Headnotes

to the order of the First Senate of 17 December 2013

– 1 BvL 6/10 –

1. **The provision governing the authorities' right to contest paternity (§ 1600 sec. 1 no. 5 of the Civil Code, *Bürgerliches Gesetzbuch* – BGB) must be deemed to constitute an absolutely prohibited deprivation of citizenship under Article 16 sec. 1 sentence 1 of the Basic Law (*Grundgesetz* – GG) because the parties concerned are in some cases unable and in other cases not reasonably able to influence the loss of citizenship resulting from a contestation by the authorities.**

2. **The provision does not meet the constitutional requirements regarding a loss of citizenship for other reasons (Article 16 sec. 1 sentence 2 GG) because it leaves no room for considering whether the child will become stateless, and, in terms of meeting the requirement of a statutory provision (*Gesetzesvorbehalt*), because there are no rules governing the loss of statehood, and no appropriate rules regarding deadlines and the age of the persons concerned.**

3. **In cases in which legal paternity is established through acknowledgment, constitutional parenthood (Article 6 sec. 2 sentence 1 GG) exists also if the acknowledging father is neither the child's biological father nor has established a social and family relationship with the child. However, the level of protection guaranteed by the Constitution depends on whether the legal paternity is reflected in the social interactions.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvL 6/10 –

IN THE NAME OF THE PEOPLE

In the proceedings

for constitutional review of

whether § 1600 sec. 1 no. 5 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) in the version of the Act Supplementing the Right to Contest Paternity (*Gesetz zur Ergänzung des Rechts zur Anfechtung der Vaterschaft*) of 13 March 2008 – Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I page 313 – in conjunction with Article 229 § 16 of the Introductory Law of the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch* – EGBGB) in the version of the Act Supplementing the Right to Contest Paternity of 13 March 2008 – BGBl I page 313 – is compatible with the Basic Law (*Grundgesetz* – GG)

- order of suspension and referral from the Hamburg-Altona Local Court (*Amtsgericht Hamburg Altona*) of 15 April 2010 (350 F 118/09) –

the Federal Constitutional Court – First Senate – with the participation of Justices

Vice-President Kirchhof

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 17 December 2013:

§ 1600 section 1 no. 5 of the Civil Code in the version of the Act Supplementing the Right to Contest Paternity of 13 March 2008 (Federal Law Gazette I page 313) and Article 229 § 16 of the Introductory Law of the German Civil Code in the version of the Act Supplementing the Right to Contest Paternity of 13 March 2008 (Federal Law Gazette I page 313) violate Article 16 section 1, Article 6 section 2 sentence 1, Article 2 section 1 in conjunction with Article 6 section 2 sentence 1, and Article 6 section 1 of the Basic Law and are void.

Reasons:

A.

The referral concerns the question whether the provisions concerning the so-called contestation of acknowledgments of paternity by the competent authorities, which results in the retroactive loss of paternity and the child's loss of German citizenship established by this acknowledgment of paternity, are compatible with the Basic Law. 1

I.

[Excerpt from the Court's press release no. 4/2014 of 30 January 2014]

With an order of 15 April 2010, the Hamburg-Altona Local Court (*Amtsgericht Hamburg-Altona)* suspended proceedings concerning the contesting of paternity by the authorities in order to obtain a decision from the Federal Constitutional Court as to whether the provisions relevant to the matter are compatible with the Basic Law.

The authorities' right to contest acknowledgments of paternity was introduced in 2008. The legislature was of the impression that, in certain scenarios, an acknowledgment of paternity is used to circumvent rules on the right of residence, in particular so that the child acquires German citizenship and the foreign mother has a right to residence.

Apart from a lack of biological paternity, the authorities' entitlement to contest the acknowledgment of paternity requires that there be no social and family relationship between the child and the person acknowledging, nor was there a social and family relationship at the date of the acknowledgment or of his death and the recognition satisfies legal requirements for the permitted entry or the permitted residence of the child or of a parent (§ 1600 sec. 3 of the Civil Code, *Bürgerliches Gesetzbuch* – BGB). Moreover, paternity must be contested within a certain time limit, which may not commence prior to 1 June 2008 (Art. 229 § 16 of the Introductory Law of the German Civil Code, *Einführungsgesetz zum Bürgerlichen Gesetzbuch* – EGBGB). Once the decision on the non-existence of paternity has become final, the former legal paternity ends and the child's German citizenship acquired as a result of the acknowledged paternity and the mother's right of residence lapse. These legal consequences take retroactive effect dating back to the time of the child's birth.

[*End of Excerpt*]

[…] 2-8

II.

[…] 9-13

III.

[…] 14-16

IV.

[…] 17-23

The Federal Government […], the Free and Hanseatic City of Hamburg, as the plaintiff in the initial proceedings […], the Association of Binational Families and Partnerships (*Verband binationaler Familien und Partnerschaften, iaf e.V.*), the German Association for Public and Private Welfare *(Deutscher Verein für öffentliche und private Fürsorge e.V.*), the German Red Cross (*Deutsches Rotes Kreuz e.V.*) […], the Social Welfare Organisation of Germany's Protestant Churches (*Diakonisches Werk der Evangelischen Kirche in Deutschland e.V.)* […], as well as the German Family Court Association (*Deutscher Familiengerichtstag e.V.*) [have submitted statements with regard to the proceedings]. 24

B.

The provisions governing the authorities' right to contest paternity (§ 1600 sec. 1 no. 5 BGB and Art. 229 § 16 EGBGB) are unconstitutional. They violate Art. 16 sec. 1 GG (I.), Art. 6 sec. 2 sentence 1 GG (II.), Art. 2 sec. 1 in conjunction with Art. 6 sec. 2 sentence 1 GG (III.) and Art. 6 sec. 1 GG (IV.). However, there is no violation of Art. 6 sec. 5 GG (V.). 25

I.

The specific framing of the provisions governing the authorities' right to contest paternity violates Art. 16 sec. 1 GG because it results, in a constitutionally impermissible manner, in the child's loss of its German citizenship. The child's citizenship is protected by Art. 16 sec. 1 GG (1.) and is subject to an interference (2.) resulting from the contested paternity. This interference with fundamental rights is not constitutionally justified. Art. 16 sec. 1 GG distinguishes between the deprivation of citizenship (Art. 16 sec. 1 sentence 1 GG) and a loss of citizenship for other reasons (Art. 16 sec. 1 sentence 2 GG) and has different constitutional requirements for both forms of loss. According to Art. 16 sec. 1 sentence 1 GG, the deprivation of citizenship is prohibited without exception. By contrast, a loss of citizenship for other reasons can, under certain conditions, be constitutionally justified according to Art. 16 sec. 1 sentence 2 GG. Given their specific framing, the rules governing the authorities' right to contest paternity must be deemed to constitute an absolutely prohibited deprivation of citizenship 26

under Art. 16 sec. 1 sentence 1 GG (3.) because the parties concerned were either not or not reasonably able to exert any influence on the loss of citizenship. In view of the circumstances of the acquisition of citizenship as a result of a contestable acknowledgment of paternity, it might, however, be possible to attribute to the children the existing influence of their parents (3. a) and b)). The loss of citizenship, however, is also beyond the parents' influence insofar as an act by the authorities contesting paternity relates to acknowledgments of paternity that were made before the provisions subject to review entered into force (3. c)). Furthermore, it cannot reasonably be expected that the loss of citizenship be influenced by forgoing a contestable acknowledgment of paternity if the acknowledgment of paternity does not specifically aim at obtaining residence-related advantages (3. d)). Notwithstanding this, the rules do not meet the constitutional requirements of Art. 16 sec. 1 sentence 2 GG regarding a loss of citizenship for other reasons (4.) because they leave no room for considering whether the child will become stateless (4. a), and because there are no explicit rules regarding the loss of citizenship (4. b) and no appropriate rules regarding deadlines and the age of the persons concerned that could prevent that older children who possessed German citizenship for a longer period can also still lose this citizenship (4. c)).

1. Art. 16 sec. 1 GG provides protection against the deprivation of German citizenship. This protection also covers children who have acquired German citizenship in accordance with § 4 secs. 1 or 3 of the Nationality Act (*Staatsangehörigkeitsgesetz* – StAG) as a result of an acknowledgment of paternity. The fact that the acquisition of citizenship by virtue of paternity is subject to the authorities' right to contest this acknowledgment does not preclude the constitutional protection of citizenship. The judicial finding that the paternity to which the child's acquisition of German citizenship by birth is linked does not exist eliminates a hitherto existing German citizenship of the child as such and not just a mere bogus citizenship. According to § 1592 no. 2 BGB, the man who acknowledged paternity is the father of the child. Until a judgment – following an act to contest paternity – that declares the non-existence of paternity becomes final, this man is the legal father. Legally, paternity established by acknowledgment is a fully valid paternity, not just a bogus paternity. For this reason alone, the derived German citizenship obtained pursuant to § 4 secs. 1 or 3 StAG is also not just a bogus citizenship (cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 9, 381 <383 and 384> accordingly, regarding measures contesting paternity taken by the legal father pursuant to § 1600 sec. 1 no. 1 BGB). The fact that the loss of citizenship through a contested paternity is construed under statutory law as an initially invalid paternity and citizenship and is therefore retroactively eliminated does not affect the constitutional protection of the German citizenship, which existed in the meantime. It is merely a regulatory technique to retroactively correct a particular result, which does not, however, undo the legal acknowledgment of paternity or the citizenship, respectively, which existed in the meantime – and their worthiness of protection does not automatically lapse (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des* 27

Bundesverfassungsgerichts – BVerfGE 116, 24 <46>).

2. A successful measure taken by the authorities to contest paternity interferes with the constitutional guarantees of Art. 16 sec. 1 GG. A contested paternity results in the affected child's loss of German citizenship if this citizenship is solely derived from the man who acknowledged paternity, hence, the hitherto legal father. The family court ruling obtained by the authority upon a contestation of paternity expressly relates only to paternity. However, even without any explicit legal regulation to this effect, paternity is lost retroactively according to established case-law of the civil courts and with that, the loss of citizenship […] also occurs automatically according to likewise established case-law of the administrative courts. This loss is then to be assessed under Art. 16 sec. 1 GG. The Senate regularly bases its evaluation of the rules under review on the respective interpretation by the referring court. Here, the referring court assumes that the successful contesting of paternity according to § 1600 sec. 1 BGB can implicate that the child loses its citizenship. Even though this legal consequence does not follow directly from the wording of the provision, the Senate also bases its review on this assumption, given that the court's view is not unreasonable. 28

An interference with Art. 16 sec. 1 GG can also not be simply denied by arguing that the loss of citizenship is only an unintended side effect of the contestation of paternity by the authorities. Apart from the fact that such a classification of the contesting measure taken by the authorities would still be characterised as an interference, it is also incorrect in substance; the elimination of the child's citizenship is the actual aim of the measure since the residence-related advantages of the other parent that which the measure intends to eliminate result directly from the child's acquisition of citizenship. 29

3. The interference with fundamental rights is not constitutionally justifiable because the provisions governing the authorities' right to contest paternity must be deemed to constitute an absolutely prohibited deprivation of citizenship within the meaning of Art. 16 sec. 1 sentence 1 GG. 30

A deprivation of German citizenship as defined in Art. 16 sec. 1 sentence 1 GG is "any infliction of loss that impairs the function of citizenship as a reliable basis for equal affiliation – a function which is of equal importance to both the individual and the society. An impairment of the reliability and equality of the affiliation status is constituted in particular by every infliction of loss which the party concerned was unable or not reasonably able to influence (BVerfGE 116, 24 <44> with further references). 31

The provisions governing the authorities' right to contest paternity constitute an unconstitutional deprivation of citizenship (Art. 16 sec. 1 sentence 1 GG), because the parties concerned are in some cases unable and in other cases not reasonably able to influence the loss of citizenship. In any event, the children cannot influence the loss of their citizenship themselves (a). With respect to the circumstances of an acquisition of citizenship by a contestable acknowledgment of paternity, it may, in principle, be possible to attribute to the children the existing influence of their parents (b). However, the parents themselves had no influence on the loss of citizenship insofar as the 32

provisions were applied to paternities that were acknowledged before § 1600 sec. 1 no. 5 BGB entered into force (c). Furthermore, it is not reasonable to expect that the parents influence the outcome if the aim of the acknowledgment of paternity is not specifically to obtain residence-related advantages through the child's acquisition of citizenship (§ 4 sec. 1 and sec. 3 StAG) (d).

a) The affected children themselves cannot influence the loss of citizenship resulting from a measure of the authorities with which paternity is contested. The responsibility for contesting paternity lies with the authority and the court. According to the administrative courts' established case-law, the loss of citizenship takes place automatically. The child does not have any notable influence on whether the requirements for the authorities' entitlement to contest paternity are met. In the same way, also the acquisition of citizenship by virtue of acknowledged paternity, whose annulment the authorities aim to achieve, is often beyond the child's influence. The responsibility for acknowledging paternity lies with the parents; the acquisition of citizenship proceeds automatically by law as a result of acknowledged paternity. 33

b) It may be possible, in principle, to attribute the parents' influence (aa) to the children (bb). 34

aa) The parents can also not directly influence the child's loss of citizenship, which occurs automatically if the authorities' act of contesting paternity is successful. 35

The allegation of a deprivation of citizenship prohibited under Art. 16 sec. 1 sentence 1 GG cannot be simply dismissed by arguing that the parents could have avoided the loss of citizenship by forgoing the acquisition of citizenship in the first place. 36

However, special circumstances of the acquisition of citizenship may lead to the conclusion that influence exerted on the acquisition procedure can, exceptionally, also be deemed to have been a means of influencing the loss of citizenship […]. If the parties concerned bear the responsibility for a specific instability of the citizenship arising at the time of acquisition already, they are also responsible for the situation which as such ultimately results in the loss of citizenship. It is thus possible for them to influence this loss […]. Such instability can occur if the citizenship was obtained in a manner that is legally disapproved of and the legislature adopted provisions according to which the disapproved acquisition of citizenship can be revoked. If the parties concerned effectuate the acquisition of a legally tainted citizenship under these conditions, they bear responsibility for its instability and must thus also assume responsibility for the fact that they influenced the loss of citizenship. 37

In cases in which authorities are entitled to contest paternities, the possible influence of the parents is defined by the fact that they could have decided not to acknowledge a paternity that is contestable pursuant to § 1600 sec. 1 no. 5 and sec. 3 BGB and thus could have avoided the situation that later led to the child's loss of citizenship […]. Inducing the parties to refrain from acknowledging paternity that is tainted according to § 1600 sec. 1 no. 5 and sec. 3 BGB is ultimately also the aim of providing 38

the authorities with an entitlement to contest paternity. The question whether such a waiver is reasonable, however, needs to be assessed separately (see below, d).

bb) Insofar as the parents can indirectly exert influence on the child's loss of citizenship, this influence can, under certain circumstances, be attributed to the child. In this case, the loss of citizenship is rated as something the child was able to influence, and thus it is concluded that there has not been an impermissible deprivation within the meaning of Art. 16 sec. 1 sentence 1 GG (cf. BVerfGE 116, 24 <60>). The child thus has to bear a severe consequence of its parents' actions, which are in fact beyond the child's actual control. However, the rationale of the prohibition of the deprivation of citizenship nevertheless allows for an attribution of the parents' actions to the child. The prohibition of deprivation under Art. 16 sec. 1 sentence 1 GG aims at protecting against an arbitrary instrumentalisation of citizenship laws. This is already taken into account by the fact that the parents can influence the child's loss of citizenship, which is therefore not at the state's free disposal. Under these circumstances, the loss of citizenship does not result from a unilateral act of volition of the state but follows from the contestable acknowledgment of paternity triggered by the parents. […]. The fact that the child cannot on its own influence the loss of its citizenship cannot, however, be ignored within a constitutional review of a loss of citizenship. This is taken into account by the review that adheres to the standards set out in Art. 16 sec. 1 sentence 2 GG. 39

[…] 40

c) There is no way in which the parents can influence the child's loss of citizenship by renouncing the acknowledgment of paternity if the requirements set out in § 1600 sec. 3 BGB that determine the authorities' right to contest paternity are met, insofar as the contestation according to Art. 229 § 16 EGBGB covers cases in which the acknowledgment of paternity, and, accordingly, the acquisition of citizenship, occurred before § 1600 sec. 1 no. 5 BGB entered into force on 1 June 2008 – in other words at a time when the provisions governing the right to contest paternity that may result in an annulment of the acquired citizenship were not yet in place. Insofar, considering the lack of predictability, it can be held that the parents were not able to exert influence in a manner that would allow the conclusion that this influence precludes the existence of a deprivation within the meaning of Art. 16 sec. 1 sentence 1 GG. 41

aa) If a provision that leads to the elimination of citizenship enters into force retroactively, this is deemed to constitute a prohibited deprivation within the meaning of Art. 16 sec. 1 sentence 1 GG. The parties concerned can only influence the loss of citizenship if they knew at that time or at least could have known that they thereby create the prerequisites for the loss of citizenship. Reliability of the citizenship status also comprises predictability of a loss and thus a sufficient degree of legal certainty and legal clarity in the context of citizenship laws governing the loss of citizenship (BVerfGE 116, 24 <45>). 42

Where a paternity that can be contested according to § 1600 sec. 1 no. 5 and sec. 3 43

BGB was acknowledged before § 1600 sec. 1 no. 5 BGB entered into force, the parents could not have known that by acknowledging paternity they create the prerequisites for a subsequent loss, because the authorities' entitlement to contest paternity did not yet exist at that time. Before the authorities' entitlement to contest paternity was introduced, the parents concerned were allowed to assume that the acknowledgment of paternity would be effective regardless of its purpose and would provide the basis for the child's acquisition of citizenship. […] In fact, until then they did not have to expect an act with which the authorities contest paternity.

bb) […] 44

d) Insofar as measures taken by the authorities to contest paternity affect paternities which were acknowledged after the provisions under review entered into force, the measures and the subsequent loss of citizenship were indeed foreseeable and could have been influenced by the parents by forgoing the acknowledgment of paternity. However, it is not necessarily reasonable to expect that the parents influence the loss of citizenship by refraining from acknowledging an ultimately contestable paternity. 45

Refraining from acknowledging an ultimately contestable paternity is only reasonable if the acknowledgment of paternity specifically aims at obtaining residence-related advantages (aa). The requirements for the authorities' right to contest paternity that are set out in § 1600 sec. 3 and sec. 4 BGB are, however, formulated broadly and are not specific enough for covering only those acknowledgments of paternity (bb). Forgoing a contestable acknowledgment of paternity cannot reasonably be expected from the parties concerned by arguing that the legislature has no other means of regulating the authorities' right to contest paternity and that the interest in contesting paternity clearly outweighs the interests of those who would have to forgo a contestable acknowledgment of a paternity that is not aimed at circumventing legal prerequisites for permitted residence (cc). 46

aa) A waiver of a contestable acknowledgment of paternity is only reasonable if paternity was acknowledged specifically with a view to obtaining a better residence status by circumventing legal requirements. Otherwise, it cannot be reasonably expected of the parents, because it would deprive them of a means to obtain a family law status that is readily available to all other couples who are in the same situation. 47

(1) According to the rules on the acknowledgment of paternity, paternity can be acknowledged for a legally fatherless child with the approval of the mother without having to meet any other conditions, and irrespective of biological paternity. The legislature granted the parents the right to adopt an autonomous decision as to whether or not they wish to acknowledge paternity and expressly reaffirmed this when introducing § 1600 sec. 1 no. 5 BGB (cf. *Bundestag* document, *Drucksache des Deutschen Bundestages* – BTDrucks 16/3291, pp. 1 and 11). It abstained from exploring the reasons for a specific acknowledgment or from regulating such reasons. The parties concerned may acknowledge paternity for a wide range of reasons. This also applies to cases in which they assume – or even know – that the person acknowledging pa- 48

ternity is not the child's biological father. The provision does not establish a legal expectation that certain acknowledgments of paternity will be forgone.

(2) By comparison, the rule under review here demands that the parties concerned refrain from acknowledging paternity if the requirements set out in § 1600 sec. 3 BGB are met, if they do not wish to expose the child to the risk of subsequently losing its citizenship if paternity is contested. Given that § 1600 sec. 3 BGB requires that the acknowledgment of paternity objectively establishes residence-related advantages the only parties concerned by contested paternities are binational and foreign couples where the residency status of at least one parent is not secured. 49

(3) It cannot reasonably be expected of the parties concerned to refrain from acknowledging paternities that are open to all other couples just because one parent has neither German citizenship nor a secured residence status. 50

(a) It can, however, reasonably be expected that parties concerned refrain from acknowledging paternity under the circumstances mentioned in § 1600 sec. 3 BGB if this acknowledgment specifically aims at obtaining residence-related advantages under residence laws. If the mother and the person willing to acknowledge paternity specifically aim to create the prerequisites for the permitted entry or residence of the child or a parent, they make use of the family-law instrument of acknowledgment of paternity to obtain residence-related advantages that are as such not provided by residence laws. The fact that § 1600 sec. 1 no. 5 BGB now limits this way of acquiring citizenship and a right of residence which is not provided for by statutory law contributes to the realisation of the objectives of citizenship and residence laws. It is reasonable to refrain from acknowledging a paternity that specifically aims at obtaining residence-related advantages under residence laws that are not provided for by applicable statutory law, in particular because in this case, weak family interests in the paternity cannot outweigh the interest in the contestation. 51

(b) On the other hand, if paternity is not specifically acknowledged in order to circumvent the legal requirements of residence law, the citizenship and residence-related statutory objective of the rules governing the authorities' right to contest paternity does not justify the expectation that the parties concerned waive the possibility of acknowledging paternity that the legislature has otherwise instituted without any regard being had to the motives behind it and that is readily available to all other couples who are in exactly the same in situation. 52

bb) Therefore, if the loss of citizenship can only be viewed as a justifiable loss rather than an absolutely prohibited deprivation if the acknowledgment of paternity specifically aimed at circumventing the legal requirements of residence law, the authorities' ability to contest paternity must be restricted to such cases in which paternity is acknowledged solely with a view to specific residence-related interests. The prerequisites for the right to contest paternity chosen by the legislature fail to ensure this limitation with sufficient reliability. 53

(1) When establishing the requirements the authorities' right to contest paternities that were acknowledged specifically because of residence rights, the legislature may, for practical reasons, make use of objective criteria that are suitable for indicating, in an exemplary and refutable manner, that there is a corresponding subjective motivation. In addition to a confession by the parents, examples for objective indications could be that the acknowledging father has already repeatedly acknowledged children of other foreign mothers, or that it becomes known that the acknowledgment of paternity was paid for (cf. BTDrucks 16/3291, p. 16). 54

(2) However, the objective requirements for a contestation set out in § 1600 sec. 3 BGB do not satisfy constitutional requirements. 55

(a) According to § 1600 sec. 3 BGB, the authorities' right to contest paternity requires that at specific times there is or was no social and family relationship between the child and the person acknowledging paternity, and that the acknowledgment satisfies legal requirements for the permitted entry or the permitted residence. Under these conditions, and provided there is no established biological paternity, the court has to determine the non-existence of paternity, without being obliged or even allowed to demand further proof that paternity was in fact acknowledged specifically for the purpose of obtaining advantages under residence law. Instead, this is irrefutably presupposed in case there is no social and family relationship (cf. BTDrucks 16/3291, p. 14). 56

(b) The objectively formulated requirements of § 1600 sec. 3 BGB are not sufficiently conclusive to indicate whether an acknowledgment of paternity is specifically based on the motivation to obtain residence rights. 57

(aa) The requirement of creating prerequisites for permitted entry or residence as such is not suitable for narrowing down the contesting of paternities in a way that satisfies the requirements of Art. 16 sec. 1 sentence 1 GG, because it covers all cases of acknowledged paternity in which the mother did not have a secured residence status. It has not been proven in the course of the legislative process nor are there any other indications suggesting that paternity is generally acknowledged specifically for residence-related reasons in these cases. 58

(bb) The lack of a social and family relationship between the father and the child is also not a reliable indicator that an acknowledgment of paternity which objectively improves the residence status of the parties concerned specifically aims at obtaining residence-related. According to § 1600 sec. 4 BGB, a social and family relationship exists if the father has or had actual responsibility for the child at the relevant point of time. As a rule, this is typically the case if the father is married to the mother of the child or has lived with the child in domestic community for a long period of time. Here, it is already excluded that the conditions set out in the first alternative are met, given that the parents are normally not married to each other in cases of acknowledged paternities. The second alternative defines the social and family relationship too narrowly insofar as the lack of such a relationship is assumed to suffice as an indication of a 59

motivation to obtain residence rights […]. The requirement of a domestic community is strict and significantly exceeds the extent of social father-child contacts that is common for the relationship between children born out of wedlock and their fathers […]. The absence of a domestic community is therefore not a reliable indicator that an acknowledgment of paternity is specifically motivated by residence rights […].

This does not disregard that in a certain number of situations in which no domestic community has been established between father and child, acknowledgments of paternity indeed aim at obtaining advantages under residence law. Nevertheless, the generalising assumption that the lack of an established domestic community indicates that the motivation to acknowledge paternity relates to residence-related reasons allows for too far-reaching contestation possibilities, and it cannot reasonably be expected of the parties concerned to refrain from acknowledging paternity to avoid that paternity is contested (see below, cc)). 60

(3) Of course § 1600 sec. 4 sentence 2 BGB could be understood as a non-exclusive list of examples. In that case it could be assumed that there are, in addition to the cases of marriage and domestic community which are mentioned specifically, also other cases in which responsibility is assumed and a social and family relationship within the meaning of § 1600 sec. 3 BGB is thereby established. In that case, the protection of the legal father-child relationship established by acknowledgment against an act of the authorities aiming to contest the acknowledged paternity would be further-reaching. 61

[…] 62-63

(4) However, considering its structure, the constitutional deficits of the provision cannot be remedied by means of interpretation. 64

The criterion of a “social and family relationship” that was introduced in 2004 is also used as a negative constituent element for contestations of paternity by the biological father (§ 1600 sec. 1 no. 2 BGB). By including this negative criterion (§ 1600 sec. 2 BGB) when regulating the right to contest paternity, the legislature essentially transposed stipulations by the Federal Constitutional Court regarding the protection of existing legal families (cf. BVerfGE 108, 82). Later, the same criterion was used for circumstances in which paternity is contested by authorities and simply adopted this criterion in a different context (§ 1600 sec. 3 BGB). The social and family relationship is defined in § 1600 sec. 4 BGB in the same way for both scenarios in which paternity can be contested. In the end, the double function of the negative constituent element of a social and family relationship does not allow for a broad interpretation in light of the requirements of Art. 16 sec. 1 sentence 1 GG in scenarios in which paternity is contested by authorities under § 1600 sec. 1 no. 5 BGB, given that constitutional reasons require that the same constituent element be interpreted narrowly when paternity is contested by the presumably biological father (§ 1600 sec. 1 no. 2 BGB). 65

The negative constituent element of the social and family relationship relates to dif- 66

fering contexts in these two distinct scenarios and has an entirely different function when it comes to cases in which paternity is contested by the biological father and cases in which paternity is contested by authorities, respectively […].

In view of cases in which paternity is contested by the biological father, the existing paternity of the legal father is to be substituted by the paternity of the biological father. Here, the negative constituent element of a social and family relationship to the legal father seeks to ensure the protection of the existing social family in the interest of the child (cf. BVerfGE 108, 82 <109 and 110>). The need for protection is, however, limited due to the fact that the child does not become fatherless but receives the biological father as legal father. This is in the child's own interest, which can outweigh the interest in maintaining the legal parent-child relationship with the previous father. The negative constituent element of the social and family relationship, which generally provides the biological father with the right to contest paternity, was chosen so as to ensure that contesting paternity does not become unnecessarily difficult. In light of this element, a measure aiming at contesting paternity only fails to be successful if the child and the legal father indeed have a common social and family life that would be damaged by a legal reorganisation of paternity. In contrast, when paternity is contested by authorities, the aim is to remove a legally established father-child nexus in the public interest; however, a new biologically correct paternity is not determined. Unlike in cases in which paternity is contested by the biological father, this scenario is not determined by the aim of protecting the fundamental rights of the parties concerned. Instead it aims to enforce citizenship and residence objectives. It neither effectuates the protection of the father's rights nor benefits the child in any way. Instead, the child loses its German citizenship as well as a legally fully-fledged parent without receiving a substitution. 67

Accordingly, the function of the constituent element of the social and family relationship in the context of a contestation by the authorities differs from its function in the context of a contestation by the biological father. In case of a contestation by the authorities, it primarily serves to identify whether an acknowledgment of paternity is specifically motivated by residence-related rights. In the context of a contestation by the biological father, however, it solely aims at determining whether the challenge is in conflict with a constitutionally protected, socially valuable relationship between the child and the legal father. 68

It would be constitutionally impermissible to interpret the relevant constituent element of a social and family relationship – which has been defined uniformly in § 1600 sec. 4 BGB – differently in both scenarios , depending on the context, by interpreting it widely as a prerequisite for the authorities' right to contest paternity but narrowly for the biological father's right to contest […]. One and the same constituent element that is legally uniformly defined cannot be interpreted narrowly in one instance and broadly in another, depending on the applicable provision it relates to. In view of the substantial interference with fundamental rights that contested paternities involve in both cases, this would not be acceptable under fundamental rule-of-law principles requir- 69

ing that provisions are clear and easily understood.

cc) It is also not reasonable to expect that the parties concerned already refrain from acknowledging paternity if there is no social and family relationship in a narrower sense merely because this is the only way to enforce the authorities' right to contest and given that there are no external factors that distinguish acknowledgments of paternity specifically motivated by residence-related interests from other acknowledgments of paternity, and because the interest in contesting paternity would outweigh the interest in acknowledging paternity. It is not impossible to use criteria that are more accurate than the lack of a social and family relationship (see above, bb) (1)). Even if such criteria would not cover all cases of acknowledgments of paternity motivated by residence-related interests, this could be tolerated, especially as it is not evident that there is a particular urgency to combat acknowledgments of paternity that are motivated by residence-related interests. 70

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4. Moreover, the provisions under review also violate Art. 16 sec. 1 sentence 2 GG. They do not meet the constitutional requirements of Art. 16 sec. 1 sentence 2 GG regarding loss of citizenship for other reasons because they do not offer any possibility to consider whether the child becomes stateless (a), because there is no explicit legal provision governing the loss of citizenship (b), and because there is no adequate deadline or age-regulation that could prevent that also older children, who have had German citizenship for a longer time period, still lose this citizenship (c). 74

a) § 1600 sec. 1 no. 5 BGB is unconstitutional insofar as the court which decides about the contested paternity is neither called upon nor enabled to take into consideration whether the affected child will become stateless as a consequence of an act by the authorities to contest paternity. Pursuant to Art. 16 sec. 1 sentence 2 GG, citizenship may be lost against the will of the person concerned only if he or she does not become stateless as a result. Given that the loss of citizenship usually occurs against the will of the affected child, the legislature would have had to have taken precautionary measures against cases resulting in statelessness. The wording does not allow for an interpretation in conformity with the Constitution. 75

aa) It cannot be ruled out that children become stateless as a result of an act by the authorities to contest paternity. Foreign citizenship law determines the consequences of a loss of German citizenship for the other citizenship of the child. German law, however, cannot control the acquisition, continuation or reinstatement of a foreign citizenship derived from the mother. 76

bb) There is no justification for acquiescence in statelessness. Apart from the criterion relating to the affected person's will, the wording of Art. 16 sec. 1 sentence 2 GG does not stipulate any other limitations on the prohibition of acquiescence in statelessness. The prohibition of statelessness is formulated strictly. 77

Acquiescence in statelessness in the case of withdrawal of an illegal naturalisation 78

acquired through intentionally false declarations was deemed to be constitutionally permissible (cf. BVerfGE 116, 24, 45 et seq.>). However, due to the strictly formulated prohibition of Art.16 sec.1 sentence 2 GG, one has to exercise extreme restraint when extending considerations used to justify a withdrawal in this instance to other circumstances. In any event, the the scenario under review here does not withstand the considerations guiding the withdrawal of a naturalisation obtained by intentional deception. The core issue of that case was that the parties concerned defied the legal system and obtained an illegal naturalisation by means of intentional deception. In the case of an act by the authorities to contest paternity the situation is, however, different.

By acknowledging paternity, the parents have neither defied the legal system, nor did they deceive anybody about anything, nor did they give rise to an illegal decision. Due to the low requirements German law of descent stipulates for acknowledgments of paternity, which in particular does not require biological paternity, there is nothing parents could deceive about. In any case, legal disapproval of German citizenship acquired through acknowledgment of paternity could only be considered for acknowledgments of paternity that took place after § 1600 sec. 1 no. 5 BGB entered into force. Even then, however, the flaws of a citizenship acquired through acknowledgment of paternity are not comparable to naturalisation resulting from illegal behaviour or obtained surreptitiously, and they do not justify setting aside the prohibition of bringing about statelessness. Under these circumstances, by accepting statelessness, the German legal system would also violate rules of public international law concerning statelessness (Art. 8 secs. 1 and 2 of the Convention on the Reduction of Statelessness of 30 August 1961, BGBl II 1977, p.598, United Nation Treaty Series, vol. 989, p. 175; Art. 7 sec. 3 of the European Convention on Nationality of 6 November 1997, BGBl II 2004, p. 579; BGBl II 2006, p. 1351, United Nations, Treaty Series, vol. 2135, p. 215). 79

Above all, however, the loss of citizenship and therefore the possibility of statelessness affect the child although it was not itself actively involved in the acquisition of the citizenship. Unlike the distinction of deprivation and loss of citizenship (see above, 3. b) bb)), it is not possible in this case to attribute the parents' behaviour to the child as there is a clear prohibition to acquiesce in statelessness. 80

b) Furthermore, the provisions constitute a violation of the requirement of a statutory provision (*Gesetzesvorbehalt*). Art. 16 sec. 1 sentence 2 GG requires a legal basis to legitimise an involuntary loss of citizenship (cf. BVerfGE 116, 24 <52 et seq.). Art. 16 sec. 1 sentence 2 GG demands that the loss of citizenship be regulated specifically enough to ensure that the function of the citizenship as a reliable basis for equal affiliation, which is of equal importance to both the individual and the society, is not impaired (cf. BVerfGE 116, 24 <61>). The provisions governing the authorities' right to contest paternity do not meet these requirements, given that it is not explicitly provided for by a statutory provision that citizenship is lost as a result of the determination of the non-existence of paternity. At the same time, there is a violation of the require- 81

ment of specifying the fundamental right affected and the Article in which it appears (*Zitiergebot,* Art. 19 sec. 1 sentence 2 GG).

[…] 82-83

c) The provision violates the principle of proportionality. Although it serves a legitimate purpose, it does not meet the requirements of proportionality in a narrow sense. It legitimately aims at ensuring the effectiveness of the legal requirements of residence law by preventing its purposeful circumvention through an acknowledgment of paternity (see above, 3. d) aa) (3) (a)). In view of the impact of a loss of citizenship (aa), which increases along with increasing age and duration of the German citizenship (bb) and considering the remaining doubts about the urgency of the objective pursued by acts of authorities taken to contest paternity (cc), the specific framing of the authorities' right to contest paternity, is, however, disproportionate in the narrow sense, because there are no appropriate provisions governing deadlines and the age of the persons concerned (dd). This also applies to cases in which the acknowledgment of paternity indeed took place to circumvent legal requirements of residence law. Insofar as contestations cover acknowledgments of paternity that are not specifically aimed at circumventing residence law, they are already unconstitutional as they violate Art. 16 sec. 1 sentence 1 GG (see above, 3. d)). 84

aa) From the affected child's perspective, the induced loss of its citizenship by an act of the state is a serious interference with its fundamental rights. German citizenship ensures the child's continued permission to stay in Germany and allows for its equal partaking in goods and rights, and thus guarantees the full participation in the social life of the Federal Republic of Germany. In case of a loss of citizenship, that the child is deprived of opportunities in life, which, depending on its age, the child had planned for and adjusted to […]. Another significant factor in scenarios in which authorities contest paternity is that children are affected as outsiders who did not participate in the tainted acquisition of citizenship and thus have to bear the consequences of their parents' actions as far as the contested paternity is concerned. 85

bb) The detrimental effect of the interference with fundamental rights linked to the loss of citizenship through an act by the authorities contesting paternity increases the older the affected child gets and the longer the period of time during which the child possessed German citizenship lasts. With age-dependently increasing awareness of its citizenship, the child's confidence in the continued existence of its citizenship and the factual and legal consequences connected with German citizenship increase. Besides age, the duration during which the child possessed German citizenship also increases the detrimental effect of its loss. The longer a child has adjusted itself to a life in Germany and integrated itself into German society – in particular by participating in the German education system – the more severe the interference with fundamental rights that results from the loss of citizenship. 86

87 cc) On the other hand, irrespective of the legitimate goal of the authorities' right to contest paternity, there does not seem to be any specific urgency for combating ac-

knowledgments of paternity made with the intention to circumvent laws (see above, 3 d) cc)).

88888888 dd) Due to the significant detrimental effect of a loss of citizenship which increases with the child's age and the duration of its citizenship, time limitations need to be established under which children cannot lose citizenship at a later age than relatively early childhood. Considering also, among other things, that it is doubtful whether this regulation is urgently needed, it is acceptable that such age restrictions will not allow for a reversal of every acknowledged paternity made to circumvent the prerequisites of residence law.

(1) The confidence of children in the continued existence of German citizenship has to be reflected in specific provisions which limit the possibility of losing citizenship (cf. BVerfGE 116, 24 <60>). Accordingly, the legislature has created age limits for the loss of citizenship of children. […] 89

(2) However, according to § 17 sec. 3 sentence 2 StAG the thus established absolute age limit of 5 years does not apply to the loss of citizenship as a result of paternities contested by the authorities. 90

[…] 91

(3) Insofar as the authorities' acts contesting paternity […] affect older children whose acquisition of citizenship possibly already dates back many years and thus long enough for them to have been able to develop an awareness of their citizenship and of the consequences linked to it and who assumed during the formative years of their personal development that they are German citizens, the rules are excessively rigorous, especially since the children affected did not themselves contribute to the tainting of the acquisition of citizenship. According to the estimates and assessment by the legislature, the awareness of their own citizenship begins when children are five years old. Constitutionally, it is also necessary to significantly reduce the time limit until when authorities are entitled to contest paternities if this affects children that are older than five. 92

II.

The provisions governing the authorities' right to contest paternity violate parental rights protected by Art. 6 sec. 2 sentence 1 GG. 93

1. As the basis and core of parental rights, Art. 6 sec. 2 sentence 1 GG also protects the continued existence of parenthood. Contestations by the authorities affect the father's interest as well as the equally protected (cf. BVerfGE 38, 241 <252>) interest of the mother in the continuation of the previously intentionally founded common parenthood. 94

Parenthood is also constitutionally protected if paternity is established through acknowledgment according to § 1592 no. 2 BGB and – as required by § 1600 sec. 3 BGB – if the acknowledging father is neither the child's biological father nor has es- 95

tablished a social and family relationship with the child. At the same time, fatherhood obtained by virtue of an acknowledgment of paternity under § 1592 no. 2 BGB grants the acknowledging man the constitutional parental right of Art. 6 sec. 2 sentence 1 GG, regardless of the biological relationship and irrespective of whether a social and family relationship has been established. However, the level of protection guaranteed by Art. 6 sec. 2 sentence 1 GG depends on whether the legal paternity is reflected in the social interactions.

2. When authorities contest paternity, this then terminates legal paternity retroactively against the will of the family members (see above, A. III. 2.) and therefore interferes with the parents' interests in the continuation of parenthood. 96

3. The interference is not justifiable because it is disproportionate. 97

a) The fundamental parental right does not stipulate a general requirement of a statutory provision (*Gesetzesvorbehalt*). The fundamental parental rights can, however, be restricted in light of constitutional limitations inherent in the Basic Law. Contestations by the authorities aim at implementing residence law objectives and therefore pursue a legitimate goal (see above I. 3. d) aa) (3) (a)), which constitutes a constitutionally inherent limit to the fundamental parental right. Although the Basic Law does not explicitly place a mandate on the legislature to regulate the immigration possibilities of foreign nationals, the respective granting or refusal of immigration affects the core of the community and thus requires statutorily regulated specifications. 98

b) If the acknowledgment of paternity specifically aimed at obtaining residence-related advantages, the parental status is only worthy of a lower level of protection. Therefore, in view of its legitimate goal, the interference resulting from a contestation by the authorities is proportionate. However, as far as the overly broad wording of § 1600 sec. 1 no. 5 BGB also grants the right to contest paternities acknowledged for purposes other than circumventing residence law (see above I. 3. d) bb)), these acts are not covered by the original purpose of the law and are thus disproportionate as far as the fundamental parental right is concerned. 99

III.

The reviewed provisions violate the child's right to parental care and upbringing protected by Art. 2 sec. 1 in conjunction with Art. 6 sec. 2 sentence 1 GG. 100

1. Children are entitled to their own right to a free development of their personality (Art. 2 sec. 1 GG) and need protection and help to be able to develop into independent individuals within the social community. Art. 2 sec. 1 in conjunction with Art. 6 sec. 2 sentence 1 GG therefore grants the child a right to parental care and upbringing to be guaranteed by the state (cf. BVerfGE 133, 59 <73 and 74, paras. 41 et seq.>). At the same time it protects children against state measures depriving it of specific parental devotion. 101

2. If an action for annulment by the authorities is successful, the prior attribution of 102

paternity ends with a retroactive effect that dates back to the child's birth. A successful legal challenge of paternity by the authorities deprives the child of its legal father. This interferes with the child's right to parental care and upbringing.

3. The interference with the rights of the child is disproportionate insofar as the authorities' contestation of paternity affects acknowledgments of paternity that did not aim at circumventing residence law (see above, I. 3. d) bb)). If paternity was acknowledged solely for residence-related reasons, the social quality and nature of paternity is, typically, not of very high value for the child. Against that background, the fact that the legislature chose to prioritise the interest in enforcing residence law is constitutionally not objectionable. 103

IV.

There is a violation of the general fundamental right to special protection of the family by the states under Art. 6 sec. 1 GG that is only partly avoidable by means of constitutional interpretation, because the provision unnecessarily burdens an actually existing family life by imposing administrative and judicial investigations within the contestation procedure under § 1600 sec. 1 no. 5 BGB. 104

1. The clarification of parentage entails burdens. Like all other forms of contested paternity, a successful contestation by the authorities requires that the father who acknowledged paternity is not the biological father. Therefore, the descent of the child must be determined within the contestation procedure. The law does not require that the clarification of parentage may not take place before having ensured that the other requirements necessary to contest paternity are met. As a result, parents and children could be forced to undergo the clarification of parentage even if the authorities' contestation of paternity eventually fails due the fact that other requirements are not met. Although the contestation of paternity by the authorities would then be unsuccessful due to the existence of a social and family relationship, the clarification of parentage as such already interferes with the right of the child and the parents under Art. 6 sec. 1 GG. If there is a social and family relationship to the father, the social relationship of the parties concerned is burdened by the fact that an action for annulment is pursued at the family court where the entire family situation is subjected to an examination by the state and the biological paternity is questioned. The strains are particularly high if the clarification of parentage results in the finding that the legal father is not the biological father despite the fact that there is a social and family relationship […]. 105

However, in this respect the reviewed provisions do not preclude an interpretation in conformity with the Constitution. The legislature has not determined the order in which the requirements for contesting paternity need to be demonstrated. To avoid unnecessary interferences with the fundamental right of the family resulting from the impacts a clarification of parentage has on the family, it may be necessary to ensure that a clarification of parentage is not initiated before the court is convinced that the other requirements are fulfilled. However, if it is foreseeable that the other require- 106

ments for contesting paternity are disparately more burdensome for the parties concerned – e.g. because of a potentially broader scope of necessary investigations – it may conversely be necessary to clarify the parentage first. The provisions governing the authorities' right to contest paternity allow for a consideration of these constitutional aspects.

2. However, the impairment of family life resulting from investigations carried out as part of the contestation proceedings does not begin with the judicial clarification of parentage. In fact, also the prior investigations by the authorities already burden the social relationships within the family as they already confront the parties involved with the suspicion that there is no biological relationship between father and child and with the danger of terminating the legal father-child relationship, and because they might explore details of the family life and thereby impede its unburdened continuation. The investigations by the authorities deprive the parties concerned of their certainty and confidence in family relationships by questioning their actual and legal basis. This can even be the case if there is no social and family relationship between father and child, as the questioning of paternity by the authorities also burdens the family relation between a mother and her child. 107

The burdens are constitutionally justified insofar as the measures aim to contest an acknowledgment of paternity that is based on a specific residence-related motivation. In principle, it must also be tolerated that investigations by the authorities also involve families regarding which investigations eventually result in the finding that the requirements for contesting paternity are not met. Precisely this, however, may potentially be proven only through investigations by the authorities. 108

It is, however, constitutionally not acceptable that the unnecessarily broad conditions for a contestation of paternity under § 1600 sec. 4 BGB tend to subject unmarried foreign or binational parents who do not live together to the suspicion of having acknowledged paternity solely for residence-related reasons, and burden their family life readily with investigations by the authorities […]. Also in view of Art. 6 sec. 1 GG, a more precise wording of the prerequisites for contestations would thus be required in this regard. 109

V.

The provisions do not violate Art. 6 sec. 5 GG. 110

As a specification of the general principle of equality and as a provision providing protection to children born out of wedlock, Art. 6 sec. 5 GG limits legislative freedom (cf. BVerfGE 84, 168 <184 et seq.>). In addition, Art. 6 sec. 5 GG also prohibits an indirect deterioration of the position of children born out of wedlock in comparison to that of legitimate children (cf. BVerfGE 118, 45 <62> with further references). An unequal treatment that disadvantages children born out of wedlock vis-à-vis legitimate children always requires a convincing justification (cf. BVerfGE 84, 168 <185>). 111

Authorities can only contest paternities in cases that involve children born out of wedlock, which therefore indirectly discriminates against them (1.). This can, however, be justified (2.). 112

1. The provisions governing the authorities' right to contest paternity indirectly discriminate against children born out of wedlock. The legislature has subjected legal paternity by virtue of acknowledgment (§ 1592 no. 2 BGB) but not legal paternity by virtue of marriage (§ 1592 no. 1 BGB) to contestations by the authorities, even though also paternity by virtue of marriage can be based on a solely legal paternity that lacks a biological parentage relationship, and which possibly – similar to the acknowledgment of paternity – also leads to a better residence status. In the case of acknowledged paternity, the contestation by the authorities does not tie in with the illegitimacy of the child. However, in practice it particularly affects children born out of wedlock and therefore leads to an (indirect) unequal treatment of non-marital children of legal fathers compared to legitimate children of legal fathers. […] 113

2. The unequal treatment of children born out of wedlock whose legal relationship to their father is based on acknowledged paternities (§ 1592 no. 2 BGB) and legitimate children whose legal relationship to their father is based on their father's marriage to the mother (§ 1592 no. 1 BGB) is justified. 114

The legislature is not constitutionally compelled to order administrative intervention in all scenarios in which there is solely a legal father-child relationship that offers the persons concerned residence-related advantages. Rather, it has political leeway to limit itself to scenarios in which it sees a special need for action. Apparently, the legislature found that the need for measures relating to cases of paternities established by virtue of a marriage that aim at obtaining advantages under residence law is less pressing than in case of paternities based on acknowledgments. At the same time, the legislature has not been inactive with regard to marriages motivated by the aim of obtaining residence-related advantages. As seen, it subjected such marriages to annulments by the authorities. However, the legislature refrained from also subjecting the paternity for children of the foreign parent that was established by the annulled marriage to such annulments. 115

The fact that the legislature concentrated on allowing the annulment of a marriage that aims at obtaining residence-related advantages, but did not wish to annul paternities acquired through such a marriage, is sufficiently plausible and therefore not constitutionally objectionable. Quantitatively, in comparison to paternities acquired by acknowledgment, paternities based on marriage have a significantly lower potential of providing other people with a better residence status. In Germany, a man can only be married to one woman at a time. However, he can at all times acknowledge paternity for numerous children. In addition, marriages can only convey paternity for future children, whereas paternity can also be acknowledged for children that are already born. Thus, one man alone can provide many more people with residence-related advantages by acknowledging paternity than by marriage. 116

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Baer		Britz

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