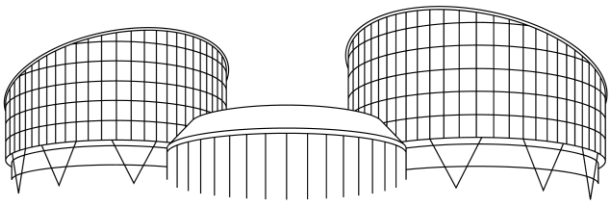

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GAS AND DUBOIS v. FRANCE

(Application no. 25951/07)

JUDGMENT

STRASBOURG

15 March 2012

FINAL

15/06/2012

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Gas and Dubois v. France,

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

Dean Spielmann, *President*,
Jean-Paul Costa,
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Isabelle Berro-Lefèvre,
Ganna Yudkivska, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 12 April 2011 and 14 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 25951/07) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Ms Valérie Gas and Ms Nathalie Dubois ("the applicants"), on 15 June 2007.

2. The applicants were represented by Mr C. Mécary, a lawyer practising in Paris. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that they had been discriminated against compared with heterosexual couples since no legal means existed in France allowing same-sex couples to have access to second-parent adoption. Relying on Article 14 of the Convention taken in conjunction with Article 8, they alleged that they had been subjected to discriminatory treatment based on their sexual orientation, in breach of their right to respect for their private and family life.

4. By a decision of 31 August 2010, the Court declared the application admissible. On 30 November 2010 the Chamber decided to hold a hearing on the merits of the case.

5. The applicants and the Government each filed further observations on the merits (Rule 59 § 1 of the Rules of Court). In addition, third-party comments were received from the International Federation for Human Rights (FIDH), the International Commission of Jurists (ICJ), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex

Association (ILGA-Europe), the British Association for Adoption and Fostering (BAAF) and the Network of European LGBT Families Associations (NELFA), which had been given leave by the President to intervene. The parties replied to those comments (Rule 44 § 6). The organisations in question were also given leave to participate in the oral procedure.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 April 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms A.-F. TISSIER, Head of the Human Rights Section,
Department of Legal Affairs,
Ministry of Foreign Affairs *Co-Agent*,
Mr J.-C. GRACIA, Secretariat General of
the Ministry of Justice, *Counsel*,
Ms C. BLANC, Department of Civil Affairs,
Ministry of Justice,
Ms M.-A. RECHER LAMBEY, Secretariat General of
the Ministry of Justice,
Ms A. TALBOT, Secretariat General of
the Ministry of Justice,
Ms M. SCHULTZ, Directorate-General for Social Cohesion
attached to the Ministry of Social Affairs and
the Ministry of Solidarity and Social Cohesion,
Ms J. SPITERI, Financial, Legal and Services Department,
Ministry of Labour, Employment and Health,
Ms E. TOPIN, Department of Legal Affairs,
Ministry of Foreign and European Affairs, *Advisers*;

(b) *for the applicants*
Mr C. MÉCARY, lawyer,
Mr Y. STREIFF, lawyer, *Counsel*,
Mr T. BOUZENOUNE, *Adviser*;

(c) *for the third-party interveners*
Prof. R. WINTEMUTE, Professor of Human Rights,
King's College London, *Adviser*.

7. The Court heard addresses by Mr Mécary, Ms Tissier and Professor Wintemute, and also Mr Mécary's and Ms Tissier's replies to judges' questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1961 and 1965 respectively and live in Clamart.

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

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

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

12. On 12 April 2006 the public prosecutor lodged an objection against the first applicant's application, on the basis of Article 365 of the Civil Code (see paragraph 19 below).

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

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

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

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

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

16. On 21 February 2007 the applicants lodged an appeal on points of law, but did not pursue the proceedings before the Court of Cassation to their conclusion. On 20 September 2007 the President of the Court of Cassation issued an order declaring the right to appeal on points of law to be forfeit.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Adoption

17. There are two types of adoption in French law: full adoption and simple adoption.

1. Full adoption

18. A full-adoption order can be made only while the child is still a minor and may be requested by a married couple or by one person. It creates a legal parent-child relationship which takes the place of the original relationship (if such existed). The child takes on the adoptive parent's surname. A new birth certificate is drawn up and the adoption is irrevocable (Articles 355 et seq. of the Civil Code).

2. Simple adoption

19. A simple-adoption order, by contrast, does not sever the ties between the child and his or her original family, but creates an additional legal parent-child relationship (Articles 360 et seq. of the Civil Code). The order can be made irrespective of the age of the person being adopted, including

when he or she has reached the age of majority. The adoptive parent's surname is added to that of the adoptee. The latter retains some inheritance rights in his or her family of origin and acquires rights *vis-à-vis* the adoptive parent. Simple adoption gives rise to reciprocal obligations between adopter and adoptee, in particular a maintenance requirement. The biological parents are required to support the adopted person financially only if the adoptive parent is unable to do so.

Where the adoptee is a minor, simple adoption results in all the rights associated with parental responsibility being removed from the child's father or mother in favour of the adoptive parent. The legislation provides for one exception to this rule, namely where an individual adopts the child of his or her spouse. In this case, the husband and wife share parental responsibility. Hence:

Article 365 of the Civil Code

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

Unlike a full-adoption order, a simple-adoption order may be revoked at the request of the adoptive parent, the adoptee or, where the latter is a minor, the public prosecutor.

Simple adoption is largely aimed, where minors are concerned, at compensating for the failings of the biological parent or parents. In practice, most cases of full adoption are overseas adoptions, while the great majority of simple-adoption orders granted within families concern persons having reached the age of majority, and are often inheritance-related.

B. Parental responsibility

20. Parental responsibility is defined as the complete set of parents' rights and responsibilities towards their minor children. It is aimed at protecting children's "health, safety and morals, in order to ensure their education and development" (Article 371-1 of the Civil Code). In principle, once parentage has been established, the parents of a minor child automatically have parental responsibility, which can only be withdrawn on serious grounds. Parental responsibility ends when the child reaches the age of majority, normally at 18. A distinction is made between parental responsibility and the exercise of parental responsibility; the latter may be entrusted to just one parent for reasons relating to the child's best interests. The parent not exercising parental responsibility retains the right and the

obligation to oversee the maintenance and upbringing of his or her children. He or she must be informed of important decisions concerning them and may not be deprived of contact rights and the right to overnight visits without compelling reasons.

21. It is possible to delegate parental responsibility to a third party (Articles 376 et seq. of the Civil Code). Since the enactment of the Law of 4 March 2002 on parental responsibility, Article 377 of the Civil Code, which governs the "standard" delegation of parental responsibility, provides that, where the circumstances so require, one or both parents may apply to the family judge to have the exercise of parental responsibility delegated to a third party (an individual, an approved institution or the child welfare services for the *département* concerned). The delegation of responsibility is not permanent and does not encompass the right to consent to adoption. In this context, parental responsibility may be transferred in whole or in part: parental responsibility continues to be vested in the parents, but its exercise is handed over to the third party.

22. Within the standard delegation procedure, the Law of 4 March 2002 introduced a more flexible delegation option based on the sharing of parental responsibility (Article 377-1 of the Civil Code). The order delegating parental responsibility may stipulate, "in the interests of the child's upbringing", that one or both parents are to share the exercise of their parental responsibility in whole or in part with the third party, thus retaining shared responsibility. This measure makes it possible to regulate the relationship between the child, the separated couple and the third parties, whether they be grandparents, step-parents or live-in partners. Each parent retains parental responsibility and continues to exercise it. The delegation of responsibility does not entail any change of surname or the establishment of a legal parent-child relationship; it is temporary and ceases to have effect once the child reaches the age of majority.

C. Marriage and civil partnerships

23. In France, marriage is not available to same-sex couples (Article 144 of the Civil Code). This principle was reaffirmed by the Court of Cassation, which, in a judgment delivered on 13 March 2007, reiterated that "in French law, marriage is a union between a man and a woman".

24. A civil partnership is defined by Article 515-1 of the Civil Code as "a contract entered into by two individuals of full age, of opposite sex or of the same sex, for the purposes of organising their life together". Civil partnerships entail a number of obligations for those who enter into them, including the obligation to live as a couple and lend each other material and other support.

Civil partnerships also confer certain rights on the parties, which increased with the entry into force on 1 January 2007 of the Law of 23 June

2006 on the reform of the arrangements concerning inheritance and gifts. Hence, the partners constitute a single household for tax purposes; they are also treated in the same way as married couples for the purposes of exercising certain rights, particularly in relation to health and maternity insurance and life assurance. Some effects deriving from marriage remain inapplicable to civil partnerships. Among other things, the legislation does not give rise to any kinship or inheritance ties between the partners. In particular, the dissolution of the partnership does not entail judicial divorce proceedings but simply involves a joint declaration by both partners or a unilateral decision by one partner which is served on the other (Article 515-7 of the Civil Code). Furthermore, civil partnerships have no implications as regards the provisions of the Civil Code concerning legal adoptive relationships and parental responsibility.

D. Assisted reproduction

25. Assisted reproduction, which refers to the techniques allowing *in vitro* fertilisation, embryo transfer and artificial insemination, is governed by Articles L. 2141-1 et seq. of the Public Health Code. Under Article L. 2141-2 of the Code, assisted reproduction techniques are authorised in France for therapeutic purposes only, with a view to "remedying clinically diagnosed infertility" or "preventing transmission to the child or partner of a particularly serious disease". They are available to opposite-sex couples of reproductive age who are married or show proof of cohabiting.

26. In these circumstances, Article 311-20 of the Civil Code provides for legal recognition of paternity for the second parent in the following terms:

> "Married or cohabiting couples who, in order to conceive, have recourse to medical assistance involving a third-party donor shall give their prior consent, in a manner that ensures confidentiality, before the judge or notary, who shall inform them of the implications of this act as regards the legal parent-child relationship.
>
> ...
>
> Any man who, having given his consent to assisted reproduction, does not recognise the child born as a result shall incur liability *vis-à-vis* the mother and the child.
>
> A judicial declaration of paternity shall also be issued in his regard. The action shall be brought in conformity with the provisions of Articles 328 and 331."

E. Case-law

1. Refusal of applications for simple adoption of the minor child of an individual's civil partner

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

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

It upheld the second Court of Appeal judgment as follows:

> "However, the Court of Appeal correctly observed that Ms Y ..., the children's mother, would lose parental responsibility in relation to the children were they to be adopted by Ms X, although the couple were cohabiting. It noted that a delegation of parental responsibility could be requested only if the circumstances so required, which had been neither established nor alleged, and that in the present case the delegation or sharing of parental responsibility would, in the context of an adoption, be contradictory since the adoption of a minor was designed to attribute exclusive parental responsibility to the adoptive parent. Accordingly, the Court of Appeal, which, despite the allegations to the contrary, examined the issue, gave lawful grounds for its decision." (Two judgments of the First Civil Division, Court of Cassation, 20 February 2007, judgments nos. 224 and 221, *Bulletin Civil* 2007 I, nos. 70 and 71).

The Court of Cassation subsequently reaffirmed this approach:

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

2008, unpublished, on appeal no. 07-12948 and First Civil Division, Court of Cassation, 9 March 2011).

28. The first two judgments, delivered on 20 February 2007, were published in the Court of Cassation Information Bulletin, on the Internet and in the Court of Cassation's annual report.

2. Delegation of parental responsibility

29. In a first leading judgment (Court of Cassation, First Civil Division, 24 February 2006, published in the Bulletin), the Court of Cassation granted an application by a same-sex couple living in a civil partnership who sought to take advantage of this option. The court ruled that Article 377-1 of the Civil Code "[did] not prevent a mother with sole parental responsibility from delegating the exercise of that responsibility in whole or in part to the woman with whom she live[d] in a stable and lasting relationship, where the circumstances so require[d] and the measure [was] compatible with the child's best interests". The Court of Cassation subsequently tightened up the conditions to be met for the granting of an application to delegate parental responsibility (Court of Cassation, First Civil Division, 8 July 2010, published in the Bulletin). While the conditions laid down remain the same (the circumstances have to require such a measure and it has to be compatible with the child's best interests), the Court of Cassation now requires applicants to demonstrate that the measure would improve the lives of the children concerned and is essential. This restrictive approach is now applied by the courts hearing such cases on the merits (Paris *tribunal de grande instance*, 5 November 2010).

3. Constitutional Council decision of 6 October 2010

30. In a case concerning facts similar to those in the present case, the applicants alleged a breach of the constitutional principle of equality and requested the Court of Cassation to transmit a request for a priority preliminary ruling on constitutionality to the Constitutional Council. The Court of Cassation granted the request.

31. In a decision of 6 October 2010, the Constitutional Council held that it was not its task to rule on the constitutionality of the impugned statutory provisions in the abstract, but rather in the light of the Court of Cassation's consistent interpretation. In the case under consideration, the constitutionality of Article 365 of the Civil Code therefore had to be assessed in the light of the fact that the latter had the effect of prohibiting in principle the adoption of a child by the individual's partner or cohabitant, as ruled by the Court of Cassation on 20 February 2007.

The Constitutional Council began by pointing out that the provisions of Article 365 did not hinder couples from cohabiting or entering into a civil partnership, any more than it prevented the biological parent from involving

his or her partner or cohabitant in the child's upbringing. However, the Constitutional Council ruled that the right to family life as guaranteed by the Constitution did not confer a right to establish a legal adoptive relationship between the child and his or her parent's partner.

The Constitutional Council went on to observe that the legislature had deliberately chosen to confine the option of simple adoption to married couples and that it was not its place to substitute its own assessment for that of the legislature.

III. COUNCIL OF EUROPE TEXTS AND MATERIALS

A. European Convention on the Adoption of Children (revised)

32. This Convention was opened for signature on 27 November 2008 and came into force on 1 September 2011. It has not been signed or ratified by France. Its relevant provisions read as follows.

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.

...

4. States Parties may make provision for other forms of adoption having more limited effects than those stated in the preceding paragraphs of this Article."

B. Committee of Ministers' Recommendation

33. 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, recommends, *inter alia*, to member States:

"...

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."

THE LAW

34. The applicants alleged that they had been subjected to discriminatory treatment based on their sexual orientation, in breach of their right to respect for their private and family life. They relied on Article 14 of the Convention taken in conjunction with Article 8. These two Articles provide:

Article 8

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

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

Article 14

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

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

35. As their main submission, the Government reiterated that Article 8 of the Convention was not applicable in the present case. Echoing the arguments already put forward during examination of the admissibility of the application, the Government referred to the Court's case-law according to which the existence or otherwise of family life, which was not confined to the legal framework of marriage, had to be assessed in each case. However, the Government stressed that, according to the Court's settled case-law, Article 8 did not guarantee any right to adoption or to the creation of a legal tie between an adult and a child who lived in the same family, still less a right to have a child. Since the Convention did not cover a right to adopt, the Government submitted that the applicants could not claim discrimination in the enjoyment of such a right, as Article 14 had no independent existence.

36. The applicants referred to the arguments put forward during examination of the admissibility of the case.

37. The Court notes that the applicants based their arguments on Article 14 of the Convention taken in conjunction with Article 8 and that the latter does not guarantee either the right to found a family or the right to adopt (see *E.B. v. France* [GC], no. 43546/02, § 41, 22 January 2008). This was not disputed by the parties. Nevertheless, the Court cannot but observe that examination of the applicants' specific case leads to the conclusion that they have a "family life" within the meaning of Article 8 of the Convention. Furthermore, sexual orientation falls within the personal sphere protected by Article 8. It follows that the facts of the case come "within the ambit" of at least one Article of the Convention, which may be taken in conjunction with Article 14, on which the applicants rely in the present case.

38. The Court refers in that regard to its decision of 31 August 2010 on the admissibility of the application, in which it found that Article 14 taken in conjunction with Article 8 was applicable in the present case.

39. The Court must therefore dismiss the Government's preliminary objection and will proceed to examine the merits of the complaint.

II. MERITS

A. The parties' submissions

1. The applicants

40. The applicants complained of the refusal of the first applicant's application to adopt her partner's daughter. They alleged that the reason given for that refusal, namely the legal consequences of such adoption, which would deprive the child's mother of parental responsibility, definitively ruled out adoption only for same-sex couples, who – unlike opposite-sex couples – could not marry and thereby take advantage of the provisions of Article 365 of the Civil Code. They submitted that the refusal to grant the first applicant a simple-adoption order in respect of A. for reasons of principle had infringed their right to respect for their private and family life, in a discriminatory manner.

41. The applicants pointed out that A. had been conceived in Belgium via anonymous donor insemination. Although she had been raised from birth by both women, for legal purposes she had only one parent, namely the second applicant. The latter had passed on her surname to A., exercised sole parental responsibility and would leave her property to A. on her death. By contrast, from a legal viewpoint the first applicant had no obligations or rights *vis-à-vis* the child. The applicants explained that they had sought to remedy that situation by applying for a simple-adoption order, which would have created a legal parent-child relationship in addition to the original relationship. A. would thus have had two parents in the eyes of the law, with the legal certainty that entailed. This had been refused them by the domestic courts.

42. The applicants therefore claimed that they had been subjected to discrimination based on their sexual orientation, since the French authorities prohibited same-sex couples, but not married couples, from obtaining a simple-adoption order. They pointed out that same-sex marriage was still prohibited in France, as indicated by the Court of Cassation in a judgment of 13 March 2007.

This discriminatory difference in treatment also applied between same-sex couples who cohabited or had entered into a civil partnership and heterosexual couples in the same situation, since the latter could circumvent the strict requirements of Article 365 of the Civil Code by marrying, an option that was not available to same-sex couples. The applicants stressed that they were not seeking access to marriage in the instant case, but emphasised that the provisions of the Civil Code merely appeared to be neutral but in fact gave rise to indirect discrimination.

43. At the hearing, to illustrate their remarks, the applicants compared the situation of A. with that of another child, A.D. The latter had been conceived via anonymous donor insemination by a woman cohabiting with a man, Mr D. Although A.'s situation was in all respects comparable to A.D.'s, their legal status differed, since by virtue of Article 311-20 of the Civil Code Mr D. had become the child's legal father without even having to apply for a simple-adoption order (see paragraph 26 above). Hence, whether in relation to everyday life (school enrolment and monitoring of the child's progress in school) or more serious circumstances (a road traffic accident), A. could be accompanied only by her mother, whereas A.D. could be taken care of by Mr D. Moreover, in the event of the death of the child's birth mother, A. would become an orphan and could be placed in the care of a guardian or a foster family, whereas custody of A.D. would be entrusted to her legal father. The applicants inferred from this that the French legislation concerning simple adoption and anonymous donor insemination prevented the creation of a legal adoptive relationship between A. and the first applicant, which would have been possible had the latter been a man. While the applicants stressed that they did not wish to call into question the provisions of French law concerning access to anonymous donor insemination, they maintained that there was a difference in treatment under the law depending on whether a couple raising children was made up of two women cohabiting or in a civil partnership or of a woman and a man in the same situation.

44. As a further example the applicants referred to the scenario in which Mr D. died and A.D.'s mother met another man, Mr N., and decided to set up home with him or marry him. Mr N. could apply for a simple-adoption order in respect of A.D., whereas the first applicant could not do the same in relation to A.

45. Two women who cohabited or had entered into a civil partnership, who could not marry, were therefore treated differently from a man and a woman who, if they married, could obtain permission for the mother's husband to adopt the child under a simple-adoption order, with automatic sharing of parental responsibility.

46. In the applicants' view, this difference in treatment did not pursue any legitimate aim. In any event, the child's best interests required that he or she should have the legal protection of two parents rather than just one. Furthermore, according to the applicants, the delegation of parental responsibility on a shared basis (which they had not requested before the domestic courts) would not suffice. This related only to parental responsibility, was temporary and, as from 8 July 2010, had not been readily granted by the national courts (see paragraph 29 above). They stressed that a simple-adoption order, rather than delegation of parental responsibility on a shared basis, provided the best guarantee of the child's interests.

47. The applicants concluded that the refusal of the application for a simple-adoption order amounted to both direct and indirect discrimination based on sexual orientation, in breach of the Convention. In their view, the French government should propose amendments to the legislation to put an end to that discrimination.

2. The Government

48. The Government first provided a recap of the rules concerning adoption and delegation of parental authority in French law, and the background to them (see paragraphs 17-22 above). As to the present case, the Government had observed at the hearing that the applicants had not applied for the delegation of parental responsibility on a shared basis, although this could be justified in the circumstances (for instance, if the second applicant were to take a trip away from home).

49. Next, the Government submitted that Article 365 of the Civil Code did not give rise to any objective discrimination, since it applied in identical fashion to all unmarried couples, regardless of the composition of the couple. The sole exception provided for by the Article in question, applicable to an individual's spouse, had been introduced by the legislature with a view to safeguarding the child's interests. In the Government's submission, marriage remained an institution which ensured greater stability within couples than other types of union. Moreover, in the case of the break-up of a marriage, the family judge automatically became involved. Civil partnerships, on the other hand, afforded greater leeway with regard to entering into them and terminating them, and did not have any implications in terms of family law or the legal relationship between parents and children. In view of these considerations, the legislature had therefore sought to restrict the possibility of obtaining a simple-adoption order, in order to provide a stable framework for children's care and upbringing.

50. The Government also rejected the applicants' argument that discrimination arose indirectly or as a knock-on effect from the fact that marriage in France was available only to heterosexual couples. They observed that, according to the Court's case-law, family life could exist outside the confines of marriage, just as it could exist without legal ties of parentage.

51. In any event, even if the Court were to find that there was a difference in treatment, the Government were of the view that it was justified and did not amount to discrimination, whether the applicants' situation was compared with that of a married couple or with that of a heterosexual couple living in a civil partnership or cohabiting.

52. At the hearing the Government stressed in particular that French law on the legal relationship between parents and children was based entirely on the model of sexual difference. In view of this approach, which was a choice made by society, the Government took the view that allowing a child

to have ties of parentage with two women or two men was a fundamental reform which could only be undertaken by Parliament. The issue therefore had to be dealt with as a whole in the course of a democratic debate and not through tangential issues such as the sharing of parental responsibility in the context of simple adoption.

3. The third-party interveners

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

54. The organisations in question began by pointing out that there were three distinct situations in which lesbian or gay individuals adopted children: firstly, an unmarried individual might seek to adopt, in a member State where this was permitted (even just as an exception), on the understanding that any partner he or she might have would have no parental rights (individual adoption); secondly, one member of a same-sex couple might seek to adopt the child of the other partner, such that both partners had parental rights *vis-à-vis* the child (second-parent adoption); finally, both members of a same-sex couple might seek jointly to adopt a child with no connection with either of them, such that both partners simultaneously acquired parental rights *vis-à-vis* the child (joint adoption). In *E.B. v. France* (cited above), the Court had ruled in favour of equal access to individual adoption for all persons, regardless of their sexual orientation. The instant case concerned second-parent adoption.

55. In 2011, ten out of the forty-seven Council of Europe member States allowed second-parent adoption, and other countries were considering amending their legislation to permit it. According to the third-party interveners, there therefore appeared to be a growing consensus that, where a child was being raised within a stable same-sex couple, legal recognition of the second parent's status promoted the child's welfare and the protection of his or her best interests.

56. Other countries displayed similar trends in the legislation and case-law. Second-parent adoption was possible for same-sex couples in thirteen Canadian provinces, in at least sixteen of the fifty States of the United States of America and in other countries such as Brazil, Uruguay, New Zealand and some parts of Australia.

57. Referring to the United Nations Convention on the Rights of the Child and the relevant case-law of the Court and of certain national courts (such as the United Kingdom's House of Lords and the South African Constitutional Court), the third-party interveners requested the Court to

adopt the same approach, which in their view gave priority to the protection of the child's interests.

B. The Court's assessment

1. General principles

58. The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in the 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 State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008), including a different treatment in law (see *Marckx v. Belgium*, 13 June 1979, § 38, Series A no. 31).

59. On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see *Karner v. Austria*, no. 40016/98, § 37, ECHR 2003-IX; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 45, ECHR 2003-I; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, ECHR 1999-VI; and *Schalk and Kopf v. Austria*, no. 30141/04, §§ 96-97, ECHR 2010).

60. On the other hand, the margin of appreciation enjoyed by States in assessing whether and to what extent differences in otherwise similar situations justify a different treatment is usually wide when it comes to general measures of economic or social strategy (see, for example, *Schalk and Kopf*, cited above, § 97).

2. Application of these principles to the present case

61. The Court notes at the outset that the present case is to be distinguished from the case of *E.B. v. France*, cited above. The latter concerned the handling of an application for authorisation to adopt made by a single homosexual person. In that case, the Court pointed out that French law allowed single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual. Against the background of the domestic legal provisions, it considered that the reasons put forward by the Government could not be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorisation. The reasons for rejecting her application had therefore related to her personal situation and were found by the Court to be discriminatory (ibid., § 94).

62. The Court notes that the position is different in the present case, in which the applicants complained of the refusal to grant a simple-adoption order in respect of A. In giving reasons for their decision, the national courts found that, since a simple-adoption order would result in the rights associated with parental responsibility being transferred to the adoptive parent, it was not in the child's best interests, given that the birth mother intended to continue raising the child. In so ruling, the courts applied the provisions of Article 365 of the Civil Code governing the exercise of parental responsibility in the event of simple adoption. As the applicants were not married, they were not covered by the sole exception provided for by that provision.

63. With regard to anonymous donor insemination as provided for in French law, the Court notes that the applicants, without wishing to call into question the conditions in which this is made available, criticised the legal consequences and alleged an unjustified difference in treatment (see paragraph 43 *in fine* above). The Court observes at the outset that the applicants did not challenge the legislation in question before the national courts. Above all, it notes that while French law provides that anonymous donor insemination is available only to heterosexual couples it also states that it is to be made available for therapeutic purposes only, with a view in particular to remedying clinically diagnosed infertility or preventing the transmission of a particularly serious disease (see paragraphs 25-26 above). Hence, broadly speaking, anonymous donor insemination in France is confined to infertile heterosexual couples, a situation which is not comparable to that of the applicants. In the Court's view, therefore, the applicants cannot be said to be the victims of a difference in treatment arising out of the French legislation in this regard. The Court further notes that the legislation in question does not allow the creation of the legal adoptive relationship sought by the applicants.

64. The applicants maintained that the French courts' refusal to grant the first applicant a simple-adoption order in respect of A. infringed their right to respect for their private and family life in a discriminatory manner. They alleged that, as a same-sex couple, they had been subjected to an unjustified difference in treatment compared with heterosexual couples, whether married or not.

65. The Court considers it necessary firstly to examine the applicants' legal situation compared with that of married couples. It notes that Article 365 of the Civil Code provides for the sharing of parental responsibility in cases where the adoptive parent is the spouse of the biological parent. The applicants cannot avail themselves of this possibility since they are prohibited under French law from marrying.

66. The Court observes at the outset that it has already ruled, in examining the case of *Schalk and Kopf*, cited above, that Article 12 of the Convention does not impose an obligation on the governments of the

Contracting States to grant same-sex couples access to marriage (ibid., §§ 49-64). Nor can a right to same-sex marriage be derived from Article 14 taken in conjunction with Article 8 (ibid., § 101). The Court has further held that, where a State chooses to provide same-sex couples with an alternative means of recognition, it enjoys a certain margin of appreciation as regards the exact status conferred (ibid., § 108).

67. The Court notes that in the instant case the applicants stated that they were not seeking access to marriage but alleged that, since their situation was relevantly similar to that of married couples, they had been subjected to a discriminatory difference in treatment.

68. The Court is not persuaded by this argument. It points out, as it has already 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 *Burden*, cited above, § 63, and *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000; see also *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI; *Lindsay v. the United Kingdom*, no. 11089/84, Commission decision of 11 November 1986, Decisions and Reports 49; and *Şerife Yiğit v. Turkey* [GC], no. 3976/05, 2 November 2010). Accordingly, the Court considers that, for the purposes of second-parent adoption, the applicants' legal situation cannot be said to be comparable to that of a married couple.

69. Next, turning to the second part of the applicants' complaint, the Court must examine their situation compared with that of an unmarried heterosexual couple. The latter may, like the applicants, have entered into a civil partnership or may be cohabiting. In essence, the Court notes that any couple in a comparable legal situation by virtue of having entered into a civil partnership would likewise have their application for a simple-adoption order refused (see paragraphs 19, 24 and 31 above). It does not therefore observe any difference in treatment based on the applicants' sexual orientation.

70. It is true that the applicants also alleged indirect discrimination based on the fact that it was impossible for them to marry, whereas heterosexual couples could circumvent Article 365 of the Civil Code by that means.

71. However, in that connection the Court can only refer to its previous findings (see paragraphs 66-68 above).

72. Lastly, in the alternative, the Court observes that it 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 (see, *mutatis mutandis*, *Emonet and Others v. Switzerland*, no. 39051/03, § 80, 13 December 2007). It considers that, in view of the background to and purpose of Article 365 of the Civil Code (see paragraph 19 above), which governs the exercise of parental responsibility in the event of simple adoption, 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 with A.

73. Accordingly, the Court concludes that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;

2. *Holds* by six votes to one that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8;

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 March 2012.

Claudia Westerdiek	Dean Spielmann
Registrar	President

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

(a) Concurring opinion of Judge Costa, joined by Judge Spielmann;

(b) Concurring opinion of Judge Spielmann, joined by Judge Berro-Lefèvre;

(c) Dissenting opinion of Judge Villiger.

D.S.
C.W.

CONCURRING OPINION OF JUDGE COSTA JOINED BY JUDGE SPIELMANN

(Translation)

I voted in favour of finding no violation of Article 14 of the Convention read in conjunction with Article 8. I would like to express some reservations regarding this outcome and make a few remarks on the possible follow-up to this case, in particular on the part of the respondent State, France.

The facts are straightforward. Ms Gas and Ms Dubois, the first and second applicants, live together as a couple. They first cohabited and then entered into a civil partnership. The second applicant gave birth to a daughter, conceived by means of anonymous donor insemination, and formally recognised her. Her partner, the first applicant, subsequently applied to adopt the child, with the second applicant's express consent. The domestic courts rejected the application on the grounds that, while Article 365 of the Civil Code did not *per se* prohibit adoption in such cases, it would have had the effect of depriving the second applicant of parental responsibility by transferring it to the first applicant. Article 365 provides for only one exception to this rule, namely where the adoptive parent is the spouse of the biological parent. Ms Gas is not married to Ms Dubois and, as French law currently stands, cannot be married to her since they are of the same sex.

The two applicants therefore argued before our Court that the refusal of the application to adopt had been discriminatory for the purposes of Article 14.

The situation resulting from this application of Article 365 – which, in my view, was correctly applied – brings to light certain paradoxes.

First of all, had the applicants been a man and a woman who were not married, they would not have been eligible for this type of adoption either; it is therefore difficult to argue that this was a case of discrimination based on sex, still less that it was homophobic.

Secondly, it is true that the applicants were unable to marry. Admittedly, they argued that they were not claiming a right to marriage for same-sex couples; nevertheless, it is clear that, if the prohibition on same-sex marriage were to be lifted, and the applicants decided to marry rather than remain as civil partners, the objection to the little girl's adoption raised by the French courts would no longer apply. As to the fact that the adoptive parent would be a lesbian, this would not in principle pose an obstacle to the adoption, as held by the Court in *E.B. v. France* ([GC], no. 43546/02, 22 January 2008).

Lastly, the only ground on which discrimination could be established would be that of unequal treatment between two prospective adoptive parents, irrespective of their gender, on the basis that one was the spouse of

the biological and legal parent, and the other was not. However, that is not of direct concern to the applicants in this case. The judgment therefore rightly states, in paragraph 69, that the applicants' complaint, in so far as it relates to their sexual orientation, is unfounded, since the effects of Article 365, in my view, do not differ according to sexual orientation.

I would add, however, that I was a little unsettled by the dissenting opinion of my colleague Judge Villiger. He takes the view, pointing to some important practical aspects, that the situation giving rise to the present case is incompatible with the child's "best interests". It is undisputed that this concept occupies an important position in the United Nations Convention on the Rights of the Child, in particular in Article 3 and, in the specific context of adoption, in Article 21. It is equally clear that the Court's case-law, in a variety of spheres, has for a long time made extensive reference to this criterion (see *Johansen v. Norway*, 7 August 1996, § 77, *Reports of Judgments and Decisions* 1996-III, and numerous judgments since).

But I can only agree with my colleague up to a point. First of all, it is not clear that it would be in the best interests of the child to be adopted by Ms Gas, since this would deprive her mother, Ms Dubois, of parental responsibility. And even if it were to be the case, it is difficult to argue this point without falling into the "fourth instance" trap. Let us not yield to that temptation.

In fact, Judge Villiger's reasoning should be taken to its logical conclusion by ruling that the Convention overrides Article 365 of the Civil Code. This is certainly possible, and was done by the Court in *Mazurek v. France* (no. 34406/97, ECHR 2000-II). But I do not believe that, in a matter such as this, which concerns real societal issues, it is the Court's place to censure the legislature in so drastic a manner (which, it should be pointed out, the Constitutional Council refrained from doing, albeit from the standpoint of the Constitution rather than the Convention: see its decision no. 2010-39 QPC of 6 October 2010).

In reality – and this will be my closing remark – the case-law concedes that there are areas in which the national legislature is better placed than the European Court to bring about change in institutions concerning the family, relations between adults and children, and the concept of marriage. Let me give one example. Same-sex marriage is the subject of democratic debate in several European countries. It was mainly for that reason that the Court opted in a recent judgment to exercise limited supervision over national choices (see *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010). In my view, the need for consistency in case-law policy calls for an equally restrained approach in the present case, although I find the structure of Article 365 of the Civil Code less than convincing... It is to be hoped, therefore, that the French legislature will not merely be satisfied with the finding of no violation and will decide, if I may say so, to review this issue.

CONCURRING OPINION OF JUDGE SPIELMANN JOINED BY JUDGE BERRO-LEFÈVRE

(Translation)

I joined Judge Costa in his concurring opinion as I agree with him that the only ground on which "discrimination could be established would be that of unequal treatment between two prospective adoptive parents, irrespective of their gender, on the basis that one was the spouse of the biological and legal parent, and the other was not".

I am of the view that, contrary to what is asserted in paragraph 68 of the judgment, for the purposes of second-parent adoption the applicants' legal situation is comparable to that of a married couple.

The reason why I ultimately voted in favour of finding no violation of Article 14 of the Convention taken in conjunction with Article 8 is that, all things duly considered, it does not seem obvious to me that this difference in treatment was contrary to the Convention.

Although the applicants' daughter can have a legal tie only with her mother, this does not appear to me to stand in the way of a normal family life. In the event of a crisis, the delegation of parental responsibility remains an option "where the circumstances so require" and especially "in the interests of the child", for instance should the child's mother be seriously ill or injured. Moreover, in the event of the second applicant's death, Ms Gas can become A.'s guardian. Lastly, a simple-adoption order remains an option when the child reaches full age.

Above all, and more fundamentally, I consider that this case concerns issues on which no consensus exists in Europe. According to the third-party interveners (reputable non-governmental organisations specialising in this field), in February 2011 second-parent adoption was permitted in ten of the forty-seven States Parties to the Convention (that is to say, in 21.3% of them: Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom).

However, the obstacle represented by Article 365 of the Civil Code remains a source of problems, even if it is not contrary *per se* to the Convention. The child's legal status remains precarious, a situation which cannot be in his or her best interests, as Judge Villiger demonstrates with particular eloquence in his dissenting opinion.

For that reason I echo Judge Costa's call for the legislature to revisit the issue by bringing the wording of Article 365 of the Civil Code into line with contemporary social reality.

DISSENTING OPINION OF JUDGE VILLIGER

I respectfully disagree with the judgment which concludes that there has been no breach of Article 14 of the Convention taken together with Article 8.

My disagreement lies with the perspective of the judgment which, I believe, fails to identify the relevant elements in order to assess whether the measure was justified. The judgment focuses on the adults, but not on the children who are nevertheless an integral part of the applicants' complaints. In my view, the issue should rather be whether the difference of treatment complained of is justified from the vantage point of the child's best interests.

It transpires from the judgment – and was also stated by the applicants at the hearing – that they do not wish to marry. Rather, they wish to adopt the child in order to obtain joint parental custody. This is not possible according to Article 365 of the French Civil Code, as the applicants represent a same-sex couple. On the other hand, such adoption and the ensuing joint parental custody would be possible if the two adults (one of whom had a child) were a heterosexual couple and if they married.

My difficulty lies with the position of the children of the various relationships. The children of a heterosexual couple benefit from joint parental responsibility if the couple are married; those of a same-sex couple do not as, in such a case, adoption is excluded. Therein lies for me the difference of treatment viewed under Article 14 of the Convention taken together with Article 8.

At this stage I should add that I firmly believe – and I consider this undisputed – that joint parental custody is in the best interests of the child.

I fail to see a justification for this difference in treatment. In my view, all children should be afforded the same treatment. I cannot see why some children, but not others, should be deprived of their best interests, namely of joint parental custody.

Indeed, how can children help it that they were born of a parent of a same-sex couple rather than of a parent of a heterosexual couple? Why should the child have to suffer for the parents' situation? As the Court stated in *Mazurek v. France* (no. 34406/97, § 54, ECHR 2000-II) in the circumstances of the disadvantaged position of an adulterine child:

> "... an adulterine child cannot be blamed for circumstances for which he or she is not responsible. It is an inescapable finding that the applicant was penalised, on account of his status as an adulterine child ..."

To say in the present case that this difference in treatment is justified because marriage has a special status in society does not convince me. This reasoning may, possibly, be justified from the point of view of the legislator when distinguishing marriage from other forms of cohabitation. But this is not the only point of view as regards the balancing of the various interests

under Articles 14 and 8. Indeed, society's views should not even be the main point of view (let alone, as in the present judgment, the only one). Should not the child's position be equally important? Justifying discrimination in respect of the children by pointing out that marriage enjoys a particular status for those adults who engage in it is, in my view, insufficient in this balancing exercise.

In fact, the root of the problem in this case appears to be the blanket prohibition of joint parental custody over children of the parent of a same-sex couple. This is the problem of every legislation which regulates all situations according to one standard. Such blanket legislation immediately raises issues as to proportionality – particularly, I would emphasise, in cases concerning family life.

The Court has been confronted with such blanket legislation under Article 8 of the Convention, *inter alia*, in cases against Germany, where in certain circumstances all fathers were hindered by law from having contact with their children. In those cases, the Court found that the legislation was so rigid that it became disproportionate; rather, it was considered that in the best interests of the child a judge should decide individually in each case (see *Zaunegger v. Germany*, no. 22028/04, 3 December 2009, and *Anayo v. Germany*, no. 20578/07, 21 December 2010).

In the present case, I am not at all proposing that the applicants should be authorised to marry which anyway they do not wish to do. I am also not pronouncing myself on issues of adoption. I am merely highlighting discrimination in respect of the best interests of the child.

In the best interests of a child born into a same-sex relationship, I believe that the child should be offered the best possible treatment afforded to other children born into a heterosexual relationship – which is joint parental custody.

For these reasons, I conclude that in this case only insufficient justification has been made out as regards the discrimination in issue. There has, therefore, been a violation of Article 14 of the Convention taken together with Article 8.