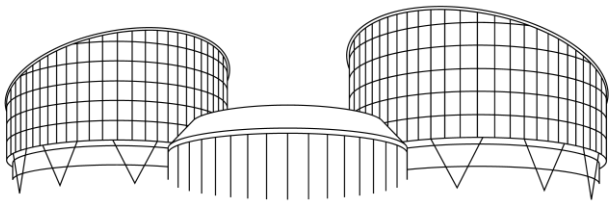

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 25951/07
by Valerie GAS and Nathalie DUBOIS
against France

The European Court of Human Rights (Fifth Section), sitting on 31 August 2010 as a Chamber composed of:

Peer Lorenzen, *President,*
Renate Jaeger,
Jean-Paul Costa,
Karel Jungwiert,
Rait Maruste,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 15 June 2007,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, Ms Valérie Gas and Ms Nathalie Dubois, are French nationals who were born in 1961 and 1965 respectively and live in Clamart. They were represented before the Court by Ms C. Mécary, a lawyer practising in Paris. The respondent Government were represented by their

Agent, Ms E. Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

Having cohabited since 1989 with Ms Valérie Gas ("the first applicant"), Ms Nathalie Dubois ("the second applicant") gave birth in France on 21 September 2000 to a daughter, A., who had been conceived in Belgium by means of medically-assisted procreation using an anonymous donor. A. does not have a legally established relationship with the father, who acted as an anonymous donor in accordance with Belgian law. The child has lived all her life in the applicants' shared home. On 22 September 2000 her name was entered in the register of births, deaths and marriages held at Clamart town hall. The child was recognised by her mother on 9 October 2000.

The two applicants subsequently entered into a civil partnership agreement, which was registered on 15 April 2002 with the registry of the Vanves District Court.

On 3 March 2006 the first applicant applied to the Nanterre *tribunal de grande instance* for a simple adoption order in respect of her partner's daughter, after her partner had given her express consent before a notary.

On 12 April 2006 the public prosecutor lodged an objection against the first applicant's application, on the basis of Article 365 of the Civil Code (see "Relevant domestic law and practice" below).

In a judgment of 4 July 2006 the *tribunal de grande instance* observed that the statutory conditions for adoption were met and that it had been demonstrated that the applicants were actively and jointly involved in the child's upbringing, caring for and displaying affection towards her. However, the court rejected the application on the grounds that the requested adoption would have legal implications running counter to the applicants' intentions and the child's interests, by transferring parental responsibility to the adoptive parent and thus depriving the biological mother of her own rights in relation to the child.

The first applicant appealed against that decision and the second applicant intervened in the proceedings on her own initiative.

Before the Versailles Court of Appeal the applicants reaffirmed their wish, by means of the adoption, to provide a stable legal framework for the child which reflected the reality of her situation. They argued that the loss of parental responsibility on the part of the child's mother could be remedied by means of a complete or partial delegation of parental responsibility, and submitted that other European countries permitted adoptions which created a legal relationship between same-sex partners.

In a judgment of 21 December 2006 the Court of Appeal upheld the refusal of the application.

Like the first-instance court, the Court of Appeal noted that the statutory conditions for the adoption had been met and that it had been established that the first applicant was active in ensuring the child's emotional and material well-being. It nevertheless upheld the finding that the legal consequences of such adoption would not be in the child's interests, since the applicants would be unable to share parental responsibility as permitted by Article 365 of the Civil Code in the event of adoption by the spouse of the child's mother or father, and the adoption would therefore deprive Ms Dubois of all rights in relation to her child. The court further considered that simply delegating the exercise of parental responsibility at a later date would not suffice to eliminate the risks to the child resulting from her mother's loss of parental responsibility. Accordingly, in the court's view, the application merely accorded with the applicants' wish to have their joint parenting of the child recognised and legitimised.

On 21 February 2007 the applicants lodged an appeal on points of law, but did not pursue the proceedings before the Court of Cassation to their conclusion.

On 20 September 2007 the President of the Court of Cassation issued an order declaring the right to appeal on points of law to be forfeit, observing that no memorial containing grounds of appeal against the impugned decision had been produced within the statutory time-limit.

B. Relevant domestic law and practice

Civil partnership agreements (PACS)

A civil partnership agreement is defined by Article 515-1 of the Civil Code as "a contract entered into by two individuals of full age, of opposite sex or of the same sex, for the purposes of organising their life together". The agreement is registered by the registry of the district court for the area in which the partners have their shared residence, and is made public. Civil partnership agreements are enforceable *vis-à-vis* third parties from the date of their publication and entail a number of obligations for those who enter into them, including the obligation to live together and to lend each other material and other assistance (Article 515-4 of the Civil Code). The same Article articulates the principle of mutual liability between the partners for debts incurred *vis-à-vis* third parties under the head of day-to-day expenses.

Civil partnership agreements also confer certain rights on the parties, which increased with the entry into force on 1 January 2007 of Law no. 2006-723 of 23 June 2006 on the reform of the arrangements concerning inheritance and gifts. Hence, the partners constitute a single household for tax purposes, thus benefiting from the advantages derived from filing a

single income-tax return (Articles 6 and 7 of the General Tax Code). They are also placed on the same footing as married couples for the purposes of exercising certain rights, particularly in relation to health and maternity insurance (Article L. 161-14 of the Social Security Code) and life assurance (Article L. 361-4 of the Social Security Code), and also as regards employees' leave entitlement (Employment Ministry instruction of 7 January 2000 extending certain employment-related provisions to persons who have entered into a civil partnership agreement). Since 1 January 2007 surviving partners are also entitled to remain in the shared home on the same basis as surviving spouses (Article 515-6 of the Civil Code).

However, some effects deriving from marriage remain inapplicable to civil partnership agreements. Among other things, the legislation does not give rise to any kinship or inheritance ties between the partners. In particular, the dissolution of the partnership does not entail judicial divorce proceedings but simply involves a joint declaration by both partners or a unilateral decision by one partner which is served on the other. The declaration or decision is registered by the district court registry (Article 515-7 of the Civil Code).

Simple adoption procedure

Simple adoption is a form of adoption which enables a second legal parent-child relationship to be established with a person of any age, in addition to the original parent-child relationship based on blood ties. Unlike full adoption, where the new legal relationship replaces the original one (see Articles 355 et seq. of the Civil Code concerning the effects of full adoption), simple adoption does not entail the severing of the tie to the family of origin. In particular, it enables a minor to be adopted by the spouse of his or her mother or father, with the latter's consent (Articles 361, 347 and 348 of the Civil Code).

Where an application for a simple adoption order is made to the *tribunal de grande instance*, the latter must review the lawfulness of the application (in particular, the age of the adoptive parent, the age difference between the adoptive parent and the adoptee and the consent of the father and mother), and must also assess whether the adoption is appropriate, as a simple adoption order must be in the interests of the adoptee (Articles 361 and 353 of the Civil Code).

In terms of its effects, simple adoption primarily leaves the original legal parent-child relationship intact, with the adopted person retaining all the corresponding rights, including inheritance rights (Article 364 of the Civil Code). The maintenance of legal ties may also justify granting contact rights to members of the family of origin, and in particular to the father and mother.

A simple adoption order further creates a legal parent-child relationship equivalent to a relationship of legitimate descent between the adoptive

parent and the adoptee. This gives rise to reciprocal obligations in respect of maintenance, the creation of a reserved portion of the estate (*réserve héréditaire*) and marriage restrictions. It also results in the adoptive parent's surname being added to the name of the person being adopted (Articles 363 and 366 to 368 of the Civil Code).

Where the adoptee is a minor, simple adoption results in the transfer of parental responsibility to the adoptive parent. The relevant Article of the Civil Code provides as follows:

Article 365

> "All rights pertaining to parental responsibility shall be vested in the adoptive parent alone, including the right to consent to the marriage of the adoptee, unless the adoptive parent is married to the adoptee's mother or father. In this case, the adoptive parent and his or her spouse shall have joint parental responsibility, but the spouse shall continue to exercise it alone unless the couple make a joint declaration before the senior registrar of the *tribunal de grande instance* to the effect that parental responsibility is to be exercised jointly. ..."

This attribution of parental responsibility also confers on the adoptive parent the right to administer the assets of an adopted minor and the statutory right to the income from his or her property (third paragraph of Article 365).

The original parents thus lose parental responsibility and among other things will no longer automatically exercise such responsibility if the adoptive parent dies or is prevented from exercising it. The courts have also ruled that, following adoption, the child's father or mother no longer has capacity to apply to the judge responsible for educational assistance and appeal against decisions taken by the adoptive parent concerning the child's education (Court of Cassation, First Civil Division, 11 May 1977, *Bulletin Civil* 1977 I, no. 223).

However, the legislation provides for one exception to the transfer of parental responsibility, namely where an individual adopts the child of his or her spouse. In this case, parental responsibility is vested jointly in the adoptive parent and his or her spouse, but the latter continues to exercise it alone unless a joint declaration is made before the senior registrar of the *tribunal de grande instance* with a view to the joint exercise of responsibility.

Finally, a simple adoption order may be revoked by decision of the *tribunal de grande instance* at the request of the adoptive parent or the adopted person, "where there are serious grounds for such a measure" (Article 370 of the Civil Code). The biological parents may also request revocation of the order if the adoptee is a minor. Article 370-2 of the Civil Code specifies that "revocation permanently ends all effects of the adoption order".

Simple adoption of the minor child of an individual's civil partner

The Court of Cassation has issued several rulings on this subject. The first two judgments, delivered on 20 February 2007, concerned cases involving lesbian couples who had concluded civil partnership agreements and were raising children whose sole legal parent was their mother, as their paternity had not been legally established. In both cases the mother's partner had applied for a simple adoption order in respect of the children, with the consent of their mother. One of the applications was granted by the Bourges Court of Appeal on the grounds, in particular, that "the adoption [was] in the child's interests", while the other was rejected by the Paris Court of Appeal. Referring to Article 365 of the Civil Code, the First Civil Division of the Court of Cassation quashed the judgment of the Bourges Court of Appeal and declared it null and void, in the following terms:

> "The adoption resulted in parental responsibility for the child being transferred, and in the biological mother, who planned to continue raising the child, being deprived of her rights. Accordingly, although Ms Y had consented to the adoption, the Court of Appeal, in granting the application, acted in breach of the above-mentioned provision;"

It upheld the judgment of the Paris Court of Appeal as follows:

> "However, the Court of Appeal correctly observed that Ms Y..., the children's mother, would lose parental responsibility in relation to the children were they to be adopted by Ms X, although the couple were cohabiting. It noted that a delegation of parental responsibility could be requested only if the circumstances so required, which had been neither established nor alleged, and that in the present case, the delegation or sharing of parental responsibility would, in the context of an adoption, be contradictory since the adoption of a minor was designed to attribute exclusive parental responsibility to the adoptive parent. Accordingly, the Court of Appeal, which, despite the allegations to the contrary, examined the issue, gave lawful grounds for its decision." (Two judgments of the First Civil Division, 20 February 2007, *Bulletin Civil* 2007 I, nos. 70 and 71).

The Court of Cassation subsequently confirmed this approach:

> "Firstly, the child's (father or) mother would lose parental responsibility in the event of the child's adoption, despite being perfectly fit to exercise that responsibility and having given no indication of wishing to reject it. Secondly, Article 365 of the Civil Code provides for the sharing of parental responsibility only in the event of adoption of the spouse's child; as the French legislation stands, spouses are persons joined by the bonds of marriage. Accordingly, the Court of Appeal, which did not rule in breach of any of the provisions of the European Convention on Human Rights, gave lawful grounds for its decision." (First Civil Division, 19 December 2007, *Bulletin Civil* 2007 I, no. 392; see also, to similar effect, the judgment of the First Civil Division of 6 February 2008, unpublished, on appeal no. 07-12948).

The first two judgments, delivered on 20 February 2007, were published in the Court of Cassation Information Bulletin, on the Internet and in the

Court of Cassation's annual report. They were published with the following concluding remark: "On issues of this kind, which concern personal status and, more broadly, the foundations of our society, it is ultimately for the legislature to decide whether the Civil Code needs to be amended". The research and documentation department of the Court of Cassation issued a press release in connection with these judgments, which was worded as follows:

> "The First Civil Division of the Court of Cassation today delivered two judgments concerning the conditions governing simple adoption ... in cases where the partner of the child's biological mother applies to adopt the child, who does not have a legally established relationship with the father. ...
>
> Ruling following diverging decisions by the lower courts, the Court of Cassation held that a simple adoption order deprives the biological mother of parental responsibility, as the exception provided for by Article 365 of the Civil Code, cited above, is applicable only in the case of married couples, and that the delegation or sharing of parental responsibility, which one of the appellate courts had envisaged as a means of restoring the biological mother's rights, was contradictory in the context of the requested adoption, the effect of which was to attribute sole parental responsibility to the adoptive parent. The Court of Cassation therefore concluded that the Court of Appeal decision refusing the application for a simple adoption order, on the grounds that it was not in the child's interests for its biological mother to be deprived of parental responsibility, met the legal requirements. It quashed the second judgment referred to it. ..."

These judgments were also the subject of a large number of academic articles in specialist journals.

Procedure governing appeals on points of law

Under Article 978 of the Code of Civil Procedure persons lodging an appeal on points of law must submit their pleadings within a statutorily defined time-limit following the notice of intention to appeal, failing which the appeal will be declared forfeit by order of the President of the Court of Cassation or his or her deputy. At the material time, the time-limit was five months (since the entry into force on 25 May 2008 of Decree No. 2008-484 of 22 May 2008 it has been four months).

Parental responsibility and delegation of the exercise of parental responsibility

Article 372 of the Civil Code

> "The father and mother shall exercise parental responsibility jointly.
>
> However, where the mother or father is recognised as the legal parent more than one year after the birth of the child, who already has a legally established relationship with the other parent, the latter shall continue to exercise sole parental responsibility. This

shall also apply where the second parent is recognised by the courts as the child's legal parent.

Parental responsibility may nevertheless be exercised jointly if the child's father and mother make a joint declaration before the senior registrar of the *tribunal de grande instance*, or following a decision by the family judge."

Delegation of the exercise of parental responsibility is provided for by Articles 377 and 377-1 of the Civil Code, which read as follows:

Article 377

"The father and mother, together or separately, may, where the circumstances so require, apply to the judge to have the exercise of their parental responsibility delegated in whole or in part to a third person, a family member, a trusted relative, an approved childcare establishment or a departmental child welfare agency."

Article 377-1

"The complete or partial delegation of parental responsibility shall be ordered by the family judge."

COMPLAINT

Relying on Article 14 in conjunction with Article 8 of the Convention, the applicants complained of the refusal of the first applicant's request to adopt her partner's child. They alleged that the reason given for that refusal, namely the legal consequences of such adoption, which would deprive the child's mother of parental responsibility, definitively ruled out adoption only in the case of same-sex couples who, unlike opposite-sex couples, could not marry and thereby take advantage of the provisions of Article 365 of the Civil Code. They submitted that the refusal to grant the first applicant a simple adoption order in respect of A. for reasons of principle had infringed their right to respect for their private and family life, in a discriminatory manner. They alleged that this discriminatory breach of their rights, based on their sexual orientation, was not justified by any legitimate aim nor was it necessary in a democratic society, in violation of Article 14 in conjunction with Article 8 of the Convention.

THE LAW

A. Objections of inadmissibility

1. Objection of inadmissibility for failure to exhaust domestic remedies

This objection related to the exhaustion of domestic remedies in both procedural and substantive terms. The Government submitted that the applicants had not lodged a valid appeal with the Court of Cassation and that they had not raised before the other domestic courts the complaints they subsequently submitted to the Court.

With regard to the lack of a valid appeal to the Court of Cassation, the Government noted that the applicants had lodged an appeal on points of law but had declined to pursue the proceedings, as demonstrated by the order of the President of the Court of Cassation of 20 September 2007 declaring the appeal forfeit. It could not be argued that the appeal in question had been bound to fail simply because of the simultaneous existence of the unfavourable judgments delivered by the Court of Cassation on 20 February 2007. These two precedents alone, which were not general in scope, did not provide sufficient basis for inferring that the appeal to the Court of Cassation had had no prospect of success and was therefore not an effective remedy.

The Government further argued that the applicants had at no point, either expressly or in substance, submitted to the domestic courts the complaint they had raised before the Court. They had also omitted to rely on the relevant provisions of the Convention.

The Government therefore concluded that the application should be rejected for failure to exhaust domestic remedies.

In the applicants' submission, the appeal on points of law which they had lodged in February 2007 had had no prospect of succeeding in view of the judgments delivered by the Court of Cassation on 20 February 2007, in which the latter had adopted a position of principle which definitively ruled out simple adoption as an option for same-sex couples. They had therefore been justified in deciding not to pursue their appeal, which did not constitute an effective remedy for the purposes of Article 35 of the Convention.

As to the complaint raised before the Court, the applicants argued that they had duly relied upon the relevant provisions of the Convention, in particular in their written submissions to the Court of Appeal.

The Court reiterates that, according to its case-law, "the only remedies which Article [35] of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not

only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied" (see, in particular, *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; *Dalia v. France*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I; *Civet v. France* [GC], no. 29340/95, ECHR 1999-VI; and *Gautrin and Others v. France*, 20 May 1998, § 38, *Reports* 1998-III). Furthermore, "the rule [of exhaustion of domestic remedies] is neither absolute nor capable of being applied automatically. In reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that the Court must take realistic account of the general legal and political context in which the remedies operate, as well as the personal circumstances of the applicant" (see *Menteş and Others v. Turkey*, 28 November 1997, § 58, *Reports* 1997-VIII).

In the instant case the Court notes that in February 2007 the applicants duly lodged an appeal on points of law against the judgment of the Versailles Court of Appeal. In accordance with the provisions in force at the time, they were thus required, for the appeal to be valid, to submit pleadings by July 2007 at the latest, but did not do so.

On 20 February 2007 the First Civil Division of the Court of Cassation delivered two judgments in cases concerning similar facts to the applicants' case and raising the same question of law. Bringing to an end the diverging interpretations of two courts of appeal, the Court of Cassation, referring to Article 365 of the Civil Code, refused an application for a simple adoption order made by the civil partner of the child's mother. The judgments in question, which were delivered on the basis of the submissions to that effect made by the advocate-general and represented the first rulings by the Court of Cassation on the subject, were widely published (see "Relevant domestic law and practice" above). They were subsequently upheld by further judgments of the First Civil Division of the Court of Cassation dated 19 December 2007 and 6 February 2008.

In view of the authority enjoyed by the Court of Cassation in the French judicial system and the nature of the judgments of 20 February 2007, which settled clearly and unambiguously an issue of law that had previously been the subject of diverging interpretations by the lower courts, the Court considers that, given the legal context, the applicants could legitimately infer from the rulings of the First Civil Division that in the instant case an appeal on points of law before that body would have no prospect of success.

The Court further notes, as did the applicants, that in their submissions to the Versailles Court of Appeal, which they produced in support of the present application, they alleged a violation of Article 8 of the Convention.

Accordingly, the Government's objection should be dismissed.

2. Objection of incompatibility ratione materiae

The Government submitted that the application was inadmissible because the applicants' complaint did not fall within the scope of Article 8 of the Convention and, accordingly, of Article 14. The right to adopt was not guaranteed by Article 8, as the Court had recently reiterated (the Government referred to *E.B. v. France* [GC], no. 43546/02, §§ 41 et seq., ECHR 2008-...). In *E.B.*, it was only after finding that the case concerned primarily the "procedure for obtaining authorisation to adopt" rather than the issue of adoption itself, and that the applicant claimed to have been discriminated against in the context of that procedure on account of her avowed homosexuality, that the Court had linked the applicant's complaint to rights falling within the scope of "private life" for the purposes of Article 8 of the Convention.

By contrast, in the Government's view, the present case concerned the right to adopt as such. It could not therefore be considered to fall within the scope of Article 8, as the Court had already indicated implicitly in *E.B.* (cited above, § 49). The Government concluded from this that the refusal of the first applicant's adoption application could not be said to have infringed her right or that of the second applicant to the free expression and development of their personalities or the manner in which they led their life, in particular their sexual life.

The Government concluded that Article 8 of the Convention was inapplicable to the present case and that the application was incompatible *ratione materiae* with the Convention.

The applicants argued first of all that their household, made up of themselves and A., constituted a family within the meaning of Article 8 of the Convention.

Next, they pointed out that they were not claiming any right to adopt; no such right existed, regardless of the sexual orientation of the persons seeking to adopt. Nevertheless, they considered Article 14 of the Convention taken in conjunction with Article 8 to be applicable in the present case. Firstly, the possibility, provided by a simple adoption order, of establishing a legal parent-child relationship enabling the adoptive parent to pass on his or her surname and property and to exercise parental responsibility while the child was a minor amounted to recognition of a *de facto* family situation which came within the scope of Article 8. Secondly, sexual orientation was an aspect of private life and was covered by Article 8 on that basis.

The Court notes that the applicants alleged discrimination on the basis of their sexual orientation since, being unable to marry because of that orientation, they – and their child – were unable to take advantage of the simple adoption procedure although they had been living for years in a *de facto* family situation comparable to that of an opposite-sex couple. The applicants' request was aimed at establishing a legal parent-child

relationship between the first applicant and A., while retaining the original parent-child tie, and its essential purpose was to confer legal status on an existing *de facto* situation.

With regard to Article 14, on which the applicants relied in the instant case, the Court reiterates that it only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Articles of the Convention (see, among many other authorities, *E.B.*, cited above, § 47).

Noting that the applicants based their arguments on Article 14 taken in conjunction with Article 8 of the Convention, the Court observes at the outset that the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt. Neither party contests this (see *E.B.*, cited above, § 41).

However, in accordance with its case-law, the Court notes that the existence or non-existence of "family life" is essentially a question of fact depending upon the existence of close personal ties (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31, and *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII). It reiterates that the notion of the "family" in Article 8 is not confined solely to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together outside of marriage (see, among other authorities, *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C; and *X, Y and Z v. the United Kingdom*, 22 April 1997, § 36, *Reports* 1997-II).

When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together (see, in particular, *X, Y and Z*, cited above, § 36, and *Emonet and Others v. Switzerland*, no. 39051/03, § 36, ECHR 2007-XIV).

The instant case concerns two people who have lived together since 1989 and entered into a civil partnership in 2002 which established contractual ties between them concerning the organisation of their life together (see "Relevant domestic law and practice" above). One of the partners is the biological mother of A., a child wished for by both partners and conceived by means of medically-assisted procreation using an anonymous donor. The applicants have raised A. since she was born and are jointly and actively involved in her upbringing, a fact acknowledged by the domestic courts. In these circumstances the Court considers that the relationship between the

applicants and A. amounts to "family life" within the meaning of Article 8 of the Convention.

Furthermore, sexual orientation falls within the personal sphere protected by Article 8 of the Convention (see *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, §§ 23 and 28, ECHR 1999-IX; *E.B.*, cited above, § 43; and *Kozak v. Poland*, no. 13102/02, § 82, 2 March 2010).

In view of the foregoing, the Court concludes that Article 14 of the Convention taken in conjunction with Article 8 is applicable in the present case, and dismisses the Government's objection of inadmissibility.

B. Merits

The applicants alleged that they had been discriminated against on the basis of their sexual orientation and in breach of their right to respect for their private and family life. They relied on Article 14 of the Convention in conjunction with Article 8. These Articles provide:

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."

1. The parties' submissions

(a) The Government

The Government contended primarily that, for a finding of discrimination to be made in the present case, persons in the same situation as the first applicant would have to be able to claim different treatment. That was not the case, since an unmarried opposite-sex couple living in a civil partnership under French law could have met with the same refusal as the first applicant. Thus, the fact that Article 365 of the Civil Code laid down a rule which applied only to married couples did not amount to

discrimination. The Government stressed that the Court's case-law accepted that marriage conferred a particular status on those who entered into it. The absence in domestic law of a right for the applicants to marry was based on legitimate reasons, as was the particular status conferred on married couples, and could not be invoked to argue by extension that a difference in treatment existed within the uniform framework of civil partnerships. Accordingly, no direct finding of a difference in treatment could be made in the instant case.

Even assuming that there had been a difference in treatment, the Government submitted, in the alternative, that it was justified. The judge's refusal of the first applicant's simple adoption application had pursued a legitimate aim, namely the protection of the family based on the bonds of marriage. In this connection the Government stressed that the decision had been based on the child's interests and not on the first applicant's sexual orientation. Had the adoption order been granted the biological mother would have lost parental responsibility in relation to her child; this could in no circumstances be considered to be in the child's interests.

Furthermore, in the Government's submission, the refusal to grant the adoption order had been proportionate to the aim pursued, as it remained open to unmarried couples to request a delegation of parental responsibility in accordance with Articles 377 and 377-1 of the Civil Code, as confirmed by the case-law of the Court of Cassation. Lastly, the refusal of the application for simple adoption was based on a temporary obstacle linked to the fact that the child was a minor, an obstacle which would be removed once the child reached full age. Hence, even if a difference in treatment was found to have existed, it was in no sense discriminatory. The application was therefore manifestly ill-founded.

(b) The applicants

The applicants contested the Government's arguments. The reason behind the first applicant's request for a simple adoption order had been her wish to establish a legal relationship with the child in addition to the original parent-child relationship, allowing the first applicant to pass on her surname and property and to exercise parental responsibility while the child was a minor. Furthermore, contrary to the Government's assertion, the situation of same-sex and opposite-sex couples in civil partnerships was not identical. Opposite-sex couples in a civil partnership could circumvent the requirements of Article 365 of the Civil Code by marrying, whereas civil marriage was not available to same-sex couples in France, as the Court of Cassation had confirmed. Although the judgment by the Court of Cassation in that regard was the subject of an application to the Court, the fact remained that marriage between two women or two men was not currently possible in France. Accordingly, same-sex couples, who could not marry, had no way of circumventing the strict requirements of Article 365 of the

Civil Code. As a result, a child brought up by a same-sex couple could never be adopted by his or her *de facto* parent, even if, like A., he or she had lived with that parent for years. This was indirect discrimination which was based on the parents' sexual orientation and operated to the detriment of the child. If the first applicant had been a man the couple could have married and, after obtaining a simple adoption order, could have shared parental responsibility.

As this was not the case, the applicants were of the view that the refusal to grant a simple adoption amounted to interference with their right to family life. In their view, the measure was not warranted in the child's interests, nor could it be said to be proportionate to the aim pursued, since a delegation of parental responsibility did not establish any legal parent-child relationship and, accordingly, did not allow the person concerned to pass on his or her surname or property. The relationship created therefore afforded less protection to the child's interests.

The applicants also pointed out that there was consensus at European level on prohibiting discrimination based on sexual orientation and that several countries allowed a child to be adopted by the same-sex partner of his or her birth parent, or joint adoption of a child by a same-sex couple.

There had therefore been a violation of Article 14 of the Convention in conjunction with Article 8.

(b) The third-party interveners

The International Federation for Human Rights (FIDH), the International Commission of Jurists (ICJ), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the British Association for Adoption and Fostering (BAAF) and the Network of European LGBT Families Associations (NELFA) submitted a joint intervention to the Court.

The organisations in question pointed out first of all that there were three distinct situations in which lesbian or gay individuals adopted children: firstly, an unmarried individual might seek to adopt, in a member State where this was permitted (even if only in exceptional cases), it being understood that any partner he or she might have would have no parental rights (individual adoption); secondly, one member of a same-sex couple might seek to adopt the child of the other partner, so that both partners had parental rights *vis-à-vis* the child (second-parent adoption); finally, both members of a same-sex couple might seek to jointly adopt a child with no connection with either of them, so that both partners simultaneously acquired parental rights *vis-à-vis* the child (joint adoption). In the case of *E.B. v. France* (cited above), the Court had ruled in favour of equal access to individual adoption for all persons, regardless of their sexual orientation. The instant case concerned second-parent adoption. The only additional question that arose in this case was whether there was any reason not to

permit the second parent to become the child's "legal parent" and thus to formalise the relationship that already existed in practice. Having two "legal parents" rather than one was in the child's best interests as it meant a doubling of the resulting protection (financial support obligations, inheritance rights and, in day-to-day life, parental authority when dealing with schools, hospitals and immigration officials). It also eliminated the possibility that, if the genetic and legal mother died, the child could be taken away from the only other parent it had known and transferred to another home. Allowing second-parent adoption meant ensuring that the law conformed to the reality of the child's existence. Admittedly, this would entail changes to some existing national legal systems. However, according to the intervening organisations, a study of the legislation of the Council of Europe member States, Canada, the United States, Australia and South Africa showed that, while differences persisted, there was a growing trend towards permitting second-parent adoption for same-sex couples. This was justified in the best interests of the child, as expressly reasoned by a number of courts in South Africa, the United States and Germany.

In the view of the intervening organisations, cases like the present one involved several forms of difference in treatment, both direct and indirect, based on sexual orientation, for which there was no objective and reasonable justification.

(d) The parties' replies to the third-party intervention

The Government began by observing that the differences between legal systems described by the third-party interveners testified to the margin of appreciation which had to be left to the national authorities in this sphere.

In the Government's view, it was inaccurate to assert, as the third-party interveners had, that the child's best interests could only be safeguarded within a system which allowed children to be adopted by the partner of their biological mother. They referred again to Article 377 of the Civil Code, which allowed the biological mother and her partner to exercise parental responsibility jointly. In that connection they cited a judgment by the Rennes Court of Appeal granting shared parental responsibility to a child's biological mother and her former partner, from whom she had separated. Sharing the exercise of parental responsibility in this way made it possible to avoid a situation of the kind criticised by the Court in *Emonet*, in which the legal relationship with the child was severed.

The applicants replied that a simple adoption order and delegation of parental responsibility differed in terms of their nature and their effects. Only the former enabled an irrevocable legal relationship to be established which allowed the person concerned to pass on his or her surname and property and to exercise parental responsibility. The adoptive parent-child relationship was established in addition to the original parent-child relationship, which remained intact. Where responsibility was shared by

means of delegation, on the other hand, there was no legal relationship, which was precisely what the application for a simple adoption order was aimed at establishing.

The applicants further submitted that the argument that delegation of parental responsibility would prevent the legal relationship between the biological mother and her child from being severed was based on a misapprehension. Although full adoption indeed severed that relationship, this was not the case with simple adoption, which allowed the adoptive relationship to be created in addition to the original relationship. It was possible under French law for a judge to grant a simple adoption order which could then be followed by a delegation of responsibility allowing the parent who had been deprived of parental responsibility to share it. This approach had been adopted in the case of opposite-sex couples but had been denied to the applicants because of their sexual orientation.

2. The Court's assessment

The Court considers, in the light of all the arguments put forward by the parties, that the complaint raises serious issues of fact and law which cannot be resolved at this stage in the examination of the application, but require examination on the merits. It follows that this complaint cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring the application inadmissible has been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Claudia Westerdiek
Registrar

Peer Lorenzen
President