothers were entitled to such leave, amounted to discrimination on grounds of sex. The ECJ found that the positions of a male and a female worker, father and mother of a young child, were comparable with regard to their possible need to reduce their daily working time in order to look after their child. The Spanish legislation established a difference on grounds of sex, as between mothers whose status was that of an employed person and fathers with the same status.

68. As concerns justification for such a difference in treatment, the ECJ considered, firstly, that the leave at issue had been detached from the biological fact of breastfeeding, entitlement to it being granted even in cases of bottle feeding. It could be therefore considered as time purely devoted to the child and as a measure which reconciled family life and work following maternity leave. Feeding and devoting time to the child could be carried out just as well by the father as by the mother. Therefore that leave seemed to be accorded to workers in their capacity as parents of the child. It could not therefore be regarded as ensuring the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child.

69. Secondly, the measure at issue did not constitute a permissible advantage given to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. On the contrary, the fact that only a woman whose status was that of an employed person could take that leave, whereas a man with the same status could not, was liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties. To refuse entitlement to the leave at issue to fathers whose status was that of an employed person, on the sole ground that the child's mother did not have that status, could have as its effect that the mother would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden. Consequently, a measure at issue could not be considered to be a measure eliminating or reducing existing inequalities in society, nor as a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that could arise in society and thus to prevent or compensate for disadvantages in the professional careers of the relevant persons.

70. The ECJ concluded that the relevant provisions of Spanish law were incompatible with EU law.

D. Comparative law material

71. The Court conducted a comparative study of the legislation of thirty-three member States of the Council of Europe (Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, the "Former Yugoslav Republic of Macedonia", France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Poland, Portugal, Romania, Serbia, Spain, Sweden, Switzerland, Turkey and the United Kingdom).

72. The comparative study suggests that as far as civilians are concerned, in two States (Armenia and Switzerland) entitlement to parental leave is limited to women. In one State (Turkey) men working in the private sector are not entitled to parental leave, while male civil servants are entitled to such leave. In one State (Bosnia and Herzegovina) men may take parental leave under certain conditions only (for example, absence of maternal care of the child). In one State (Albania) no parental leave entitlement is provided by law. In the remaining twenty-eight States both men and women are equally entitled to parental leave in civilian life.

73. In some countries parental leave is a family entitlement to be divided between parents as they choose (for example in Azerbaijan, Georgia and Romania). In other countries it is an individual entitlement, with each parent entitled to a certain portion of parental leave (for example in Belgium, Croatia, the Czech Republic, Luxembourg and Italy). In Sweden the entitlement is partly family, partly individual, with 60 days reserved for each parent and the rest divided between them as they choose. In some countries parental leave is unpaid (for example Austria, Belgium, Cyprus, Malta, the Netherlands, Spain and the United Kingdom). In others parental leave is paid either in part or in full (for example Azerbaijan, the Czech Republic, Luxembourg, Serbia and Portugal). There are also varied approaches to the length of parental leave, ranging from three months (Belgium) to three years (Spain).

74. As regards military personnel, it appears that in one State (Albania) military personnel are not expressly entitled to parental leave. In six States (Armenia, Azerbaijan, Georgia, Moldova, Switzerland and Turkey) only servicewomen are entitled to such leave. In three States (Bosnia, Herzegovina, Bulgaria and Serbia) all servicewomen are entitled to parental leave, while servicemen are entitled to such leave only in exceptional cases, for example if the mother has died, has abandoned the child, is seriously ill or is unable to take care of the child for any other justified reason. In the remaining twenty-three States both servicemen and servicewomen are equally entitled to parental leave.

75. In some countries (for example Austria, Croatia, Cyprus, Estonia, Finland, Italy, Luxembourg, Malta, Poland, Portugal, Serbia and Sweden) parental leave for military personnel seems to be governed by the same general provisions as those applicable to civilians. In other countries (for

example the Czech Republic, Latvia, Greece, Lithuania, Romania and France) parental leave is regulated by specific provisions which do not, however, contain any significant differences as compared to the rules applicable to civilians. In five countries (Spain, Germany, the Netherlands, Belgium and the United Kingdom) the specific provisions governing parental leave for military personnel contain certain differences or restrictions not applicable to civilians. For example, legislation in the Netherlands provides that parental leave may be postponed where "important interests of the service" so require. In Germany military personnel benefit from the same statutory entitlements as civilians in terms of parental leave. However, the Ministry of Defence may oppose the attribution of parental leave to a serviceperson or recall a serviceperson on parental leave to duty on grounds of imperative needs of national defence. Similarly, in the United Kingdom, service personnel, who in principle have the same entitlement to parental leave as civilians, may not be able to take parental leave at their convenience if it is considered to affect the combat effectiveness of the armed forces.

THE LAW

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

76. The applicant complained that the refusal to grant him parental leave amounted to discrimination on grounds of sex. He relied on Article 14 of the Convention taken in conjunction with Article 8 of the Convention. The relevant provisions read as follows:

Article 8

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

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

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The Government's preliminary objections

77. The Government raised three preliminary objections. They submitted that the applicant could not claim to be a victim of a breach of Article 14 in conjunction with Article 8, that the application should be struck out of the Court's list of cases because the matter had been effectively resolved and that the application constituted an abuse of the right of individual petition. They relied on Articles 34, 35 § 3 and 37 § 1 of the Convention, the relevant parts of which read as follows:

Article 34

"The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto..."

Article 35

"... 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application..."

Article 37

"1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires..."

78. The Court will examine each of the Government's objections in turn.

1. Victim status

(a) The Chamber judgment

79. The Chamber, which raised the matter of its own motion, noted that in the absence of an acknowledgment by the national authorities of a breach of the applicant's rights under the Convention, he could still claim to be the victim of the alleged discriminatory treatment for the purposes of Article 34 of the Convention. The Chamber noted that the parental leave and the financial aid had been granted by reference to the applicant's difficult family and financial situations. Those measures could not therefore be interpreted as acknowledging, in substance, that his right not to be discriminated against on account of sex had been breached. Moreover, even after the applicant had been allowed, exceptionally, to take parental leave, the domestic courts had continued to hold that, being a serviceman, he had no statutory entitlement to parental leave and that his ineligibility for such leave did not breach his right to equal treatment.

(b) The Government's submissions

80. Before the Grand Chamber the Government argued that the applicant had been granted parental leave and received financial aid. He had therefore been afforded redress for the alleged violation. Moreover, the above measures could be seen as an acknowledgment in substance of a violation of his rights under the Convention. The applicant could not therefore claim to be a victim of a breach of Article 14 in conjunction with Article 8.

(c) The applicant's submissions

81. The applicant submitted that the domestic authorities had not acknowledged a violation of the Convention and had not provided adequate redress. The parental leave of two years instead of three had been granted with a one-year delay after the application had been communicated to the Government. The applicant had been disciplined for his frequent absences from work during the year in which he had had to combine his military service with the care for his new-born child. Moreover, the domestic courts had declared that the parental leave had been granted unlawfully. As to the financial aid, it had been paid by reference to the applicant's difficult family and financial situations and could not therefore be regarded as compensation for a violation of his right not to be discriminated against.

(d) The Court's assessment

82. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention

(see, for example, *Amuur v. France*, 25 June 1996, § 36, Reports of Judgments and Decisions 1996-III; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 67, 2 November 2010).

83. The Grand Chamber notes that the parties have not put forward any new arguments on the issue of victim status in their written or oral submissions in the proceedings before it which were not examined by the Chamber. It therefore sees no reason to depart from the Chamber's finding as to the applicant's victim status. It finds that in the absence of an acknowledgment, either expressly or in substance, by the national authorities of a breach of the applicant's rights under the Convention, he may claim to be the victim of the alleged discriminatory treatment for the purposes of Article 34 of the Convention. Accordingly, it rejects the Government's first preliminary objection.

2. Application of Article 37 § 1 (b) of the Convention

(a) The Chamber judgment

84. The Chamber did not find it necessary to decide whether the granting of parental leave and of financial aid to the applicant had sufficiently redressed his situation such as to warrant the striking-out of his application. It observed that in any event the alleged discrimination under Russian law against male military personnel as regards entitlement to parental leave involved an important question of general interest, which the Court had not yet examined. It considered that there were special circumstances regarding respect for human rights as defined in the Convention and its Protocols which required the further examination of the application on the merits.

(b) The Government's submissions

85. As they did before the Chamber, the Government submitted that the matter had been effectively resolved because the applicant had been granted parental leave and had received financial aid. They referred to the case of *Pisano v. Italy* ([GC] (striking out), no. 36732/97, §§ 41-50, 24 October 2002) and asked the Court to strike the application out of its list of cases in accordance with Article 37. It was not justified, in their opinion, to continue the examination of the case on the ground that it involved an important question of general interest. The Court's task was not to examine *in abstracto* whether the Russian legal system complied with the Convention, but to examine whether there had been a violation in the particular case before it. By assessing Russia's legislation, the Court would encroach upon the sovereign powers of the Parliament and the Constitutional Court.

(c) The applicant's submissions

86. The applicant submitted that in order to conclude that "the matter [had] been resolved" within the meaning of Article 37 § 1 (b) of the Convention, the Court had to answer two questions in turn: firstly, it had to ask whether the circumstances complained of by the applicant still obtained and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances had also been redressed (he referred to *Shevanova v. Latvia* (striking out) [GC], no. 58822/00, § 45, 7 December 2007). Neither of those two criteria was met in his case. Firstly, the legal provisions which had served as a basis for refusing him parental leave and the domestic decisions rejecting his application for parental leave remained in force. Secondly, the violation of his rights had not been sufficiently redressed. He had been granted two years of leave instead of three and there had been a delay of one year. He had not received any compensation for the delay or the reduction in length. The financial assistance received by him had been a welfare benefit paid in connection with his difficult financial circumstances. Moreover, in the applicant's view, the Government could not take advantage of the decision by the head of the military unit to grant him parental leave and pay financial assistance on an exceptional basis, because that decision had been declared unlawful by the domestic courts. Finally, the applicant supported the Chamber's finding that the case could not be struck out under Article 37 § 1 (b) because it "involved an important question of general interest which [had] not yet been examined by the Court".

(d) The Court's assessment

87. The Court reiterates that, under Article 37 § 1 (b) of the Convention, it may "at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that ...the matter has been resolved...". To be able to conclude that this provision applies to the instant case, the Court must answer two questions in turn: firstly, it must ask whether the circumstances complained of by the applicant still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Kaftailova v. Latvia* (striking out) [GC], no. 59643/00, § 48, 7 December 2007).

88. In this respect it is significant that parental leave was granted to the applicant with a one-year delay and for only two years instead of three. The applicant was therefore unable to take care of his child during the first year of the child's life when it most needed care. He had not received any compensation for the delay in granting parental leave or for the reduction of its length, the financial assistance having been granted, as noted above, by reason of his difficult financial situation. Accordingly, the Court considers that the effects of a possible violation of the Convention have not been

sufficiently redressed for it to conclude that the matter has been resolved within the meaning of Article 37 § 1 (b).

89. There is, however, a further ground for rejecting the Government's request to strike the application out under Article 37 § 1 (b) of the Convention. Before taking a decision to strike out a particular case, the Court must verify whether respect for human rights as defined in the Convention requires it to continue the examination of the case. The Court reiterates in this respect that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25; *Guzzardi v. Italy*, 6 November 1980, § 86, Series A no. 39; and *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see *Karner*, cited above, § 26; *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII (extracts); and *Rantsev v. Cyprus and Russia*, no. 25965/04, § 197, 7 January 2010).

90. The Court considers that the subject matter of the present application – the difference in treatment under Russian law between servicemen and servicewomen as regards entitlement to parental leave – involves an important question of general interest not only for Russia but also for other States Parties to the Convention. It refers in this connection to the comparative law material showing that a similar difference in treatment exists in at least five of the States Parties (see paragraph 74 above) and to the submissions of the third party stressing the importance of the issues raised by the present case (see paragraphs 119 to 123 below). Thus, further examination of the present application would contribute to elucidating, safeguarding and developing the standards of protection under the Convention.

91. Accordingly, there are special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the further examination of the application on its merits.

92. The Court therefore rejects the Government's request for the application to be struck out under Article 37 § 1 (b) of the Convention.

3. Alleged abuse of the right of individual petition

(a) The Government's submissions

93. Before the Grand Chamber the Government argued for the first time that the application constituted an abuse of the right of individual petition. They submitted that the applicant had deliberately distorted the relevant facts in an attempt to mislead the Court. In particular, they argued that the applicant's divorce from his wife had been a sham. After the divorce the applicant and his children had continued to live with his former wife's parents and she had never paid any maintenance to them. There was evidence that she had regularly talked to her children over the phone and had occasionally picked them up from school or taken them to the doctor's. She had also acted as the applicant's representative in an unrelated set of court proceedings. In the Government's opinion, it followed from the above that the applicant and his wife had continued their marital relationship even after the divorce and that the applicant's wife had continued to take care of the children. Accordingly, the applicant's statement that he was a single father of three children was false. It was also relevant that in 2008 the applicant had remarried his former wife and they had had a fourth child together. Finally, to show the applicant's general dishonesty, the Government referred to a conflict between him and one of his colleagues and to a quarrel he had had with a presiding judge in an unrelated civil case.

(b) The applicant's submissions

94. The applicant submitted, firstly, that the Government had raised this objection for the first time before the Grand Chamber. The objection had therefore been raised too late. Secondly, the scurrilous false allegations made by the Government against him were irrelevant for the case before the Court. Thirdly, the applicant had indeed divorced his wife and had obtained custody of their three children. The fact that he had later been reconciled with his ex-wife could not alter the fact that at the time when he had asked for parental leave he had been the sole carer for his three children. He had never concealed his remarriage from the authorities. His superiors had been immediately notified of this marriage and the birth of a fourth child.

(c) The Court's assessment

95. The Court reiterates that, according to Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *K. and T. v. Finland* [GC], no. 25702/94, § 145, ECHR 2001-VII; *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X; and *Mooren v. Germany* [GC], no. 11364/03, §§ 57-59, ECHR 2009-...).

96. The issue of the abuse of the right of individual petition was raised by the Government for the first time in their written submissions before the Grand Chamber. Their submissions relate to the events which had occurred in 2005 and 2006, that is before the present application was lodged. The Court sees no exceptional circumstances which could have dispensed the Government from the obligation to raise their preliminary objection before the adoption of the Chamber's decision on admissibility. The Government are therefore estopped from raising it at this stage (see, for similar reasoning, *Aydın v. Turkey*, 25 September 1997, § 60, *Reports* 1997-VI).

97. Accordingly, the Government's third preliminary objection must be also dismissed.

B. Compliance with Article 14 taken in conjunction with Article 8

1. The Chamber judgment

98. Referring to the case of *Petrovic v. Austria* (27 March 1998, §§ 26-29, *Reports* 1998-II), the Chamber found that the applicant could rely on Article 14 of the Convention. It further found that, being a serviceman, the applicant had been treated differently from civilians, both men and women, as well as servicewomen, who were all entitled to parental leave. The denial of parental leave to the applicant had accordingly been based on a combination of two grounds: military status plus sex. It further found that in their relations with their children during the period of parental leave men and women were in an analogous situation.

99. The Chamber noted that, in the *Petrovic v. Austria* case (cited above), a distinction on the basis of sex with respect to parental leave allowances had been found not to be in violation of Article 14 because at the material time there was no European consensus in this field, as the majority of Contracting States did not provide for parental leave or related allowances for fathers. The Chamber further noted that since the adoption of the judgment in the *Petrovic* case the legal situation as regards parental leave entitlements in the Contracting States had evolved. In an absolute majority of European countries the legislation now provided that parental leave might be taken by both mothers and fathers. In the Chamber's opinion, this showed that society had moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role had gained recognition. It was therefore time to overrule the *Petrovic* case and to hold that there was no objective or reasonable justification for the difference in treatment between men and women as regards entitlement to parental leave. The Chamber further condemned gender stereotypes in the sphere of child-raising.

100. Turning then to the special military context of the case, the Chamber reiterated that a system of military discipline, by its very nature,

implied the possibility of placing limitations on certain of the rights and freedoms of the members of the armed forces which could not be imposed on civilians. Thus, a wide margin of appreciation was afforded to States wishing to impose restrictions on the rights of military personnel under Articles 5, 9, 10 and 11 of the Convention. The States, however, had a narrower margin of appreciation in the sphere of family and private life. Indeed, although States were allowed to impose certain restrictions on the Article 8 rights of military personnel where there was a real threat to the armed forces' operational effectiveness, assertions as to the existence of such a threat had to be "substantiated by specific examples".

101. The Chamber was not convinced by the Government's argument that the extension of the parental leave entitlement to servicemen, where servicewomen already had such entitlement, would have a negative effect on the fighting power and operational effectiveness of the armed forces. Indeed, there was no expert study or statistical research on the number of servicemen who would be in a position to take three years' parental leave at any given time and who would be willing to do so. Further, the fact that in the armed forces women were less numerous than men could not, in the Chamber's opinion, justify the disadvantaged treatment of the latter as regards entitlement to parental leave. Finally, the argument that a serviceman was free to resign from the army if he wished to take personal care of his children was particularly questionable, given the difficulty in directly transferring essentially military qualifications and experience to civilian life. The Chamber noted with concern that servicemen were forced to make a difficult choice between caring for their new-born children and pursuing their military career, while no such choice was faced by servicewomen. Accordingly, it found that the reasons adduced by the Government had not provided objective or reasonable justification for imposing much stronger restrictions on the family life of servicemen than on that of servicewomen.

2. The applicant's submissions

102. The applicant submitted that the Government's position that he could not rely on Article 14 taken together with Article 8 was inconsistent with the Court's long-established case-law. The Court had held on many occasions that parental leave, as well as parental and child benefits, came within the scope of Article 8 and that Article 14, taken together with Article 8, was applicable (see *Weller v. Hungary*, no. 44399/05, § 29, 31 March 2009; *Okpisz v. Germany*, no. 59140/00, § 32, 25 October 2005; *Niedzwiecki v. Germany*, no. 58453/00, § 31, 25 October 2005; and *Petrovic*, cited above, § 29). He further argued that parental leave had been necessary to promote his family life and the interests of his children. As his ex-wife had been unwilling to take care of them, it had been necessary for

the applicant to stay at home and look after them, which would have been impossible without parental leave.

103. The applicant further argued that, as regards the need to take parental leave in order to be able to take care of his child, he was in a situation analogous to that of other parents, namely servicewomen and civilian men and women. As a serviceman, he had been treated differently from the above classes of parents as he had not been entitled to parental leave. Servicewomen, as well as civilian men and women, all had an unconditional entitlement to three years' parental leave, while a serviceman could at most claim three months' leave if his wife was dead or otherwise incapable of taking care of the child. Although the applicant had been ultimately granted parental leave, it could not alter the fact that he had been treated differently from other parents. In fact, his parental leave had been of a shorter duration and, according to the domestic courts, had been granted unlawfully. The applicant had therefore felt anxiety during the entire duration of the parental leave, as he had known that the leave could be cancelled and he could be recalled to duty at any time. Finally, the applicant had also been treated differently from servicewomen in that he had had to make a difficult choice between his military career and family life, while servicewomen were not faced with such a choice.

104. The applicant submitted that the argument that women had a special social role in the upbringing of children was based on gender stereotypes. As to the "positive discrimination" doctrine, it could not be used to justify a difference in treatment between men and women as regards entitlement to parental leave. Positive discrimination measures had to be proportionately tailored to the aim of correcting, compensating for, or mitigating the continuing effects of a hardship suffered by a historically disadvantaged group, such as women (see *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, §§ 37 and 40-43, 10 May 2007, and *Stec and Others v. the United Kingdom* [GC], no. 65731/01, §§ 61 and 66, ECHR 2006-VI). Far from mitigating any historic disadvantage suffered by women, a policy whereby only women were entitled to take parental leave perpetuated gender stereotypes, inequality and hardship arising out of women's traditional role of caring for the family in the home rather than earning money in the workplace. As a result, that policy discriminated both against men (in family life) and against women (in the workplace). The applicant concluded that there was no reasonable or objective justification for the difference in treatment between men and women as regards entitlement to parental leave.

105. As to the arguments relating to the fighting capacity of the army, the applicant submitted that under the Court's case-law assertions as to the existence of a threat to the operational effectiveness of the army had to be substantiated by evidence whose validity and adequacy was subject to careful scrutiny by the Court (he referred to *Smith and Grady v. the United*

Kingdom, nos. 33985/96 and 33986/96, §§ 89-112, ECHR 1999-VI, and *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, §§ 82 and 88-98, 27 September 1999). In his opinion, the Government had not provided evidence showing that an extension of the parental leave entitlement to servicemen would create a threat to the fighting capacity of the army. In particular, the statistics provided by the Government were not conclusive and were not moreover supported by any document. The number of children under the age of three indicated by the Government apparently also included the children of servicewomen and those of administrative army personnel. It was therefore impossible to establish the number of servicemen who would be in a position to take parental leave at any given time. Most importantly, the Government's admission that there was no relevant statistical information in their possession showed that the legal provisions limiting the parental leave entitlement to servicewomen had no factual foundation at the time of their adoption and had never been subjected to any factually-based review or update. According to the applicant's estimation the number of servicemen who would be in a position to take parental leave at any given time would not exceed 3.47% of servicemen under contract; moreover, not all of them would be willing to take parental leave. The applicant submitted that under Russian law up to 30% of the personnel of a military unit were allowed to take leave at the same time and such military unit was considered to be fully operational.

106. The applicant further submitted that although it was true that women were few in number in the armed forces, they often performed the same duties as servicemen. In particular, the applicant's superior in 1999 had been a woman. As shown by the lists of personnel on duty, on certain days the number of servicewomen on duty in his unit had reached 60%. These servicewomen were entitled to take parental leave and this had never created any concerns for the operational effectiveness of the army. In his opinion, instead of a purely quantitative approach, the Government should have adopted a qualitative one taking account of the nature of each person's duties. The applicant concluded that the Government had not provided a reasonable or objective justification for the difference in treatment between servicemen and servicewomen as regards entitlement to parental leave.

107. Further, in reply to the Government's argument that by signing a military contract he had agreed to a limitation of his rights, the applicant submitted that the Convention applied to members of the armed forces and not only to civilians (he referred to *Engel and Others v. the Netherlands*, 8 June 1976, § 54, Series A no. 22, and *Lustig-Prean and Beckett*, cited above, § 82). He further argued that although it was possible to waive Convention rights, such a waiver, to be valid, had to satisfy certain conditions. Firstly, a waiver "must not run counter to any important public interest" (he referred to *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR

2006-XII). Secondly, it "must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent" (he referred to *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 202, ECHR 2007-...). In the applicant's opinion, the waiver alleged by the Government in the present case did not satisfy the above requirements. The Court had already held, in the context of discrimination based on race, that "in view of the fundamental importance of the prohibition of racial discrimination ... no waiver of the right not to be subjected to racial discrimination [could] be accepted, as it would be counter to an important public interest" (he referred to *D.H. and Others*, cited above, § 204). He argued that as the prohibition of sex discrimination was of the same fundamental importance (he referred to *Andrle v. the Czech Republic*, no. 6268/08, § 49, 17 February 2011; *Van Raalte v. the Netherlands*, 21 February 1997, § 39, *Reports* 1997-I; and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94), the right not to be discriminated against on account of sex could not be waived either. Further, the alleged waiver could not be considered unequivocal. The contract signed by the applicant was a standard one-page form which did not expressly inform the signatory that he undertook to renounce his right to parental leave.

108. Finally, the applicant submitted that Russian law did not leave any room for an individualised approach to parental leave in the army. The circumstances of the present case illustrated this amply. Indeed, after the applicant had been granted parental leave in view of his difficult family situation, the domestic courts had declared that measure unlawful. The applicant argued that an acceptable individualised approach would be to grant parental leave depending on the person's position in the army rather than on sex. In particular, account should be taken of whether his or her unit was involved in active military actions or was being prepared for such actions and of his or her position in the unit. In the applicant's view, it was illogical that a servicewoman who held an important military position in the unit had an automatic entitlement to parental leave, while a serviceman in a relatively insignificant military position had no such entitlement.

3. The Government's submissions

109. In their request for referral the Government argued that the applicant could not rely on Article 14 taken together with Article 8. Article 8 did not guarantee a right to parental leave or parental leave allowances. These were by their very nature social and economic rights covered by the European Social Charter. They were not protected by the Convention. Accordingly, Article 14, which had no independent existence, was inapplicable.

110. The Government conceded that the applicant was in an analogous situation to all other parents – namely servicewomen and civilian men and

women. As he had been granted parental leave, he had not been treated differently from them.

111. Further, the Government submitted that military personnel had a special status because their task was to ensure the defence of the country and the security of the State. The State was therefore entitled to set up limitations on their civil rights and freedoms and to assign special duties. The choice of military career was voluntary and, by signing a military service contract and by taking the oath of allegiance, servicemen accepted a system of military discipline that by its very nature implied the possibility of being subjected to limitations which could not be imposed on civilians (they referred to *Kalaç v. Turkey*, 1 July 1997, § 28, *Reports* 1997-IV). They also referred in this connection to the case of *W., X., Y. and Z. v. the United Kingdom* (nos. 3435/67, 3436/67, 3437/67 and 3438/67, Commission decision of 19 July 1968, Yearbook of the European Convention on Human Rights, Vol. 11 (1968), p. 598) in which the Commission found that "the term 'respect for family life' [could not] reasonably be given such a wide interpretation as to allow an individual - even a minor - to free him from the obligations under a long-term service engagement freely entered into but involving a separation from his family except for periods of leave".

112. The Government further argued that States had a wide margin of appreciation in matters of national security, as well as in matters relating to general measures of economic and social strategy (they referred to *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98, and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, *Reports* 1997-VII). Because of their direct knowledge of the society and its needs, the national authorities were better placed than the international judge to appreciate what was "in the public interest". The Court should respect the legislature's policy choice unless it was "manifestly without reasonable foundation".

113. They referred to the judgment of the Constitutional Court, which had found that military service imposed specific demands in so far as it required uninterrupted performance of duties by servicemen and that, consequently, the taking of parental leave by servicemen on a large scale would have a negative effect on the fighting power and operational effectiveness of the armed forces. That finding had had an objective and reasonable justification for the following reasons. Firstly, as argued by the British Government in the case of *W., X., Y. and Z.* (cited above), "the authorities responsible for the administration of the armed forces (upon which the security of the State depends) [had to] ensure the continuous and efficient manning of such forces if they [were] to meet their commitments". Secondly, as of 1 January 2011 the total number of military personnel under contract was 216,600 persons. On the same date, there were 50,519 children under the age of three in the care of military and administrative army

personnel. The Government submitted that they were unable to provide any further statistics. In particular, there were no statistics on the number of servicemen having children under the age of three. However, as all servicemen were of a "childbearing" age, that number might be significant.

114. The Government admitted that they were also unable to provide any document relating to the parliamentary debate on parental leave for military personnel. Given that the Military Service Act had been adopted 13 years earlier, that is before the ratification of the Convention by Russia, the Russian Parliament had no obligation under the Convention to address the question of justification for the difference in treatment and the Court had no jurisdiction *ratione temporis* to examine the issues relating to the parliamentary debate preceding the enactment of the law in question.

115. Further, the Government submitted that in a number of member States of the Council of Europe parental leave was not available to servicemen. Such countries included Switzerland, Turkey, Bulgaria, Poland and the Czech Republic. Moreover, in many countries parental leave was much shorter than in Russia. Given that in Russia parental leave was three years, such a long absence from service would have a negative impact on servicemen's military skills, often involving the use of complicated high technology military equipment, and costly refresher training would be needed on their return. In such circumstances, it was reasonable that parental leave should be taken by servicemen's wives, whose absence from work would have less negative consequences for society. In particular, the applicant served as a radio intelligence operator in a unit which was required to be in a state of permanent combat readiness. At the same time, they admitted that the applicant's position could be held by a woman, who would be entitled to parental leave.

116. In this connection, the Government submitted that servicewomen were exceptionally granted an entitlement to parental leave in view of the following considerations. Firstly, according to modern scientific research, there existed a special biological and psychological connection between the mother and the newborn child. The mother's presence and care during the first year of the child's life was particularly important. It was therefore in the child's interest that the mother took parental leave. Secondly, given that there were few women in the army, their absence from service would have no impact on fighting capacity. Indeed, on 1 January 2011 there had been only 1,948 servicewomen in the Russian army. Accordingly, in 2011 women represented only 0.8 % of military personnel (10% in 2008). Moreover, a majority of them served in positions not directly involving military duties, such as positions in the medical, financial or communications departments. In view of the above, the present case concerned a justified positive discrimination of women.

117. The Government also argued that Russian law provided for exceptions to the rule that servicemen were not entitled to parental leave. In

particular, in accordance with Article 32 § 7 of the Regulations on military service (see paragraph 48 above), a serviceman under contract was entitled to such leave in one of the following cases: (a) his wife had died in childbirth, or (b) he was bringing up a child or children under 14 years old (handicapped children under 16 years old) left without maternal care (in the event of the mother's death, withdrawal of parental authority, lengthy illness or other situations where his children had no maternal care). The list of exceptions was not an exhaustive one. The Government also referred to section 10(9) of the Military Service Act (see paragraph 47 above) according to which military personnel bringing up children left without maternal/paternal care were entitled to social benefits in accordance with federal laws and other legal instruments concerning the protection of family, motherhood and childhood. They produced documents showing the statistics for parental leave granted to servicemen and to policemen. It can be seen from the statistical information that there had been only one case, in 2007, where a serviceman had been granted parental leave of one year and a half in connection with his wife's serious illness. In 2010 another serviceman had been granted three months' special leave because his son had been left without maternal care. The Government also referred to twenty-one cases in which three years' parental leave had been granted to male police officers. The main criterion for granting leave was therefore the fact that a serviceman's children were left without maternal care. This fact, however, had to be proven. As the applicant had failed to prove that his children lacked maternal care, his application for leave had been refused. At the same time, he had ultimately been granted parental leave in view of his difficult family situation.

118. Finally, the Government submitted that the Chamber had acted outside its competence when it had ordered, under Article 46 of the Convention, that the Russian authorities should amend the relevant legislation. In their opinion, this was an isolated case which did not disclose any systemic problem under the Convention. It was not the Court's task to assess an abstract problem of compatibility of domestic legislation with the Convention, let alone abolish, or give directions to abolish, the legal provisions contested by the applicant.

4. The third party's submissions

119. The Human Rights Centre of the University of Ghent denounced the danger of gender stereotypes. Such stereotypes limited individuals' life-choices and served to perpetuate gender inequality and subordination. They were at the same time the cause and manifestation of discriminatory treatment. Stereotyping men and women and confining them to certain traditional gender roles resulted, in particular, in a lack of support for those people, both men and women, who did not fulfil traditional roles. Such lack of support could be manifested, for example, through denial of social

benefits to them. Gender stereotypes were also often referred to as a justification for the difference in treatment between men and women. The Court had, however, held on several occasions that prejudices and stereotypes were not sufficient justification for discriminatory treatment (they referred to *Zarb Adami v. Malta*, no. 17209/02, §§ 81 and 82, ECHR 2006-VIII; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 52, ECHR 2003-I; *Lustig-Prean and Beckett*, cited above, § 90; and *Inze v. Austria*, 28 October 1987, § 44, Series A no. 126). The two stereotypes underlying the present case were, firstly, the traditional idea that women were responsible for the household and children, with men earning money outside the home and, secondly, the idea that fighting and military service were for men rather than for women.

120. The third party also referred to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in particular to its Article 5 (see paragraph 49 above), which imposed an obligation on States Parties to address gender stereotypes by modifying the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which were based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. The third party argued that although the present case concerned discrimination against a man, the CEDAW was relevant because the CEDAW Committee had interpreted it as applying to "all human beings regardless of sex" and because stereotypes of men were harmful not only to men but also to women. Gender role stereotypes locked women into the home and men out of it, thereby disadvantaging both sexes. The CEDAW Committee had stressed the importance of more than purely formal equality and had sought to combat the structural causes of discrimination. Gender stereotyping, and in particular the deeply rooted female-caregiver/male breadwinner stereotype, was one of them.

121. The third party also referred to the Concluding Observations on the periodic reports submitted by the Russian Federation, adopted on 30 July 2010 by the CEDAW Committee (see paragraph 51 above). The CEDAW Committee had stated, in particular, that it was concerned by "the persistence of practices, traditions, patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life ... [and by] the State party's repeated emphasis on the role of women as mothers and caregivers". The Committee was of the opinion "that a shift from a focus on women primarily as wives and mothers to individuals and actors equal to men in society [was] required for the full implementation of the Convention and the achievement of equality of women and men."

122. Finally, the third party submitted that the present case involved so-called intersectional discrimination, that is discrimination based on several

grounds which interacted with each other and produced specific types of discrimination. In their opinion, the difference in treatment of which the applicant complained could not be reduced to either military status or sex, but was rather the result of a combination of those two grounds. If discrimination on the basis of sex and discrimination on the basis of military status were analysed separately, the stereotypes concerning military servicewomen would recede to the background. If one set of comparisons concerned men and women in general, and the other set of comparisons concerned soldiers and civilians, then nowhere in that equation could the concerns of military servicemen, and even less so of servicewomen, be recognised directly.

123. In conclusion, the third party submitted that it was important to identify gender stereotypes and recognise their harm. States should be held accountable when they discriminated on grounds of sex and perpetuated gender inequality on the basis of gender stereotypes.

5. The Court's assessment

(a) General principles

124. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of them. The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see, among many other authorities, *E.B. v. France* [GC], no. 43546/02, §§ 47-48, 22 January 2008).

125. The Court has also held that not every difference in treatment will amount to a violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory (see *Ünal Tekeli v. Turkey*, no. 29865/96, § 49, ECHR 2004-X (extracts)). A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Stec and Others*, cited above, § 51).

126. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar

situations justify a difference in treatment (see *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports* 1996-IV). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background (see *Rasmussen v. Denmark*, 28 November 1984, § 40, Series A no. 87, and *Inze*, cited above, § 41), but the final decision as to the observance of the Convention's requirements rests with the Court. Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Weller v. Hungary*, no. 44399/05, § 28, 31 March 2009; *Stec and Others*, cited above, §§ 63 and 64; *Ünal Tekeli*, cited above, § 54; and, *mutatis mutandis*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV).

127. 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 (see *Burghartz v. Switzerland*, 22 February 1994, § 27, Series A no. 280-B, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A no. 263). 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. For example, States are prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family (see *Ünal Tekeli*, cited above, § 63).

128. Regarding the specific context of the armed forces, the Court notes that during the preparation and subsequent conclusion of the Convention, the vast majority of the Contracting States possessed defence forces and, in consequence, a system of military discipline that by its very nature implied the possibility of placing on some of the rights and freedoms of the members of those forces limitations incapable of being imposed on civilians. The existence of such a system, which those States have retained since then, does not in itself run counter to their obligations under the Convention (see *Engel and Others*, cited above, § 57). It follows that each State is competent to organise its own system of military discipline and enjoys a margin of appreciation in this respect. The proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State **(**see *Smith and Grady*, cited above, § 89, and *Lustig-Prean and Beckett*, cited above, § 82)**.**

(b) Application of these principles to the present case

(i) On whether Article 14 read in conjunction with Article 8 is applicable

129. The Court must determine at the outset whether the facts of the case fall within the scope of Article 8 and hence of Article 14 of the Convention. It has repeatedly held that Article 14 of the Convention is pertinent if "the subject matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed ...", or if the contested measures are "linked to the exercise of a right guaranteed ...". For Article 14 to be applicable, it is enough for the facts of the case to fall within the ambit of one or more of the provisions of the Convention (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV; *E.B.*, cited above, §§ 47-48; and *Fretté v. France*, no. 36515/97, § 31, ECHR 2002-I, with further references).

130. It is true that Article 8 does not include a right to parental leave or impose any positive obligation on States to provide parental leave allowances. At the same time, by enabling one of the parents to stay at home to look after the children, parental leave and related allowances promote family life and necessarily affect the way in which it is organised. Parental leave and parental allowances therefore come within the scope of Article 8 of the Convention. It follows that Article 14, taken together with Article 8, is applicable. Accordingly, if a State does decide to create a parental leave scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see *Petrovic*, cited above, §§ 26-29).

(ii) On whether there was a breach of Article 14 taken in conjunction with Article 8

131. The Court observes that the applicant, being a serviceman, had no statutory right to three years' parental leave, while servicewomen were entitled to such leave. It must therefore first consider whether the applicant was in an analogous situation to servicewomen.

132. The Court has already found that, in so far as parental leave and parental leave allowances are concerned, men are in an analogous situation to women. Indeed, in contrast to maternity leave which is intended to enable the woman to recover from the childbirth and to breastfeed her baby if she so wishes, parental leave and parental leave allowances relate to the subsequent period and are intended to enable a parent concerned to stay at home to look after an infant personally (see *Petrovic*, cited above, § 36). The Court is therefore not convinced by the Government's argument concerning the special biological and psychological connection between the mother and the newborn child in the period following the birth, which is said to be confirmed by modern scientific research (see paragraph 116 above). Whilst being aware of the differences which may exist between mother and father in their relationship with the child, the Court concludes that, as far as the role of taking care of the child during the period

corresponding to parental leave is concerned, men and women are "similarly placed" .

133. It follows from the above that for the purposes of parental leave the applicant, a serviceman, was in an analogous situation to servicewomen. It remains to be ascertained whether the difference in treatment between servicemen and servicewomen was objectively and reasonably justified under Article 14.

134. The Court does not lose sight of the special armed forces context of the present case. It is special because it is intimately connected with the nation's security and is, accordingly, central to the State's vital interests. A wide margin of appreciation is afforded to the States in matters relating to national security in general and the armed forces in particular (see case-law cited in paragraph 128 above).

135. The Court has accepted on several occasions that the rights of military personnel under Articles 5, 9, 10 and 11 of the Convention may in certain circumstances be restricted to a greater degree than would be permissible in the case of civilians. Thus, as far as Article 14 taken together with Article 5 is concerned, the Court has found that the use of deprivation of liberty as a disciplinary sanction that might be imposed on military personnel, but not on civilians, did not result in any discrimination incompatible with the Convention, because the conditions and demands of military life were by nature different from those of civil life (see *Engel and Others*, cited above, § 73). Further, with respect to Article 9, the Court has remarked that certain restrictions on conduct and attitudes motivated by religion, although they could not be imposed on civilians, were acceptable in the army. In choosing to pursue a military career, members of the armed forces have accepted of their own accord a system of military discipline and the limitations of rights and freedoms implied by it (see *Kalaç*, cited above, § 28, and also *Larissis and Others v. Greece*, 24 February 1998, §§ 50-51, *Reports* 1998-I, concerning proselytising in the army). Similarly, when examining cases under Article 10, the Court has held that it is necessary to take into account the special conditions attaching to military life and the specific "duties" and "responsibilities" incumbent on military personnel, as members of the armed forces are bound by an obligation of discretion in relation to anything concerning the performance of their duties (see *Hadjianastassiou v. Greece*, 16 December 1992, §§ 39 and 46, Series A no. 252, and *Pasko v. Russia*, no. 69519/01, § 86, 22 October 2009, both concerning disclosure by a serviceman of confidential information entrusted to him). The Court has also found that distinctions between military personnel and civilians in the field of freedom of expression are justified under Article 14 by the differences between the conditions of military and civil life and, more specifically, by the "duties" and "responsibilities" peculiar to members of the armed forces (see *Engel and Others*, cited above, § 103). Finally, it must be noted that Article 11 § 2 states explicitly that it is

permissible to impose lawful restrictions on the exercise by members of the armed forces of the right to freedom of assembly and association (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 119, 12 November 2008).

136. At the same time, the Court has also stressed that the Convention does not stop at the gates of army barracks and that military personnel, like all other persons within the jurisdiction of the Contracting States, are entitled to Convention protection. It is therefore not open to the national authorities to rely on the special status of the armed forces for the purpose of frustrating the rights of military personnel. Any restrictions on their Convention rights, to be justified, must satisfy the test of necessity in a democratic society (see, in respect of Article 10, *Grigoriades v. Greece*, 25 November 1997, §§ 45-48, *Reports* 1997-VII, and *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, §§ 36-40, Series A no. 302).

137. Further, in respect of restrictions on the family and private life of military personnel, especially when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8 § 2 of the Convention. In particular, there must be a reasonable relationship of proportionality between the restrictions imposed and the legitimate aim of protecting national security. Such restrictions are acceptable only where there is a real threat to the armed forces' operational effectiveness. Assertions as to a risk to operational effectiveness must be "substantiated by specific examples" (see *Smith and Grady*, cited above, § 89, and *Lustig-Prean and Beckett*, cited above, § 82).

138. Turning now to the circumstances of the present case, the Court notes that the Government advanced several arguments to justify the difference in treatment between servicemen and servicewomen as regards entitlement to parental leave. The Court will examine them in turn.

139. Firstly, as regards the argument relating to the special social role of women in the raising of children, the Court observes that already in the *Petrovic v. Austria* case (cited above) it noted the gradual evolution of society towards a more equal sharing between men and women of responsibilities for the upbringing of their children. In that case the Court did not consider it possible to find that a distinction on the basis of sex with respect to parental leave allowances, which had existed in Austria in the 1980s, was in violation of Article 14 taken in conjunction with Article 8. It took into account, in particular, the great disparity at the material time between the legal systems of the Contracting States in the sphere of parental benefits. At the same time it noted with satisfaction that the Austrian legislation had been changed in 1990 so that eligibility for parental leave allowances had been extended to fathers. The Austrian authorities could not therefore be criticised for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which was at the material

time very progressive in Europe (see *Petrovic*, cited above, §§ 39-43). In the more recent case of *Weller v. Hungary* the Court found that the exclusion of natural fathers from the entitlement to receive parental allowances, when mothers, adoptive parents and guardians were entitled to them, amounted to discrimination on grounds of parental status (see *Weller*, cited above, §§ 30-35).

140. The relevant international and comparative-law material (see paragraphs 49 to 75 above) demonstrates that the evolution of society – which began in the 1980s as acknowledged in the *Petrovic* case – has since significantly advanced. It shows that in a majority of European countries, including in Russia itself, the legislation now provides that parental leave may be taken by civilian men and women, while the countries limiting the parental leave entitlement to women are in a small minority (see paragraph 72 above). Even more important for the present case is the fact that in a significant number of the member States both servicemen and servicewomen are also entitled to parental leave (see paragraph 74 above). It follows from the above that contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition. The Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States concerning this issue (see, *mutatis mutandis*, *Smith and Grady*, cited above, § 104).

141. Further, the Court considers that the Government's reference to positive discrimination is misconceived. The different treatment of servicemen and servicewomen as regards entitlement to parental leave is clearly not intended to correct the disadvantaged position of women in society or "factual inequalities" between men and women (contrast *Stec and Others*, cited above, §§ 61 and 66). The Court agrees with the applicant and the third party that such difference has the effect of perpetuating gender stereotypes and is disadvantageous both to women's careers and to men's family life.

142. Similarly, the difference in treatment cannot be justified by reference to traditions prevailing in a certain country. The Court has already found that States may not impose traditional gender roles and gender stereotypes (see the case-law cited in paragraph 127 above). Moreover, given that under Russian law civilian men and women are both entitled to parental leave and it is the family's choice to decide which parent should take parental leave to take care of the new-born child, the Court is not convinced by the assertion that Russian society is not ready to accept similar equality between men and women serving in the armed forces**.**

143. The Court concludes from the above that the reference to the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave. The

Court agrees with the Chamber that gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.

144. Nor is the Court persuaded by the Government's second argument, namely that the extension of the parental leave entitlement to servicemen would have a negative effect on the fighting power and operational effectiveness of the armed forces, while the granting of parental leave to servicewomen does not entail such risk because in the armed forces women are less numerous than men. There is no indication that any expert study or statistical research was ever made by the Russian authorities to evaluate the number of servicemen who would be in a position to take three years' parental leave at any given time and would be willing to do so, and to assess how this would affect the operational effectiveness of the army. In the Court's view the mere fact that all servicemen are of a "childbearing" age, as asserted by the Government (see paragraph 113 above), is insufficient to justify the difference in treatment between servicemen and servicewomen. The statistical information submitted by the Government at the request of the Court is inconclusive (see paragraphs 113 and 114 above). It does not indicate either the total number of military personnel (both military personnel under contract and conscripts) or the number of servicemen having children under the age of three. It therefore does not help to establish, even approximately, the percentage of servicemen that would be eligible to take parental leave at any given time. Nor is it possible, in the absence of any survey of servicemen's willingness to take parental leave or any statistical information on the take-up rates among the civilian population, to make an assessment of how many servicemen would actually make use of the entitlement to parental leave. The Government's claim that such servicemen would be numerous contradicts their argument that this is an isolated case not disclosing any systemic problem under the Convention (see paragraph 118 above). In such circumstances the Court cannot accept the Government's assertion as to the risk to operational effectiveness of the army because it has not been "substantiated by specific examples" (see the case-law in paragraph 137 above).

145. Further, the Court notes the rigidity of the Russian legal provisions on parental leave in the army. It is not persuaded by the Government's argument that Russian law provides for exceptions to the rule that servicemen are not entitled to parental leave. Article 32 § 7 of the Regulations on military service (see paragraph 48 above), to which the Government referred, provides for three months' special leave, which is clearly different from three years' parental leave. It can be seen from the Constitutional Court's judgment that it is not a substitute for normal parental leave because its purpose is to give the serviceman a reasonable

opportunity to arrange for the care of his child and, depending on the outcome, to decide whether he wishes to continue the military service (see paragraph 34 above). As regards the Government's reference to section 10(9) of the Military Service Act (see paragraph 47 above), the applicant relied on that legal provision in the domestic proceedings, but the national courts found that it could not serve as a basis for granting three years' parental leave to a serviceman (see paragraphs 17 and 26 above). Further, it is clear from the Constitutional Court's judgment and from the judgments of the domestic courts in the applicant's case that Russian law does not give a serviceman the right to three years' parental leave. In this connection the Court takes particular note of the first-instance and appeal judgments, which state that "male military personnel have no entitlement to three years' parental leave even in those cases where their children are left without maternal care" and that "male military personnel are not in any circumstances entitled to parental leave" (see paragraphs 26 and 29 above). It also takes note of the judicial decision of 8 December 2006 finding that the military unit's decision to grant the applicant parental leave on an exceptional basis was unlawful (see paragraph 32 above).

146. As to the examples of cases where parental leave was granted to servicemen, the Court notes that only one such example was provided by the Government (see paragraph 117 above) and this does not suffice, in the Court's view, to show the existence of settled domestic practice (see, for a similar approach, *Kozhokar v. Russia*, no. 33099/08, § 93, 16 December 2010, and *Horvat v. Croatia*, no. 51585/99, § 44, ECHR 2001-VIII). The remaining examples referred to by the Government concern the granting of parental leave to police officers and are therefore irrelevant for the present case. Accordingly, the Government did not submit convincing evidence to show that the exception to which they referred operated in practice or to prove that a case-by-case assessment was indeed possible and that servicemen were granted parental leave when their particular situation so required.

147. That being said, the Court accepts that, given the importance of the army for the protection of national security, certain restrictions on the entitlement to parental leave may be justifiable, provided they are not discriminatory. In the Court's opinion there are means to attain the legitimate aim of protecting national security other than by limiting the parental leave entitlement to servicewomen while excluding all servicemen from such entitlement. Indeed, in a significant number of the member States both servicemen and servicewomen are entitled to parental leave (see paragraph 74 above). The Court notes with particular interest the legal provisions on parental leave existing in such countries as the Netherlands, Germany and the United Kingdom (see paragraph 75 above). Their example illustrates that there are techniques which can be employed to accommodate

legitimate concerns about the operational effectiveness of the army and yet afford military personnel equal treatment in the sphere of parental leave.

148. The Court takes note of Article 1 of ILO Convention No. C111 concerning Discrimination in Respect of Employment and Occupation according to which any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination (see paragraph 52 above). It is however not convinced that the exclusion from the entitlement to parental leave in the present case may be regarded as being based on an inherent requirement of military service. Indeed, female military personnel are entitled to parental leave and the exclusion concerns only servicemen. At the same time it considers that, having regard to the specific demands imposed by military service, it may be justifiable to exclude from the entitlement to parental leave any personnel, male or female, who may not easily be replaced in their duties owing to such factors as, for example, their hierarchical position, rare technical qualifications or involvement in active military actions. In Russia, by contrast, the entitlement to parental leave depends exclusively on the sex of the military personnel. By excluding servicemen from the entitlement to parental leave, the provision imposes a blanket restriction. It applies automatically to all servicemen, irrespective of their position in the army, the availability of a replacement or their individual situation. Such a general and automatic restriction applied to a group of people on the basis of their sex must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 14.

149. The Court observes that the applicant, who served as a radio intelligence operator, was capable of being replaced by either servicemen or servicewomen. It is significant that equivalent posts in the applicant's unit were often held by servicewomen and that he himself was frequently replaced in his duties by servicewomen (see paragraph 11 above). Those servicewomen had an unconditional entitlement to three years' parental leave. The applicant, by contrast, did not have such entitlement, and that was only because he was a man. He was therefore subjected to discrimination on grounds of sex.

150. Finally, as regards the Government's argument that by signing a military contract the applicant had waived his right not to be discriminated against, the Court considers that, in view of the fundamental importance of the prohibition of discrimination on grounds of sex, no waiver of the right not to be subjected to discrimination on such grounds can be accepted as it would be counter to an important public interest (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 204, ECHR 2007-IV, for a similar approach in respect of racial discrimination).

151. In view of the foregoing, the Court considers that the exclusion of servicemen from the entitlement to parental leave, while servicewomen are

entitled to such leave, cannot be said to be reasonably or objectively justified. The Court concludes that this difference in treatment, of which the applicant was a victim, amounted to discrimination on grounds of sex.

152. There has therefore been a violation of Article 14 taken in conjunction with Article 8.

II. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

153. The applicant complained that the prosecutor's visit to his home shortly before the Grand Chamber hearing amounted to a hindrance to the exercise of his right of individual petition under Article 34 of the Convention, which reads, in so far as relevant, as follows:

> "The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

A. Submissions by the parties

1. The applicant

154. The applicant submitted that there had been no reason for the prosecutor to come to his flat. Firstly, he had not concealed the information about his remarriage to his former wife and the birth of their fourth child from the authorities. On the contrary, he had informed the head of his military unit about these facts. If it had been necessary to obtain further information from him, he could have been summoned to the prosecutor's office, which was not the case. The Government's allegation that summonses had been sent to him were not supported by any evidence. Moreover, it was significant that night visits were unlawful under domestic law. In the applicant's opinion, it was clear from the above that the sole purpose of the night visit was to put pressure on him before the Grand Chamber hearing in violation of Article 34 of the Convention (he referred to *Popov v. Russia*, no. 26853/04, § 249, 13 July 2006; *Fedotova v. Russia*, no. 73225/01, § 51, 13 April 2006; *Knyazev v. Russia*, no. 25948/05, § 115, 8 November 2007; and *Ryabov v. Russia*, no. 3896/04, § 59, 31 January 2008). Indeed, the applicant and his family had felt intimidated and frightened.

155. As regards the Government's claim that he had distorted the facts surrounding the visit (see paragraph 157 below), the applicant confirmed that there had been a typing error in respect of his parents-in-law's age in the English version of his submissions (the Russian version had been correct). He however insisted that the remaining information provided by

him was accurate. In his opinion, the Government had attempted to denigrate him in order to weaken his case.

2. The Government

156. The Government confirmed that a prosecutor had indeed visited the applicant at 9 p.m. on 31 March 2011. The purpose of the visit, however, had not been to intimidate the applicant, but to obtain up-to-date information about his situation, in particular about the places where he, his wife and their children currently lived and about the payment of child maintenance by the mother. The prosecutor had summoned the applicant to come to his office on 30 or 31 March 2011. As the applicant had failed to be there at the appointed time, the prosecutor had visited him at home. The applicant had, however, refused to reply to the prosecutor's questions, thereby showing disrespect for the authorities. The Government concluded that the Russian authorities had not in any way hindered the applicant's right of petition.

157. Finally, referring to their submissions in respect of the alleged abuse of the right of petition, the Government alleged that the applicant had a tendency to exaggerate and distort information. Thus, the visit had been made at 9 p.m. and not at 10 p.m. as claimed by the applicant. The applicant had moreover lied about the age of his parents-in-law.

B. The Court's assessment

158. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 105, *Reports* 1996-IV, and *Aksoy v. Turkey*, 18 December 1996, § 105, *Reports* 1996-VI). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy (see *Kurt v. Turkey*, 25 May 1998, § 159, *Reports* 1998-III).

159. Whether or not contacts between the authorities and an applicant are tantamount to unacceptable practice from the standpoint of Article 34 must be determined in the light of the particular circumstances of the case. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities (see *Akdivar and Others*, cited above, § 105, and *Kurt*, cited above, § 160). Even an informal "interview" with the applicant, let alone his or her formal questioning in respect of the Strasbourg proceedings, may be regarded as a

form of intimidation (contrast *Sisojeva and Others v. Latvia* [GC], no. 60654/00, §§ 117 et seq., ECHR 2007-I).

160. The Court has emphasised on several occasions that it was in principle not appropriate for the authorities of a respondent State to enter into direct contact with an applicant in connection with his case before the Court (see *Ryabov v. Russia*, cited above, §§ 59-65; *Fedotova*, cited above, § 51; *Akdeniz and Others v. Turkey*, no. 23954/94, §§ 118-121, 31 May 2001; *Assenov and Others v. Bulgaria*, 28 October 1998, §§ 169-171, *Reports* 1998-VIII; and *Ergi v. Turkey*, 28 July 1998, § 105, *Reports* 1998-IV). In particular, if a Government had reason to believe that in a particular case the right of individual petition had been abused, the appropriate course of action was for that Government to alert the Court and to inform it of its misgivings. Questioning by the local authorities can very well be interpreted by the applicant as an attempt to intimidate him (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 131-133, ECHR 1999-IV).

161. At the same time the Court reiterates that not every enquiry by the authorities about an application pending before the Court can be regarded as "intimidation". For example, the Court has found that the authorities' contacts with an applicant for the purpose of securing a friendly-settlement agreement do not amount to hindrance of the exercise of his right of individual petition, provided that steps taken by a State in the context of settlement negotiations with an applicant do not involve any form of pressure, intimidation or coercion (see *Yevgeniy Alekseyenko v. Russia*, no. 41833/04, §§ 168-174, 27 January 2011). In other cases concerning questioning by the local authorities of an applicant about the circumstances underlying his application, the Court was also unable to find, in the absence of evidence of pressure or intimidation, that the applicant was hindered in the exercise of his right of individual petition (see *Manoussos v. the Czech Republic and Germany* (dec.), no. 46468/99, 9 July 2002, and *Matyar v. Turkey*, no. 23423/94, §§ 158-159, 21 February 2002).

162. Turning to the circumstances of the present case the Court notes that in the evening of 31 March 2011 an official from the local military prosecutor's office came to the applicant's flat. The official stated that he was conducting an inquiry at the request of the Representative of the Russian Federation at the European Court of Human Rights. He asked questions about the applicant's family life and requested him to produce documents. The official remained in the flat for about an hour and left only after the applicant had signed a written statement refusing to answer his questions.

163. The Court accepts that the applicant and his family felt intimidated and frightened by the prosecutor's visit to their home. However, there is no evidence that the visit – which apparently pursued the aim of obtaining up-to-date information about the applicant's family situation for the purpose of the Government's submissions to the Court (see paragraphs 41 and 156

above) – and the circumstances attending it were calculated to induce the applicant to withdraw or modify his complaint or otherwise interfere with the effective exercise of his right of individual petition, or indeed had this effect. Thus, the authorities of the respondent State cannot be held to have hindered the applicant in the exercise of his right of individual petition. Accordingly, the respondent State has not breached its obligations under Article 34 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

164. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

165. The applicant claimed 400,000 euros (EUR) in respect of non-pecuniary damage. In respect of pecuniary damage, he claimed 59,855.12 Russian roubles (RUB), representing the bonuses he would have received if he had not been subjected to disciplinary sanctions for his absence during his parental leave.

166. The Government submitted that the claim for pecuniary damage was not substantiated by any documents. The applicant had been subjected to disciplinary sanctions even before the birth of his child. He had moreover received financial aid in an amount exceeding the losses allegedly sustained by him. The claim for non-pecuniary damage was excessive. The applicant had been granted parental leave and had received financial aid. He had not therefore suffered any distress in connection with the alleged violation of the Convention.

167. The Court observes that the applicant did not submit any documents to substantiate his claim for pecuniary damage. It therefore rejects that claim.

168. As regards non-pecuniary damage, the Court considers that the applicant must have suffered distress and frustration as a result of the discrimination on grounds of sex to which he had been subjected. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,000 for non-pecuniary damage, plus any tax that may be chargeable on the above amount.

B. Costs and expenses

169. Relying on a legal fee agreement, the applicant claimed EUR 5,000 for legal fees incurred before the Grand Chamber.

170. The Government considered the amounts claimed by the applicant to be excessive. The applicant was granted legal aid. The case was not a complex one and did not require much work on the part of the representatives. Moreover, according to the legal fee agreement, the applicant was to pay his representatives RUB 160,000, that is about EUR 4,000.

171. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and to the fact that legal aid was paid to the applicant, the Court considers it reasonable to award the sum of EUR 3,150, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Dismisses*, by sixteen votes to one, the Government's preliminary objections;

2. *Holds*, by sixteen votes to one, that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 of the Convention;

3. *Holds*, by fourteen votes to three, that the respondent State has not failed to comply with its obligations under Article 34 of the Convention;

4. *Holds*, by fourteen votes to three,

   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:

      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,150 (three thousand one hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 March 2012.

Johan Callewaert	Nicolas Bratza
Deputy to the Registrar	President

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

(a) partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque;

(b) partly dissenting opinion of Judge Kalaydjieva;

(c) partly dissenting opinion of Judge Nußberger joined by Judge Fedorova;

(d) dissenting opinion of Judge Popović.

N.B.
J.C.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

The *Markin* case is about the role of parents in the early stages of a child's life and the justification for a special parental status of servicemen. I concur with the decision of the Court regarding the finding of a violation of Article 8 taken in conjunction with Article 14, although for reasons significantly different from those adduced in the judgment. These reasons relate to the nature of the right to parental leave, which can only be properly assessed in the light of the evolving protection of social rights by the European Convention on Human Rights ("the Convention"). In addition, I find it important, for both practical and theoretical reasons, to analyse separately the double nature of the discrimination suffered by the applicant as a serviceman: in relation to servicewomen (the sexual-discrimination issue) and in relation to civilian men (the professional-discrimination issue). Finally, I dissent on the finding that there has been no violation of Article 34.

The dissenting opinion

The peaceful enjoyment of the applicant's home

I dissent as far as the complaint based on Article 34 is concerned. I find the interference with the applicant's right to the peaceful enjoyment of his home during the night unacceptable. Regardless of the precise hour the visit to the applicant's home began, it is not disputed that it went on through the night. The Court has repeatedly repudiated any related contact by the national authorities with the applicant and his family while the complaint is pending before the Court. In the present case, two elements compound the gravity of the interference. Firstly, the interference took place during the night in the applicant's home, in other words, in a space of particular intimacy and at a time of significant vulnerability for the applicant and his family. Secondly, the information which was required by the enquiring official could have been obtained elsewhere and in another manner. The authorities chose the wrong method to gather the information they were looking for. If they did not intend to intimidate, the fact remains that their behaviour was objectively intimidating and was felt as such by the applicant and his family, thus resulting in a breach of Article 34.

The concurring opinion

The nature of the right to parental leave

Parental leave is a period of time, immediately subsequent to maternity leave, of authorised absence from work, during which the employment contract or relationship and the rights resulting from it are safeguarded. The right to parental leave is a Convention right. Parental leave does not only come within the scope of Article 8 of the Convention, by promoting family life and affecting the way in which it is organised. It derives directly from Article 8. Parental leave is protected by Article 8 of the Convention in as much as it is an essential guarantee of the bond between a parent and his or her child at a time of particular vulnerability and special need for the child. The family ties which are thus protected may be based on a biological relationship of motherhood or fatherhood, or a legal relationship of adoption, or any other legally equivalent relationship. The right to parental leave is a fundamental Convention right which belongs to the core of the human rights of the family.

The right to parental leave thus has two complementary facets: firstly, it is a social right, which safeguards the position of a worker with regard to his or her employment; and, secondly, it is also a Convention right, which protects the bond between parent and child. In other words, the right to parental leave is not an *ex novo* Convention right, but an additional facet of the right to respect for family life which the Convention as a living instrument certainly encompasses. Some major practical consequences flow from this reasoning. Firstly, States have a positive obligation to create a legal system of parental leave. Secondly, parental leave is protected by Article 8 of the Convention independently of any discriminatory infringement of Article 14.

The Court has been increasingly open to admitting the protection of social rights under the Convention through its Article 14. According to established jurisprudence, Article 14 covers not only the enjoyment of the rights foreseen by the Convention but also those rights that "fall within the ambit" of a Convention provision and that a State has chosen to guarantee, even if in so doing it goes beyond the requirements of the Convention itself[1]. Based on this method of interpretation, the Court has reproached the

1. This principle was expressed for the first time by the Court in the *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (merits), 23 July 1968, p. 33, § 9, Series A no. 6). In other words, Article 14 also applies when "the subject matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed" (*National Union of Belgian Police v. Belgium*, 27 October 1975, § 45, Series A no. 19) or the measures complained of are "linked to the exercise of a

discriminatory application of social rights which come within the ambit of Convention provisions[1]. But social rights have also been derived directly from Convention provisions without any reference to discriminatory treatment of the applicant, such as the right to medical treatment for people under the State's authority[2], the right to medical treatment for every citizen[3], the right to a healthy environment[4], the right to housing[5], the right to an old-

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right guaranteed" by the Convention (*Schmidt and Dahlström v. Sweden*, 6 February 1976, § 39, Series A no. 21). The Court has added that the notion of discrimination within the meaning of Article 14 includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94).

1. Such as different tax-exemption regimes for residents and non-residents (*Darby v. Sweden*, 23 October 1990, §§ 33-34, Series A no. 187), different emergency-assistance regimes for nationals and non-nationals (*Gaygusuz v. Austria*, 16 September 1996, § 50, *Reports of Judgments and Decisions* 1996-IV), different contributory obligations for unmarried childless men aged 45 or over and unmarried childless women of the same age (*Van Raalte v. the Netherlands*, 21 February 1997, § 43, *Reports* 1997-I), different pension-entitlement regimes of married women and married men (*Wessels-Bergervoet v. the Netherlands*, no. 34462/97, § 54, ECHR 2002-IV), different pension-entitlement regimes for former servicemen (*Bucheň v. the Czech Republic*, no. 36541/97, §§ 74-76, 26 November 2002) and different pension-entitlement regimes for nationals and non-nationals (*Andrejeva v. Latvia* [GC], no. 55707/00, §§ 88-91, ECHR 2009).

2. This right has been construed upon Article 3 (*İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII; *Kudła v. Poland* [GC], no. 30210/96, §§ 91-94, ECHR 2000-XI; *Mouisel v. France*, no. 67263/01, §§ 40-42, ECHR 2002-IX; *Paladi v. Moldova* [GC], no. 39806/05, § 71, 10 March 2009; *V.D. v. Romania*, no. 7078/02, §§ 94-99, 16 February 2010; and *Slyusarev v. Russia*, no. 60333/00, § 43, 20 April 2010).

3. This right has been based on Article 8 (*Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; *Tysiąc v. Poland*, no. 5410/03, §§ 107-08, ECHR 2007-I; and *A, B and C v. Ireland* [GC], no. 25579/05, § 245, ECHR 2010) or on Article 2 (*Oyal v. Turkey*, no. 4864/05, § 72, 23 March 2010).

4. This right has been derived from Article 8 (*López Ostra v. Spain*, 9 December 1994, § 51, Series A no. 303-C; *Guerra and Others v. Italy*, 19 February 1998, §§ 57- 60, *Reports* 1998-I; *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §§ 96-99, ECHR 2003-VIII; and *Georgel and Georgeta Stoicescu v. Romania*, no. 9178/03, §§ 61-62, 26 July 2011) or from Article 2 (*Öneryıldız v. Turkey* [GC], no. 48939/99, § 90, ECHR 2004-XII). In a case of conflicting social rights, the Court has even decided that the State's positive obligation to protect the environment prevails over the obligation to protect a minority's way of life in the relevant regulatory planning framework (*Chapman v. the United Kingdom* [GC], no. 27238/95, §§ 96, 113-15, ECHR 2001-I).

5. The failure to provide proper housing has been censured under Article 3 (*Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, §§ 107 (g) and 110, ECHR 2005-VII, and *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 263-64, ECHR 2011) or under Article 8 (*Marzari v. Italy* (dec.), no. 36448/97, 4 May 1999, with regard to an "individual suffering from a severe disease", and *Stanková v. Slovakia*, no. 7205/02, §§ 60-62, 9 October 2007, which finds the reasoning of the Constitutional Court "convincing"). The Court has even been prepared to assess public policies on housing from the perspective of their impact on the rights of owners (*James and Others v. the United*

age pension[1], the right to collective negotiations and the right to strike[2]. An additional right to a fair procedure in the determination of one's social rights has been established[3].

The acknowledgment of social rights under the Convention by the Court faces two principled critiques. It has been pointed out that, by doing so, the Court oversteps its remit and imposes international obligations which the Contracting Parties to the Convention did not agree upon, since the founding fathers intended to recognise in the Convention only civil and political rights[4]. This argument is flawed for two reasons. Firstly, it ignores the purpose of the Convention as a treaty which envisages the "development" of human rights in the light of the Universal Declaration on Human Rights, where economic and social rights are foreseen. This clear

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Kingdom, 21 February 1986, § 46, Series A no. 98; *Mellacher and Others v. Austria*, 19 December 1989, § 45, Series A no. 169; *Spadea and Scalabrino v. Italy* , 28 September 1995, § 29, Series A no. 315-B; and *Hutten-Czapska v. Poland* [GC], no. 35014/97, §§ 224-25, 239, ECHR 2006-VIII).

1. The Court considered that a "wholly insufficient" pension raised an issue under Article 3 (*Larioshina v. Russia* (dec.), no. 56869/00, 23 April 2002, and *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009) or under Article 2 (*Kutepov and Anikeyenko v. Russia*, no. 68029/01, § 62, 25 October 2005, and *Huc v. Romania and Germany* (dec.), no. 7269/05, § 59, 1 December 2009).

2. The Court derived the right to collective negotiations foreseen by Article 6 of the European Social Charter from the freedom to form trade unions, as provided for in Article 11 of the Convention, in spite of the fact that the respondent State had not accepted Article 6 when it ratified the Charter (*Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 153 and 154, ECHR 2008). This approach was reiterated in *Enerji Yapi-Yol Sen v. Turkey* (no. 68959/01, §§ 24, 31-32, 21 April 2009), which acknowledged the right to strike under Article 11 of the Convention.

3. Such as procedures for the determination of sickness allowances (*Feldbrugge v. the Netherlands*, 29 May 1986, § 40, Series A no. 99), social security allowances based on an industrial-accident insurance scheme (*Deumeland v. Germany*, 29 May 1986, § 75, Series A no. 100) or reversionary pensions (*Massa v. Italy*, 24 August 1993, § 26, Series A no. 265-B). The positive obligation to establish a judicial system which ensures effective protection of a social right has already been determined by the Court (*Danilenkov and Others v. Russia*, no. 67336/01, § 136, ECHR 2009).

4. See, for instance, Renucci, *Traité de Droit Européen des Droits de l'Homme*, Paris, 2007, pp. 492-93. In the same vein there is the criticism according to which, since there is no clear definition of a right which "falls within the ambit" of a provision of the Convention, no dividing line has been drawn between those cases which should be dealt with under Article 14 of the Convention and those that should be examined in accordance with Article 1 of Protocol No. 12, and therefore any right set forth by national law could artificially be considered to "fall within the ambit" of the Convention itself (for example, Tomuschat, "Social rights under the European Charter on Human Rights", in Breitenmoser (Hrsg.), *Human Rights, Democracy and the Rule of Law:* Liber Amicorum *Luzius Wildhaber*, Zürich, 2007, p. 862-63, Sudre, "La protection des Droits Sociaux par la Cour Européenne des Droits de l'Homme: Un Exercise de « Jurisprudence Fiction »?", in *Revue Trimestrelle des Droits de l'Homme*, 55, 2003, p. 770, and Lucas-Albertini, *Le Revirement de Jurisprudence de la Cour Européenne des Droits de l'Homme*, Brussels, 2008, p. 326).

intention is expressed in the Preamble to the Convention and is confirmed by the Convention provisions on the right to join a trade union and the prohibition of forced labour, and the subsequent adoption of Protocols on the right to property and the right to education[1]. In addition, there is no unequivocal dividing line between civil rights and social rights, and most of the civil rights have social and economic derivations[2].

Secondly, the disputed argument neglects the nature of the Convention as a "living instrument", which evolves and adapts to the actual circumstances of Europeans. Whilst the preparatory work in respect of the Convention shows a special concern of the founding fathers for the protection of civil and political rights on a continent recently devastated by war and the concomitant grave human rights breaches[3], that concern does not correspond to the circumstances of Europeans today. The petrification of the Convention would not only depart from the common rules of treaty interpretation, which leave a supplementary role to the preparatory work and give preference to the letter, purpose and object of the provision (see Article 31 § 1 of the Vienna Convention on the Law of Treaties): it would also ultimately disregard the true intention of the founding fathers, namely to create an instrument for the guarantee of rights that are practical and effective, not theoretical and illusory.

It is also argued that the inherently vague and technical nature of social rights makes them judicially unenforceable. Social rights are said to be mere aspirational policy goals or action programmes directed at the political and administrative branches of the State and do not lend themselves to any judicial review. This argument overlooks the notion of a minimum core of

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1. See on the social content of the Convention, among others, Pellonpää, "Economic, social and cultural rights", in MacDonald/Matscher/Petzold (eds.), *The European system for the protection of human rights*, Dordrecht, 1993, pp. 859-66, Costa, "La Cour Européenne des Droits de l'Homme et la Protection des Droits Sociaux", in *Revue Trimestrelle des Droits de l'Homme*, 21, 2010, pp. 212-16, and Eichenhofer, "Der sozialrechtliche Gehalt der EMRK-Menschenrechte", in Hohmann-Dennhardt/Masuch/ Villiger, *Festschrift für Renate Jaeger, Grundrechte und Solidarität, Durchsetzung und Verfahren*, 2011, pp. 628-35.

2. See *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32. Cases involving financial implications for the State are not necessarily off limits for the Court, since the implementation of basic civil rights does imply public costs. The provision of State-paid legal and interpretative assistance is a good example. In fact, civil and social rights are interdependent and interrelated. There is no watertight division into two separate sets of human rights. In this sense, see, for instance, the preamble to the European Social Charter, the preamble to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Vienna Declaration and Programme of Action, proclaimed by the World Conference on Human Rights (A/CONF.157/23, 12 July 1993, § 5), and Recommendation 1415 of 23 June 1999 of the Parliamentary Assembly of the Council of Europe.

3. See *Travaux préparatoires* 1, p. 194.

fundamental rights[1]. Social rights, as any other fundamental rights, have a minimum core which can and should be determined and enforced by courts, according this task the greatest relevance especially in times of financial hardship, when social rights are the first to be neglected[2]. If wide latitude is

1. The notion of minimum core obligations as developed by the United Nations Committee on Economic, Social and Cultural Rights must be taken in account. In its General Comment No. 3, the Committee was "of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [was] incumbent upon every State party." (see General Comment No. 3, UN doc. E/1991/23, § 10, confirmed by General Comment No. 12, UN doc. E/2000/22, § 17, General Comment No. 13, E/C.12/1999/10, § 57, General Comment No. 14, UN doc. E/C.12/2000/4, §§ 43-47, and General Comment No. 15, UN doc. E/C.12/2002/11, §§ 37-40, General Comment No. 17, E/C.12/GC/17, § 39, General Comment No. 18, E/C.12/GC/18, § 31, General Comment No. 19, E/C.12/GC/19, § 59, and General Comment No. 21, E/C.12/GC/21, § 55). The Limburg Principles on the Implementation of the ICESCR (UN Doc. E/CN.4/1987/19) and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (UN Doc. E/C.12/2000/13) have further clarified States' obligations in the field of economic and social rights. In its Resolution 1993/14, the Commission on Human Rights urged States to "consider identifying specific national benchmarks designed to give effect to the minimum core obligation to ensure the satisfaction of minimum essential levels of each of the [economic, social and cultural] rights". In its Annual Report of 1994, the Inter-American Commission on Human Rights declared that "the obligation of member States to observe and defend the human rights of individuals within their jurisdictions, as set forth in both the American Declaration and the American Convention, obligates them, regardless of the level of economic development, to guarantee a minimum threshold of these rights". The Committee of Ministers of the Council of Europe (Recommendation R (2000) 3 of 19 January 2000), as well as the European Committee of Social Rights, also defended the need for legal protection of a minimum level of certain social rights (for the position of the Committee, see Mikkola, *Social Human Rights in Europe*, Porvoo, 2010, pp. 316-17). Finally, renowned international law scholars have supported this approach, such as Alston, "Out of the abyss: the challenges confronting the new U.N. Committee on Economic, Social and Cultural Rights", in *Human Rights Quarterly*, 9, 1987, pp. 352-53, Craven, *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development*, Oxford, 1995, pp. 141-43, Liebenberg, "Adjudicating social rights under a transformative Constitution", in Langford (ed.), *Social rights jurisprudence, Emerging trends in international and comparative law*, Cambridge, 2008, pp. 89-91, Fredman, *Human Rights Transformed, Positive rights and positive duties*, Oxford, 2008, pp. 84-87, Tushnet, *Weak Courts, Strong Rights*, Princeton, 2009, pp. 242-47, and Kerdoun, "La Place des Droits Économiques, Sociaux et Culturels dans le Droit International des Droits de l'Homme", in *Revue Trimestrelle des Droits de l'Homme*, 22, 2011, p. 511.

2. Stressing this point, Alexy, in *A Theory of Constitutional Rights*, Oxford, 2002, p. 344, writes: "it is precisely in times of crisis that even a minimal constitutional protection of social rights seems indispensable". The exact same thought may be found in Alston/Quinn, "The nature and scope of States Parties' obligations under the International Covenant on Economic, Social and Cultural Rights", in *Human Rights Quarterly*, 9, 1987, p. 164: "Endeavours to ensure respect for human rights must be pursued in bad times as well as the good times. Indeed, it is in periods of extreme hardship, whether of an economic or political nature, that human rights guarantees assume their greatest relevance", and Dankwa/Flinterman/Leckie, "Commentary to the Maastricht Guidelines on Violations of

given to the State to take the appropriate social-policy measures, the Court's role is to determine whether they fall within the bounds of "reasonableness"[1]. The reasonableness of State social policy is assessed in terms of its proportionality in the sense that it must not only cater even-handedly for all social groups, but must also counterbalance factual inequalities and pay special attention to the most vulnerable social groups[2].

Economic, Social and Cultural Rights", in *Human Rights Quarterly*, 20, 1998, p. 717: "Every State that has accepted legal obligations … agrees that under all circumstances, including periods characterized by resource scarcity, basic minimum obligations and corresponding essential rights remain in place".

1. For the assessment of the "reasonableness" of policy choices on social rights, see the recent cases of *Valkov and Others v. Bulgaria*, nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, §§ 91-97, 25 October 2011 (not final); *Bah v. the United Kingdom*, no. 56328/07, §§ 37 and 50, ECHR 2011; and *Schuitemaker v. the Netherlands* (dec.), no. 15906/08, 4 May 2010; and those mentioned above on the right to housing. The principle of the judiciability of social rights in European human rights law is shared by universal human rights law (see CESCR General Comment No. 3, cited above, §§ 4-5, General Comment No. 9, E/C.12/1998/24, § 10, the Limburg Principles, cited above, § 19, and the Maastricht Guidelines, cited above, § 22) and Inter-American human rights law (Inter-American Court of Human Rights, *Acevedo Buendia* et al. *v. Peru*, 1 July 2009, §§ 102-03, and Inter-American Commission on Human Rights, Report on Admissibility and Merits No. 38/09, 27 March 2009, §§ 140-47) and African human rights law (African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center for Economic and Social Rights (SERAC) v. Nigeria*, Communication No. 155/96, 27 May 2002, §§ 61, 62, 64, 68, and *Purohit and Moore v. Gambia*, Communication No. 241/2001, 29 May 2003, §§ 81-83).

2. See *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (merits), 23 July 1968, p. 34, § 10, Series A no. 6 ("certain legal inequalities tend only to correct factual inequalities"), *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 51 and 66, ECHR 2006-VI, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 175, 181-82, ECHR 2007-IV, *Oršuš and Others v. Croatia* [GC], no. 15766/03, §§ 147-48, 182, ECHR 2010, *Andrle v. the Czech Republic*, no. 6268/08, § 48, 17 February 2011, and *Oyal v. Turkey*, no. 4864/05, 23 March 2010. The same approach has been adopted by the European Committee of Social Rights (*International Association Autism-Europe (IAAE) v. France*, Complaint no. 13/2002, decision of 4 November 2003, § 53), following in the footsteps of some national courts, such as the German Constitutional Court (see the ground-breaking decision of 18 June 1975, BVerfGE 40, 133, on a constitutional right to a "*menschenwürdigen Existenzminimums*"), the Swiss Federal Court (see the leading case of *V. v. Einwohnergemeinde X. und Regierungsrat des Kantons Bern*, decision of 9 June 2006, on an implied constitutional right to "*conditions minimales d'existence*") and, as part of a transformative Constitution, the Portuguese Constitutional Court (see decisions 39/1984, 330/1989, 148/1994, 62/2002 and 509/2002 on the constitutional guarantee of a minimum "social income" and of a "social minimum adequate for a decent life" in the public sector with regard to health and education). This European standard corresponds to the universal human rights standard (see CESCR, General Comment No. 3, cited above, § 12, "Statement by the Committee: An evaluation of the obligation to take steps to the 'maximum of available resources' under an optional protocol to the Covenant", E/C.12/2007/1, 10 May 2007, § 4, the Limburg Principles, cited above, § 39, and the Maastricht Guidelines, cited

For instance, a social-policy measure will be "unreasonable", that is disproportionate, if it makes no provision for those most in need. A point of confluence is then found between the implementation of a "reasonable" social policy and the obligatory guarantee of the minimum core of the social right[1]. As Justice William Brennan so eloquently put it, "public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity'"[2].

The preceding considerations lead inevitably to the following conclusion: a social right can legitimately be derived from a Convention provision, even when such right is foreseen in the European Social Charter and the Contracting Party is not bound by the relevant provision of that Charter[3]. Thus, the fact alone that Article 27 § 2 of the European Social Charter guarantees the right to parental leave does not impede the acknowledgment of parental leave as a Convention right under Article 8 of the Convention, even if the Contracting Party has not accepted the former. In the instant case, it is noteworthy that the respondent State has accepted Article 27 § 2 of the European Social Charter, like almost all other States Parties to the Convention, and this enhances the undisputed nature of the right in the face of international law. Scientific and legal arguments can be presented to evidence this evolving right in the light of the Convention.

Evidence of the paramount importance of the physical and psychological relationship between parent and child at the very early stage of the child's life has been put forward in scientific studies. These studies have shown clear benefits of parental leave, including reduced infant-mortality rates and

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above, § 20) and the Inter-American human rights criterion (*Pueblo Bello Massacre v. Colombia*, judgment of 31 January 2006, §§ 111, 123, *Comunidad Indígena Yakye Axa v. Paraguay*, judgment of 17 June 2005, §§ 68, 167-68, and *Villagrán-Morales et al. v. Guatemala*, 19 November 1999, §§ 144, 191).

1. This confluence of criteria has been admitted by the CESCR, in its "Statement by the Committee", cited above, § 8 (f), and the Constitutional Court of South Africa in *Government of the Republic of South Africa and Others v. Grootboom and Others*, Case CCT 11/00, 4 October 2000, §§ 33, 36, 44, *Minister of Health and Others v. Treatment Action Campaign and Others*, Case CCT 8/02, 5 July 2002, §§ 34, 79, and in *Mazibuko and Others v. City of Johannesburg and Others*, CCT 39/09, 8 October 2009, § 67, and the Joint Committee on Human Rights of the House of Lords, Twenty-Ninth Report: Economic and social rights, 10 August 2008, §§ 172, 181. It should be noted that this confluence does not produce perfectly overlapping criteria, since the "reasonableness" (or proportionality) test does not cover exclusively minimum obligations. There may be cases where minimum obligations are met, but States are still failing to provide "reasonable" (proportionate) social policy measures.

2. *Goldberg v. Kelly*, 397 U.S. 254, 1970.

3. Renowned legal scholars have pointed precisely in the direction of the protection of social rights foreseen by the European Social Charter under the European Convention on Human Rights (Sudre, cited above, pp. 761-66, and Arandji-Kombé, "Quelques perspectives pour les 10 prochaines années?", in Olivier De Schutter (coord.), *The European Social Charter: A Social Constitution for Europe*, Brussels, 2010, p. 159).

long-term effects on children's cognitive and socio-emotional outcomes. In other words, there is a trade-off between parental leave and the child's health and academic performance[1]. Were such a right to parental leave not protected and effected, the general well-being of the child would be significantly prejudiced and the bond between parent and child would be considerably weakened. Parental leave has thus proved to be an essential instrument of social policy to guarantee the general well-being of the child and the healthy development of family ties.

Besides the mounting scientific evidence as to the utmost importance of parental leave, there is also an established international consensus on the recognition of a right to parental leave. Out of thirty-three member States of the Council of Europe, only one does not provide for parental leave at all, two States provide for parental leave only in the case of women and all the remaining States grant parental leave to both men and women. Servicemen and servicewomen benefit from a legal regime that is the same as, or similar to, that of civilians, except in five countries where only servicewomen are entitled to such leave. The political institutions of the Council of Europe have enshrined this consensus in a number of resolutions and recommendations[2]. Within the European Union, the Directive on parental

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1. See, among others, Cools/Fiva/Kirkebøen, *Causal effects of paternity leave on children and parents*, Discussion Papers No. 657, Statistics Norway, 2011; Rege/Solli, *The Impact of Paternity Leave on Long-term Father Involvement*, Cesifo Working Paper no. 3130, 2010; Lamb, *The Role of the Father in Child Development*, Hoboken, 2010; Liu/Skans, "The duration of paid parental leave and children's scholastic performance", in *The B.E. Journal of Economic Analysis and Policy*, 2010, vol. 10; Han/Ruhm/Waldfogel, "Parental leave policies and parents' employment and leave taking", in *Journal of Policy Analysis and Management*, 2009, Vol. 28, No. 1; Gupta/Smith/Verner, *Child Care and Parental Leave in the Nordic Countries: A Model to Aspire to?*, IZA Discussion Paper No. 2014, 2006; Tanaka/Waldfogel, "Effects of Parental Leave and Work Hours on Fathers' Involvement with their Babies", in *Community, Work and Family*, 10, 2007, No. 4; Tanaka, "Parental Leave and Child Health Across OECD Countries", in *The Economic Journal*, 2005, 115, pp. 7-28; Ruhm, "Parental Employment and Child Cognitive Development", in *Journal of Human Resources*, 2004, vol. 39, pp. 155-92; Jaumotte, *Labour force participation of women: empirical evidence on the role of policy and other determinants in OECD countries*, OECD Economic Studies, 2004; Tamis-Lemonda/Cabrera, *Handbook of Father Involvement: Multidisciplinary Perspectives*, Mahwah, NJ, 2002; Ermisch/Francesconi, "Family Structure and Mothers' Behaviour and Children's Achievements", in *Journal of Population Economics*, 2001, pp. 249-70. Parental leave also facilitates upward social mobility for children coming from low-income families (Esping-Andersen, "Untying the Gordian Knot of Social Inheritance", *Research in Social Stratification and Mobility*, 21, 2004, pp. 115-39, and Waldfogel, *Social Mobility, Life Chances and the Early Years*, CASE paper 88, 2004).

2. Resolution 1274 (2002) of the Parliamentary Assembly of the Council of Europe on Parental leave urged member States to guarantee the principle of paid parental leave including adoption leave. The same message was sent in Recommendation 1769 (2006) on the need to reconcile work and family life, where the Assembly stressed that parental leave should be made available to both fathers and mothers, "taking special care to ensure that

leave (Council Directive 96/34/EC of 3 June 1996, revised by Council Directive 2010/18/EU of 8 March 2010) represents the binding standard for member States of the Union, according to which parental leave is, in principle, available to both parents as a non-transferable, individual entitlement[1]. This consensus in European human rights law is reflected in international labour law, which has repeatedly acknowledged the right to parental leave since the 1980s, as evidenced by a number of recommendations of the International Labour Organisation (ILO): the Workers with Family Responsibilities Recommendation (R165), 1981, § 22 (1) to (3), the Part-Time Work Recommendation (R182), 1994, § 13, and the Maternity Protection Recommendation (R191), 2000, § 10 (3) to (5). Lastly, universal human rights law has joined the above-mentioned consensus. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has noted that the implementation of Article 3 of the International Covenant on Economic, Social and Cultural Rights, in relation to Article 9, requires, *inter alia*, guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women[2].

As a result of this wide international consensus in European and universal human rights law and international labour law, the approach taken by the Court in *Petrovic v. Austria* is manifestly outdated. The basic argument presented at that time, according to which the majority of member States of the Council of Europe did not provide for parental leave for fathers, does not correspond anymore to reality today. But coherence demands that conclusions must be drawn from this new consensus. If it is correct to conclude that no reason remains for a distinction on the basis of sex with respect to parental leave, it is all the more to be concluded that the right to parental leave itself is now understood by almost all member States of the Council of Europe and the international community in general to be an integral part and a constitutive element of the legal protection of the family and the parent-child relationship. Therefore, it can be inferred that the cost of parental leave is not likely to place an unnecessary and

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men are actually able to use it". Committee of Ministers Recommendation No. R (96) on reconciling work and family life and Recommendation Rec(2007)17 on gender-equality standards reiterated the same right, with the possibility of taking the leave on a part-time basis and of sharing it between parents. Finally, Recommendation Rec(2010)4 on the human rights of members of the armed forces stated clearly the right of servicemen and servicewomen to enjoy maternity and paternity leave.

1. The Court of Justice of the European Union has already decided that clauses of the framework agreement on parental leave annexed to the Council Directive can be relied on by individuals before a national court (case C-537/07, judgment of 16 July 2009, *Gomez Limon*, and, on the nature of this right, Henion/Le Barbier-Le Bris/Del Sol, *Droit Social Européen et International*, Paris, 2010, pp. 326-27).

2. General comment No. 16 (2005), E/C.12/2005/4, 11 August 2005, § 26.

impractical burden on the State's resources. In other words, the argument can no longer be made that the cost of human rights protection in this particular area does not derive from the choices of the legitimate representatives of the people. The common ground between laws of member States of the Council of Europe and international legal standards reveals a new facet of the right to respect for family life – a facet which has gained broad democratic legitimacy.

Consequently, there is a positive obligation for the Contracting Parties to the Convention to provide for a legal system of parental leave[1]. States are free to create a system of shared entitlement for men and women to parental leave or an individual right to parental leave, which cannot be transferred to the other parent. In order to promote gender equality, States may approve a paternity quota of leave that can only be taken by the father and is lost if he does not use it. Although the rules set by the Directive on parental leave are binding for countries in the European Union, the Convention does not impose the same legal standard in view of the lack of a European consensus as to the exact form, duration and conditions of parental leave among all member States of the Council of Europe. Yet the regime governing the right to parental leave, as those that govern any other social rights, is not entirely subject to the discretion of political majorities. Some fundamental features of this right can be ascertained in the light of the Convention and such a regime is therefore subject to the supervision of the Court. The classic Achilles heel of social rights being their effectiveness and judicial enforceability, a clear definition of the scope of competences of the legislature and the judiciary in the implementation of social rights is of the utmost importance.

Firstly, the right to parental leave benefits all citizens without any distinction based on sex or professional status. The armed forces, the police and domestic servants are not excluded from the beneficiaries of this

1. It is standing case-law of the Court to acknowledge the existence of positive obligations for the States to promote and guarantee the effective enjoyment of family life, going back to the *Marckx* case (*Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31). This obligation may consist in providing for an adequate legislative framework which promotes in practical and effective terms the right to respect for family life, as was firstly affirmed in the case of *X and Y v. the Netherlands* (26 March 1985, §§ 23, 28-30, Series A no. 91). In regard to the bond between the child and his or her parents, the Court has even admitted that "the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter, the child's integration in his family" (*Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 49, ECHR 2003-V). More specifically, the Inter-American Court of Human Rights has affirmed the State's obligation to adopt the "the measures required for children's existence to develop under decent conditions" (Advisory Opinion OC-17/2002 of 28 August 2002, § 80, and point 7 of the Opinion).

fundamental right[1]. The same applies to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency. The implementation of the right to parental leave within the private sector of the economy is the result of the horizontal effect of the human rights protection system[2].

Secondly, the right to parental leave has a minimum content. The ultimate objective of reconciliation of work, private and family life for working parents, and equality between men and women with regard to labour-market opportunities and treatment at work, must be borne in mind when establishing the form, duration and conditions of parental leave. At the end of a period of parental leave, workers have the right to return to the same job or, if that is not possible, to an equivalent job consistent with their employment contract or relationship. Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts must be maintained as they stand until the end of parental leave. Workers must be protected against less favorable treatment or dismissal on the grounds of an application for, or the taking of, parental leave. States are free to decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal manner or in the form of a time-credit system, as well as to make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification, but States may not, for instance, require an excessive qualifying period. States are also free to define the circumstances in which an employer is allowed to postpone the granting of parental leave as long as postponement is exclusively justified by extraordinary reasons related to the operation of the employer's organisation.

Thirdly, to guarantee the right to parental leave is an obligation of result, which the State is bound to achieve within a reasonable period of time through adequate legislative instruments[3]. This right may be restricted or

1. This has also been the firm position of the European Committee of Social Rights, as shown by the respective reports on the situation in the contracting States with regard to Article 27 § 2 of the Charter.

2. International liability may be engaged for State omission with regard to private actors' conduct contrary to economic and social rights (for example, African Commission on Human and Peoples' Rights, *SERAC v. Nigeria*, cited above, Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District v. Belize*, report No. 40/04, Case 12.053, and Committee on the Elimination of Discrimination against Women, *A.T. v. Hungary*, 2/2003, and Human Rights Committee, *Länsmann v. Finland no. 2*, Communication No. 671/1995).

3. Social rights are usually viewed as corresponding to obligations of conduct, the State being bound to take all reasonable legislative and administrative measures in order to achieve the progressive realisation of the right within available resources and without any time constraint. But the existence of social rights corresponding to obligations of result is also accepted. In its very first decision, the European Committee of Social Rights decided that the respect for the minimum labour age of 15 years required the *de facto* suppression

even annulled in exceptional circumstances[1], since the State is not constrained by a rigid principle of non-retrogression of social rights as long as retrogressive measures pursue general welfare aims and are implemented progressively and proportionately[2].

Discrimination against servicemen

In view of the minimum core of the Convention right to parental leave, as described above, a discriminatory legal regime of parental leave or the discriminatory application of a regime of parental leave will breach Article 8 taken separately and in conjunction with Article 14. This is true in

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and the effective punishment of all the practices contrary to this standard (*International Commission of Jurists v. Portugal*, Complaint No. 1/1998, § 32). Later, the Committee considered that the mere act of approval of legislative measures to provide handicapped people with education and professional orientation was not enough, since States should ensure that these legislative measures do have a concrete and practical effect. When the implementation of a social right was "exceptionally complex and particularly expensive", some flexibility was admitted, but the social right should be implemented in "reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources" (*International Association Autism-Europe (IAAE) v. France*, cited above, § 53, and *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, § 37). In particular, a time-limit for the introduction of adequate legislative changes may be appropriate in certain cases, as the Court allowed in *Šekerović and Pašalić v. Bosnia and Herzegovina*, nos. 5920/04 and 67396/09, 8 March 2011. In exceptional cases, an obligation of result may be imposed on the State for an indefinite period of time (*Oyal*, cited above).

1. A social right may be annulled if it was granted on an erroneous basis (*Iwaszkiewicz v. Poland*, no. 30614/06, § 55, 26 July 2011) or a false statement of the beneficiary (*Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009) or by a totalitarian regime for the personal benefit of a member of the ruling party (see, *mutatis mutantis*, *Tesař and Others v. the Czech Republic*, no. 37400/06, § 73, 9 June 2011), but the annulment may not deprive the beneficiary of his or her basic means of subsistence (*Moskal v. Poland*, no. 10373/05, §§ 73-75, 15 September 2009).

2. For an assessment of retrogressive legislation, see *Valkov and Others*, cited above, and for retrogression resulting from a collective agreement, see *Aizpurua Ortiz and Others v. Spain*, no. 42430/05, 2 February 2010. The European approach is substantively close to the universal human rights standard (International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports* 2004, § 136, CESCR General Comment No. 3, cited above, § 9, General Comment No. 13, cited above, § 45, General Comment No. 14, cited above, §§ 29, 32, General Comment No. 17, cited above, § 27, General Comment No. 18, cited above, § 21, General Comment No. 21, cited above, §§ 46, 65, "Statement by the Committee", cited above, 10 May 2007, §§ 9-10, Committee on the Elimination of Racial Discrimination, *Ms .L.R. et al. v. Slovakia*, Communication No. 31/2003, CERD/C/66/D/31/2003, § 10.7, and among legal scholars, Craven, quoted above, pp. 129-34) and the Inter-American human rights standard (Inter-American Commission, report no. 27/09, case 12.249, merits, *Jorge Odir Miranda Cortez et al. v. El Salvador*, 20 March 2009, § 106, and Inter-American Court, *Five Pensioners Case*, judgment of 28 February 2003, § 147).

the present case. I find that the denial of parental leave to the applicant was based on a combination of two different discriminatory grounds: military status and sex. The impugned discrimination has a twofold legal nature: there is not only sex discrimination between servicemen and servicewomen, since servicewomen are treated better than servicemen, but also discrimination based on professional status, since civilian men are treated better than servicemen. I will deal separately with these two kinds of discriminatory treatment, with the purpose of showing that the less favourable treatment of servicemen lacks justification in any event. In addition to the theoretical importance of separating the different grounds of discrimination, a major practical consequence will be relevant for the purposes of Article 46.

Discrimination based on sex

Russian servicemen do not have a statutory right to parental leave, while servicewomen do have such a right. The discrepancy is established by the law between men and women, independently of their actual ranks and duties within the armed forces. The blanket and general nature of the legal provision in question, which does not allow for balanced solutions according to the functions of different service personnel, shows that a category of citizens (servicemen) was singled out by the legislature only on account of their gender. Neither the preponderance of servicemen in the armed forces nor the "special role of mothers in the upbringing of children" can be invoked to justify such a radical difference in treatment. In fact, only a minimal percentage of civilian men take parental leave in Russia, according to the statistics. If such a percentage is replicated in the armed forces, no major changes are to be expected in the normal life of the military services. Furthermore, tradition alone does not suffice to justify any discrimination[1]. The discriminatory character of this regime stands out when one takes into account the fact that civilians, both men and women, are all entitled to the same legal benefits. If the Russian legislature is prepared to accept equality between civilian men and women who benefit from the same period of parental leave, it is difficult to understand why such equality is not guaranteed between servicemen and servicewomen.

1. Of particular interest in this regard is the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (cited above, Part I, chap III, § 18). In the same vein, the Maastricht Guidelines (cited above, § 8).

Discrimination based on professional status

The discriminatory nature of the legal regime of parental leave in Russia can also be viewed from another perspective. A comparison between servicemen and civilian men shows that the first are treated with less generosity by the national law. The defensive nature of the functions of the men engaged by the Russian armed forces is not a decisive argument. Firstly, no factual evidence was presented of any concrete danger to the operational effectiveness of the armed forces due to the possible parental leave taken by servicemen. Secondly, there are alternative solutions for the organisation of military personnel to allow for servicemen who take their parental leave to be replaced without prejudice to the normal functioning of the services and to suspend parental leave in case of exceptional circumstances, such as the imminence of war.

In order to comply with international obligations under the Convention, a legal solution must be found that avoids discrimination based both on sex and professional status. Lowering the parental status of servicewomen to the current status of their fellow servicemen would not only unreasonably diminish the degree of social protection afforded to servicewomen, but it would also put all military personnel in an unjustified lesser legal standing in relation to civilians. Such a solution would not solve the problem of discrimination based on professional status.

In view of the nature of the right to parental leave as a constituent element of a dignified life standard, one should recall the lesson of Montesquieu on the State's obligation to provide to every citizen "a way of life which does not counter health"[1]. By properly guaranteeing the general enjoyment of the right to parental leave, the respondent State will simultaneously ensure the right of children to healthy development and comply with a fundamental family right and a basic assurance for all workers.

1. "Quelques aumônes que l'on fait à un homme nu dans les rues, ne remplissent point les obligations de l'État, qui doit à tous les citoyens une subsistance assurée, la nourriture, un vêtement convenable, et un genre de vie qui ne soit point contraire à la santé", Montesquieu, *De l'Esprit des lois*, Livre XXIII, chap. XXIX, 1758.

PARTLY DISSENTING OPINION OF JUDGE KALAYDJIEVA

Like the majority, I see no reason to question the respondent Government's statement that the Deputy Military Prosecutor's visit to Mr Markin's home in the late evening of 31 March 2011 was related to the applicant's proceedings before the Court. I share the conclusion that this visit caused *intimidation and fear to the applicant and his family*.

Unlike the majority, however, I am unable to dismiss the applicant's complaints under Article 34 because *"there* [was] *no evidence that th*[is] *visit ...and the circumstances attending it were calculated to induce the applicant to withdraw or modify his complaint or otherwise interfere with the effective exercise of his right of individual petition, or indeed had this effect"*.

In my view this reasoning shifts the burden of proof in the context of States parties' negative obligations, by requiring an individual to "prove beyond doubt" that the authorities' action was intended, or "calculated", to prevent the free exercise of the right of individual petition guaranteed by the Convention. Under Article 34 States parties undertake *"not to hinder in any way the effective exercise"* of this right – even if it is exercised in an abusive manner. In such circumstances the authorities should be required to provide a plausible explanation for the purpose of any contacts with applicants with regard to pending Convention proceedings and to demonstrate that their conduct was lawful and necessary in the pursuit of a legitimate aim in the public interest. I am not persuaded by the respondent Government's explanations in this regard. I also fail to understand the relevance to the Convention proceedings of facts concerning the applicant's subsequent personal life – the fact that he remarried in 2008 and had a fourth child with Ms Z. later that year, or that he left the army in 2010 for health reasons. In fact the Government did not rely on any of the prosecutor's findings before the Grand Chamber. In these circumstances, the late visit and questioning "related to the Convention proceedings" remain unwarranted. Regardless of whether there was an intention to dissuade Mr Markin from pursuing his complaints before the Court, he was informed that the visit was related to them and it was carried out in a manner which clearly could have been perceived as threatening, thus causing feelings of intimidation and fear to him and his family. This suffices to render the authorities accountable for a failure to respect their undertaking *"not to hinder in any way the effective exercise"* of the right of individual petition as guaranteed by Article 34 of the Convention.

I am also unable to adhere to the majority's view that the absence of an achieved effect of withdrawal or amendment of complaints may be regarded as indicative for the extent to which the authorities succeeded, or failed, in meeting this undertaking. Such a criterion risks making the exercise of the

right of individual petition dependent on the threshold of tolerance by applicants to any form of pressure. In other words, it would depend on whether they are able or sufficiently courageous to sustain the resulting intimidation without withdrawing or modifying their complaints. I am not convinced that this approach would reflect the spirit of Article 34 correctly.

PARTLY DISSENTING OPINION OF JUDGE NUßBERGER JOINED BY JUDGE FEDOROVA

I wholeheartedly support the decision of the majority in the present case. However, I cannot agree with the Court's finding under Article 41. As a violation of Article 8 in conjunction with Article 14 has been found, it is fair to grant the applicant costs and expenses. But in the specific circumstances of the case I am opposed to an award for non-pecuniary damage in addition.

The case is about equality between men and women. Without any reasonable justification Russian law treats servicemen and servicewomen differently for the purposes of parental leave. It is therefore a question of principle for the Court to react to such an inequality, which touches upon the fundamental values enshrined in the Convention.

However, whilst it is true that in the present case the applicant was treated *differently* from women, that does not mean that his treatment was *worse* in every respect. On the contrary, even though he had to wait for a year before being granted parental leave and even though he received only an *ex gratia* payment and not a payment based on law, it is obvious that ultimately the financial aid he was awarded (5,900 euros) was far greater than what a servicewoman would have received in his place (see paragraph 45 of the judgment: 40% of the salary for only a year and a half with a minimum amount of 37.50 euros per month).

In a case about equality and inequality it is impossible not to take into account this important factor. Therefore, I find it somewhat paradoxical to award 3,000 euros for non-pecuniary damage in addition to the *ex gratia* payment the applicant has already received. Even if he has suffered distress and frustration as a result of discrimination on grounds of sex, this has been largely compensated for by the *ex gratia* payment. The applicant's "net gain" might be misunderstood as an invitation to fight for social benefits in Strasbourg.

Therefore I am of the opinion that the Chamber's approach was much wiser. In the present case, the finding of a violation would have constituted in itself sufficient just satisfaction.

DISSENTING OPINION OF JUDGE POPOVIĆ

Much to my regret I could not follow the majority of colleagues in this case. My disagreement is not based on the arguments the majority developed, but mostly on the assessment of facts. It concerns two different aspects. One of these pertains to Article 8 in conjunction with Article 14 of the Convention, whereas the other is related to Article 34 of the Convention.

I. Article 8 in conjunction with Article 14 of the Convention

(1) The applicant stated he had divorced his wife by way of mutual agreement on 6 October 2005. He alleged that his community of life with his ex-spouse had ceased immediately afterwards, thus obliging him to raise their three children alone. He also submitted to the Court that his wife had left for another city several days after the divorce, which in fact occurred only six days after she had given birth to their third child. On the basis of such submissions the majority found that the community of life of the former spouses had effectively ceased.

At this point my finding runs counter to that of the majority, for it seems that many significant elements of the common life of the former spouses persisted, despite the fact that they had agreed to divorce. These elements are the following.

(a) The applicant's ex-spouse allegedly signed an employment contract in the city to which she purported to have moved. However the contract has never been duly registered with the authorities. It remains unclear whether it has ever produced proper effects for the purposes of labour law.

(b) The applicant's ex-spouse has never obtained a passport stamp confirming the divorce.

(c) Although it was stipulated in the divorce agreement that the ex-wife should pay child allowances to the applicant, she has never done so. The applicant has not reacted to this behaviour of his former wife in any possible way. He has neither demanded payments from her, nor brought any action against her, as he was entitled to do according to the law, on the basis of the divorce agreement.

(d) The fact that the applicant's ex-spouse represented him in a case before a court of law in an unrelated matter clearly shows the persistence of their mutual understanding, of which the applicant denied the existence exclusively in respect of matters concerning his application to this Court.

(e) The applicant continued to live in the city in which he had lived with his ex-spouse and did not change address after the divorce, for he remained in the apartment that had previously been shared with his ex-wife's parents, who continued living with the applicant and his children.

(f) It is beyond any doubt that the applicant's lodging in the same apartment as his ex-spouse's parents has never been interrupted, and this is

a fact that in many important aspects has maintained an unaltered environment for his children, even though their mother had allegedly left for another city.

(g) The events concerning the applicant's divorce started on 6 October 2005, whereas on 1 April 2008 the applicant remarried his former spouse.

(h) The applicant's fourth child was born in August 2010. The child's mother is the lady the applicant had divorced on 6 October 2005 and whom he remarried on 1 April 2008.

On the grounds of the above-mentioned facts I find that, despite a formal divorce, the community of life between the applicant and the mother of his four children has never been substantially interrupted.

Regretfully, this point was not elucidated by the majority, although it warranted the Court's attention, as it had to be considered whether the applicant's behaviour was not guided by the idea of acting *in fraudem legis domesticae*.

The circumstances mentioned above, taken in their entirety, thus lead me to find that the applicant in the present case did not have victim status.

(2) Even assuming that the majority were justified in finding that the applicant nevertheless had victim status, he should be considered to have lost it for the following reasons.

(a) The applicant obtained leave from service to an extent which almost equalled his demand.

(b) Apart from the fact that the applicant was indeed granted leave from service, he was awarded by the authorities a considerable amount of money on an *ex gratia* basis, corresponding to more than six months' worth of salary.

For the reasons I have thus set out, I find the Government's objection as to the applicant's victim status under Article 8 of the Convention to be justified and in my view the objection should be sustained. Consequently I consider that under Article 37 § 1 (b) of the Convention the matter has been resolved, and this should in my opinion have led to the striking out of the application from the Court's list in so far as it concerned Article 8 of the Convention, taken together with Article 14.

II. Article 34 of the Convention

(3) The second aspect of my disagreement with the majority is related to its finding that there has been no violation of Article 34 of the Convention in the present case. The Contracting Parties are obliged by that provision not to hinder in any way the effective exercise of the right of individual application to the Court.

The Grand Chamber held in *Akdivar and Others v. Turkey* (16 September 1996, § 105, *Reports of Judgments and Decisions* 1996-IV) that, owing to

their vulnerable position, applicants to this Court must not be exposed to "behaviour on the part of the authorities ... amounting to a hindrance in respect of the applicants in breach of [the above-mentioned] provision".

I consider the conduct of the authorities *vis-à-vis* the applicant in the present case to be in violation of Article 34 of the Convention, as interpreted in the light of the rule in *Akdivar* that I have just quoted. This opinion is based on the fact that the applicant was visited one evening at his home, where he lived with his family, by an official belonging to the Military Prosecutor's service. The purpose of the visit, according to the Government's submissions to the Court, consisted in clarifying certain facts. However, the whole set of circumstances concerning this particular event leads me to conclude that there has been a violation of Article 34 of the Convention. The reasons for such a conclusion are the following.

(a) The official's visit was not announced in advance. Its abrupt character had an effect of surprise and put pressure on the applicant.

(b) The Government failed to provide any evidence that the applicant had been summoned to make a statement in order to clarify the facts concerning his family situation, instead of providing clarifications at home upon a surprise visit by a State official.

(c) The official's visit had no grounds in the domestic law of the respondent State. It was instigated by the respondent Government's Agent before this Court and this clearly demonstrates its connection to the application lodged with the Court, accordingly attracting the protection of Article 34 of the Convention.

(d) The prosecutor in question, during his visit, warned the applicant that if he failed to produce certain documents, which he was by no means under a legal duty to do, the investigation would be conducted by way of questioning the applicant's neighbours.

These are the elements which I find sufficient to prove that the applicant has been hindered in the exercise of his right of individual application to the Court under Article 34 of the Convention. I am therefore of the opinion that there has been a violation of Article 34 of the Convention in the present case.