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

FIRST SECTION

EMONET AND OTHERS v. SWITZERLAND

(Application no.39051/03)

JUDGMENT

STRASBOURG

13 December 2007

FINAL

13/03/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Emonet and Others v. Switzerland,

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

Mr C.L. ROZAKIS, *President,*
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS,
Mr G. MALINVERNI, *judges,*
and Mr S. NIELSEN, *Section Registrar,*

Having deliberated in private on 22 November 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 39051/03) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Swiss nationals, Mrs Isabelle Chantal Emonet (the first applicant), Mrs Mariannick Faucherre (the second applicant) and Mr Roland Emonet (the third applicant), on 2 December 2003.

2. The applicants were represented by Mr C. Zellweger, a lawyer practising in Geneva. The Swiss Government ("the Government") were represented by Mr P. Boillat, former Deputy Director of the Human Rights and Council of Europe Section of the Federal Office of Justice, then by Mr F. Schürmann, Head of the European Law and International Human Rights Protection Unit, the Government's agent.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

4. On 22 April 2005 the President of the Fourth Section decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, the Fourth Section decided to examine the merits of the application at the same time as its admissibility.

5. On 19 January 2007 the application was assigned to the First Section (Rules 25 § 5 and 52 § 1).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 June 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr F. SCHÜRMANN, Head of the European Law and International Human Rights Protection Unit *Agent*,
Ms R. REUSSER, Head of the Private Law Directorate, Substitute Director of the Federal Office of Justice
Ms D. STEIGER, scientific adviser, European Law and International Human Rights Protection Unit *Advisers*;

(b) *for the applicants*
Mr C. ZELLWEGER, lawyer *Counsel.*

The applicants were also present.

7. The Court heard addresses by Mr C. Zellweger and Mr. F. Schürmann, and the replies of the parties' representatives and Ms Reusser to the judges' questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1971, 1946 and 1948 respectively and live in Geneva.

9. In 1971 Mariannick Faucherre (the second applicant) and her husband had a daughter, Isabelle Chantal Emonet (the first applicant). The couple divorced in 1985 and the second applicant's former husband died in 1994.

10. Since 1986 Mariannick Faucherre has been living with Roland Emonet (the third applicant), who is divorced and has no children. The three applicants lived together between 1986 and 1992, when the first applicant left to live with the man she had married. The couple divorced in 1998.

11. In March 2000 a serious illness left the first applicant paraplegic. She kept her own home, but needed to be cared for by her mother and the third applicant, whom she regarded as her father. By agreement between the three applicants, it was therefore decided that the third applicant should adopt the first applicant so that they could become a real family in the eyes of the law.

12. On 14 December 2000 the third applicant filed an adoption request with the Canton of Geneva Court of Justice, enclosing two letters attesting to the other two applicants' agreement.

13. On 8 March 2001 the Court of Justice pronounced the adoption.

14. On 15 June 2001 the cantonal civil status authorities informed the second applicant that the adoption had the effect of terminating her legal parent-child relationship with the first applicant and that the latter would take on her adoptive father's surname, as she was henceforth his daughter. The first two applicants objected to the termination of the mother-daughter relationship between them and requested that it be restored.

15. In a letter of 23 July 2001 the cantonal civil status authorities announced that they were standing by their decision, which was based on Article 267 of the Swiss Civil Code (see "Relevant domestic and international law", paragraph 20 below). Under the provisions of that Article previously existing parent-child relationships were severed on adoption, save in respect of the spouse of the adoptive parent. Mariannick Faucherre and Roland Emonet, however, were simply cohabiting.

16. On 3 September 2001 the President of the Geneva Department of Justice, Police and Transport formally rejected the request for restoration of the mother-daughter relationship. The applicants applied to the administrative court seeking to have that decision quashed and requesting a declaration that the adoption had not severed the mother-child relationship and that the adopted child could keep her name. On 17 December 2001 the applicants instituted parallel proceedings in the Court of Justice to have the adoption order set aside. The court suspended the proceedings pending the outcome of the present application.

17. On 25 June 2002 the administrative court partly allowed the application, setting aside the decisions of 23 July and 3 September 2001 in so far as they severed the mother-daughter relationship, and ordering the cantonal civil status authorities to restore that relationship.

18. On 2 September 2002 the Federal Office of Justice, having been informed of that decision, referred the matter to the Federal Court.

19. On 28 May 2003 the Federal Court allowed the appeal and invited the cantonal civil status authorities to record the adoption in the civil status register. In its judgment the Federal Court considered whether there was an omission in the Civil Code with regard to the adoption by a cohabitant of his or her partner's child. It pointed out that the adoption of the spouse's child, whether considered as a form of joint adoption or as adoption by a single person, created a legal parent-child relationship between the child and the adoptive parent without severing the existing relationship between the child and its parent. It also pointed out that adoption should be in the interest of the child, so that joint adoption should be the rule and adoption by a single person the exception. The Federal Court noted that adoption by a single person was not subject to any condition other than that of the child's welfare. It concluded that adoption could satisfy that condition only if the link between the partners was strong and lasting, which in principle excluded cohabiting partners, between whom relationships were less stable

than between married couples. That was also the reasoning behind the adoption of section 3, paragraph 3, of the Federal Medically Assisted Procreation Act of 18 December 1998, which entered into force on 1 January 2001 and restricted sperm donation to married couples only. The Federal Court reiterated in this connection that the Federal Council had explicitly stated that the requirements in respect of sperm donation could not be less strict than those concerning joint adoption, a possibility which was open only to married couples, that a stable and lasting relationship between the parents was essential to the child's healthy development, and that common-law partnerships were generally less solid than marriages and, unlike marriage, did not guarantee durability and could therefore not be compared with marriage. The Federal Court thus held that Article 264 a) § 3 of the Civil Code could not be applied by analogy, and that there was no omission in the law that needed to be remedied. That court considered that the situation was that provided for in Article 264 b) § 1 of the Civil Code (see "Relevant domestic and international law", paragraph 20 below). Concerning the Convention, the Federal Court considered that Article 8 did not embody the right to demand a form of adoption that was not provided for by law. Furthermore, the very essence of adoption being the forging of new family ties, prohibiting the accumulation of parent-child relationships was not at variance with Article 8. As to Article 12 of the Convention, the Federal Court repeated that it referred only to marriage and did not confer a right to adopt. The Federal Court also considered the complaint concerning the applicants' unwillingness to accept the legal consequences of the adoption, and found that they could bring proceedings to have the adoption annulled for lack of consent. The judgment was served on the applicants on 3 October 2003.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

20. The relevant provisions of the Swiss Civil Code are as follows:

Article 264 a) – II. Joint adoption

"1. Spouses shall only adopt jointly; joint adoption shall not be open to other persons.

2. The spouses must have been married for five years or be at least 35 years of age.

3. A spouse may adopt the child of the other spouse if the spouses have been married for five years."

Article 264 b) – III. Adoption by a single person

"1. An unmarried person may adopt a child alone if they are at least 35 years old.

2. ..."

Article 266 – B. Adoption of adults and persons declared incapable

"I. Where there are no descendants, an adult or a person who has been declared incapable may be adopted:

1. if he or she suffers from a physical or mental disability requiring permanent care and the adoptive parents have provided such care for at least five years;

2. ...

III. For the remainder, the provisions on the adoption of minors shall apply by analogy."

Article 267– C. Effects – I. General

"1. The child shall acquire the legal status of a child of the adoptive parents.

2. The existing parent-child relationships shall be severed, save in respect of the spouse of the adoptive parent.

3. The child may be given a new forename upon adoption."

Article 269 – E. Annulment of adoption – I. Grounds – 1. Lack of consent

"1. If, for no lawful reason, consent has not been sought, the persons entitled to give consent may challenge the adoption in court, provided that this would not seriously prejudice the child's welfare.

2. This right does not, however, concern parents who have the possibility of appealing against the decision to the Federal Court."

21. Section 122 of the Federal Court Act of 17 June 2005, which entered into force on 1 January 2007, provides for the possibility of having Federal Court judgments reviewed in the event that the Court finds a violation of the Convention.

Section 122 - Violation of the European Convention on Human Rights

"Revision of a Federal Court judgment for violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR) may be requested under the following conditions:

a. when the European Court of Human Rights, in a final judgment, has found a violation of the ECHR or its protocols;

b. compensation cannot remedy the effects of the violation;

c. revision is necessary to remedy the effects of the violation."

22. The relevant provisions of the European Convention of 24 April 1967 on the adoption of children, which entered into force in Switzerland on 1 April 1973, read as follows:

Article 3

"This Convention applies only to legal adoption of a child who, at the time when the adopter applies to adopt him, has not attained the age of 18, is not and has not been married, and is not deemed in law to have come of age."

Article 6

"1. The law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person.

2. The law shall not permit a child to be again adopted save in one or more of the following circumstances:

a. where the child is adopted by the spouse of the adopter;

b. where the former adopter has died;

c. where the former adoption has been annulled;

d. where the former adoption has come to an end."

Article 10

"1. Adoption confers on the adopter in respect of the adopted person the rights and obligations of every kind that a father or mother has in respect of a child born in lawful wedlock.

Adoption confers on the adopted person in respect of the adopter the rights and obligations of every kind that a child born in lawful wedlock has in respect of his father or mother.

2. When the rights and obligations referred to in paragraph 1 of this article are created, any rights and obligations of the same kind existing between the adopted person and his father or mother or any other person or body shall cease to exist. Nevertheless, the law may provide that the spouse of the adopter retains his rights and obligations in respect of the adopted person if the latter is his legitimate, illegitimate or adopted child.

In addition the law may preserve the obligation of the parents to maintain (in the sense of *l'obligation d'entretenir* and *l'obligation alimentaire*) or set up in life or provide a dowry for the adopted person if the adopter does not discharge any such obligation.

3. As a general rule, means shall be provided to enable the adopted person to acquire the surname of the adopter either in substitution for, or in addition to, his own.

4. If the parent of a child born in lawful wedlock has a right to the enjoyment of that child's property, the adopter's right to the enjoyment of the adopted person's property may, notwithstanding paragraph 1 of this article, be restricted by law.

5. In matters of succession, in so far as the law of succession gives a child born in lawful wedlock a right to share in the estate of his father or mother, an adopted child shall, for the like purposes, be treated as if he were a child of the adopter born in lawful wedlock."

23. At its 77th meeting, held in May 2002, the European Committee on Legal Cooperation instructed the Committee of Experts on Family Law to examine the European Convention on the Adoption of Children. A working party on adoption was set up at the start of 2003 to draft a report making detailed proposals for a possible revision of that convention. In its final report (CJ-FA-GT1 (2004) 2) the working party concluded that a new (revised) convention on the adoption of children should be elaborated as soon as possible.

24. On 16 May 2006, the draft revised Convention of the Council of Europe on the Adoption of Children, as amended by the working party at its 4th meeting, from 5 to 7 April 2006, was published. The revised version is based on the information contained in the working party's final activity report.

25. The following are excerpts from the draft (revised) Convention and the corresponding explanatory report, as adopted by the working party at its 36th meeting, from 15 to 17 November 2006, and by the European Committee on Legal Cooperation at its 82nd meeting, from 26 February to 1 March 2007:

Text of the draft Convention (revised):

Preamble

"...

Considering that, although the institution of the adoption of children exists in the law of all member states of the Council of Europe, there are in those countries still differing views as to the principles which should govern adoption and differences in the procedure for effecting, and the legal consequences of, adoption;

..."

Article 2 (Scope of the Convention)

"1. This Convention applies to the adoption of a child who, at the time when the adopter applies to adopt him or her, has not attained the age of 18, is not and has not been married and has not reached majority.

..."

Article 7 (conditions for adoption)

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

a. by two persons of different sex who

i. 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 together or who have entered into a registered partnership. 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 registered partner 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.

3. As regards the termination of the legal relationship between the child and his or her family of origin, States Parties may make exceptions in respect of matters such as the surname of the child and impediments to marriage or to entering into a registered partnership.

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.

..."

Commentary on the Articles of the Convention.

Article 7 (conditions for adoption)

"...

48. 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 the States Parties to specify the criteria for assessing the stability of such a relationship.

49. If a State Party has extended the scope of the convention its provisions have to be applied *mutatis mutandis*.

..."

Article 11 (Effects of an adoption)

"64. The revised convention mainly deals with "full" adoption (which is an adoption that severs all ties with the family of origin) without preventing those states that have "simple" adoption (which is an adoption that does not sever the relationship with the family of origin so that the adopted child is not entirely integrated into his or her adoptive family) from continuing to use this form of adoption.

65. The main object of this article is to ensure that an adopted child is treated from every standpoint like a child of the adopter and his or her family and that, in principle, all ties with the child's family of origin should be severed.

...

67. According to paragraph 2, the parent whose child is adopted by his or her spouse or registered partner retains his or her rights and obligations in respect of the child, unless the law otherwise provides.

...."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

26. The applicants maintained that the effects of the adoption of Isabelle Chantal Emonet by Roland Emonet had violated their right to respect for their family life, as protected by Article 8 of the Convention, the relevant parts of which provide:

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

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."

A. Admissibility

1. *Preliminary objection that Article 8 of the Convention was inapplicable to the facts of the case*

(a) Submissions of the parties

27. According to the Government, Article 8 § 1 was not applicable in the present case.

28. In support of that objection the Government submitted that the right to adopt was not, as such, included among the rights guaranteed by the Convention, and that Article 8 did not oblige the States to grant a person the status of adoptive parent or adopted child. They further submitted that the right to respect for family life presupposed the existence of a family and did not protect the simple wish to found one.

29. The Government also argued that the main consequence of full adoption, as provided for under Article 267 of the Civil Code (see "Relevant domestic and international law", paragraph 20 above), was to sever the existing parent-child relationship and fully integrate the child into the adoptive family. The consequences of this type of adoption were clear in the law. Indeed, the need to sever the legal relationship between the adopted child and its natural family had been explicitly recognised by the European Commission of Human Rights (the Government cited *X v. Belgium and the Netherlands*, no. 6482/74, Commission decision of 10 July 1975, Decisions and Reports (DR) 7, p. 75).

30. The Government also submitted that the applicants could have avoided the situation at the origin of their complaint, namely the severance of the mother-child relationship, either by forgoing the adoption or by getting married. As they were represented by counsel they should have been aware of the consequences of the adoption. Their ignorance of the law and its consequences was not something for which the State could be rendered liable.

31. Finally, the Government emphasised that there were no binding European standards regarding the adoption by a person of their cohabiting partner's child, nor any general consensus on the matter among the Council of Europe's member States, as no provision was made in most European legislation for the adoption of a cohabiting partner's child.

32. The applicants rejected the Government's arguments and argued that Article 8 was applicable to their case. They challenged the allegation that they had been represented by counsel in their dealings with the Swiss authorities. They referred in that connection to the court decision of 8 March 2001, delivered on the application of Roland Emonet, "who appeared in person". They also submitted that that decision made no mention whatsoever of the severance of the mother-child relationship, or even of

Article 267 § 2 of the Civil Code (see "Relevant domestic and international law", paragraph 20 above).

(b) The Court's assessment

33. In keeping with its case-law, the Court notes that the question of the existence or non-existence of "family life" is essentially a question of fact depending upon the existence of close personal ties (*Marckx v. Belgium*, judgment of 13 June 1979, series A no. 31, pp. 14 et seq., § 31, and *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII).

34. It points out that the notion of a "family", for the purposes of Article 8, is not confined solely to marriage-based relationships but may also encompass other *de facto* "family ties" where partners live together without being married (see, among other authorities, *Johnston and Others v. Ireland*, judgment of 18 December 1986, series A no. 112, p. 25, § 55; *Keegan v. Ireland*, judgment of 26 May 1994, series A no. 290, p. 17, § 44; *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, series A no. 297-C, pp. 55 et seq., § 30; and *X, Y and Z v. the United Kingdom*, judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, p. 629, § 36).

35. The Court also reiterates the principle that relationships between parents and adult children do not fall within the protective scope of Article 8 unless "additional factors of dependence, other than normal emotional ties, are shown to exist" (see, *mutatis mutandis*, *Kwakye-Nti and Dufie v. the Netherlands* (dec.), no. 31519/96, 7 November 2000).

36. When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together (see, for example, *Kroon and Others*, cited above, pp. 55 et seq., § 30, and *X, Y and Z v. the United Kingdom*, cited above, p. 630, § 36).

37. In the present case one of the partners in the couple is the biological mother of the adopted person, who was about 30 years old when she was adopted. The three applicants all lived together from 1986 to 1992, then the first applicant left the family home to live with her husband, whom she divorced in 1998. Since 2000 she has needed care and support, which the other two applicants provide. The Court therefore considers that what amounts to a *de facto* family tie exists between the three applicants, and that "additional factors of dependence other than normal ties of affection" exist, of the type referred to in the above-cited *Kwakye-Nti and Dufie v. the Netherlands* decision. Although she was not born of the relationship between the other two applicants, Isabelle Chantal Emonet is Mariannick Faucherre's daughter and considers Roland Emonet as her father (see, by contrast, the *Haas v. the Netherlands*, judgment, no. 36983/97, § 42, ECHR 2004-I, where the Court held that no "family life" existed because the

applicant had never lived with his son and had only ever had sporadic contact with him; see also, *mutatis mutandis*, *Söderbäck v. Sweden*, judgment of 28 October 1998, *Reports* 1998-VII, p. 3095, § 32).

38. Accordingly, the Court finds that Article 8 is applicable in the instant case.

2. Preliminary objection on grounds of failure to exhaust domestic remedies

(a) Submissions of the parties

39. The Government maintained that if the applicants' intention had been to challenge the legal consequence of the adoption, namely the severance of the mother-daughter relationship, they should have applied for the annulment of the adoption decision of 8 March 2001, not contested, as they had done, the decision of the civil status authorities to register the adoption, as it was not those authorities' role to examine the merits of adoption decisions. The applicants had therefore not exhausted domestic remedies.

40. According to the Government, the applicants also had the possibility of remedying the alleged violation of the Convention at the domestic level, by applying to have the adoption annulled for lack of consent, in accordance with Articles 23 et seq. of the Code of Obligations, combined with Articles 269 et seq. of the Civil Code (see "Relevant domestic and international law", paragraph 20 above). The Government observed that the applicants had in fact initiated such proceedings, which were still pending before the Canton of Geneva Court of Justice. Those proceedings had been suspended pending delivery of the Court's judgment on the present application.

41. The applicants maintained that they had exhausted domestic remedies. They argued that they had appealed to the Canton of Geneva Administrative Court against the initial decision of the Department of Justice and Police of the canton, of 3 September 2001, in which the authority concerned had found that the adoption of 8 March 2001 had effectively severed the mother-child relationship between the first and second applicants. The Administrative Court had found in their favour, but the Federal Office of Justice had decided to appeal to the Federal Court.

42. The applicants did not deny having brought proceedings before the Canton of Geneva Court of Justice to have the adoption annulled for lack of consent, but they alleged that they had no reason to believe their action would succeed. Furthermore, the annulment of the adoption would not be a satisfactory outcome for them: while restoring the legal relationship between the mother and her biological daughter, it would also make it impossible for the third applicant to adopt the first applicant, who considered him as her father.

(b) The Court's assessment

43. The Court is not convinced by the Government's reasoning. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time, that is to say, that the remedy was accessible, capable of providing redress in respect of the applicants' complaints and offered reasonable prospects of success (see *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX). As neither the Administrative Court nor, in the last instance, the Federal Court had declared the applicants' appeals against the decision inadmissible, but had examined them on the merits, it cannot be said that these remedies were not effective for the purposes of Article 35 § 1 of the Convention.

44. Furthermore, the Court notes that the proceedings to have the adoption annulled for lack of consent, in accordance with Articles 23 et seq. of the Code of Obligations, together with Articles 269 et seq. of the Civil Code (see "Relevant domestic and international law", paragraph 20 above), which are currently pending before the Court of Justice, could effectively lead to the annulment of the adoption. However, that was not the aim of the application. Were this application to prove to be ill-founded, annulment would be the applicants' last resort. As annulment proceedings are unable to remedy the effect of adoption at the origin of the dispute, annulment cannot be considered as an "effective" remedy in keeping with the Court's above-mentioned case-law.

45. It follows that the complaint concerning Article 8 cannot be rejected for failure to exhaust domestic remedies.

3. Conclusion

46. The Court concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Court notes, moreover, that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The merits

1. The parties' submissions

(a) The applicants

47. The applicants maintained that the effects of the adoption at issue amounted to an interference with the exercise of their right to respect for their family life.

48. They submitted that severing the mother's legal relationship with her child did not serve any public or private interest. On the contrary, the very

purpose of the adoption procedure was clearly to allow the first applicant, whose biological father had died, to be adopted by the third applicant, whom she considered as a father, in order to place him on an equal footing with the mother in the eyes of the law. The sole purpose of the adoption had thus been to legalise a "*de facto*" family. However, the legal relationship between the second applicant and her biological daughter, the first applicant, had been severed without their knowledge and against their will, simply because the second applicant was not married to the third applicant.

49. In the applicants' submission, for the purposes of Article 8 § 2 of the Convention the first criterion to be taken into account when weighing up the various interests was the child's welfare. In the present case all three applicants had wanted the adoption. Above and beyond the emotional aspect and the support – including material support – the first applicant needed because of her disability, it was evident that the impugned decision deprived her of her inheritance rights to her natural mother's estate.

50. The applicants submitted that the present case should also be considered from the point of view of the equal treatment, enshrined in Article 14 of the Convention, between married and unmarried couples. They pointed out, in support of that submission, that the draft revision of the European Convention on the Adoption of Children opened up adoption to registered partners (see "Relevant domestic and international law", paragraphs 23-25 above). The survey produced by the Swiss Institute of Comparative Law and adduced by the Government showed that a number of European States had already provided in their legislation for the principle of equal treatment in adoption matters between registered partners and married couples, and in some cases even same-sex partners.

51. Lastly, the applicants submitted that they had at no time been informed that the adoption would result in the severing of the legal relationship between the second and first applicants. Not until the letter sent by the Canton of Geneva civil status authorities to the second applicant on 15 June 2001 had the applicants known what effects the adoption would have.

52. In the light of the above, the applicants were convinced that the severance of the mother's legal relationship with her daughter was unjustified and indeed disproportionate.

(b) The Government

53. The Government disputed these arguments. They submitted that the adoption in question had not amounted to an interference with the applicants' right to respect for their family life as there had been no interruption of their personal relationship.

54. According to the Government the adoption had been based on Article 264 b) of the Civil Code and that was quite clear from the decision of 8 March 2001 of the Canton of Geneva Court of Justice.

55. They argued that the consequence of the adoption, as provided for in Article 267 § 2 of the Civil Code, namely the severing of existing legal parent-child relationships, answered a "pressing social need" and was proportionate to the legitimate aim pursued, as it made the situation clear and avoided any conflicts of interest that might arise for the adopted person as a result of his or her new legal status which, in accordance with Article 267 § 1 of the Civil Code, was that of a child of the adoptive parents (see "Relevant domestic and international law", paragraph 20 above).

56. The Government explained that the joint adoption system had been introduced in the wake of a complete overhaul of Swiss adoption law in 1972. The question of the adoption of a child by cohabiting partners or the adoption of the cohabiting partner's child had not been broached in the Federal Council's message or in the debates in the Swiss Parliament. Nor had it been discussed when Swiss divorce law had been revised in 1998, and Parliament had increased the duration of marriage required for adoption of the spouse's child from two to five years precisely in order to protect the child's interests. According to the Government, however, adoption can only satisfy this requirement if the link between the partners is strong and lasting, which excludes cohabiting partners, whose relationships are generally less stable than those of married couples.

57. The Government further submitted that there were no binding European standards regarding the adoption by a person of their cohabiting partner's child, nor any general consensus on the matter among the Council of Europe's member States. That was made clear in a study produced by the Swiss Institute of Comparative Law, whose findings confirmed the existence of considerable differences from one country to another. Even in those States which legally recognised cohabitation, the situation varied from one to another: the most flexible legislation authorised adoption by the child's parent's cohabiting partner, establishing a legal parent-child relationship by adoption without the other parent losing his or her legal status *vis-à-vis* the child (in England, Belgium, Spain, the Netherlands, Portugal and Luxembourg, for example). In other countries (such as France, Italy, Ireland and Denmark) this type of adoption was prohibited. In yet other countries adoption was possible, but with varying consequences for existing parent-child relationships (Germany, Austria and Croatia, for example).

58. According to the Government, the results of the survey were corroborated by the intergovernmental work done recently in connection with the revision of the 1967 European Convention on the Adoption of Children. Article 7 of the draft revised convention (see "Relevant domestic and international law", paragraph 25 above) required the law to permit a child to be adopted by two persons of different sex who are married to each other or have entered into a registered partnership together, or by one person. For people in other types of relationships, the revised draft text

provided only for the possibility for States to extend the Convention to homosexual or heterosexual couples living together in stable relationships. Although the Convention only covered the adoption of children, the Government nevertheless considered that the reasoning behind the solutions adopted was also applicable, *a fortiori*, to the exceptional case of the adoption of an adult.

59. As regards the applicability of Article 8 to the present case, the Government maintained that they had shown sufficiently clearly that uncertainty subsisted as to the best way to protect the interests of children in situations similar to that of the first applicant. They submitted that States should be left a broad margin of appreciation in that respect and that it was not for the Court to impose a single solution for use in such situations.

60. The respondent Government considered it important to point out that the question of the alleged difference of treatment between married and unmarried couples had not been raised before the domestic authorities and should therefore not be examined by the Court.

61. Lastly, on the matter of whether the Court of Justice was obliged, of its own motion, to alert the applicants to the consequences of the adoption, the Government submitted that the Civil Code was perhaps Switzerland's best-known law and that the wording of Article 267 § 2 left no room for doubt as to the effects of the adoption (see "Relevant domestic and international law", paragraph 20 above). Furthermore, it was clear from the Administrative Court's judgment that the applicants' lawyer had read the adoption request without warning the applicants of its consequences.

62. In conclusion, as the question of the adoption of a cohabiting partner's child raised complex questions to which the Contracting States did not all have the same approach, Article 8 could not be considered to impose an obligation on the respondent Government to permit such adoptions in the same conditions as adoption by married couples.

2. The Court's assessment

(a) The principles developed by the Court

63. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole; and in both cases the State enjoys a certain margin of appreciation (see *Keegan*, cited above, p. 19, § 49, and *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, § 149, ECHR 2004-V).

64. According to the principles that emerge from the Court's case-law, where the existence of a family tie with a child has been established the State must act in a manner calculated to enable that tie to be developed and

legal safeguards must be established that render possible the child's integration in his family (see, *mutatis mutandis*, *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, § 32, and *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 119, 28 June 2007).

65. The Court reiterates that the Convention must be applied in accordance with the general principles of international law, in particular those concerning the international protection of human rights (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II, and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI). As regards, more specifically, the obligations under which Article 8 of the Convention places the Contracting States in respect of adoption, they must be interpreted in the light of the United Nations Convention on the Rights of the Child, of 20 November 1989, and the European Convention on the Adoption of Children, of 24 April 1967 (see *Pini and Others*, cited above, § 139), especially as Switzerland is party to both instruments (for the second of the above-mentioned treaties, see "Relevant domestic and international law", paragraphs 23-25).

66. The Convention and its Protocols must be interpreted in the light of present-day conditions (see *Marckx*, cited above, p. 19, § 41; *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, p. 15, § 31; and *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14 et seq., § 26; case-law confirmed subsequently, in particular, in *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII, and *Mamatkoulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I). However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset (see *Johnston and Others*, cited above, § 53). In this context the Court reiterates that the right to adoption is not included as such among the rights guaranteed by the Convention (see *Di Lazzaro v. Italy*, no. 31924/96, Commission decision of 10 July 1997, DR 90-B, p. 134; *Fretté v. France*, no. 36515/97, § 32, ECHR 2002-I, and *Pini and Others*, cited above, § 140). However, this does not preclude the possibility, in certain circumstances, of States Parties to the Convention finding themselves under an obligation to take positive measures to permit the formation and development of legal family ties (see *Keegan*, cited above, § 50, and *Pini and Others*, cited above, §§ 150 et seq.).

67. Whether the question is analysed in terms of a positive duty on the State – to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 – or in terms of a negative obligation, that is, an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar. An interference with the right to respect for family life entails a violation of Article 8 unless it is "in accordance with the law", has an aim or aims that is

or are legitimate under Article 8 § 2 and is "necessary in a democratic society" for the aforesaid aim or aims.

68. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and is proportionate to the legitimate aim pursued (see *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142, p. 18, § 41). The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are "relevant and sufficient" is one for this Court. A margin of appreciation is left to Contracting States in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions (see *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 21 and 23, §§ 52 and 59, and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 88, ECHR 1999-VI).

(b) Application of the above principles to the instant case

(i) Interference

69. The Government submitted that there had been no interference with the applicants' family life.

70. The Court has no doubt that the severing of the mother-daughter relationship between the first and second applicants as a result of the adoption constituted an interference with the applicants' enjoyment of the right to respect for their family life (see, *mutatis mutandis*, *Keegan*, cited above, pp. 19 et seq., § 51).

71. Such interference can be considered justified only if the conditions of the second paragraph of Article 8 are satisfied. It must be "in accordance with the law", have an aim which is legitimate under that paragraph and must be "necessary in a democratic society" for the aforesaid aim (*Smith and Grady*, cited above, § 72).

(ii) Whether the interference was justified

(α) "In accordance with the law"

72. The parties have not disputed the fact that this condition is satisfied. The Court notes that the cantonal civil status authorities relied on Article 267 § 2 of the Civil Code to justify the severing of the legal relationship between the mother and her daughter. That provision provides for existing parent-child relationships to be severed, save in respect of the spouse of the adoptive parent (see "Relevant domestic and international law", paragraph 20 above).

73. In the Court's view that provision is unambiguous as to the effects of adoption and, that being so, this condition is satisfied.

(β) Legitimate aim

74. According to the applicants, severing the parent-child relationship between the two applicants pursued no legitimate aim under Article 8 § 2 of the Convention.

75. According to the Government, however, limiting the number of parent-child relationships was in the public interest because it was good for the child's physical, mental and intellectual welfare, fulfilment and development.

76. The Court is not convinced that the severing of the mother-daughter relationship in the instant case was in the interest of the first applicant, an adult who freely consented to her adoption by the third applicant.

77. It should be remembered that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, *mutatis mutandis*, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33). It follows that, to be considered legitimate, the arguments used to justify an interference must pursue the aims referred to in Article 8 § 2 in a practical and effective manner. Being exceptions to the exercise of the right to respect for private and family life, they call for close and careful examination by the Court.

78. However, the Court considers that the question whether, in the instant case, the severing of the existing mother-daughter relationship really pursued the aim of the first applicant's welfare in a practical and effective manner is closely linked to that of whether the impugned measure was "necessary in a democratic society", and prefers to approach it from that angle.

(γ) "Necessary in a democratic society"

79. The Government referred to the reasons that had led Parliament, in 1972, to introduce the joint adoption system, which had the effect of severing the existing parent-child relationship between the adopted person and the natural parent (see paragraphs 55 et seq. above). They argued that the measure answered a "pressing social need" and was proportionate to the legitimate aim pursued, as it made the situation clear and avoided any conflicts of interest that might arise for the adopted person as a result of his or her new legal status, which was that of a child of the adoptive parents.

80. In the present case the Court is not satisfied that such reasons exist. It acknowledges that the logic behind that approach to adoption is valid for minors and is indeed the solution a large majority of Council of Europe member States have adopted in respect of this type of adoption. The Court does not consider, however, that the same reasoning can be applied to the particular circumstances of the present case, which concerns an adult, with a

disability, to whose adoption all the interested parties gave their free and informed consent. Even though the first applicant is an adult, she needs care and emotional support. By adopting her, the other two applicants, who provide that care and support, hoped to make the *de facto* family they formed a real family in the eyes of the law. In that setting, the Court considers that "additional factors of dependence, other than normal emotional ties" exist here which exceptionally bring into play the guarantees that derive from Article 8 between adults (see, *mutatis mutandis*, *Kwakye-Nti and Dufie* (dec.), cited above).

81. The Court shares the Government's view that it is not necessary in this case to examine whether the applicants were subjected to discriminatory treatment within the meaning of Article 14 of the Convention compared with a married couple, as that allegation was never made before the domestic courts. Before the Court, the applicant party raised that complaint only at the public hearing held on 7 June 2007. However, in the eyes of the Court the Government's argument that the institution of marriage guaranteed the adopted person greater stability than adoption by an unmarried couple who lived together is not necessarily relevant nowadays.

82. As to the Government's argument that the second and third applicant could have achieved the same purpose by marrying each other, the Court considers that it is not for the national authorities to take the place of those concerned in reaching a decision as to the form of communal life they wish to adopt. As it pointed out earlier, the concept of "family" under Article 8 of the Convention is not confined to marriage-based relationships and can encompass other "family" ties (see case-law cited in paragraph 34 above). In this case, the Court having found a "family" life to exist, the national authorities were under an obligation to take action to allow those family ties to develop (see, *mutatis mutandis*, *Keegan*, cited above, § 50; *Pini and Others*, cited above, §§ 150 et seq.; and *Kroon and Others*, cited above, § 32).

83. Furthermore, the Court notes that the Government relied heavily on the reasoning from the preparatory work on the Civil Code to justify the difference in treatment between married couples and unmarried partners (see paragraph 56 above). It reiterates in this regard that the rights deriving from the Convention should be interpreted not only in relation to the State's domestic law but also independently of it (see *Marckx*, cited above, pp. 14 et seq., § 31). On numerous occasions it has also stressed the importance of an evolutive approach to the interpretation of the Convention, in the light of today's living conditions, to avoid excessive reliance on historical interpretations (see case-law cited in paragraph 66 above).

84. It is true that Article 10 § 2 of the European Convention on the Adoption of Children clearly states that all rights and obligations of the father or mother towards their child cease to exist when the child is adopted. However, even on the highly unlikely assumption that that Convention does

apply to the present case, the Court notes that only 18 Council of Europe member States have ratified it and three signed it (situation at 1 July 2007). Furthermore, the draft revised Convention stipulates that the law may provide for the spouse or registered partner of the adopter to retain his or her rights and obligations in respect of the adopted child if the latter is his or her child (Article 11 § 2 of the draft revised convention, see "Relevant domestic and international law", paragraph 25 above). The Court sees this as a sign of growing recognition in the Council of Europe's member States for adoptions such as that at the origin of this case.

85. Lastly, the applicants alleged that they had not been informed in good time of the consequences of their adoption request. The Government argued that the applicants should have been aware of the consequences. The Court acknowledges that everyone, whether they are represented by counsel or not, is expected to know the law. The Court has already found (paragraph 73 above) that Article 267 § 2 of the Civil Code (see "Relevant domestic and international law", paragraph 20 above) is particularly clear and unambiguous about the effects of adoption. Furthermore, Article 266 § 3 of the Civil Code provides for the application, by analogy, of the rules on the adoption of minors to the adoption of adults (ibid.). In addition, the applicants were represented by a lawyer before the domestic authorities. However, they cannot be criticised – and indeed the Federal Court did not really blame them – for not realising how far-reaching the consequences of their adoption request would be, resulting as they did in the severing of the legal mother-daughter relationship between the first two applicants.

86. In the light of the above, "respect" for the applicants' family life required that biological and social reality be taken into account to avoid the blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended. Failure to take such considerations into account flew in the face of the wishes of the persons concerned, without actually benefiting anybody (see, *mutatis mutandis*, *Kroon*, cited above, § 40).

87. The reasons put forward by the Government to justify the severing of the mother-child relationship between the two applicants do not appear relevant, therefore. That being so, the measure did not answer a "pressing social need" and was not "necessary in a democratic society". Accordingly, the Court concludes that, even having regard to the margin of appreciation left to the State, the respondent party has failed to secure to the applicants the "respect" for their family life to which they are entitled under the Convention.

88. There has accordingly been a violation of Article 8.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

89. The applicants also complained of a violation of their right to "found a family". They relied on Article 12 of the Convention, which reads as follows:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

90. The Court reiterates that Article 12 secures the fundamental right of a man and a woman to marry and to found a family (see *F. v. Switzerland*, judgment of 18 December 1987, Series A no. 128, p. 16, § 32, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 98, ECHR 2002-VI).

91. The Court notes that nothing prevented the second applicant from marrying the third applicant.

92. As to the right to "found a family", the applicants, as an unmarried couple cannot, under any circumstances, derive a right to adoption under Article 12 in a form for which there is no provision in law (see, *mutatis mutandis*, *Johnston and Others*, cited above, §§ 51-54).

93. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. 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

95. The applicants did not claim that they had suffered any pecuniary damage.

96. They did claim 20,000 Swiss francs (CHF – about 12,112 euros (EUR)) in respect of non-pecuniary damage for the suffering they had endured since 15 June 2001, the date when the cantonal civil status authorities informed them of the consequences of the adoption.

97. Referring to the solution adopted by the Court in the case of *Kroon and Others* (cited above, p. 59, § 45), the Government submitted that the finding of a violation would suffice, in itself, to redress the frustration caused to the applicants.

98. The Court notes that the applicants will have the possibility, based on section 122 of the new Federal Court Act of 17 June 2005, which entered

into force on 1 January 2007, of applying for a revision of the impugned judgment delivered by the Federal Court on 28 May 2003 in order to have the mother-daughter relationship between the first two applicants restored (see "Relevant domestic and international law", paragraph 21 above), without that severing the parental tie between the first and third applicants, which falls under the protection of Article 8 of the Convention since the adoption pronounced by the Court of Justice (see *Pini and Others*, cited above, § 140). However, the Court considers that in spite of that possibility the applicants suffered frustrations from the time when they were informed of the disputed measure. The Court therefore awards them the sum of EUR 5,000 under this head.

B. Costs and expenses

99. The applicants requested the sum of CHF 28,827.90 (approximately EUR 17,458) for costs and expenses incurred in the domestic proceedings and in the proceedings before the Court. That sum breaks down as follows: CHF 6,461.40 for the bill for lawyer's fees of 13 November 2001; CHF 6,617.40 for the bill for lawyer's fees of 8 October 2002; CHF 250 in respect of the institution of proceedings before the Geneva Administrative Court; CHF 1,000 for court costs charged to the applicants by the Federal Court in respect of the judgment of 28 May 2003, and CHF 14,499.10 in respect of lawyer's fees for the proceedings before the Court.

100. The Government maintained that court costs and lawyers' fees should cover only the costs incurred by the applicants in the proceedings before the Court in respect of their complaint of a violation of Article 8, the only complaint taken into consideration by the Court. On that basis they considered it fair to award the applicants the sum of CHF 625 (about EUR 378.50) for costs incurred before the Administrative Court and the Federal Court. Moreover, they considered the lawyers' fees claimed by the applicants exaggerated and unsubstantiated. In any event, they considered that a global sum of CHF 4,375 (approximately EUR 2,649.50) would be a fair sum to award under this head.

101. The Court reiterates that if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 14, § 36, and *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63). It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V, and *Linnekogel v. Switzerland*, no. 43874/98, § 49, 1 March 2005).

102. The Court considers in this case that in awarding costs and expenses it should take into account the fact that it declared the complaint under Article 12 inadmissible (see *Olsson v. Sweden (no. 2)*, judgment of 27 November 1992, Series A no. 250, p. 42, § 113, and *Linnekogel*, cited above, § 50).

103. The Court considers the costs and expenses incurred by the applicants in the proceedings before the domestic courts reasonable and sufficiently well substantiated. Concerning the costs incurred in the Strasbourg proceedings, it agrees with the Government, who deplore the lack of detailed figures accompanied by the relevant receipts. However, the Court notes that the lawyer represented the applicants throughout the proceedings before it. It takes note in particular of the initial memorial, the observations on admissibility and the merits, and his intervention before the Court at the public hearing held in Strasbourg on 7 June 2007.

104. In the light of the evidence before it and the principles established in its case-law, the Court, ruling on an equitable basis, awards the applicants a total of EUR 12,000 for their costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections;

2. *Declares* the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible.

3. *Holds* that there has been a violation of Article 8 of the Convention;

4. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

(ii) EUR 12,000 (twelve thousand euros) in respect of costs and expenses;

(iii) any tax that may be payable on the above sums;

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

5. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 13 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President