



GRAND CHAMBER

**CASE OF X AND OTHERS v. AUSTRIA**

*(Application no. 19010/07)*

JUDGMENT

STRASBOURG

19 February 2013

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



**In the case of X and Others v. Austria,**

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

Dean Spielmann, *President*,  
Josep Casadevall,  
Guido Raimondi,  
Ineta Ziemele,  
Nina Vajić,  
Lech Garlicki,  
Peer Lorenzen,  
Anatoly Kovler,  
Elisabeth Steiner,  
Khanlar Hajiyev,  
Egbert Myjer,  
Danutė Jočienė,  
Ján Šikuta,  
Vincent A. de Gaetano,  
Linos-Alexandre Sicilianos,  
Erik Møse,  
André Potocki, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 3 October 2012 and 9 January 2013,

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

## PROCEDURE

1. The case originated in an application (no. 19010/07) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Austrian nationals (“the applicants”), on 24 April 2007. The President of the Grand Chamber acceded to the applicants’ request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicants alleged that they had been discriminated against in comparison with different-sex couples, as second-parent adoption was legally impossible for a same-sex couple.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 29 January 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). A hearing was held by the First Section on 1 December 2011. On 5 June 2012 a Chamber of that Section composed of the following judges: Nina Vajić, Anatoly Kovler, Elisabeth Steiner, Khanlar Hajiyev, Julia Laffranque, Linos-Alexandre Sicilianos and Erik Møse, and also of Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber (Article 30 of the Convention), neither of the parties having objected to relinquishment within the time allowed (Rule 72).

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

6. The Government and the applicant each filed further written observations on the admissibility and merits.

7. In addition, joint third-party comments were received from Prof. R. Wintemute on behalf of the following six non-governmental organisations: *Fédération internationale des ligues des droits de l'Homme* (FIDH), the International Commission of Jurists (ICJ), the European Region of the International Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the British Association for Adoption and Fostering (BAAF), the Network of European LGBT Families Associations (NELFA) and the European Commission on Sexual Orientation Law (ECSOL), which had been granted leave by the President of the Grand Chamber to intervene in the written procedure. Further third-party comments were received from the European Centre for Law and Justice (ECLJ), the Attorney General for Northern Ireland, Amnesty International (AI) and Alliance Defending Freedom (ADF), who had each been given leave to intervene in the written procedure.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 October 2012 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms B. OHMS, Federal Chancellery,	<i>Deputy Agent,</i>
Mr M. STORMANN, Federal Ministry of Justice,	
Ms A. JANKOVIC, Federal Ministry for European and International Affairs	<i>Advisers;</i>

(b) *for the applicants*

Mr H. GRAUPNER,	<i>Counsel.</i>
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The Court heard addresses by Ms Ohms and Mr Graupner, as well as their answers to questions put by the judges.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The first and third applicants were born in 1967 and the second applicant was born in 1995.

10. The first applicant and the third applicant are two women living in a stable relationship. The second applicant is the third applicant's son and was born outside marriage. His father has recognised paternity and his mother had sole custody of him. The applicants have been living in a common household since the second applicant was about five years old and the first and third applicants care for him jointly.

11. On 17 February 2005 the first applicant and the second applicant, represented by his mother, concluded an agreement whereby the second applicant would be adopted by the first applicant. The applicants' intention was to create a legal relationship between the first and second applicants corresponding to the bond between them, without severing the relationship with the child's mother, the third applicant.

12. The applicants, aware that the wording of Article 182 § 2 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) could be understood to exclude the adoption of the child of one partner in a same-sex couple by the other partner without the relationship with the biological parent being severed, requested the Constitutional Court to declare that provision unconstitutional as discriminating against them on account of their sexual orientation. In the case of heterosexual couples, Article 182 § 2 of the Civil Code allowed for second-parent adoption, that is to say, the adoption by one partner of the child of the other partner, without the latter's legal relationship with the child being affected.

13. On 14 June 2005 the Constitutional Court rejected the request as inadmissible under Article 140 of the Federal Constitution. It noted that the competent District Court, in deciding whether to approve the adoption agreement, would have to examine the question whether or not Article 182 § 2 of the Civil Code allowed second-parent adoption in the case of a same-sex couple. Should the District Court refuse to approve the adoption agreement, the applicants remained free to submit their arguments regarding the alleged unconstitutionality of that provision to the appellate courts, which in turn could bring the issue before the Constitutional Court if they shared the applicants' view.

14. Subsequently, on 26 September 2005, the applicants requested the District Court to approve the adoption agreement, to the effect that both the first and the third applicants would be the second applicant's parents. In their submissions they explained that the first and second applicants had developed close emotional ties and that the second applicant benefited from living in a household with two caring adults. Their aim was to obtain legal recognition of their *de facto* family unit. The first applicant would thus replace the second applicant's father. They noted that the second applicant's father had not consented to the adoption, without giving any reasons for his position. Furthermore, they alleged that he had displayed the utmost antagonism towards the family and that the court should therefore override his refusal to consent under Article 181 § 3 of the Civil Code, as the adoption was in the best interests of the second applicant. In support of their submissions, the applicants attached a report from the Youth Welfare Office which confirmed that the first and third applicants shared the day-to-day tasks involved in caring for the second applicant and the overall responsibility for his upbringing, and which concluded, while expressing doubts as to the legal position, that the award of joint custody would be desirable.

15. On 10 October 2005 the District Court refused to approve the adoption agreement, holding that Article 182 § 2 of the Civil Code did not provide for any form of adoption producing the effect desired by the applicants. Its reasoning reads as follows:

“Ms ..., the third applicant, has sole custody of her minor son ..., who was born outside marriage. [She] shares a home in ... with her partner ... (the first applicant) and with ... (the second applicant).

An application to the courts made jointly on 12 October 2001 by the child's mother and her partner for partial transfer of custody of [the child] to the mother's partner, so that the two women could exercise joint custody, was dismissed with final effect.

Under the terms of the adoption agreement of 17 February 2005 for which approval is now sought, the first applicant, as the partner of [the child's] mother, agreed to adopt the child.

The applicants seek court approval of the adoption such that the relationship with the biological father and his relatives under family law would cease to exist while the relationship with the biological mother would remain fully intact. They request the courts to override the refusal of consent by the child's father.

The application, which is aimed *de facto* at securing joint custody for the biological mother and the adoptive mother – who lives in a same-sex relationship with her – fails on legal grounds.

Article 179 of the Civil Code provides for adoption either by one person or by a married couple. Only under certain strict conditions may a married person adopt a child on his or her own. Under the second sentence of Article 182 § 2 of the Civil Code, the legal relationship in family law – above and beyond the legal kinship itself – ceases only in respect of the biological father (the biological mother) and his (her) relatives, if the child is adopted **only** by a man (or a woman). In so far as the

relationship with the other parent remains intact subsequently (that is, after the adoption), the court declares it to have been severed in respect of the parent concerned, subject to his or her consent.

Article 182 of the Civil Code was last amended in 1960 (Federal Gazette 58/1960). On the basis of the unambiguous wording of this provision and the undoubted intentions of the legislature at that time it must be assumed that, in the event of adoption by one person, the legal relationship with the biological parent of the **same** sex as the adoptive parent ceases to exist, while the relationship with the parent of the **opposite** sex remains intact (see also Schlemmer in *Schwimann*, ABGB<sup>2</sup> I § 182, point 3). Only in this scenario does the law allow the courts to declare the latter relationship – which is unaffected by the adoption *per se* – to have been severed.

The arrangement sought by the applicants, whereby [the child] would be adopted by a woman and the relationship with his biological father, but not with his biological mother, would cease, is therefore incompatible with the law. In the court's view, the interpretation of this legislative provision in conformity with the Constitution – which, needless to say, is required – does nothing to alter this finding.

It is correct to state that, according to the settled case-law of the European Court of Human Rights, issues concerning sexual orientation fall within the scope of protection of the right to private and family life (Article 8 ECHR). It is also true that, according to the Court's case-law, discrimination on the basis of sexual orientation is fundamentally incompatible with Articles 8 and 14 of the Convention. It should be noted, however, that the European Court has also consistently ruled that the Council of Europe member States are to be allowed a margin of appreciation in this regard, which is correspondingly broader the less common ground there is amongst member States' legal orders. In paragraph 41 of its judgment in *Fretté v. France* (application no. 36515/97, 26 May 2002), the European Court expressly stated that, in the sphere of the right of homosexuals to adopt, member States had to be afforded a wide margin of appreciation as the issues concerned were subject to societal change and in a state of transition; however, this margin of appreciation was not to be interpreted as giving States *carte blanche* to exercise arbitrary power.

The issue whether a member State provides the possibility for two persons of the same sex to establish a legal relationship with a child on an equal footing is therefore a matter for the State itself to decide, subject to the limits laid down in Article 8 § 2 of the Convention. In the view of this court no such possibility exists under Austrian law as it currently stands, even when the law is interpreted, as it is required to be, in conformity with the Constitution. The arrangement sought by the applicants would require an amendment to the legislation; it could not be authorised by means of an ordinary court decision interpreting Article 182 of the Civil Code in a manner running counter to the unambiguous wording of that provision.

For these reasons the court dismisses the application for approval of the adoption agreement.”

16. The applicants appealed. Referring to Articles 8 and 14 of the Convention, they argued that Article 182 § 2 of the Civil Code was discriminatory in that it led to an unjustified distinction between different-sex and same-sex couples. So-called second-parent adoption was possible for married or unmarried heterosexual couples but not for same-sex couples. The present case had to be distinguished from *Fretté*, which had dealt with adoption by a single homosexual. By contrast, the present case

concerned a difference in treatment between different-sex and same-sex couples.

17. Having regard to the Court's judgment in *Karner v. Austria* (no. 40016/98, ECHR 2003-IX) the difference in treatment between unmarried heterosexual couples and same-sex couples was particularly problematic. Only a few European States allowed second-parent adoption in same-sex couples; the majority of States reserved second-parent adoption to married couples, and there was a consensus that unmarried different-sex couples and same-sex couples should not be treated differently. The difference complained of did not serve a legitimate aim: in particular, it was not necessary in order to protect the child's interests. There was research to show that children developed just as well in families with homosexual parents as in families with heterosexual parents. What was important was not the parents' sexual orientation but their ability to provide a stable and caring family. The applicants requested the appellate court to quash the District Court's decision and to grant their request of 26 September 2005 or, alternatively, to refer the case back to the District Court for a fresh decision.

18. The Regional Court, without holding a hearing, dismissed the applicants' appeal on 21 February 2006. In its decision it described a number of related sets of proceedings (concerning visiting rights for the second applicant's father as well as his maintenance obligations, and the proceedings in which the first and third applicants had tried unsuccessfully to obtain joint custody of the second applicant). The Regional Court observed that it had doubts as to whether the third applicant could represent her son in the proceedings, as there was a potential conflict of interests. It went on to state as follows:

"Further examination of this issue is, however, objectively unnecessary, as, in the view of this court – as set out below – approval of the adoption agreement should in any event be refused in this case without the need for further investigation, and was indeed refused by the first-instance court, with the result that the effective representation of the child in the proceedings is not at issue.

As far back as the decision on the application for a partial transfer of custody of [the child] to [the mother's partner], the courts reviewing the case observed that, while Austrian family law contained no legal definition of the term 'parents', it was nevertheless abundantly clear from the provisions of Austrian family law as a whole that the legislature intended that a parental couple should consist, as a matter of principle, of two persons of opposite sex. The legislation therefore provided first and foremost for the biological parents to have custody, or the biological mother in the case of a child born outside marriage. Only where this was not possible did the law provide for other persons to be awarded custody of a child. If the biological parents (father and mother) were present, it was unnecessary to award custody to another person, even if, from a purely factual viewpoint, that person had a close relationship with the child (compare OGH, 7 Ob 144/02 f). The courts stressed that no discrimination against persons in same-sex partnerships could be inferred from this legal stance, but that the provisions of family law were based, in line with the biological reality, on the presence of a couple made up of parents of opposite gender.



In this court's view, these considerations also apply to the issue under examination here, namely the approval of the adoption of a minor child by the same-sex partner of one of the child's parents. Here also, it is unnecessary to create an additional 'legal parent' where both the child's opposite-sex parents are present. The aim is in no sense to discriminate against the same-sex partnership of the child's mother; however, where both the opposite-sex parents are present, there is simply no need for a provision enabling one of the parents to be replaced by the same-sex partner of the other.

The adoption of a minor child is fundamentally designed to create a relationship akin to that which exists between biological parents and their children. The file in the present case shows that the biological father has regular contact with his child, with the result that the child maintains a meaningful relationship with both his opposite-sex parents. In these circumstances, however, there is no need to replace either of the biological parents with the same-sex partner of the other parent by authorising the child's adoption.

The case-law concerning contact rights for parents also generally and indisputably recognises that, according to the available psychological and sociological findings, it is of particular importance for the child's subsequent development that adequate personal contact be maintained with the parent with whom he or she is not living (see, *inter alia*, EFSlg 100.205). Accordingly, the legislation goes so far as to confer a right on the child to have personal contact with the parent not living in the same household (see, *inter alia*, OGH, 3 Ob 254/03 z). It is likewise beyond dispute that, for a minor child to thrive, it is highly desirable that he or she should have a personal relationship with both – opposite-sex – parents, in other words, with both a female (mother) and a male (father) caregiver, and that efforts should be made to that end (compare, *inter alia*, EFSlg 89.668). At least a minimum degree of personal contact between the child and both parents is therefore greatly to be desired and is generally made a requirement in the interests of the child's healthy development (compare OGH, 7 Ob 234/99 h). These considerations also clearly militate against authorising the adoption of a child by the same-sex partner of one of the parents if that has the effect of severing the family-law relationship with the other parent.

As stated above, this legal position in no sense amounts to discrimination against people in same-sex partnerships. On this point the first-instance court, in the reasoning of the impugned decision, correctly pointed to the settled case-law of the European Court of Human Rights, according to which sexual orientation falls within the scope of protection of private and family life (Article 8 of the Convention), with the result that discrimination on the basis of sexual orientation is fundamentally incompatible with Articles 8 and 14 of the Convention. However, the first-instance court also correctly pointed out that national legal systems must be afforded a margin of appreciation in enacting legislation, a margin which is correspondingly broader where there is no clear consensus between member States' legal systems in the sphere in question. While noting that the margin of appreciation must not be interpreted as giving States *carte blanche* to make arbitrary decisions, the first-instance court observed that it must be construed very generously in the sphere of the right of homosexuals to adopt, as these were issues which were subject to societal change. In the context of this assessment, the Austrian legal system made no provision for the adoption of a child by the same-sex partner of one of the parents.

The appellants have adduced no convincing arguments to indicate that the provisions in force amount to discrimination against same-sex partners. Even in the case of heterosexual couples, the only legal relationship that may be severed when a partner's child is adopted is the relationship between the child and the parent of the

same sex as the adoptive parent. In such cases the child therefore continues to have two opposite-sex parents and caregivers. This state of affairs, which is important for the child's development, does not however apply in the event of his or her adoption by the same-sex partner of one of the parents; there is therefore no evidence of an unjustified difference in treatment in this regard. Furthermore, in the judgment of the European Court of Human Rights cited by the appellants (see *Karner v. Austria*, 24 July 2003), the Court reiterated that a difference in treatment of people living in a same-sex relationship was to be considered discriminatory only if it had no objective and reasonable justification, that is if it did not pursue a legitimate aim, or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court would thus regard a difference in treatment as compatible with the Convention only where very weighty reasons had been put forward. Particularly compelling reasons therefore had to be advanced to justify any difference in treatment based on sexual orientation. However, the Court also explicitly acknowledged in this regard that protection of the 'traditional family' was, in principle, a weighty and legitimate reason which might justify a difference in treatment by the national legislature. At the same time, it found that the aim of protecting the family in the traditional sense was rather abstract and that a broad variety of concrete measures could be used to implement it. Compelling reasons had to be given for excluding people living in homosexual relationships from the scope of application of certain legal provisions. In the case in question, which concerned the right of a deceased person's same-sex partner to succeed to a tenancy, the Court found that no such reasons had been given.

Nevertheless, the judgment in question does not lend any support to the appellants' arguments in the present case. On the basis of the right – recognised by the Court – to include measures in the national legal system to protect the 'traditional family', the stance taken in the Austrian legal system whereby, as a matter of principle and in accordance with biological reality, a minor child should have an opposite-sex couple as parents, has to be respected. Hence, in the view of this court, the decision by the legislature not to provide for a child to be adopted by the same-sex partner of one of the parents, with the result that the relationship with the opposite-sex parent is severed, unquestionably pursues a 'legitimate aim'. Likewise, it cannot be said that 'no reasonable relationship of proportionality' exists between this aim and the means employed. This legal situation is not based – contrary to the appellants' assertions – on 'the prejudice of the heterosexual majority towards the homosexual minority', but is merely designed to ensure that minor children have regular contact with both a female and a male parent while they are growing up. This aim must be respected in just the same way as the decision of the child's mother to live in a same-sex partnership. Thus, there is no apparent justification for depriving the child of his family-law relationship with his parent of the other sex. However, that is precisely what the child's mother and her partner sought in the present case and have continued to seek since the lodging of the appeal.

Accordingly, in view of these overall considerations, the present appeal should be dismissed.

The ruling on the admissibility of an appeal on points of law is based on sections 59(1)(2) and 62(1) of the Non-contentious Proceedings Act. While it is true that the Supreme Court already issued one decision in the instant case, that decision concerned the lawfulness of the (partial) transfer of custody of the child to the mother's same-sex partner. As regards the issue now to be determined, however, namely whether the adoption of a child by the same-sex partner of one of the parents is lawful, no specific and express Supreme Court rulings exist on the subject to date,

to the best of this court's knowledge. For that reason the present decision is of considerable importance in terms of the unity of the law, legal certainty and development of the law."

19. The applicants lodged an appeal on points of law with the Supreme Court. They submitted that Article 182 § 2 of the Civil Code as applied by the courts led to a difference in treatment between different-sex and same-sex couples in cases where one partner wished to adopt the other partner's biological child. While heterosexual couples (including unmarried ones) could establish an additional parent-child relationship between the child and its parent's partner, this was impossible for same-sex couples, as the same-sex partner would replace the biological parent. Thus, any meaningful kind of second-parent adoption was excluded. The Regional Court had sought to justify this difference in treatment by referring to the aims of protecting the family in the traditional sense and allowing the child to grow up with both a male and a female caregiver. However, the Regional Court had not shown that the exclusion of same-sex families from second-parent adoption was necessary to achieve that aim. Recent studies showed that same-sex couples were just as capable of raising children as different-sex couples. Moreover, the present case did not concern the question whether the second applicant should or should not grow up in a same-sex family. He was already part of a *de facto* same-sex family. The question therefore was whether it was justified to deny legal recognition to the relationship between him and the first applicant. It had not been shown to be necessary to distinguish between unmarried heterosexual and same-sex couples. Finally, the applicants maintained that in many European States second-parent adoption was reserved to married couples. They asserted that where a State chose, as Austria had, to allow second-parent adoption in unmarried couples, it was not free to make a distinction on the basis of sexual orientation.

20. On 27 September 2006 the Supreme Court dismissed the appeal on points of law lodged by the applicants. It held as follows:

"[The minor] is the biological child of the third applicant, Ms..., and of Mr ..., born on ... The child's mother has sole custody. She shares a home in ... with her partner (the first applicant) and with [the child]. The applicants applied for court approval of an adoption agreement entered into on 17 February 2005 by the first applicant and the minor child, represented by his mother, under the terms of which the first applicant agreed to adopt the child. However, the agreement provided for the first applicant to take the place not of the child's mother but of his biological father. The applicants sought court approval of the adoption such that the relationship with the biological father and his relatives under family law would cease to exist while the relationship with the child's biological mother would remain fully intact. They requested the courts to override the refusal of consent by the child's father.

The first-instance court refused the application, taking the view that Article 182 of the Civil Code reflected the legislature's clear intention that, in the case of adoption by one person, the legal relationship with the parent of the same sex as the adoptive parent should cease to exist and the relationship with the opposite-sex parent should

be preserved. Only in this scenario, according to the first-instance court, did the law allow the courts to also declare the latter relationship, which was not affected by the adoption *per se*, to have been severed. In the view of the first-instance court, the arrangement sought by the applicants, whereby [the child] would be adopted by a woman and the legal relationship with his biological father but not with his biological mother would cease, was incompatible with the law. This interpretation was in conformity with the Constitution and in particular with Articles 8 and 14 of the European Convention on Human Rights. According to the case-law of the European Court of Human Rights, member States had a particularly wide margin of appreciation in the sphere of adoption by homosexuals, as these issues were subject to societal change and were in a state of transition. The question whether a member State provided the possibility for two persons of the same sex to create a legal relationship with a child on an equal footing was therefore a matter for the State itself to decide, subject to the limits laid down in Article 8 § 2 of the Convention. The arrangement sought by the applicants was not possible under Austrian law.

The appellate court upheld the decision of the first-instance court, taking the view that the law was clearly based on the premise that the term ‘parents’ necessarily referred to two persons of opposite sex. This was reflected in the law on custody, which as a matter of principle gave priority to the biological parents over other persons. The same considerations applied in the sphere of adoption law. Here too the legislative provisions were based, in line with the biological reality, on the presence of a couple made up of parents of opposite gender. Where both the opposite-sex parents were present, there was no need for a provision enabling one of the parents to be replaced by the same-sex partner of the other; this did not reflect any wish to discriminate against same-sex partners. In the sphere of contact rights it was also recognised beyond dispute that, for a minor child to thrive, it was highly desirable that he or she should have a personal relationship with both – opposite-sex – parents, in other words with both a female (mother) and a male (father) caregiver. At least a minimum degree of personal contact between the child and both (biological) parents was to be desired and was generally made a requirement in the interests of the child’s healthy development. These considerations too could be applied in relation to adoption. The appellate court also endorsed the first-instance court’s view that there was no discrimination against same-sex partners from the standpoint of the case-law of the European Court of Human Rights. A difference in the treatment of persons living in a same-sex relationship was to be regarded as discriminatory only if it had no objective and reasonable justification, in other words, if the rule in question did not pursue a legitimate aim or if there was no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Differences in treatment were found to be compatible with the Convention where weighty reasons had been put forward. The Austrian legislature pursued one such legitimate aim in seeking to ensure that children, as they were growing up, had the regular contact with both a male and a female parent which their development required. That aim was to be accorded the same respect as the mother’s decision to live in a same-sex partnership. There was no justification, however, for depriving a child of the relationship under family law with his or her parent of the other sex.

The appellate court ruled that leave to appeal on points of law should be granted since no case-law existed on the issue of the lawfulness of the adoption of a child by the same-sex partner of one of his or her biological parents.

The applicants’ appeal on points of law is admissible for the reasons given by the appellate court. It is nevertheless unfounded.

Article 179 § 2 of the Civil Code provides that the adoption of a child by more than one person is permissible only where the adoptive parents are a married couple. Legal commentators have concluded from this that adoption by more than one person of the same sex (whether simultaneously or consecutively) is prohibited (see Schwimann in *Schwimann*, Civil Code § 179, point 6, and Hopf in *Koziol/Bydlinksi/Bollenberger*, § 179, point 2, both cited by the Vienna Regional Civil Court, 27 August 2001 – EFSIlg 96.699).

The second sentence of Article 182 § 2 of the Civil Code governs the effects produced in the event of adoption by one adoptive parent. If the child is adopted only by an adoptive father (an adoptive mother), the ties of kinship cease only in respect of the biological father (the biological mother) and his (her) relatives. It is quite clear from the materials (ErlBem RV 107 BlgNR IX. GP, 21) that this provision should be construed to mean that the non-proprietary legal ties are severed only with the biological parent who is being replaced by an adoptive parent of the same gender. In explicit terms, this means that the child cannot, for instance, be deprived of his or her biological father if he or she is being adopted just by a woman (see also: Schwimann in *Schwimann*, op. cit., § 182, sub-paragraph 3; Stabentheiner in *Rummel I* § 182, sub-paragraph 2).

Contrary to the applicants' assertion, this provision is not to be construed extensively in the way that they argue, nor does there exist an unintended legislative gap which therefore needs to be filled by analogy. According to the materials (op. cit., 11), the chief aim of adoption is to promote the well-being of the minor child (the protective principle). Adoption should constitute an appropriate means of entrusting to suitable and responsible individuals the care and upbringing of children who have no parents, those who come from broken homes or those whose parents, for whatever reason, are unable to provide their children with a proper upbringing or may not even want their children. However, this aim can be achieved only when the adoption allows the situation in a biological family to be recreated as far as possible.

The case-law (6 Ob 179/05z) also makes clear that the tie between the child and the adoptive parent is to be understood as a social and psychological relationship, akin to that between biological parents and their children. The model for the child-parent relationship in the context of adoption of minors is informed by the specific social and psychological ties that exist between parents and young people approaching adulthood. In addition to the socially typical ties of physical and personal proximity (shared household, care for the child's physical and psychological needs by its parents), these encompass emotional ties comparable to the love between parents and their children, and a specific role for the parents as mentors and role models.

Article 182 § 2 of the Civil Code imposes a general prohibition (that is, not just in the case of same-sex partners) on adoption by a man as long as the ties of kinship with the child's biological father still exist, and by a woman where such ties still exist with the biological mother. Under Article 182 § 2, therefore, a person who adopts a child on his or her own does not take the place of either parent at will, but only the place of the parent of the same sex. The adoption of the child by the female partner of the biological mother is therefore not legally possible.

Contrary to the applicants' view, this provision also survives the test of compatibility with the Constitution (fundamental rights perspective). In the case of *Fretté v. France*, the European Court of Human Rights was called upon to examine whether the authorities' refusal to authorise the adoption of a child by a homosexual man amounted to discrimination. In its judgment of 26 February 2002, the Court found that adoption meant 'providing a child with a family, not a family with a child'.

According to the Court, it was the State's task to ensure that the persons chosen to adopt were those who could offer the child the most suitable home in every respect. Not least in view of the wide differences in national and international opinion concerning the possible consequences of a child being adopted by one or more homosexual parents, and bearing in mind the fact that there were not enough children to adopt to satisfy demand, States had to be allowed a broad margin of appreciation in this sphere. A refusal to authorise adoption by a homosexual would not be in breach of Article 14 of the Convention read in conjunction with Article 8 if it pursued a legitimate aim, namely the protection of the child's best interests, and did not infringe the principle of proportionality between the means employed and the aim sought to be achieved.

The applicants have not demonstrated, nor is there any other evidence to suggest, that the provisions of Article 182 § 2 of the Austrian Civil Code overstep the margin of appreciation accorded by the European Court, or that they infringe the proportionality principle. The Supreme Court is therefore in no doubt as to the compatibility of this provision with the Constitution, which is called into question by the applicants.

In view of the legal impossibility of the adoption it is also not necessary to further examine whether the conditions for overriding the father's refusal to consent, as an exceptional measure under Article 181 § 3 of the Civil Code, have been met."

The judgment was served on the applicants' counsel on 24 October 2006.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Adoption

21. The Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) contains the following definitions of "mother" and "father":

Article 137b reads as follows:

"The mother shall be the woman who has given birth to the child."

Article 138 provides:

"(1) The child's father shall be the man

1. who is married to the child's mother at the time of the child's birth or, being the mother's husband, died no earlier than three hundred days prior to the child's birth, or
2. who has recognised paternity, or
3. whose paternity has been established by a court."

22. The following provisions of the Civil Code on adoption are relevant in the present case.

Article 179, in so far as relevant, provides as follows:

"(1) Persons of full legal age and capacity ... may adopt. The adoption creates an adoptive parent-child relationship.

(2) The adoption of a child by more than one person, whether simultaneously or – as long as the adoptive relationship still exists – consecutively, shall be permitted only if the adoptive parents form a married couple. As a rule, spouses may only adopt a child jointly. An exception may be made where the child to be adopted is the spouse's

biological child, where one spouse does not fulfil the requirement of having full legal age or the required difference in age with the adoptee, where one spouse's whereabouts have been unknown for at least a year, where the spouses have not been living in matrimonial community for at least three years or where there are similar and particularly serious grounds justifying adoption by only one spouse."

23. Pursuant to Article 179a of the Civil Code adoption requires a written agreement between the adoptive parent and the adoptive child (who, if a minor, will be represented by his or her legal representative) and the approval of that agreement by the competent court.

24. The court has to approve the agreement if it serves the child's interests and if a relationship corresponding to a biological parent-child relationship already exists or if such a relationship is intended to be created (Article 180a of the Civil Code).

25. Article 181 of the Civil Code, in the version in force at the material time, and in so far as relevant, provided as follows:

"(1) Approval may be granted only if the following persons agree to the adoption

1. the parents of the minor adopted child;
2. the spouse of the adoptive parent;
3. the spouse of the adopted child;
4. the adopted child from the age of fourteen;

...

(3) Where one of the persons referred to in points 1 to 3 of paragraph 1 refuses consent without justifiable grounds, the court shall override the refusal on an application from one of the parties."

26. According to the domestic courts' case-law, overriding a party's refusal to consent under Article 181 (3) of the Civil Code is an extraordinary measure that will only be envisaged where the interests of the child in the adoption clearly outweigh the interests of the biological parent, for instance in having contact with the child. It may also be envisaged if the refusal is not justified in moral terms, for example if the parent who is refusing consent has consistently displayed extreme antagonism towards the family or is guilty of flagrant neglect of his or her statutory obligations *vis-à-vis* the child such that the child's development has been jeopardised on a lasting basis or would have been jeopardised without third-party assistance.

27. Article 182 of the Civil Code regulates the effects of adoption. It provides as follows:

"(1) The same rights that arise as a consequence of legitimate descent shall be created at that time between the adoptive parent and his or her offspring on the one hand, and the adopted child and his or her offspring who are minors at the time the adoption takes effect on the other hand.

(2) If the child is adopted by a married couple, the legal relationship under family law – above and beyond the legal kinship itself (Article 40) – between the biological parents and their relatives on the one hand, and the adopted child and his or her offspring who are minors at the time the adoption takes effect on the other hand, shall

cease at that time, apart from the exceptions referred to in Article 182a. If the child is adopted by just an adoptive father (an adoptive mother), the relationship shall cease only in respect of the biological father (the biological mother) and his (her) relatives; in so far as the legal relationship with the other parent remains intact after the adoption, the court shall declare it to have been severed, subject to the consent of the parent concerned. The relationship ceases to exist as of the date on which the statement of consent is given, but no earlier than the date on which the adoption takes effect.”

As the Supreme Court’s judgment in the present case demonstrates, this provision is understood as excluding the adoption of one partner’s child by the other partner in a same-sex couple.

28. In the event of an adoption all family-law relationships apart from the legal kinship between the adopted child and his or her biological parent or parents cease to exist. That means in particular that the biological parents or parent lose all parental rights such as custody, visiting rights and rights of information and consultation (see below).

29. Following adoption only a subsidiary maintenance obligation remains on the part of the biological parent or parents *vis-à-vis* the child, pursuant to Article 182a of the Civil Code. A relationship also remains intact in inheritance law: pursuant to Article 182b the adopted child still has inheritance rights through his or her biological parents, while the biological parents and their descendants have subsidiary inheritance rights through the adopted child; the inheritance rights of the adoptive parents and their descendants take precedence over these rights.

30. It follows from the provisions of the Civil Code set out above that adoption under Austrian law is either joint adoption by a couple (this form being reserved to married couples), or adoption by one person. Persons adopting alone may be heterosexual and be living in a married couple (in which case the possibilities to adopt alone are tightly restricted), in an unmarried couple or alone. They may also be homosexual and be living in a registered partnership, in an informal couple or alone.

31. Second-parent adoption, namely the adoption of one partner’s biological child by the other partner, is allowed in heterosexual couples (whether married or unmarried) but is not possible in same-sex couples.

32. Currently, a draft law is pending which proposes amendments to the provisions of the Civil Code regulating the relations between parent and child and the right to bear a name, as well as amendments to a number of other laws (*Kindschaftsrechts- und Namensrechtsänderungsgesetz*). It does not include any proposals to change the provisions here at issue, in particular Articles 179 to 182 of the Civil Code. Although these provisions are renumbered under the proposed amendments, their wording remains unchanged.



## B. Same-sex couples

33. Same-sex couples are not allowed to marry, in accordance with Article 44 of the Civil Code (on this issue, see *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010). Article 44 of the Civil Code provides:

“The marriage contract shall form the basis for family relationships. Under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise children and to support each other.”

34. On 1 January 2010 the Registered Partnership Act entered into force. It gives same-sex couples the opportunity to enter into a registered partnership.

35. Section 2 of the Registered Partnership Act provides as follows:

“A registered partnership may be formed only by two persons of the same sex (registered partners). They thereby commit themselves to a lasting relationship with mutual rights and obligations.”

36. The rules on the establishment of a registered partnership, its effects and its dissolution resemble the rules governing marriage (for more details, see *Schalk and Kopf*, cited above, §§ 16-23). Like married couples, registered partners are expected to live together like spouses in every respect, to share a common home, to treat each other with respect and to provide mutual assistance (section 8(2) and (3)). Registered partners have the same obligations regarding maintenance as spouses (section 12). The Registered Partnership Act also contains a comprehensive range of amendments to existing legislation in order to provide registered partners with the same status as spouses in various other fields of law such as inheritance law, labour, social and social insurance law, fiscal law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as the law on foreigners.

37. However, some differences between marriage and registered partnership remain, the most important of which concern parental rights. Hence, assisted reproduction is available only to married or unmarried different-sex couples (section 2(1) of the Artificial Procreation Act – *Fortpflanzungsmedizingesetz*).

38. Furthermore, registered partners are not allowed to adopt a child jointly, nor is second-parent adoption permitted.

39. Section 8(4) of the Registered Partnership Act provides as follows:

“Registered partners shall not be allowed to adopt a child jointly, nor shall one registered partner be allowed to adopt the other partner’s child.”

40. A person living in a registered partnership may adopt on his or her own: an amendment to Article 181 § 1, sub-paragraph 2, of the Civil Code introduced at the same time as the Registered Partnership Act states that the registered partner has to consent if his or her partner wishes to adopt a child.

41. The general section of the explanatory report on the draft law (*Erläuterungen zur Regierungsvorlage*, 485 of Annex to the Minutes of the National Council, XXIV GP) noted that the purpose of the Registered Partnership Act was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships, having particular regard to developments in other European countries. However, it was not intended to include any provisions concerning children or any amendments to the law in force in respect of children. In that connection the explanatory report noted that the joint adoption of a child by registered partners was excluded, as was the adoption of one registered partner's child by the other partner.

42. The specific comment on section 8(4) of the Registered Partnership Act noted that this provision contained a prohibition on adoption, as repeatedly requested during the consultation procedure. Furthermore, the comments expressed the view that the judgments of the European Court of Human Rights in the cases of *E.B v. France* (no. 435466/02, 22 January 2008) and *Fretté* (cited above) were not relevant in this context, as they related only to the applicants' aptitude to raise a child. The legislature was free to regulate this issue. Moreover, second-parent adoption or joint adoption by registered partners was in any case excluded, as Austrian law on adoption as it stood did not allow situations in which a child had, for legal purposes, two fathers or two mothers.

43. The specific comment on the amendment of Article 181 § 1, sub-paragraph 2, of the Civil Code merely noted that, as the result of an oversight, the draft legislation had not proposed an amendment, an omission that had subsequently been corrected.

### **C. Children born outside marriage**

44. Under Article 166 of the Civil Code the mother of a child born outside marriage has sole custody (meaning that she exercises parental responsibility, caring for the child and raising him or her, representing the child in legal matters and managing his or her assets).

45. If the parents of a child born outside marriage are living in a common household they can agree to exercise custody jointly, under Article 167 of the Civil Code. Since an amendment to the Civil Code that entered into force on 1 July 2001, the parents of a child born outside marriage can also agree to exercise custody jointly if they are not living in a common household. An agreement to exercise joint custody is subject to the approval of the court, which has to assess whether the agreement serves the child's interests.

46. Both parents are obliged to provide maintenance for the child (Article 140 § 1 of the Civil Code). In principle, maintenance is to be

provided in kind. The parent not living in the same household as the child has to provide maintenance in the form of maintenance payments.

47. The parent not living in the same household as the child has contact rights pursuant to Article 148 § 1 of the Civil Code. Since 1 July 2001 this is also considered to be a right for the child concerned (before that date it was only regarded as a right for the parent). The parents and the child should agree on the exercise of contact rights. If they are unable to reach agreement the court, at the request of one of the persons concerned and having regard to the needs and wishes of the child, must put in place a contact arrangement which serves the interests of the child.

48. Furthermore, under Article 178 § 1 of the Civil Code the parent who does not have custody has the right to be informed of certain important matters concerning the child, some of which require his or her approval.

### III. INTERNATIONAL CONVENTIONS AND COUNCIL OF EUROPE MATERIALS

#### A. Convention on the Rights of the Child

49. The Convention on the Rights of the Child was adopted by the General Assembly of the United Nations on 20 November 1989 and came into force on 2 September 1990. It has been ratified by all Council of Europe member States. Its relevant provisions read as follows:

##### Article 3

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”

##### Article 21

“States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required,

the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

...”

## **B. European Convention on the Adoption of Children (revised 2008)**

50. The revised European Convention on the Adoption of Children was opened for signature on 27 November 2008 and entered into force on 1 September 2011. It has been ratified by seven States, namely Denmark, Finland, the Netherlands, Norway, Romania, Spain and Ukraine. Austria has not ratified or signed the Convention.

51. One of the reasons for the revision, as stated in the preamble to the 2008 Convention, was that some of the provisions of the 1967 European Convention on the Adoption of Children were outdated and contrary to the case-law of the European Court of Human Rights. The relevant provisions of the 2008 Convention read as follows:

### **Article 4 – Granting of an adoption**

“1. The competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child.

2. In each case the competent authority shall pay particular attention to the importance of the adoption providing the child with a stable and harmonious home.”

### **Article 7 – Conditions for adoption**

“1. The law shall permit a child to be adopted:

*a.* by two persons of different sex

*i.* who are married to each other, or

*ii.* where such an institution exists, have entered into a registered partnership together;

*b.* by one person.

2. States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different-sex couples and same-sex couples who are living together in a stable relationship.”

### **Article 11 – Effects of an adoption**

“1. Upon adoption a child shall become a full member of the family of the adopter(s) and shall have in regard to the adopter(s) and his, her or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally established. The adopter(s) shall have parental responsibility for the child. The adoption shall terminate the legal relationship between the child and his or her father, mother and family of origin.

2. Nevertheless, the spouse or partner, whether registered or not, of the adopter shall retain his or her rights and obligations in respect of the adopted child if the latter is his or her child, unless the law otherwise provides.

...”

52. The explanatory report on the 2008 Convention states the following under the heading “General considerations”:

“14. In a sense, there is only one principle essential to good adoption practice, namely that adoption should be in the best interests of the child as stated in Article 4, paragraph 1, of the Convention. ...”

53. Under the heading “Article 7 – Conditions for adoption” the explanatory report states, in so far as relevant in the present context:

“42. This article provides for adoption either by a couple or by one person.

43. While the scope of the 1967 Convention is restricted to heterosexual married couples, the scope of the revised Convention is extended to heterosexual unmarried couples who have entered into a registered partnership in States which recognise that institution. By such a regulation the trend in many States is taken into account.

..

45. Concerning paragraph 2 it was noted that certain State Parties (Sweden in 2002 and the United Kingdom in 2005) denounced the 1967 Convention on the ground that same sex registered partners under their domestic law may apply jointly to become adoptive parents and that this was not in line with the Convention. Similar situations in other States could also lead to the denunciation of the 1967 Convention. However, it was also noted that the right of same sex registered partners to adopt jointly a child was not a solution that a large number of States Parties were willing to accept at the present time.

46. In these circumstances, paragraph 2 shall enable those States which wished to do so, to extend the revised Convention to cover adoptions by same sex couples who are married or registered partners. In this respect, it is not unusual for Council of Europe instruments to introduce innovative provisions, but to leave it to States Parties to decide whether or not to extend their application to them ...

47. States are also free to extend the scope of the Convention to different or same sex couples who are living together in a stable relationship. It is up to States Parties to specify the criteria for assessing the stability of such a relationship.”

### **C. Recommendation of the Committee of Ministers**

54. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, covers a wide range of areas where lesbian, gay, bisexual or transgender persons may encounter discrimination. In the chapter concerning the “Right to respect for private and family life” it provides as follows:

“23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights.

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

...

27. Taking into account that the child's best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity."

#### IV. COMPARATIVE LAW

##### A. Study by the Council of Europe Commissioner for Human Rights

55. A recent study by the Council of Europe Commissioner for Human Rights entitled "Discrimination on grounds of sexual orientation and gender identity in Europe" (Council of Europe Publishing, June 2011) contains the following information on the issue:

"LGBT [lesbian, gay, bisexual and transgender persons] can adopt a child by one of three procedures. A single lesbian woman or gay man may apply to become an adoptive parent (single-parent adoption). Alternatively, a same-sex couple can adopt their partner's biological or adopted children without terminating the first parent's legal rights. These are so called 'second-parent adoptions' and give the child two legal guardians. Second-parent adoptions also protect the parents by giving both of them legally recognised parental status. The lack of second-parent adoption deprives the child and the non-biological parent of rights if the biological parent dies or in the case of divorce, separation, or other circumstances that would bar the parent from carrying out parental responsibilities. The child also has no right to inherit from the non-biological parent. Moreover, at an everyday level, the lack of second-parent adoption rules out parental leave, which can be harmful financially for LGBT families. The third procedure is joint adoption of a child by a same sex couple.

Ten member states allow second-parent adoption to same-sex couples (Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom). Apart from Finland and Germany these member states also give access to joint adoptions for same-sex couples. In Austria and France there is no access to second-parent adoption but same-sex couples in registered partnerships are allowed some parental authority or responsibilities. No access to joint adoption or second-parent adoption is a reality in 35 member states: Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Poland, Portugal, Romania, the Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Switzerland, 'the former Yugoslav Republic of Macedonia', Turkey and Ukraine. ..."

## **B. Further information on comparative law**

56. From the information available to the Court, including a survey of thirty-nine Council of Europe member States, it would appear that in addition to the ten member States mentioned by the Commissioner's study, (Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom (with the exception of Northern Ireland)), one further member State, namely Slovenia, has accepted second-parent adoption by same-sex couples in the recent case-law of its courts.

57. The majority (twenty-four) of the thirty-nine Council of Europe member States on which information is available to the Court reserve second-parent adoption to married couples.

Ten member States (Belgium, Iceland, the Netherlands, Portugal, Romania, Russia, Slovenia, Spain, Ukraine and the United Kingdom (with the exception of Northern Ireland)) also allow second-parent adoption by unmarried couples. Six States in this group allow second-parent adoption by unmarried heterosexual and unmarried same-sex couples alike, while four (Portugal, Romania, Russia and Ukraine) allow it – like Austria – only for unmarried different-sex couples but not for unmarried same-sex couples.

The remaining States surveyed have adopted different solutions, for instance allowing second-parent adoption for married couples and registered partners (for example, in Germany and Finland), but not for unmarried couples, whether heterosexual or homosexual.

## **THE LAW**

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

58. The applicants complained under Article 14 of the Convention taken in conjunction with Article 8 that they were being discriminated against in the enjoyment of their family life on account of the first and third applicants' sexual orientation. They submitted that there was no reasonable and objective justification for allowing the adoption of one partner's child by the other partner where heterosexual couples, whether married or unmarried, were concerned, while prohibiting the adoption of one partner's child by the other partner in the case of same-sex couples.

Article 8 of the Convention reads as follows:

“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 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

### **A. Admissibility**

59. The Government asserted that the application should be declared inadmissible as being manifestly ill-founded. They argued that on the facts of the case there was no issue of discrimination. In particular, they submitted that the domestic courts had refused to authorise the second applicant’s adoption on the ground that his father had not consented and that it was not in the child’s interests. Consequently, the legal impossibility for a homosexual to adopt his or her partner’s child, resulting from Article 182 § 2 of the Civil Code, had not come into play. In the Government’s view, the applicants were therefore requesting the Court to review this provision in the abstract.

60. The Government thus appear to argue that the applicants cannot claim to be victims of the alleged violation within the meaning of Article 34 of the Convention as, in the specific circumstances of the case, they were not directly affected by the law complained of. However, the Court notes that the Government have not raised an explicit objection as to admissibility on that ground. The Court considers it appropriate to deal with the issues raised by the Government in the context of the examination of the merits of the case.

61. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### **B. Merits**

#### *1. The parties’ submissions*

##### **(a) The applicants**

62. The applicants argued that they were in a relevantly similar situation to different-sex couples raising children. They referred to numerous



scientific studies which confirmed that children developed equally well in same-sex families and in different-sex families.

63. The applicants noted that second-parent adoption was open to married couples. Same-sex couples were not allowed to marry under Austrian law. Even if they became registered partners, second-parent adoption was explicitly prohibited by section 8(4) of the Registered Partnership Act. However, the applicants stressed that they did not wish to assert a right which was reserved to marriage-based families.

64. They emphasised that the key issue in the present case was the unequal treatment between unmarried different-sex couples and unmarried same-sex couples. Under Austrian law, second-parent adoption was possible for unmarried heterosexual couples, but not for unmarried same-sex couples. The applicants pointed out that this was a crucial difference compared with *Gas and Dubois v. France* (no. 25951/07, 15 March 2012), as under French law second-parent adoption was reserved to married couples. The present case therefore raised an issue similar to that in *Karner v. Austria* (no. 40016/98, ECHR 2003-IX), in that a right which was open to unmarried heterosexual couples was refused to same-sex couples. Furthermore they pointed out that only four Council of Europe member States adopted the same position as Austria, that is to say, allowing second-parent adoption in unmarried opposite-sex couples while prohibiting it in same-sex couples. The vast majority either reserved second-parent adoption to married couples or granted it also to unmarried couples irrespective of their sexual orientation.

65. The applicants asserted that they had indeed been treated differently in the proceedings at issue. Before the domestic courts, they had argued that the refusal by the second applicant's father to consent to the adoption was not justified as he had been acting against the interests of the child. Consequently, the second applicant's interest in the adoption outweighed his father's interest in objecting to it. Thus, they argued that the court should have overridden the father's refusal in accordance with Article 181 § 3 of the Civil Code. In the case of an opposite-sex couple, the District Court would have carried out a detailed examination and would have had to deliver a separate decision on this issue. However, in the applicants' case it had denied them any inquiry of the facts on the ground that the adoption requested by them was in any case not possible under Austrian law. This position had been explicitly confirmed by the Supreme Court.

66. The applicants stressed that the gist of their complaint was that they were automatically excluded from any chance of adoption. The case was therefore similar to *E.B. v. France* ([GC], no. 43546/02, 22 January 2008) in that they were excluded from any meaningful possibility of adopting on account of the first and third applicants' sexual orientation.

67. The applicants noted the Government's argument that Austrian adoption law was aimed at protecting the interests of the child. According to

the Court's case-law, it was for the Government to show that the exclusion of same-sex couples from second-parent adoption was necessary to achieve that aim. There was a far-reaching scientific consensus that same-sex couples were as capable as different-sex couples of ensuring the positive development of children. From among the studies they submitted, the applicants referred at the hearing to a large-scale study entitled "The life of children in same-sex partnerships" commissioned by the German Ministry of Justice (Rupp Martina (ed.), *Die Lebenssituation von Kindern in gleichgeschlechtlichen Partnerschaften*, Cologne, 2009).

68. In so far as the Government had argued that Austrian law sought to avoid a situation where a child had two fathers or two mothers for legal purposes, the applicants pointed out that they had formed a *de facto* family for many years but were still denied any possibility of legal recognition of their family life. Furthermore, they submitted that under Austrian law an adopted child often had two mothers or two fathers. Under Article 182 § 2 of the Civil Code the adoption severed the family-law relationship between the adopted child and the biological parent or parents. However, mutual maintenance obligations and inheritance rights, albeit subsidiary to those of the adoptive parents, remained intact.

69. The applicants submitted a further argument based on the 2008 European Convention on the Adoption of Children, the Committee of Ministers' Recommendation of 31 March 2010 and the United Nations Convention on the Rights of the Child. In all these texts the key notion in respect of adoption was the best interests of the child and not the gender or the sexual orientation of the parents. Finally, they contested the Government's argument that there were sufficient alternative possibilities under Austrian law for giving legal recognition to the relationship between a child and his or her parent's same-sex partner.

**(b) The Government**

70. The Government did not contest the applicability of Article 14 taken together with Article 8. They accepted that the relationship between the three applicants constituted family life. However, they pointed out that the facts of the present case differed from those in *Gas and Dubois* (cited above), as the second applicant had a father with whom he also maintained a family relationship.

71. Furthermore, the Government argued that the applicants' situation was not comparable to that of a married couple in which one spouse wished to adopt the other spouse's child, and invited the Court to follow its findings in *Gas and Dubois* (cited above, §§ 66-68).

72. In respect of the comparison with an unmarried different-sex couple, the Government accepted that the applicants were in a comparable situation, conceding that, in personal terms, same-sex couples could in principle be as suitable or unsuitable as different-sex couples for the adoption of children in

general or for second-parent adoption in particular. They were also in a comparable situation in that any adoption required the consent of both biological parents.

73. The Government added that the fact that the adoption of a minor severed parental ties was considered compatible with Article 8 (they referred to *Emonet and Others v. Switzerland* (no. 39051/03, 13 December 2007), and *Eski v. Austria* (no. 21949/03, 25 January 2007), and that States enjoyed a wide margin of appreciation in the area of adoption law. Austrian adoption law gave priority to the biological parents when it came to the care of their child. Since adoption resulted in the loss of parental rights it was only to be authorised if it was clearly in the child's interests. The consent of the replaced parent, whose relationship with the child was also protected by Article 8, was therefore a prerequisite for adoption. Austrian law struck a reasonable balance between all the interests involved.

74. On the facts of the case, the Government argued that it did not raise a discrimination issue as there had been no difference in treatment between the first and third applicants' case and the case of an unmarried different-sex couple. They asserted that the domestic courts, in particular the Regional Court, had thoroughly assessed the question of the second applicant's interest in the adoption and had come to the conclusion that he had a relationship with his father and that there was thus no need to replace the latter by an adoptive parent. The Government stressed in particular that the consent of both biological parents was an essential precondition for any adoption. As the second applicant's father did not consent in the present case, the courts would have been similarly prevented from agreeing to the adoption if the request had been made by the unmarried different-sex partner of the third applicant. The Government further argued that the applicants had not substantiated their allegations that there were grounds for overriding the father's refusal to consent to the adoption, nor had they requested a formal decision on that point.

75. Furthermore, the Government asserted that the Civil Code was not aimed at excluding same-sex partners. The impossibility for a woman to adopt another woman's child would also apply if an aunt wished to adopt her nephew while his relationship with his mother was still intact. The explicit exclusion of second-parent adoption in same-sex couples had only been introduced by the Registered Partnership Act in 2010. The latter had not been in force when the present case had been determined by the domestic courts and was therefore not relevant in the present context.

76. Should the Court consider that there had been a difference in treatment and enter into the question of justification for the prohibition of second-parent adoption in same-sex couples, the Government argued that recreating the biological family and securing the child's well-being were legitimate aims. Austrian adoption law did not aim to exclude same-sex couples but sought, as a general rule, to avoid a situation where a child had

two mothers or two fathers for legal purposes. The law pursued these aims using appropriate means, as it also had to take the interests of other persons involved into account, and secured the interests of the partner of the child's parent by other means.

77. Lastly, the Government asserted that States had a wide margin of appreciation on the issue of second-parent adoption by same-sex couples. According to the Government's information only ten Council of Europe member States permitted such adoptions. It followed that there was no European standard and it could not even be said that a trend or a tendency existed.

**(c) The third parties**

*(i) FIDH, ICJ, ILGA-Europe, BAAF, NELFA and ECSOL*

78. In their joint comments these six non-governmental organisations stressed that, like *Karner* (cited above), the present case concerned a difference of treatment in that an unmarried different-sex couple was granted a right which was denied to an unmarried same-sex couple. The standards developed in *Karner* should therefore be applied. Furthermore, in *Salgueiro da Silva Mouta v. Portugal* (no. 33290/96, ECHR 1999-IX) and in *E.B. v. France* (cited above), the Court had implicitly accepted that there were no reasons why a child should not be raised by a lesbian or gay individual living with a same-sex partner. A similar finding had recently been made by the Inter-American Court of Human Rights in the case of *Atala Riffo and Daughters v. Chile* (judgment of 24 February 2012).

79. Furthermore, if one considered the question of European consensus, the third-party interveners noted that the majority of the forty-seven Council of Europe member States restricted second-parent adoption to married different-sex couples. In the present case only those States which extended second-parent adoption to others, for instance to same sex-couples (married, living in a registered partnership or cohabiting) or to unmarried different-sex couples, could serve as comparison. Within that group fourteen States extended, or were planning to extend, second-parent adoption to same-sex couples, while only five (including Austria) extended it to unmarried different-sex couples while excluding same-sex couples.

80. Finally, Article 7 of the 2008 European Convention on the Adoption of Children recognised the variety of adoption legislation. This did not alter the fact that Articles 14 and 8 of the Convention prohibited member States from extending the right to adopt to one group but not to another on discriminatory grounds.

*(ii) The European Centre for Law and Justice (ECLJ)*

81. The ECLJ argued that Article 8 did not apply, as there had been no interference with the applicant's *de facto* family life. It further noted that

there was no right to adopt or to be adopted. In essence the applicants wished to assert a right to legal recognition of their family life. However, the right to found a family under Article 12 was, like the right to marry, reserved to opposite-sex couples.

82. Should the case be examined under Article 8, even assuming interference with the applicants' right to respect for their family life, it was prescribed by law, namely by Article 182 § 2 of the Civil Code, and served a legitimate aim, namely to protect the relationship between the second applicant and his father, who did not consent to the adoption. The domestic courts' refusal of the adoption requested by the applicants also served the legitimate aims of preserving the natural family and providing legal certainty for the child. Biological reality was an objective factor and was therefore to be regarded as reasonable justification.

83. With regard to Article 14 taken in conjunction with Article 8, the ECLJ submitted that the first and third applicants were not in a similar situation to a different-sex couple as they did not have the biological possibility to found a family. There had been no difference in treatment, as Article 182 § 2 of the Civil Code applied to all couples, whether of different sex or of the same sex. The fact that the effects were different for a same-sex couple did not amount to discrimination.

(iii) *The Attorney General for Northern Ireland*

84. The Attorney General for Northern Ireland referred to the 2008 European Convention on the Adoption of Children, noting that it could serve to assess the state of European consensus with respect to adoption. He observed in particular that Article 4 established the best interests of the child as the governing principle of any adoption. Article 7 made it clear that there was no consensus in respect of adoption by same-sex couples.

85. The Attorney General explained that litigation was currently pending in Northern Ireland since, under Articles 14 and 15 (1) of the 1987 Adoption (Northern Ireland) Order as amended by the Civil Partnership Act, neither a same-sex couple, whether they were civil partners or not, nor a gay or lesbian person who was in a civil partnership could apply to adopt, while a single person regardless of their sexual orientation who was not in a civil partnership could apply to adopt. It was alleged in these proceedings that the cumulative effect of these provisions violated Article 14 of the Convention taken in conjunction with Article 8.

86. Starting from the observation that the Convention did not guarantee a right to adopt, the Attorney General for Northern Ireland concluded on the basis of the Court's recent case-law (*E.B. v. France, Gas and Dubois, Schalk and Kopf*, all cited above, and *S.H. and Others v. Austria* [GC], no. 57813/00, 3 November 2011) that the Court had so far exercised judicial restraint, accepting that the domestic legislature was better placed than the

European judge to assess questions concerning the notion of family, marriage and the relations between parents and children.

(iv) *Amnesty International*

87. Amnesty International provided an overview of non-discrimination clauses in international and regional human rights treaties and of the relevant case-law of the Court and the Inter-American Court of Human Rights. They also drew on the interpretation of the relevant clauses by the various United Nations treaty monitoring bodies, in particular the Human Rights Committee and the Committee on the Rights of the Child.

88. They pointed out that differences in treatment based on sexual orientation required particularly convincing and weighty reasons, and referred in particular to a recent judgment by the Inter-American Court (*Atala Riffo and Daughters v. Chile*) which had clarified that “sexual orientation is part of a person’s intimacy and is not relevant when examining aspects related to an individual’s suitability as a parent.”

89. Amnesty International further referred to the Convention on the Rights of the Child, noting that Article 3 made the best interests of the child the “primary consideration” in all actions concerning children. In respect of adoption, Article 21 of the Convention on the Rights of the Child established that the best interests of the child were the “paramount consideration”. Thus, the Convention on the Rights of the Child placed important limits on the States’ margin of appreciation, prohibiting them, for instance, from applying different standards based on the composition of the child’s family or the sexual orientation of a parent. Consequently, any adoption system had to allow the courts or other relevant authorities to base a determination of adoption petitions primarily on what was best for the child.

(v) *Alliance Defending Freedom*

90. Alliance Defending Freedom noted that the Convention did not guarantee a right to adopt nor did the Court’s case-law recognise such a right under Article 8. By contrast, the Court had found Article 14 taken in conjunction with Article 8 to be applicable in cases of alleged discrimination in the adoption procedure and had examined a small number of such cases (*Fretté v. France*, no, 36515/97, ECHR 2002-I, *E.B. v. France* and *Gas and Dubois*, both cited above). It was important to note that in *E.B. v. France* one of the decisive considerations for the Court was the fact that French law allowed single persons to adopt, thereby opening up the possibility of adoption by a single homosexual. The present case was different as the finding of a violation would amount to rewriting domestic law, which allowed second-parent adoption for heterosexual couples only. In that context the third-party intervener noted that there was no European consensus on the issue.

91. As a second line of argument Alliance Defending Freedom asserted that the widely circulated “no differences” thesis – that is to say, the claim made by various studies that children raised by same-sex couples were not disadvantaged in any significant respect compared with children raised by heterosexual parents – had been called into question by recent social research, in particular by studies carried out in the United States. Given the inconclusive findings of the scientific research and the wide margin of appreciation States enjoyed in the area of family law, it was justified in the interests of the child to reserve adoption, including second-parent adoption, to heterosexual couples.

## 2. *The Court’s assessment*

### (a) **Applicability of Article 14 of the Convention taken in conjunction with Article 8**

92. The Court has dealt with a number of cases concerning discrimination on grounds of sexual orientation in the sphere of private and family life. Some were examined under Article 8 alone, namely cases concerning the prohibition under criminal law of homosexual relations between adults (see *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259) and the discharge of homosexuals from the armed forces (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI). Others were examined under Article 14 taken in conjunction with Article 8. The issues at stake included differing ages of consent under criminal law for homosexual relations (see *L. and V. v. Austria*, nos. 39392/98 and 39829/98, ECHR 2003-I), the granting of parental rights (see *Salgueiro da Silva Mouta*, cited above), authorisation to adopt a child (see *Fretté, E.B. v. France* and *Gas and Dubois*, all cited above), the right to succeed to the deceased partner’s tenancy (see *Karner*, cited above, and *Kozak v. Poland*, no. 13102/02, 2 March 2010), the right to social insurance cover (see *P.B. and J.S. v. Austria*, no. 18984/02, 22 July 2010) and the question of same-sex couples’ access to marriage or to an alternative form of legal recognition (see *Schalk and Kopf*, cited above).

93. In the present case the applicants formulated their complaint under Article 14 taken in conjunction with Article 8, claiming that all three of them enjoyed family life together. The Government did not dispute the applicability of Article 14 taken in conjunction with Article 8. The Court sees no reason to follow a different approach for the following reasons.

94. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions.

Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, for instance, *Schalk and Kopf*, cited above, § 89; *E.B. v. France*, cited above, § 47; *Karner*, cited above, § 32; and *Petrovic v. Austria*, 27 March 1998, § 22, *Reports of Judgments and Decisions* 1998-II).

95. The Court reiterates that the relationship of a cohabiting same-sex couple living in a stable *de facto* relationship falls within the notion of “family life” just as the relationship of a different-sex couple in the same situation would (see *Schalk and Kopf*, cited above, § 94). Furthermore, the Court found in its admissibility decision in *Gas and Dubois v. France* (no. 25951/07, 31 August 2010) that the relationship between two women who were living together and had entered into a civil partnership, and the child conceived by one of them by means of assisted reproduction but being brought up by both of them, constituted “family life” within the meaning of Article 8 of the Convention.

96. The first and third applicants in the present case form a stable same-sex couple. They have been cohabiting for many years and the second applicant shares their home. His mother and her partner care for him jointly. The Court therefore finds that the relationship between all three applicants amounts to “family life” within the meaning of Article 8 of the Convention.

97. The Court concludes that Article 14 of the Convention taken in conjunction with Article 8 applies to the facts of the present case.

**(b) Compliance with Article 14 taken in conjunction with Article 8**

*(i) The principles established in the Court’s case-law*

98. It is the Court’s established case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference of treatment (see *Schalk and Kopf*, cited above, § 96, and *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).

99. Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons (see, for example, *E.B. v. France*, cited above, § 91; *Kozak*, cited above, § 92; *Karner*, cited above, §§ 37 and 42; *L. and V. v. Austria*, cited



above, § 45; and *Smith and Grady*, cited above, § 90). Where a difference of treatment is based on sex or sexual orientation the State's margin of appreciation is narrow (see *Kozak*, cited above, § 92, and *Karner*, cited above, § 41). Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *E.B. v. France*, cited above, §§ 93 and 96, and *Salgueiro da Silva Mouta*, cited above, § 36).

100. Before examining the applicants' complaint the Court points out that three types of situation may be distinguished in the context of adoption by homosexuals. Firstly, a person may wish to adopt on his or her own (individual adoption). Secondly, one partner in a same-sex couple may wish to adopt the other partner's child, with the aim of giving both of them legally recognised parental status (second-parent adoption). Finally, a same-sex couple may wish to adopt a child (joint adoption) (see the study of the Council of Europe's Commissioner for Human Rights, cited at paragraph 55 above; see also *E.B. v. France*, cited above, § 33).

101. So far, the Court has had to deal with two cases relating to individual adoption by homosexuals (*Fretté* and *E.B. v. France*, both cited above) and with one case relating to second-parent adoption in a same-sex couple (*Gas and Dubois*, also cited above).

102. In *Fretté* (cited above) the French authorities had refused the request for authorisation to adopt, finding that owing to his "lifestyle" (meaning his homosexuality) the applicant did not provide the requisite safeguards for adopting a child. The Court, examining the case under Article 14 taken in conjunction with Article 8, noted that French law authorised any unmarried person, man or woman, to apply to adopt, and that the French authorities had refused the applicant's request for prior authorisation on the ground – albeit implicit – of his sexual orientation. Thus there had been a difference in treatment based on sexual orientation (§ 32). The Court found that the domestic authorities' decisions had pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure. With regard to whether a difference in treatment was justified, the Court noted in particular that there was little common ground between member States of the Council of Europe, where the law appeared to be going through a transitional phase, and that national authorities should enjoy a wide margin of appreciation when ruling on such matters. In respect of the competing interests of the applicant and children eligible for adoption, the Court noted that the scientific community was divided over the possible consequences of children being brought up by one or more homosexual parents, regard being had in particular to the limited number of scientific studies on the subject published at the material time. In conclusion, the Court considered that the refusal to authorise the adoption had not infringed the principle of proportionality and that, accordingly, the difference in treatment complained

of was not discriminatory within the meaning of Article 14 of the Convention (§§ 37-43).

103. In its Grand Chamber judgment in *E.B. v. France* (cited above), the Court, again examining the case under Article 14 taken in conjunction with Article 8, reversed its position. It analysed in detail the reasons given by the French authorities for refusing the applicant, who was living with another woman in a stable same-sex relationship, authorisation to adopt. The Court noted that the domestic authorities had based their decisions on two main grounds, the lack of a “paternal referent” in the applicant’s household or immediate circle of family and friends and the lack of commitment on the part of her partner. It added that the two grounds formed part of an overall assessment of the applicant’s situation, with the result that the illegitimacy of one ground contaminated the entire decision. While the second ground was not unreasonable, the first ground was implicitly linked to the applicant’s homosexuality and the authorities’ reference to it was excessive in the context of a single person’s request for authorisation to adopt. In sum, the applicant’s sexual orientation had been consistently at the centre of deliberations in her regard and had been decisive for the decision to refuse her authorisation to adopt (§§ 72-89). The Court went on to say that if the reasons advanced for a difference in treatment were based solely on considerations regarding the applicant’s sexual orientation this would amount to discrimination under the Convention (§ 93). It observed that under French law a single person was allowed to adopt and that it was undisputed that this opened up the possibility of adoption by a single homosexual. Having regard to its analysis of the reasons advanced by the French authorities, it concluded that in refusing the applicant authorisation to adopt, they had made a distinction on the basis of her sexual orientation which was not acceptable under the Convention. The Court consequently found a violation of Article 14 taken in conjunction with Article 8 (§§ 94-98).

104. The case of *Gas and Dubois* (cited above) concerned two women forming a same-sex couple who had concluded a civil partnership (*pacte civil de solidarité* (PACS)) under French law. One of them was the mother of a child conceived by means of assisted reproduction. Under French law she was the sole parent of the child. The applicants complained under Article 14 taken in conjunction with Article 8 of the Convention that one partner could not adopt the other’s child. More specifically, they wished to obtain a simple adoption order (*adoption simple*) under French law in order to create a parent-child relationship between the child and her mother’s partner with the possibility of sharing parental responsibility. The domestic courts had refused the adoption request on the ground that it would transfer parental rights from the child’s mother to her partner, which was not in the child’s interests (§ 62). The Court examined the applicants’ situation in comparison with that of a married couple. It noted that, in cases of *adoption*

*simple*, French law allowed only married couples to share parental rights. As Contracting States were not obliged to grant access to marriage to same-sex couples, and having regard to the special status conferred by marriage, the applicants' legal situation was not comparable to that of a married couple (§ 68). As to the situation of unmarried different-sex couples living together, like the applicants, in a civil partnership, the Court noted that second-parent adoption was not open to them either (§ 69). Thus, there had been no difference in treatment based on sexual orientation. In conclusion, the Court found that there had been no violation of Article 14 taken in conjunction with Article 8.

(ii) *Application of these principles to the present case*

(α) Comparison with a married couple in which one spouse wishes to adopt the other spouse's child

105. The first issue to be addressed is whether the applicants, namely the first and third applicants, who are living together as a same-sex couple, and the third applicant's son, are in a situation which is relevantly similar to that of a married different-sex couple in which one spouse wishes to adopt the other spouse's biological child.

106. The Court has recently answered this question in the negative in *Gas and Dubois*. The Court finds it appropriate to repeat and confirm the relevant considerations here. It reiterates in the first place that Article 12 of the Convention does not impose an obligation on the Contracting States to grant same-sex couples access to marriage (see *Schalk and Kopf*, cited above, §§ 54-64). Nor can a right to same-sex marriage be derived from Article 14 taken in conjunction with Article 8 (*ibid.*, § 101). Where a State chooses to provide same-sex couples with an alternative means of legal recognition, it enjoys a certain margin of appreciation as regards the exact status conferred (*ibid.*, § 108; see also *Gas and Dubois*, cited above, § 66). Furthermore, the Court has repeatedly held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences (see, among other authorities, *Gas and Dubois*, cited above, § 68, and *Burden*, cited above, § 63).

107. Austrian law indeed creates a special regime for married couples in respect of adoption. Under Article 179 § 2 of the Civil Code, joint adoption is open to married couples only. In turn, married couples may, as a rule, only adopt jointly. Second-parent adoption of the other spouse's child is provided for in the aforementioned Article as an exception to that rule.

108. The Government, relying on the Court's *Gas and Dubois* judgment, argued that the applicants were not in a relevantly similar situation to a married couple. For their part, the applicants stressed that they did not wish

to assert a right that was reserved to married couples. The Court does not see any reason to deviate from its case-law in this regard.

109. In the light of these considerations, the Court concludes that the first and third applicants are not in a relevantly similar situation to a married couple in respect of second-parent adoption.

110. Consequently, there has been no violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation is compared with that of a married couple in which one spouse wishes to adopt the other spouse's child.

(B) Comparison with an unmarried different-sex couple in which one partner wishes to adopt the other partner's child

111. The Court notes that the applicants' submissions concentrated on the comparison with an unmarried different-sex couple. They pointed out that under Austrian law second-parent adoption was open not only to married couples, but also to unmarried heterosexual couples, while it was legally impossible for same-sex couples.

*Relevantly similar situation*

112. The Court observes that, in contrast to the comparison with a married couple, it has not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple. Indeed, the Government did not dispute that the situations were comparable, conceding that, in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples. The Court accepts that the applicants, who wished to create a legal relationship between the first and second applicants, were in a relevantly similar situation to a different-sex couple in which one partner wished to adopt the other partner's child.

*Difference in treatment*

113. The Court will now turn to the question whether there was a difference in treatment based on the first and third applicants' sexual orientation.

114. Austrian law allows second-parent adoption by an unmarried different-sex couple. In general terms, individuals may adopt under Article 179 of the Civil Code, and nothing in Article 182 § 2 of the Civil Code, which regulates the effects of adoption, prevents one partner in an unmarried heterosexual couple from adopting the other partner's child without severing the ties between that partner and the child. In contrast, second-parent adoption in a same-sex couple is legally impossible. This follows from Article 182 § 2 of the Civil Code, according to which any person who adopts replaces the biological parent of the same sex. In the present case, as the first applicant is a woman, the second applicant's

adoption by her could only sever the relationship with his mother, who is her same-sex partner. Adoption can therefore not serve to create a parent-child relationship between the first and second applicants in addition to the relationship with his mother, the third applicant. Although neutral at first glance, Article 182 § 2 of the Civil Code excludes second-parent adoption in a same-sex couple.

115. For the sake of completeness the Court observes that since the entry into force of the Registered Partnership Act on 1 January 2010 same-sex couples have had the opportunity to enter into a registered partnership. The first and third applicants have not made use of this opportunity. In any case, this would not open up the possibility of second-parent adoption to them, as section 8(4) of the Act explicitly prohibits the adoption of one registered partner's child by the other partner.

116. There is thus no doubt that the applicable legislation leads to a distinction between unmarried different-sex and same-sex couples in respect of second-parent adoption. Under Austrian law as it stands second-parent adoption was and still is impossible in the applicants' case. This would be so even if the biological father of the second applicant were dead or unknown or if there were grounds for overriding his refusal to consent to the adoption. It would even be impossible if the second applicant's father were ready to give his consent to the adoption. This was not disputed by the Government.

117. However, the Government argued on the facts of the case that it disclosed no element of discrimination. They submitted that the applicants' adoption request had been refused on grounds unrelated to the first and third applicants' sexual orientation. Firstly, the courts and in particular the Regional Court had refused the adoption on the ground that it was not in the second applicant's interests. Secondly, any adoption required the consent of the child's biological parents. As the second applicant's father did not consent, the courts had been obliged to refuse the adoption request. They would have had to decide in exactly the same way had the first applicant been the male partner of the third applicant. In other words, the difference in law resulting from Article 182 § 2 of the Civil Code did not come into play in the circumstances of the applicants' case. Consequently, the Government asserted that the applicants were asking the Court to carry out a review of the law *in abstracto*.

118. Having regard to the content of the domestic courts' decisions (see paragraphs 15, 18 and 20 above), the Court is not convinced by the Government's argument. First of all, the domestic courts made it clear that an adoption producing the effect desired by the applicants, namely establishing a parent-child relationship between the first and second applicants in addition to the parent-child relationship between the latter and his mother, was in any case impossible under Article 182 § 2 of the Civil Code.

119. The District Court relied on the legal impossibility argument alone. It did not carry out any investigation into the circumstances of the case. In particular, it did not deal at all with the question whether the second applicant's father consented to the adoption or whether there were any grounds for overriding his refusal to consent, as alleged by the applicants.

120. The Regional Court too relied on the legal impossibility of the adoption requested by the applicants, but also had regard to some other factors. It expressed doubts as to whether the second applicant could be represented by his mother in the adoption proceedings owing to a possible conflict of interests. However, it found that the question need not be resolved as the District Court had rightly refused to grant the adoption without any further investigation. On the basis of the materials before the Court it does not appear that the Regional Court heard evidence from any of the persons concerned, namely the applicants and the second applicant's father. As to the role of the latter the Regional Court confined itself to observing – on the basis of the file – that he had regular contact with his son. It did not deal with the question whether, as alleged by the applicants, there were grounds for overriding the father's refusal to consent under Article 181 § 3 of the Civil Code. By contrast, it dwelt at length on the fact that the notion of “parents” in Austrian family law meant two persons of opposite sex. It also had regard to the interest of the child in maintaining contact with two parents of different sex, which in its view militated clearly against authorising the adoption of a child by the same-sex partner of one of its parents. Furthermore, it examined in the light of the Court's *Karner* judgment (cited above) whether adoption law as it stood discriminated against same-sex partners.

121. A further important element to be considered is the fact that the Regional Court declared an appeal on points of law to the Supreme Court to be admissible on the ground that there was no case-law on “the issue now to be determined, ... namely whether the adoption of a child by the same-sex partner of one of its parents is lawful”. In the Court's view this plainly contradicts the Government's assertion that the legal impossibility of second-parent adoption in a same-sex couple did not play a role in the determination of the present case.

122. The Supreme Court confirmed that the adoption of a child by the female partner of his or her biological mother was legally impossible under Article 182 § 2 of the Civil Code, finding that this provision was compatible with Article 14 taken in conjunction with Article 8 as falling within the State's margin of appreciation. Finally, it also confirmed that in view of the legal impossibility of the adoption requested it was not necessary to examine whether the conditions for overriding the father's refusal to consent, as an exceptional measure under Article 181 § 3 of the Civil Code, were met.

123. In conclusion, the Court dismisses the Government's argument that the applicants were not affected by the difference in law resulting from Article 182 § 2 of the Civil Code. In the Court's view, the legal impossibility of the adoption requested by the applicants was consistently at the centre of the domestic courts' considerations (see, *mutatis mutandis*, *E.B. v. France*, cited above, § 88).

124. Indeed, this fact prevented the domestic courts from examining in any meaningful manner whether the adoption was in the second applicant's interests as required by Article 180a of the Civil Code. Consequently, they did not investigate the circumstances of the case in detail. Moreover, they did not examine whether there were any reasons which might justify overriding the father's refusal to consent, in accordance with Article 181 § 3 of the Civil Code. The Government argued that the applicants had not sufficiently substantiated their allegations that there were such reasons, and pointed out that they had failed to request a formal decision on that issue. It suffices for the Court to note that the domestic courts did not dismiss the applicants' submissions on either of these grounds. As set out above, the District Court and the Regional Court did not deal with that issue at all and the Supreme Court confirmed in unequivocal terms that it had not been necessary to deal with it in view of the legal impossibility of the adoption requested.

125. Had the first and third applicants been an unmarried different-sex couple, the domestic courts would not have been able to refuse the adoption request as a matter of principle. Instead, the courts would have been required to examine whether the adoption served the second applicant's interests within the meaning of Article 180a of the Civil Code. If the child's father had not consented to the adoption, the courts would have had to examine whether there were exceptional circumstances such as to justify overriding his refusal under Article 181 § 3 of the Civil Code (see, as an example, *Eski*, cited above, §§ 39-42, concerning second-parent adoption in a different-sex couple, in which the Austrian courts conducted a detailed examination of that issue, balancing the interests of all the persons concerned – the couple, the child and the biological father of the child – having duly heard evidence from them and having established all the relevant facts).

126. Consequently, the Court finds that the applicants' complaint is in no sense an *actio popularis*. As already stated (see paragraph 123 above), the applicants were directly affected by the law complained of, as Article 182 § 2 of the Civil Code contains an absolute prohibition on second-parent adoption in a same-sex couple, making any examination of the specific circumstances of their case unnecessary and irrelevant and leading to the refusal of their adoption request as a matter of principle. It follows that the Court is not reviewing the law *in abstracto*: the blanket prohibition at issue, by its very nature, removes the factual circumstances of

the case from the scope of both the domestic courts' and this Court's examination (see, *mutatis mutandis*, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 72, ECHR 2005-IX).

127. The Court would add that, at first sight, the difference in treatment may seem to concern mainly the first applicant, who is treated differently from one member of an unmarried different-sex couple who wishes to adopt the other partner's child. However, as all three of the applicants enjoy family life together (see paragraph 96 above) and the adoption request was aimed at obtaining legal recognition of that family life, the Court considers that all three applicants are directly affected by the difference of treatment at issue and may therefore claim to be victims of the alleged violation.

128. Finally, the Government advanced another argument, namely that the legal impossibility of granting the applicants' adoption request was not discriminatory as it was not based on the first and third applicants' sexual orientation. They submitted that Article 182 § 2 of the Civil Code, which made it impossible for a woman to adopt a child while the legal ties with the child's mother were maintained, applied as a general rule. That rule would also prohibit an aunt from adopting her nephew while his relationship with his mother remained intact.

129. The Court is not convinced by this argument. The applicants claimed that they were treated differently from an unmarried heterosexual couple with regard to the possibility of obtaining legal recognition of their family life through second-parent adoption. The Court notes firstly that the relationship between two adult sisters or between an aunt and her nephew does not in principle fall within the notion of "family life" within the meaning of Article 8 of the Convention. Secondly, even if it did, the Court has already held that the relationship between two sisters living together is qualitatively of a different nature to the relationship of a couple, including a same-sex couple (see, *mutatis mutandis*, *Burden*, cited above, § 62). Consequently, Article 182 § 2 of the Civil Code does not affect other persons in the same way as it affects the applicants, whose family life is based on a same-sex couple.

130. Having regard to all the considerations set out above, the Court finds that there was a difference of treatment between the applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner's child. That difference was inseparably linked to the fact that the first and third applicants formed a same-sex couple, and was thus based on their sexual orientation.

131. The present case is therefore to be distinguished from *Gas and Dubois* (cited above, § 69), in which the Court found that there was no difference of treatment based on sexual orientation between an unmarried different-sex couple and a same-sex couple as, under French law, second-parent adoption was not open to either of them.



*Legitimate aim and proportionality*

132. Although it follows from the considerations set out above (see, in particular, paragraphs 116 and 126), the Court deems it appropriate to stress the fact that the present case does not concern the question whether or not the applicants' adoption request should have been granted in the circumstances of the case. Consequently, it is not concerned with the role of the second applicant's father or whether there were any reasons to override his refusal to consent. All these issues would be for the domestic courts to decide, were they in a position to examine the merits of the adoption request.

133. The issue before the Court is precisely the fact that they were not in such a position in the applicants' case, as adoption of the second applicant by his mother's same-sex partner was in any case legally impossible in accordance with Article 182 § 2 of the Civil Code. By contrast, the domestic courts would have been required to examine the merits of the adoption request had it concerned second-parent adoption in an unmarried heterosexual couple.

134. Although the present case may be seen against the background of the wider debate on same-sex couples' parental rights, the Court is not called upon to rule on the issue of second-parent adoption by same-sex couples as such, let alone on the question of adoption by same-sex couples in general. What it has to decide is a narrowly defined issue of alleged discrimination between unmarried different-sex couples and same-sex couples in respect of second-parent adoption.

135. The Court reiterates that the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require a State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. While Article 8 does not guarantee a right to adopt, the Court has already held, in respect of adoption by a single homosexual, that a State which creates a right going beyond its obligations under Article 8 of the Convention may not apply that right in a manner which is discriminatory within the meaning of Article 14 (see *E.B. v. France*, cited above, § 49).

136. In the context of the present case the Court notes that there is no obligation under Article 8 of the Convention to extend the right to second-parent adoption to unmarried couples (see *Gas and Dubois*, cited above, §§ 66-69; see also *Emonet and Others*, cited above, §§ 79-88). Nonetheless, Austrian law allows second-parent adoption in unmarried different-sex couples. The Court therefore has to examine whether refusing that right to (unmarried) same-sex couples serves a legitimate aim and is proportionate to that aim.

137. Both the domestic courts and the Government argued that Austrian adoption law was aimed at recreating the circumstances of a biological

family. As the Regional Court observed in its judgment of 21 February 2006, the provisions at issue aimed to protect the “traditional family”. Austrian law was based on the principle that, in accordance with biological reality, a minor child should have two persons of opposite sex as parents. Thus the decision not to provide for a child to be adopted by the same-sex partner of one of the parents, with the result of severing the relationship with the opposite-sex parent, served a legitimate aim. Similarly, the Supreme Court, in its judgment of 27 September 2006, noted that the primary aim of adoption was to provide children who had no parents or whose parents were not able to care for them with responsible caregivers. That aim could only be achieved by recreating the situation of a biological family as far as possible. In short, the domestic courts and the Government relied on the protection of the traditional family, based on the tacit assumption that only a family with parents of different sex could adequately provide for a child’s needs.

138. The Court has accepted that the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Karner*, cited above, § 40, and *Kozak*, cited above, § 98). It goes without saying that the protection of the interests of the child is also a legitimate aim. It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality was adhered to.

139. The Court reiterates the principles developed in its case-law. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it (see *Karner*, cited above, § 41, and *Kozak*, cited above, § 98). Also, given that the Convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life (see *Kozak*, cited above, § 98).

140. In cases in which the margin of appreciation is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people, in this instance persons living in a homosexual relationship, from the scope of application of the provisions at issue (see *Karner*, cited above, § 41, and *Kozak*, cited above, § 99).

141. Applying the case-law cited above, the Court notes that the burden of proof is on the Government. It is for the Government to show that the

protection of the family in the traditional sense and, more specifically, the protection of the child's interests, require the exclusion of same-sex couples from second-parent adoption, which is open to unmarried heterosexual couples.

142. The Court would repeat that Article 182 § 2 of the Civil Code contains an absolute, albeit implicit, prohibition on second-parent adoption for same-sex couples. The Government did not adduce any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs. On the contrary, they conceded that, in personal terms, same-sex couples could be as suitable or unsuitable as different-sex couples when it came to adopting children. Furthermore, the Government stated that the Civil Code was not aimed at excluding same-sex partners from second-parent adoption. Nonetheless, they stressed that the legislature had wished to avoid a situation in which a child had two mothers or two fathers for legal purposes. The explicit exclusion of second-parent adoption in same-sex couples had only been introduced by the Registered Partnership Act in 2010, which had not been in force when the present case was determined by the domestic courts and was therefore not relevant in the present case.

143. The Court has already dealt with the argument that the Civil Code does not aim specifically to exclude same-sex partners (see paragraphs 128 and 129 above). Regarding the Registered Partnership Act, the Court agrees that it is not directly at issue in the present case. It may nevertheless be of relevance in so far as it may shed light on the reasons underlying the prohibition of second-parent adoption in same-sex couples. However, the explanatory report on the draft law (see paragraph 42 above) only states that section 8(4) of the Act was included as a result of repeated requests made during the consultation procedure. In other words, it merely reflects the position of those sectors of society which are opposed to the idea of opening up second-parent adoption to same-sex couples.

144. The Court would add that the Austrian legislation appears to lack coherence. Adoption by one person, including one homosexual, is possible. If he or she has a registered partner, the latter has to consent, in accordance with the amendment to Article 181 § 1, sub-paragraph 2, of the Civil Code, which was introduced together with the Registered Partnership Act (see paragraph 40 above). The legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers (see, *mutatis mutandis*, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 78, ECHR 2002-VI, where the Court also took into consideration the lack of coherence of the domestic legal system).

145. The Court finds force in the applicants' argument that *de facto* families based on a same-sex couple exist but are refused the possibility of obtaining legal recognition and protection. The Court observes that in contrast to individual adoption or joint adoption, which are usually aimed at creating a relationship with a child previously unrelated to the adopter, second-parent adoption serves to confer rights *vis-à-vis* the child on the partner of one of the child's parents. The Court itself has often stressed the importance of granting legal recognition to *de facto* family life (see *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 119, 28 June 2007; see also, in the context of second-parent adoption, *Eski*, cited above, § 39, and *Emonet and Others*, cited above, §§ 63-64).

146. All the above considerations – the existence of *de facto* family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes, and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples – cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples arising out of Article 182 § 2 of the Civil Code. Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child, which is a key notion in the relevant international instruments (see, in particular, paragraph 49 above, and *E.B. v. France*, cited above, § 95).

147. The Government advanced another argument to justify the difference in treatment complained of. Relying on Article 8 of the Convention, they asserted that the margin of appreciation was a wide one in the sphere of adoption law, which had to strike a careful balance between the interests of all the persons involved. In the present context it was even wider, as there was no European consensus on the issue of second-parent adoption by same-sex couples.

148. The Court observes that the breadth of the State's margin of appreciation under Article 8 of the Convention depends on a number of factors. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see, as recent examples, *S.H. and Others v. Austria*, cited above, § 94, and *A, B and C v. Ireland* [GC], no. 25579/05, § 232, ECHR 2010). However,

the Court reaffirms that when it comes to issues of discrimination on the grounds of sex or sexual orientation to be examined under Article 14, the State's margin of appreciation is narrow (see paragraph 99 above).

149. Furthermore, and solely in order to respond to the Government's assertion that no European consensus exists, it has to be borne in mind that the issue before the Court is not the general question of same-sex couples' access to second-parent adoption, but the difference in treatment between unmarried different-sex couples and same-sex couples in respect of this type of adoption (see paragraph 134 above). Consequently, only those ten Council of Europe member States which allow second-parent adoption in unmarried couples may be regarded as a basis for comparison. Within that group, six States treat heterosexual couples and same-sex couples in the same manner, while four adopt the same position as Austria (see the comparative-law information at paragraph 57 above). The Court considers that the narrowness of this sample is such that no conclusions can be drawn as to the existence of a possible consensus among Council of Europe member States.

150. In the Court's view, the same holds true for the 2008 Convention on the Adoption of Children. Firstly, it notes that this Convention has not been ratified by Austria. Secondly, given the low number of ratifications so far, it may be open to doubt whether the Convention reflects common ground among European States at present. In any event, the Court notes that Article 7 § 1 of the 2008 Convention on the Adoption of Children provides that States are to permit adoption by two persons of different sex (who are married or, where that institution exists, are registered partners) or by one person. Under Article 7 § 2, States are free to extend the scope of the Convention to same-sex couples who are married or have entered into a registered partnership, as well as "to different-sex couples and same-sex couples who are living together in a stable relationship". This indicates that Article 7 § 2 does not mean that States are free to treat heterosexual and same-sex couples who live in a stable relationship differently. The Committee of Ministers' Recommendation of 31 March 2010 (CM/Rec (2010)5) appears to point in the same direction: paragraph 23 calls on member States to ensure that the rights and obligations conferred on unmarried couples apply in a non-discriminatory way to both same-sex and different-sex couples. In any event, even if the interpretation of Article 7 § 2 of the 2008 Convention were to lead to another result, the Court reiterates that States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, ECHR 2010 (extracts)).

151. The Court is aware that striking a balance between the protection of the family in the traditional sense and the Convention rights of sexual minorities is in the nature of things a difficult and delicate exercise, which

may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition (see *Kozak*, cited above, § 99). However, having regard to the considerations set out above, the Court finds that the Government have failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction is therefore incompatible with the Convention.

152. The Court emphasises once more that the present case does not concern the question whether the applicants' adoption request should have been granted in the circumstances of the case. It concerns the question whether the applicants were discriminated against on account of the fact that the courts had no opportunity to examine in any meaningful manner whether the requested adoption was in the second applicant's interests, given that it was in any case legally impossible. In this context the Court refers to recent judgments in which it found a violation of Article 14 taken in conjunction with Article 8 because the father of a child born outside marriage could not obtain an examination by the domestic courts of whether the award of joint custody to both parents or sole custody to him was in the child's interests (see *Zaunegger v. Germany*, no. 22028/04, §§ 61-63, 3 December 2009, and *Sporer v. Austria*, no. 35637/03, §§ 88-90, 3 February 2011).

153. In conclusion, the Court finds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

154. Article 41 of the Convention provides:

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

### A. Damage

155. The applicants claimed 50,000 euros (EUR) each in respect of non-pecuniary damage.

156. The Government asserted that an award of compensation for non-pecuniary damage was not justified in the circumstances. They pointed out in particular that the applicants were not prevented from living together

as they wished. In any case, the sum claimed by the applicants was not in line with the awards made in comparable cases.

157. The Court considers that the applicants must have suffered non-pecuniary damage that is not sufficiently compensated for by the mere finding of a violation of Article 14 taken together with Article 8. Furthermore, the Court considers that the applicants were affected as a family by the violation found. It therefore finds it appropriate to make a joint award in respect of non-pecuniary damage. Making its assessment on an equitable basis and having regard to the sum awarded in a comparable case (see *E.B. v. France*, cited above, § 102), it awards the applicants jointly EUR 10,000 in respect of non-pecuniary damage.

### **B. Costs and expenses**

158. The applicants also claimed a total amount of EUR 49,680.94 under the head of costs and expenses. This amount was composed of EUR 6,156.59 for costs incurred before the domestic courts and EUR 43,524.35 for those incurred before the Court. The sums included value-added tax (VAT).

159. The costs of the domestic proceedings included EUR 2,735.71 in respect of the proceedings before the Constitutional Court and EUR 3,420.88 in respect of the proceedings before the civil courts. The applicants argued that the proceedings before the Constitutional Court had been necessary, as it had only become clear through the Constitutional Court's decision that they would be able to apply to the civil courts for approval of the adoption agreement without the risk that the application would result in a loss of parental rights for the third applicant.

160. The costs of the Convention proceedings included EUR 889.08 in travel and accommodation costs incurred by the applicants' counsel in attending the hearing before the First Section and EUR 913.22 in travel and accommodation costs incurred in attending the hearing before the Grand Chamber. They further included a total amount of EUR 1,832.30 in respect of compensation for loss of time in connection with counsel's travel to and stay in Strasbourg to attend the two hearings. The remainder of the costs claimed were lawyer's fees. The applicants pointed out that the proceedings before the Grand Chamber were not merely a repetition of the Chamber proceedings, in particular as the Court had put a number of further questions to the parties and a number of third-party comments had had to be studied and be addressed at the hearing.

161. The Government took the view that the costs for the proceedings before the Constitutional Court had not been necessarily incurred. They argued that in the light of the Constitutional Court's case-law on Article 140 of the Federal Constitution, an individual could lodge a direct complaint with the Constitutional Court only if the alleged violation resulted from a

direct application of the law. In the present case, the applicants had had an opportunity to bring their case before the civil courts.

162. In respect of the Convention proceedings, the Government submitted that the costs claimed were excessive as a whole. Furthermore, they asserted that the applicants had been able to rely to a large extent on arguments already submitted in the domestic proceedings, and that in the proceedings before the Grand Chamber they had been able to rely on their submissions before the Chamber.

163. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In respect of the domestic proceedings the Court considers that the costs claimed for the proceedings before the Constitutional Court were not necessarily incurred. It notes in particular that the Constitutional Court dismissed the applicants' complaint as inadmissible. It therefore only awards the costs claimed in respect of the proceedings before the civil courts, namely EUR 3,420.88. Turning to the costs of the Convention proceedings the Court, regard being had to the documents in its possession and the above criteria, considers it appropriate to award EUR 25,000. In total, the Court awards the applicants EUR 28,420.88 under the head of costs and expenses.

### **C. Default interest**

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

## **FOR THESE REASONS, THE COURT**

1. *Declares*, unanimously, the application admissible;
2. *Holds*, unanimously, that there has been no violation of Article 14 taken in conjunction with Article 8 of the Convention when the applicants' situation is compared with that of a married couple in which one spouse wishes to adopt the other spouse's child;
3. *Holds*, by ten votes to seven, that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention when the applicants' situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child;



4. *Holds*, by eleven votes to six,
- (a) that the respondent State is to pay, within three months, the following amounts:
    - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, jointly to the applicants, in respect of non-pecuniary damage;
    - (ii) EUR 28,420.88 (twenty-eight thousand four hundred and twenty euros and eighty-eight cents), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert  
Deputy to the Registrar

Dean Spielmann  
President

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

- (a) Concurring opinion of Judge Spielmann;
- (b) Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos.

D.S.  
J.C.

## CONCURRING OPINION OF JUDGE SPIELMANN

(Translation)

1. With regard to point 2 of the operative provisions of the judgment, I believe that the situation of the applicants – the first and third applicants, who form a same-sex couple, and the third applicant’s son – was comparable to that of a married different-sex couple in which one partner wished to adopt the other partner’s child.

2. On this point, I would reiterate my concurring opinion annexed to the judgment in *Gas and Dubois v. France* of 15 March 2012, in which I was joined by my colleague Isabelle Berro-Lefèvre. Like *Gas and Dubois*, the present case concerns a stable same-sex couple. As regards the issue examined by the Court, the first and third applicants are, in my view, in a situation comparable to that of a married couple. The fact that the Convention does not require Contracting States to make marriage available to same-sex couples and that marriage confers a special status on those who enter into it has no bearing on the issue raised by the present case.

3. The reason why I did not vote in favour of finding a violation of Article 14 taken in conjunction with Article 8 is because I believe that it was not necessary to examine this issue. Moreover, the applicants themselves stressed that they did not wish to assert a right that was reserved to married couples. Although their position on this matter was not wholly without ambiguity, they argued mainly that there were no objective and reasonable grounds for the first applicant to be refused the right to adopt her partner’s child given that the same right would have been granted to a partner in an unmarried heterosexual couple. It is true that, in submitting their complaint initially, the first and third applicants likened their situation to that of a married couple. However, in their observations of 31 July 2012, received at the Registry on 1 August 2012, they expressed their position as follows:

“34. The issue before the Court in this case is NOT a privilege of marriage. The applicants are not claiming a right which is reserved to marriage based (step-parent) families (this being the crucial difference between *Gas and Dubois* and this case!).

35. Austria grants step-parent adoption also to unmarried couples.

36. But while unmarried heterosexual couples can meaningfully enjoy this possibility, unmarried homosexual couples and their step-children cannot. This is exactly a *Karner*-like situation (*Karner v Austria* 2003, *Kozak v Poland* 2010, *P.B. and J.S. v Austria* 2010, *J.M. v. UK* 2010).”

4. This is how the subject to be debated before the Court was defined by the applicants themselves. Accordingly, I believe that it was not necessary for the Court to examine the question of the comparison between the applicants’ situation and that of a married couple, especially since there was no real discussion as to whether any reasons existed that might have

justified the difference in treatment, in the light of a possible legitimate aim and with reference to the principle of proportionality.

JOINT PARTLY DISSENTING OPINION OF JUDGES  
CASADEVALL, ZIEMELE, KOVLER, JOČIENĖ, ŠIKUTA,  
DE GAETANO AND SICILIANOS

*(Translation)*

1. With all due respect to the approach followed by the majority, we are unable to subscribe to point 3 of the operative provisions, which finds a violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child, or to the arguments in support of that conclusion. The particular facts of the case combined with the content of the Austrian legislation, on the one hand, and a number of considerations relating to comparative and international law, on the other hand, lead us to the conclusion that there has been no violation of Article 14 taken in conjunction with Article 8 of the Convention in respect of any of the three applicants.

**I. The particular features of the case and Austrian law**

*The circumstances of the case*

2. The circumstances of this case differ from those in previous cases concerning adoption issues examined by our Court. Four persons were concerned in the present case: the biological mother, the biological father, the mother's partner and the child to be adopted (the son of the first two persons). The mother's partner wished to adopt the child, with the mother's agreement. Although his mother had parental responsibility, the child had maintained strong emotional ties with his father, whom he saw regularly and who, according to the case file, paid maintenance for his son with equal regularity. The father, as he was entitled to do, had refused to consent to the adoption. It was not disputed that the child was receiving a proper upbringing within the family home provided by his mother and her partner. We have no difficulty in agreeing that the relationship between the three applicants fell within the notion of "family life" in terms of Article 8 of the Convention.

3. Bearing in mind that Article 8 of the Convention does not guarantee either the right to found a family or the right to adopt (see, among other authorities, *E.B. v. France* ([GC], no. 43546/02, § 41, 22 January 2008)), nor does it guarantee the right to have a child or the right to be adopted, one may well ask what constituted the supposed interference by the national authorities with the applicants' private or family life. The first applicant, who is the mother's partner, could not assert a right to adopt the latter's child. The second applicant, assuming that he wished to be adopted, could

not claim such a right either; moreover, he already had a father and a mother. The rights of the third applicant, the child's mother, were not infringed in any way. On the contrary, the impugned legislation simply preserved her parental rights, which she did not intend to waive. In any event, even supposing that there was interference, it was in accordance with the law and pursued the legitimate aim of protecting the family ties between the second applicant and his father, who was opposed to the plans to adopt. But we will not dwell any further on this point.

*The impugned legislation*

4. Contrary to the view of the majority (see paragraph 126 of the judgment), we believe that the Court should have examined the issue on the basis of this specific situation rather than conducting an abstract analysis of the legal provision applicable and applied by the domestic courts, namely Article 182 § 2 of the Austrian Civil Code. Hence “in cases arising from individual petitions the Court's task is not to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it...” (see *Taxquet v. Belgium* [GC], no. 926/05, § 83 *in fine*, ECHR 2010).

5. Following the same reasoning as the District Court and later the Regional Court, the Austrian Supreme Court dismissed the applicants' appeal on points of law. It cited among the reasons for its decision the fact that Article 182 § 2 of the Austrian Civil Code governed the effects of adoption by one person, and found that the following conclusions should be drawn:

- if the child was adopted by just one adoptive parent, the ties of kinship ceased only in respect of the biological father (or the biological mother) and his (her) relatives;
- this meant, among other things, that the adoption of a child by a woman could not have the effect of depriving the child of his or her biological father;
- Article 182 § 2 of the Civil Code imposed a general prohibition (that is, not just in the case of same-sex partners) on adoption by a man as long as the ties of kinship with the child's biological father still existed, and by a woman where such ties still existed with the biological mother;
- under Article 182 § 2, therefore, a person who adopted a child on his or her own did not take the place of either parent at will, but only the place of the parent of the same sex.

6. Article 182 § 2 is a provision of a general nature which is strictly neutral and applicable in all situations without any distinction being made on the basis of the sexual orientation of the persons seeking to adopt. A given legislative provision may produce different effects depending on the situation to which it is applied. “A mere difference in effect does not amount to and does not imply a difference in treatment, where one and the

same rule produces these various effects” (see the observations of the third-party intervener ECLJ). The effects arising out of application of the relevant provisions of Austrian law (severing of the legal tie between the adopted child and his or her biological father or mother), which are the legal and logical consequence of adoption, are echoed in the legislation of many other Council of Europe member States (see, among other examples, Articles 360 et seq. of the French Civil Code). Our Court has previously acknowledged “that the logic behind this approach to adoption, which entails the severing of the existing parental tie between the adopted person and his or her biological parent, is valid for minors” and that “in view of the background to and purpose of Article 365 of the [French] Civil Code ..., there is no justification, on the sole basis of a challenge to the application of that provision, for authorising the creation of a dual legal parent-child relationship...” (see *Gas and Dubois v. France*, no. 25951/07, § 72, 15 March 2012). That assertion is valid, *mutatis mutandis*, in the present case. The fact that different stakeholders are involved has no bearing on the effects produced, which will always remain the same: the child cannot be adopted without the express consent of the father or mother with whom the parental tie remains. Accordingly, whether the person seeking to adopt is a man or a woman, heterosexual or homosexual, the adoption will be impossible as a matter of principle in each case.

#### *The position of the child’s father*

7. The applicants correctly alleged that the approval of the adoption would have led to the severing of the legal tie between the mother and her son under the relevant statutory provision; at the same time, they sought the legal severing of the tie between the child and his father (in other words, to have his mother’s partner take the place of the biological father). In doing so they overlooked the father’s legitimate right to respect for his private and family life, also protected by Article 8. Notwithstanding the position of the majority on this point (see paragraphs 120 and 124 of the judgment), we believe that the option of overriding the father’s wishes, available to the courts under the Civil Code, constitutes an exceptional measure which should only be imposed in serious and established cases of a flagrant breach of parental obligations; this does not appear to be the situation here. A father should not have to justify his wish to continue to be a father to his son, still less when, as in the present case, he assumes his parental responsibilities in full.

#### *The child’s best interests*

8. It remains for us to examine the element which is at the heart of any adoption procedure, namely the child’s best interests (the major factor overlooked in this case). Leaving aside a possible conflict of interests

between the mother as representative and her son (an issue raised but not ruled upon by the domestic authorities, see paragraph 18 of the judgment), efforts should have been made to ascertain the child's position. He was aged between eleven and twelve at the time of the domestic proceedings, and is now approaching majority. He has a mother and a father: what best interests would have been served had his father been replaced by his mother's partner? The first and third applicants, bound by emotional ties, expressed their interest in the adoption, but there was nothing to demonstrate that it was in the child's "best interests". Adoption means "providing a child with a family, not a family with a child" (see *Fretté v. France*, no. 36515/97, § 42, ECHR 2002-I). But the fact is that the second applicant has always had a family. The judgment is silent on this crucial point.

*Second-parent adoption in same-sex couples*

9. After pointing out that the present case does not concern the question whether or not the applicants' adoption request should have been granted in the circumstances of the case (see paragraphs 132 and 152 of the judgment), the majority states twice that "the Court is not called upon to rule on the issue of second-parent adoption by same-sex couples as such, let alone on the question of adoption by same-sex couples in general" (see paragraphs 134 and 149 of the judgment). The majority goes on to add – without going into further details – that the aim of protecting the family in the traditional sense is "rather abstract" and that a broad variety of concrete measures may be used to implement it (see paragraph 139 of the judgment). On the subject of section 8(4) of the Registered Partnership Act, the majority observes that this provision "merely reflects the position of those sectors of society which are opposed to the idea of opening up second-parent adoption to same-sex couples" (see paragraph 143), without commenting further on this objective reality, which may be valid for Austria but also, possibly, for other States Parties to the Convention.

10. Lastly, we have difficulty understanding why the majority criticised the Government for failing to adduce any specific argument, scientific studies or other item of evidence to show that a family with two parents of the same sex could not adequately provide for a child's needs (see paragraphs 142 and 146 of the judgment). Why should the Government have adduced such evidence? The question did not arise in the specific circumstances of this case. It was irrelevant. The fact that the second applicant appeared to be receiving a proper upbringing from his mother and her partner was not in dispute.

11. In our view the majority, with all due respect to it, said too much and yet not enough on the subject of second-parent adoption in same-sex couples.

## II. Comparative law and international law

### *Comparative law and the “consensus” issue*

12. In paragraph 149 of the judgment, in response to the Government’s assertion that there was no European consensus on the issue, the Court observed that “only those ten Council of Europe member States which allow second-parent adoption in unmarried couples may be regarded as a basis for comparison”, that “[w]ithin that group, six States treat heterosexual couples and same-sex couples in the same manner”, while “four adopt the same position as Austria”. The Court then considered that “the narrowness of this sample is such that no conclusions can be drawn as to the existence of a possible consensus among Council of Europe member States”.

13. This approach raises above all a methodological issue, regarding the “sample” of member States to be taken into account. Should this have been confined to States whose legal systems lent themselves to a near-automatic comparison with that of the respondent State, or should legislation relating to the wider context of the case also have been taken into consideration? If the former approach is taken, the majority was right to take account only of the legislation in the ten States Parties which make second-parent adoption available to unmarried couples.

14. But, assuming that this is actually the correct solution, the conclusion which the Court draws from it is, to say the least, curious. Given that six of these ten countries opted for one approach while the remaining four opted for a different one, it seems obvious that the States in question are sharply divided and that there is therefore *no* consensus. In such circumstances it seems very artificial to take refuge behind the “narrowness of this sample” in order to avoid the issue by stating that no conclusions can be drawn “as to the existence of a possible consensus”. This somewhat strange reasoning is explained by the fact that the method used may in reality not be the right one.

15. In fact, the method in question has the inescapable effect of disregarding a clear trend whereby the great majority of the States Parties currently do not authorise second-parent adoption for unmarried couples in general, still less for unmarried same-sex couples. To say that this is of no relevance for the purposes of the present case is, in our opinion, to take an unduly technical – and hence reductive – view of the situation Europe-wide. While the Court has and must have a sound technical grasp of issues, it must not lose sight of the major trends which are clearly in evidence across our continent, at least in the current circumstances. Furthermore, and moving from methodology to terminology, should we always adhere to the somewhat restrictive notion of “consensus”, which is rarely encountered in real life? Would it not be more appropriate and simpler to speak in terms of a “trend”? These observations lead us into a more detailed examination of the current state of international law in this regard.



*International law and the trend towards a laissez-faire approach*

16. The lack of any “consensus” and the variety of approaches to the subject of second-parent adoption in unmarried couples are reflected clearly in Article 7 § 2 of the European Convention on the Adoption of Children, which was revised in 2008 and entered into force in 2011. According to that provision: “States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different-sex couples and same-sex couples who are living together in a stable relationship.” In other words, this provision leaves States free to legislate as they see fit.

17. The Convention in question is dealt with in a rather ambivalent manner in the judgment. Some of its provisions – including the one cited above – and the corresponding passages of the explanatory report are reproduced in paragraphs 51 to 53 of the judgment, under the heading “International conventions and Council of Europe materials”. This suggests that this Convention is an instrument to be taken into consideration, in line with what has become the usual practice of the Court. We know that the Court frequently refers to Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties in order to draw on other international instruments which are of relevance for the purpose of interpreting the Convention (see I. Ziemele, “Other Rules of International Law and the European Court of Human Rights: A Question of a Simple Collateral Benefit?” in D. Spielmann, M. Tsirli, P. Voyatzis (eds.), *The European Convention on Human Rights, a living instrument. Essays in Honour of Christos L. Rozakis*, Brussels, Bruylant, 2011, pp. 741-758).

18. However, in paragraph 150 of the judgment the Court seems suddenly to distance itself from this practice. At first, it seems to want to dismiss the 2008 Convention from the outset because it “has not been ratified by Austria”. This argument seems strange bearing in mind that it is the Court’s usual practice to take inspiration from a number of international instruments, whether or not they have been ratified by the respondent State, on the basis that they reflect the current state of general international law (see, among many other authorities, *Cudak v. Lithuania* [GC], no. 15869/02, § 66, ECHR 2010). In order to justify this change of tack, the Court hastens to state, precisely, that “given the low number of ratifications so far, it may be open to doubt whether the [2008] Convention reflects common ground among European States at present”. This argument, while it may at first glance appear pertinent from an international law perspective, amounts in reality to a sort of *petitio principii*. In fact, the only provision of the 2008 Convention which might be relevant in the context of the present case is Article 7 § 2 (cited above). However, this provision simply brings into sharper focus, we would repeat, the *lack* of “common ground among European States at present”. In other words, the drafters of the

2008 Convention sought, by means of this provision, to express implicitly but clearly their disagreement on the subject of second-parent adoption outside marriage and to leave themselves completely free when it came to enacting legislation on the subject. Rather than acknowledge this situation – and, hence, the Austrian Government’s argument concerning the lack of consensus – the Court chose instead to cast doubt on the relevance of the 2008 Convention overall.

19. However, immediately after attempting to dismiss the 2008 Convention, the majority invokes it in support of its main argument concerning the violation of Article 14 of the Convention taken in conjunction with Article 8. After reiterating the content of Article 7 § 2 of the 2008 Convention, the judgment adds: “This indicates that Article 7 § 2 does not mean that States are free to treat heterosexual and same-sex couples who live in a stable relationship differently” (paragraph 150). Besides the fact that, in our view, this interpretation does not adhere to the letter of Article 7 § 2, it appears also to run counter to its object and purpose as set out in the explanatory report cited in paragraph 53 of the judgment. Charting the history of Article 7 § 2 and the thinking that led to its adoption, the explanatory report states as follows:

“45. Concerning paragraph 2 [of Article 7] it was noted that certain State Parties (Sweden in 2002 and the United Kingdom in 2005) denounced the 1967 Convention on the ground that same sex registered partners under their domestic law may apply jointly to become adoptive parents and that this was not in line with the Convention. Similar situations in other States could also lead to the denunciation of the 1967 Convention. However, it was also noted that the right of same sex registered partners to adopt jointly a child was not a solution that a large number of States Parties were willing to accept at the present time.

46. In these circumstances, paragraph 2 shall enable those States which wished to do so, to extend the revised Convention to cover adoptions by same sex couples who are married or registered partners. In this respect, it is not unusual for Council of Europe instruments to introduce innovative provisions, but to leave it to States Parties to decide whether or not to extend their application to them (see Article 5, paragraph 2, of the 2003 Convention on Contact concerning Children, ETS No. 192).

47. States are also free to extend the scope of the Convention to different or same sex couples who are living together in a stable relationship. It is up to States Parties to specify the criteria for assessing the stability of such a relationship.”

20. There is no escaping the fact that the passages cited above highlight first and foremost the differences in approach between European countries as regards adoption by same-sex couples, that they also underscore the “innovative” nature of Article 7 § 2 and, lastly, that they stress the fact that, under this Article, States are “also *free* to extend the scope of the Convention to different *or* same sex couples living together in a stable relationship” (italics added). The words in italics indicate clearly the complete freedom enjoyed by States when it comes to enacting legislation in this sphere. To infer from Article 7 § 2 that the Contracting States wished

to restrict the freedom of manoeuvre of their respective legislatures in any way amounts, in our view, to an erroneous interpretation of that provision.

21. Similar remarks might be made in relation to Recommendation CM/Rec(2010)5, adopted on 31 March 2010 by the Committee of Ministers. Paragraph 23 of the Recommendation states that “[w]here national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples”. The same paragraph adds the words “including with respect to survivor’s pension benefits and tenancy rights”. The last part of the sentence – which is omitted from the citation in paragraph 150 of the judgment – is clearly inspired by the Court’s judgment in *Karner v. Austria* (no. 40016/98, in particular §§ 34 et seq., ECHR 2003-IX), and appears to be an attempt to place paragraph 23 of the above-mentioned Recommendation in the sphere of property – and even inheritance – rather than that of adoption. That view is corroborated by the fact that the Recommendation contains a paragraph (paragraph 27) devoted specifically to adoption. This provision – which is omitted from paragraph 150 of the judgment – reads as follows: “Taking into account that the child’s best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity.” This paragraph echoes the situation examined by the Grand Chamber of the Court in its judgment in *E.B. v. France* of 22 January 2008 (see, in particular, §§ 70 et seq.). It does not concern second-parent adoption.

22. Paragraph 150 of the judgment contains one final argument, to the effect that: “... even if the interpretation of Article 7 § 2 of the 2008 Convention were to lead to another result, the Court reiterates that States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, ECHR 2010)”. This is undoubtedly correct from the standpoint of States’ international responsibility. However, Article 7 § 2 of the 2008 Convention on the Adoption of Children does not give rise to any commitments. On the contrary, it leaves States free to legislate as they see fit. Consequently, the passage cited above does not appear to be relevant in the present case. It should also be pointed out that in its recent judgment in *Nada v. Switzerland* ([GC], no. 10593/08, § 170, ECHR 2012) the Grand Chamber reaffirmed its previous approach, according to which, where “a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so

that they produce effects that are fully in accordance with existing law (see, to this effect, *Al-Saadoon and Mufdhi*, cited above, § 126; *Al-Adsani*, cited above, § 55; and the *Banković* decision, cited above, §§ 55-57; see also the references cited in the ILC study group’s report entitled “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, paragraph 81 above). This approach based on harmonisation – rather than opposition – between the relevant treaty instruments seems to us all the more preferable in the instant case given that the 2008 Convention on the Adoption of Children is a recent Council of Europe instrument.

*The limits of the evolutive interpretation: “present-day conditions” or those of the future?*

23. Following on from the arguments outlined above, we would like to conclude with a few brief considerations concerning the so-called evolutive method of interpretation. We know that since its judgment in *Tyrer v. the United Kingdom* the Court has frequently reiterated that the Convention is a living instrument which must be interpreted “in the light of present-day conditions” (see *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26). In other words, the point of the evolutive interpretation, as conceived by the Court, is to accompany and even channel change (see Ch. Rozakis, “The Particular Role of the Strasbourg Case-Law in the Development of Human Rights in Europe”, in *European Court of Human Rights 50 Years*, Nomiko Vima, Athens Bar Association, Athens, 2010, pp. 20-30, and especially pp. 25 et seq.); it is not to anticipate change, still less to try to impose it. Without in any way ruling out the possibility that the situation in Europe in the future will evolve in the direction apparently wished for by the majority, this does not seem to be the case, as we have seen, at present. We therefore believe that the majority went beyond the usual limits of the evolutive method of interpretation.