Team Number: 046

THE EUROPEAN HUMAN RIGHTS MOOTING COMPETITION 2014

B.N., K.N. and Others
(Applicants)

vs.

The Utopin Repubic
(Government)

Submission for the Respondent

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SUMMARY OF RESULTS

- The Government will prove that the application submitted to the Court is inadmissible under Article 35§3 of the Convention with regard to K.N. (hereinafter referred to as "second applicant") as B.N. (hereinafter referred to as "first applicant") cannot claim alleged violations on her behalf. The NGO representing the applicant did also not receive a written authority by the second applicant and can therefore not represent her.
- The applicants also failed to fulfil the admissibility criteria laid down in Article 35§1 of the Convention as they have not exhausted domestic remedies. The Government submits that the applicants' claims under Art. 8, Art 14 on conjunction with Art. 8, as well as Article 1 of Protocol 1 of the Convention, were not raised in substance before the domestic courts.

Moreover, no claim was ever submitted to any domestic remedy regarding the rights of the children and should therefore not be considered by the present Court.

- The first applicant's complaints under Article 6§3 and Article 2 of Protocol 7 of the Convention are inadmissible under the *ratione materiae* requirement. The offence which the applicant was charged of is not 'criminal', and thus the mentioned parts of the application should be declared manifestly ill-founded.
- The Government did not discriminate against the applicants on the basis of their sexual orientation. The Government excludes registered partnerships in an identical fashion to unmarried couples, regardless of the composition. Hence, there has been no difference in treatment of persons in relevantly similar situations and thus no violation of Art. 14 in conjunction with Art. 8. Furthermore, the State enjoys a wide margin of appreciation as this is considered to be an area without a clear European consensus.
- The Government did not violate the applicants' right to family life on the grounds that it struck a fair balance between the rights and interests of the applicants, while preserving the traditional sense of the family. Moreover, it did not interfere with their right to family life by not granting the second applicant legal guardianship.
- The Government claims that there is no violation under Article 14 in conjunction with Article 12. This is based on the Courts position that Article 12 does not impose an obligation on the state to grant a same-sex couple access to marriage.
- The Government observes that there is no violation under Article 14 in conjunction with Article 1 of Protocol 1 of the Convention on the grounds that it is within the margin of appreciation of the state to treat married and unmarried couples differently in terms of social policy.

LIST OF ABBREVIATIONS

Art(s). *Articles*
ECtHR *European Court of Human Rights*

I. ADMISSIBILITY

A. Inadmissibility *ratione personae*

a) Inadmissibility of the submission in relation to the second applicant

1. The Government submits that the submission on behalf of the second applicant is inadmissible as she lacks standing before this Court. In limited circumstances, the present Court does allow applications sought on behalf of a third party. However, his is limited to

representation by a close relative,[1] and only where the alleged victim is of poor health or vulnerable. The Court in *I.G and Others v Slovakia* put forward the relevant factors for determining when a third party has standing to pursue an application:

a. *The ties between the deceased applicant and those wishing to pursue the application in his or her stead.*

b. *Whether the rights in issue can be regarded as transferable.*

c. *Whether the case under consideration involves an important question of general interest transcending the person and the interests of the applicant.*[2]

2. Turning to the case at hand, the Government concedes that the tie between the first and the second applicant is close as they are a long-term cohabiting couple. However, to be able to allow the application, the other factors should also be met.[3]

3. The second relevant factor is that of whether the issue can be considered transferrable. Here, the Court's standpoint is clear; Articles 3, 8, 12 and 14 are so closely linked to the person of the original applicant that they cannot be regarded as transferrable.[4] The rights bestowed in the Articles, claimed by the first applicant on behalf of the second applicant, are therefore considered to be of a non-transferrable nature.

4. In considering the third factor, the Government notes that the Court has previously encountered matters of a similar nature. It would like to draw the attention of the Court to the case of *Schalk and Kopf v Austria* and the recent case of *Vallianatos v Greece* where the Court considered similar circumstances.

5. Thus, by virtue of Arts. 35§1 and 35§3, the Government concludes that the complaints under Arts. 8 and 14 of the Convention relating to the second applicant should be rejected under Art. 34 as being incompatible *ratione personae.*

b) Power of Attorney given to the NGO

6. The Government notes that the first applicant gave the NGO power of attorney to represent both her and the second applicant before the Court.

7. Rule 36 of the Rules of the Court reads: "*Persons, non-governmental organisations or groups of individuals may initially present applications under Article 34 of the Convention*

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1 *See Y.F v Turkey* §31, *Ilhan v Turkey* [GC] §55.
2 *See I.G and Others v Slovakia* §*90.*
3*See MP and others v Bulgaria* §99.
4 *See I.G and Others v Slovakia* §*90, Thévenon v France, Gakiyev and Gakiyeva v Russia* §167, *Koch v Germany* §78, *MP and others v Bulgaria,* §97.

themselves or through a representative".[5] When applicants decide to have a third party represent them, Rule 45§3 of the Rules of the Court requires them to produce a written authority to act, duly signed.[6]

8. The Court has seen it as essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim(s) within the meaning of Art. 34 of the Convention.[7] Hence, where there is no documentation to show that the representative received such instructions from the alleged victim, the Court will declare the application inadmissible.

9. Turning to the present case, it is clear that the second applicant never presented such a power of attorney to the Court. Equally, she did not issue a written authority to the NGO as she was in a permanent vegetative state when the first applicant started the proceedings. Furthermore, there is no proof that the second applicant contemplated starting such proceedings when she was still conscious.

10. Hence, the application must be rejected for being incompatible *ratione personae* for the purposes of Art. 34, pursuant to Art. 35§3 and 35§4 of the Convention.

B. Non-exhaustion of domestic remedies

11. The Government submits that the applicants failed to comply with the provisions of Article 35§1 of the Convention. This is because they did not exhaust the domestic remedies available to them in relation to the complaints under Article 8 in conjunction with Article 14 and Article 1 of Protocol 1.

12. Article 35§1 of the Convention provides: *"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law…"*

13. In its established case law, the Court has repeatedly held that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions.[8] The Court stated that the rule of exhaustion of domestic remedies, referred to in Article 35§1 of the Convention, obliges those seeking to bring their case against the State before an international judicial organ to first use the remedies provided by the national legal system.

[5] *See* Rules of the Court, Rule 36.
[6] *See* Rule 45(3) of the Rules of the Court, Practical Guide on Admissibility Criteria p.9, §11.
[7] *See Post v Netherlands* §3.
[8] *See Remli v. France*, §33.

Consequently, States are dispensed from answering before an international body before they have had an opportunity to resolve matters through their own legal system.[9] It is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. [10]

14. Turning to the present case, the Government insists that the applicants did have effective domestic remedies at their disposal which they failed to exhaust.

a) The domestic remedies were not exhausted in terms of claims on behalf of the children

15. In terms of the claims brought on behalf of the twins, the Government stresses that no claim was ever submitted to any domestic remedy regarding their rights. Bearing in mind that the first applicant has been the twins' legal guardian since the Supreme Court's decision and had enjoyed all the maternal rights before it, she had the opportunity to raise issues and bring applications (including on the children's rights guaranteed by the Convention and protocols thereto) on their behalf. However, she chose not to use the domestic judiciary. Therefore, the Government insists that the part of the application on the twins' behalf is to be declared inadmissible under Article 35§1.

b) Claims under Article 8, Article 14 in conjunction with Article 8, and Article 1 of Protocol 1 were not raised in substance

16. The requirement set forth in Art. 35§1 relating to exhaustion of domestic remedies requires that the complaint before the Court be at least raised in substance.[11] As to the claims under Article 8 read together with Article 14 and under Article 1of Protocol 1, the Government submits that the applicants did not raise these issues in substance in the domestic courts and that they are thus incompatible with Art. 35§1 of the Convention and deemed inadmissible under Art. 35§4.

17. The Constitution of the Utopin Republic clearly states that family life is protected by law. However, the applicants did not allege a violation of this in any of the domestic proceedings. The Court in *De Brito v Netherlands* and *Hickey v United Kingdom*[12], when finding that the applicant had not exhausted domestic remedies, relied heavily on the fact that the Convention complaint was not made expressly before the national courts. The reason for this being that the applicants could rely on them directly as they were incorporated into the

[9] *See Horvat v. Croatia*, §37.
[10] *See Handyside v. the United Kingdom* [Plenary], §48 and *Selmouni v. France* [GC], §74.
[11] *See Cardot v. France*, § 34.
[12] *See Borges De Brito v Netherlands*, § 31.

domestic legal system. The same can be said about the present case; there is an express right to family life in the Utopin Constitution, but the applicant did not rely on this.

18. The first applicant has complained that she was deprived of her right to respect for private and family life on the grounds that the second applicant's parents denied her access to the hospital room of the second applicant. Firstly, the Government observes that this happened after the Supreme Court's final decision and that the first applicant failed to apply to any domestic remedy with this complaint. Secondly, the Government affirms that although same-sex couples cannot register their marriage legally, the Utopin Republic, as a party to the Convention, accepts the Court's strict position that same-sex long term cohabiting couples constitute "family life" for the purposes of Article 8 (see more detailed in...). Moreover, hospital regulations provide the possibility of visits by anyone. Hence, the first applicant could have lodged an application on these grounds to any domestic court, and therefore did not exhaust the domestic remedies available to her with regard to this complaint.

19. As to the complaint under Article 1 of Protocol 1, the first applicant argued in particular that the denial of her recognition as the second applicant's legal guardian by the domestic courts, and the lack of legal recognition for their marriage, constitutes *inter alia* a violation of her right to property. The grounds being that she does not have access to the second applicant's bank account, and will not have inheritance rights and survivors' benefits after the second applicant's death.

20. With regard to this complaint, the Government draws the Court's attention to the fact that the first applicant did not raise an issue on her property rights in substance during domestic proceedings. She referred to money issues only in context of providing the children with material comfort and initiating proceedings on maternity of both women in Foretia.

21. In addition, the applicant did not specifically apply to receive access to the second applicant's bank account on behalf of the children, even after the Supreme Court's decision granting her the status of legal guardian.

22. In these circumstances, the Government refers to the position held by the Court, that it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument. [13]

[13] *See Azinas v Cyprus* [GC], § 38.

23. The aforementioned shows that the first applicant failed to exhaust domestic remedies in relation to Article 1 of Protocol 1 of the Convention since she did not raise the complaint regarding her property rights in substance before the domestic courts.

24. The Government hereby observes that, despite existence of available and effective domestic remedies, the applicants did not make any step to avail themselves of the remedies described above.

25. The Government accordingly submits that the applicants did not exhaust effective domestic remedies at their disposal in terms of claims under Article 8, Article 8 read together with Article 14, and Article 1 of Protocol 1. Hence, the complaint in relevant parts does not meet the admissibility criterion set forth in Article 35§1 and must be rejected in accordance with Article 35§4 of the Convention.

C. Inadmissibility *ratione materiae* in relation to Article 6§3 and Article 2 of Protocol 7

26. The first applicant brought a complaint under Article 6§3 (a,b) alleging that she was deprived of her right to fair trial due to the lack of adequate time and facilities for the preparation of her defence. This was due to the fact that she had not been informed about the accusation against her before the Court of Appeal's decision of 15 April 2014. According to the mentioned decision, the applicant had committed the offence of 'disrespecting a court order' for having proceeded with the insemination despite the explicit retraction of the second applicant's will in this regard, done by the parents in her name, and the subsequent injunction of the court. The court ordered the first applicant to pay fine of 5000 Euros and damage in the amount of 10000 Euros.

27. The Government argues that this part of the application falls under Article 35§3(a) of the Convention, and is incompatible with the provisions of the Convention and its protocols. In particular, the applicant's claim under Article 6§3 (a,b) cannot be examined by the Court since the offence of which she was charged by the Court of Appeal's decision is not 'criminal'. Therefore, the above cited provision of the Convention is not applicable and the application must be declared manifestly ill-founded in relation to it.

28. In this respect, the Government refers to "*Engel* criteria" to determine the nature of the offence of which the applicant was charged. According to these criteria, in assessing whether proceedings are criminal in nature, the Court considers (1) the classification of the

offence under national law, (2) the nature of the proceedings in question, and (3) the nature and severity of the penalty. [14]

29. Applying these findings to the present case, it is clear that the offence the applicant was charged with is not of criminal nature. Firstly, disrespecting a court order is a minor administrative offence punishable by fine under national law, legal theory and practice. Secondly, the proceedings were not criminal in nature; there was no indictment against her and the applicant was not prosecuted for any crime. And, most importantly, the severity of the applicant's sentence was not sufficient for a criminal offence. The offence in question should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the 'criminal' sphere. [15] In this regard, the Government stresses that an important criterion is whether the offence is punishable by imprisonment or not.[16] In this case, the applicant was ordered only to a pay certain amount of money. Furthermore, the nature of the sentence was not punitive, but preventive and educational. It aimed to increase respect towards the judiciary.

30. As to the applicant's argument that she had not been provided with sufficient information concerning proceedings against her, the Government acknowledges that according to the Criminal Procedure Code of Utopin, "*decisions of the prosecutor can be challenged before the First Instance Court, whose judgments can be appealed before the Court of Appeal. The party can challenge the prosecutor's decision before the court of first instance, who can either reject it or allow it*".

31. It is obvious from the formulation of the presented provision that there are parties which can challenge the prosecutor's decision to the court. This in turn means that the applicant had been notified about both the prosecutor's investigation and the court proceedings concerning the offence she had committed.

32. Based on the above, the Government reiterates that the offence that the first applicant was charged with is not of a criminal nature. Therefore, there was no violation of Art.6§3. If this were not the case, it could always be claimed when ordering, for example, so called 'court sanctions', that the court must apply all the safeguards prescribed in Article 6§3 of the ECtHR. As it stands, given the petty nature of the offence and lenient nature of the sentence,

[14] *See Engel and others v Netherlands* [GC] § 82.
[15] *See Lauko v Slovakia* §57.
[16] *See* Explanatory report to Protocol 7, §21 and *Luchaninova v Ukraine*, § 72.

those who break the order of a court hearing, or fail to attend it, cannot rely on the safeguards available for those who are accused for criminal offences.

33. Concerning the same decision, the first applicant also raised a complaint under Article 2 of Protocol 7. The applicant insists in particular that she was deprived of the right to review the Court of Appeal's decision in question.

34. With respect to this complaint, the Government acknowledges that it does not lie within the scope of the above mentioned provision since the applicant was not convicted of a 'criminal offence'. The Government insists that the applicant's action was qualified as a 'minor offence', both under domestic law and the ECHR, which therefore lies under exception prescribed by Article 2§2 of Protocol 7.

35. In terms of this complaint, the Government acknowledges that the concept of a 'criminal offence' in the first paragraph of the article corresponds to that of 'criminal charge' in Article 6 (1).[17] Hence, the Government once again refers to *'Engel criteria'* and insists that the applicant was charged with 'disrespecting a court order' which is a minor offence punishable by a fine under national law. It is worth mentioning that the expression 'punishable by fine' means that there is no possibility to convert the fine into imprisonment. As claimed above, the discussed offence does not constitute a 'criminal offence' for the purposes of Article 2 of Protocol 7 (see more detailed in §28).

36. Based on the above, the Government asks the Court to declare the complaint under Article 2 of Protocol 7 also manifestly ill-founded.

37. Provided that the Court does not accept these preliminary objections, the Government wishes to submit the following observations regarding the merits of the application.

II. ALLEGED BREACH OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8

No discrimination on the basis of sexual orientation

38. The Government, despite not legally recognising the applicants' relationship, has not discriminated against the applicants on the basis of their sexual orientation for three main reasons. Firstly, the Court clearly states that unmarried couples cannot be seen to be in an analogously similar situation to that of married couples. Secondly, as the Republic does not allow for registered partnerships for either different-sex or same-sex couples, it cannot be said that there is a difference in treatment based on sexual orientation. Lastly, this area is

[17] *See Gurepka v Ukraine* §55.

considered to be one which raises moral and ethical issue, and hence the State enjoys a wide margin of appreciation as to the means of implementation.

39. The Government relies on the approach of the Court in *Rasmussen v Denmark*, where the Court outlined in what circumstances a difference in treatment amounts to discrimination. The first consideration which has to be borne in mind is whether allegations of a violation of Art. 14 fall *"within the ambit"* of Article 8. Secondly, it should be established whether there was a "*difference of treatment"* between people in *"analogously similar situations"*.[18]

The "ambit test"

40. Art. 14 is not autonomous, but instead has effect only in relation to other Convention rights.[19] This means that its reach is restricted to discrimination only with respect to the rights and freedoms set out elsewhere in the Convention. In the case at hand, Art. 14 would be attached to Art 8. The Government accepts that according to the Court's case-law, long-term cohabiting same-sex couples will constitute 'family life' for the purposes of Art.8 of the Convention.[20] Therefore, the Government concedes to the argument that their allegations fall within the ambit of Art. 8.

Whether there has been a difference in treatment of persons in relevantly similar situations

41. The Court has established in its case-law that in order for an issue to arise under Art. 14, there must be a difference in treatment of persons in relevantly similar situations.[21] The Government accepts that according to the Court's case-law, same-sex couples are in a comparable situation to that of different-sex couples with regards to their need for recognition.[22]

42. The Court has reiterated on several occasions that, as Art. 12 of the Convention does not impose an obligation to grant same-sex couples access to marriage, neither does Art. 14 taken in conjunction with Art. 8 impose such an obligation.[23] This is because the Convention needs to be read as a whole, and Articles should be read in harmony with each other.[24] The Court has held on several occasions that, because of the special status of marriage, unmarried couples cannot be seen to be in a relevantly similar situation to that of married couples.[25]

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[18] *See Rasmussen v Denmark,* §§34, 35, 38.
[19] *See Vallianatos v Greece,*[GC] §71.
[20] *See Schalk and Kopf v Austria,* §94.
[21] *See Schalk and Kopf v Austria,* §94, *Vallianatos v Greece,* [GC] §75.
[22] *See Vallianatos v Greece,* [GC] §78, *Schalk and Kopf v Austria,* §99.
[23] *See Gas and Dubois v France,* §66, *Schalk and Kopf v Austria,* §101.
[24] *See Schalk and Kopf v Austria,* §101.
[25] *See X and Others v Austria,* [GC] §109.

Hence, the Court has said that unmarried same-sex couples can only be in relevantly similar situations to that of unmarried different-sex couples.[26]

43. In order to establish whether there has been a difference in treatment, it is therefore necessary to compare the situation of unmarried same-sex couples to unmarried different-sex couples.[27] If they are treated in an even manner, it will be unlikely that the Court finds a violation.[28] The present case needs to be distinguished from *Vallianatos v Greece*, where the Court found a difference in treatment based on sexual orientation. Here, the ruling was based heavily on the fact that different-sex couples could enter into civil unions while same-sex couples could not, and that the government could not give any weighty justifications for the difference.[29] In its judgement, the Court clearly stated that it was not looking at a general obligation, but a unique situation where civil unions were available only to different-sex couples.

44. As to the facts of the case, the exclusion of registered partnerships applies in an identical fashion to all unmarried couples, regardless of the composition of the couple. From the Court's case-law, it is clear that this means that there has been no difference in treatment of persons in relevantly similar situations, and hence no violation of Art. 14 taken in conjunction with Art. 8

Margin of Appreciation

45. The Government wishes to draw the attention of the Court to the margin of appreciation doctrine. It is a well-established position of the Court that in areas which raise moral and ethical issues, states enjoy a wide margin of appreciation as to the means of protecting those rights.[30] Legal recognition of same-sex relationships gives rise to such issues. The Government therefore argues that due to their direct knowledge of their own society and its needs, national authorities are in principle better placed than international courts at dealing with these issues.[31]

46. The Court stated in the case of *Hämäläinen v Finland: "[that] in areas where there is no consensus within the Member States of the Council of Europe […] particularly where the case raises sensitive moral and ethical issues, the margin will be wider."*[32] The Government asserts that the legal recognition of same-sex relationships would fall within this area.

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[26] *See Gas and Dubois v France*, §69.
[27] *See Vallianatos v Greece* [GC]§75.
[28] *See* Harris, O'Boyle, &Warrick, p. 806.
[29] *See Vallianatos v Greece* [GC] §75.
[30] *See X, Y and Z v. the United Kingdom*, [GC] §44. *Hämäläinen v Finland*, [GC]§75.
[31] *See Stec and* Others *v United Kingdom*, [GC] §52.
[32] *See Hämäläinen v Finland*, [GC]§67.

47. Presently, only 12 Member States of the Council of Europe recognise same-sex couples through a registered partnership or a civil union,[33] and 11 permit marriage between same-sex couples.[34] It has been affirmed in several cases before the Court[35] that such a situation in Europe enables the conclusion that there is no European consensus. Despite the argument that this area is evolving and more states are considering or enacting legislative changes, the Court has stated that States will enjoy a wide margin of appreciation in the time of legislative changes.[36]

48. For the reasons previously stated, the Utopin Republic enjoys a wide margin of appreciation when it comes to recognition of same-sex relationships. The State has therefore rightfully decided that it will not afford legal recognition to same-sex couples, and has done so on a non-discriminatory basis.

III. ALLEGED BREACH OF ARTICLE 8

A. Regarding the maternity of the children

49. The Government has not violated the applicants' right to family life by not allowing both applicants to be registered as biological parents of the children, as the interference is justified under Art. 8§2. Firstly, the Government accepts that the applicants enjoy family life for the purposes of the Convention. Secondly, the stated interference is in *accordance with law*. Thirdly, it pursues two of the *legitimate aims* set out in Art. 8§2, namely the protection of health and morals and the rights and interests of others. Lastly, the interference is *necessary in a democratic society* for achieving the sought aims. In doing this, the Government has struck a fair balance between the competing rights and interests of the applicants and the community at large.

Applicability of Article 8

50. The Government accepts, as previously stated, that the applicants enjoy 'family life' for the purposes of the Convention. Furthermore, children born out of such family arrangements will have *de facto* family ties.[37]

In accordance with law

51. The Court has stated that the requirement *"in accordance with law"* refers to the fact that the measures taken by the national authorities should have a basis in domestic law. Furthermore, the Court has stated that there are some requirements as to the quality of the

[33] *See* http://www.coe.int/t/dg4/lgbt/ "16/07/2014.
[34] *See* http://www.coe.int/t/dg4/lgbt/ "16/07/2014.
[35] *See Schalk and Kopf v Austria* §105, *Gas and Dubois v France*, §66.
[36] *See Stec and Others v United Kingdom,* [GC]§52, *Petrovic v Austria* §§36-43.
[37] *See X, Y and Z v. the United Kingdom*, §44.

domestic law. Firstly, it should be adequately accessible. [38] This means that the citizen should have an indication that is adequate in the circumstances of the legal rules applicable to a given case.[39] Moreover, it should be formulated with sufficient precision to enable the citizen to regulate his conduct accordingly.[40] Lastly, it should be foreseeable.[41]

52. Turning to the present case, the Government submits that the law in force met all the requirements for the interference to be considered as in accordance with the law. The Utopin Civil Code states that motherhood is established either through the fact of birth, by recognition, or by a court judgement. Furthermore, the Utopin Republic does not recognise two persons of the same-sex as both being parents. It is clear from the domestic proceedings that the first applicant was aware of these provisions, as she stated that she would like to move to Foretia where this is allowed by law.

Legitimate aims

53. The Government submits that the interference in question is aimed at pursuing two of the legitimate aims enumerated in Art. 8§2, namely "the protection of health and morals" and the "protection of the rights and freedoms of others". The Government submits that by preventing same-sex couples from both being registered as parents, it is protecting the family in the traditional sense. The traditional family union has a special status within the Utopin Republic. The Government is convinced that by endorsing such family arrangements and allowing both women to be registered as parents, the traditional family union would be threatened in the Utopin Republic. The traditional family union is a sensitive area with deep cultural and religious connotations which are founded on the same moral principles as the law excluding same-sex couples from marriage. Furthermore, the Government submits that this interference is also pursuing the protection of the rights and freedoms of the children. The Government concedes that there would be no harmful consequences for the children; importantly however, there are also no arguments that it would be an advantage to them.[42]

Necessary in a democratic society

54. The Government asserts that the claimants and the children still enjoy *de facto* family life despite their lack of legal recognition. The ECtHR has previously seen this as an indication that a fair balance has been struck between the applicants and the community as a

[38] *See Sunday Times v the United Kingdom* [Plenary] §49.
[39] *See Sunday Times* §49.
[40] *See Sunday Times* §49.
[41] *See Open Door and Dublin Well Women Centre v Ireland,* [Plenary] §52.
[42] *See X, Y and Z v. the United Kingdom*, [GC] §51.

whole.[43] The Court in *Mennesson v France*[44] saw the fact that the applicants lived in circumstances that were, by and large, comparable to those of other families as an indication that a fair balance had been struck in respect to their right to family life. This is true in the present case as well.

55. Another aspect that indicates that a fair balance has been struck is whether an applicant can still be considered a parent in all other areas of life.[45] Here, the Government notes that since the first applicant is the legal guardian of the children, she can be considered a mother in all areas except on the birth certificate. This means that she can be regarded as a mother in important areas such as child rearing and support. This is also in accordance with Principle 21 of the Council of Europe's Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities, which states that persons who have custody of a child by means of a court order can also be providers of parental responsibility.[46]

56. The Supreme Court granted the guardianship to the first applicant in the best interest of the children and for an indefinite period of time. If the second applicant dies, it seems likely that this will be granted to her again. Hence, the Government submits that it has struck a fair balance between the applicants respect for family life and its legitimate aim of protecting the traditional family union.

57. The children have not suffered by having only one mother registered on the birth certificate. The Government submits that the children still enjoy all the same rights that they would have done had they had two same-sex biological parents. As the second applicant would die intestate, they have the right to inherit. Furthermore, the children's identity as nationals of the Utopin Republic is not affected by the lack of formal recognition. Within the Utopin Republic, children are able to acquire Utopin nationality by the fact of being born of an Utopin parent, or by being born on Utopin territory of parents of any nationality. As they were both born in the State and have a mother of Utopin Nationality, they can be considered Utopin nationals.

58. The Court in *X, Y and Z v UK* stated that where a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed.[47] The Government submits that it has acted in accordance with this. It has done so through giving the first applicant the status of legal guardian and the second applicant the status of biological

[43] *SeeMennesson v France, X, Y and Z v. the United Kingdom*, [GC]§46.
[44] *SeeMennesson v France.*
[45] *See X, Y and Z v. the United Kingdom*, [GC] §49.
[46] *See* Principle 21 the Council of Europe's Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities.
[47] *See X, Y and Z v. the United Kingdom*, [GC] §43.

mother. Thus, while preserving the traditional sense of the family, the Government also protected the rights and interests of the applicants.

59. Hence, there has been no violation of the applicants' right to family life under Art. 8 of the Convention.

B. Regarding the guardianship of the second applicant

60. The Government argues that its decision not to grant the first applicant guardianship of the second applicant did not interfere with the applicants' right to family life for the following two reasons. Firstly, the decision in question did not affect the family life of the applicants since 'family life' is a social phenomenon, not a legal one. The applicants' enjoyment of their family life has been interfered with because of the tragic circumstances of the case, not because of any action on behalf of the state. Secondly, the fact that the first applicant cannot be considered a spouse under national law has been duly considered above; the Utopin Republic has no obligation under the Convention to give same-sex couples the right to marry.

IV. ALLEGED BREACH OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 12

The respondent did not violate Article 14 in conjunction with Article 12

61. The first applicant claimed that the absence of the opportunity under national legislation to recognise their marriage – one which was legally registered in another country – when taken in hand with the fact that this limitation does not exist for heterosexual couples, violates their rights guaranteed under Article 14 read together with Article 12.

62. The Government underlines that the Court has interpreted Article 12 as upholding 'traditional marriage between persons of opposite biological sex' and has found that Article 12 is mainly concerned with protecting marriage as the basis of the family. [48] The Court has continuously stressed that the states enjoy a large margin of appreciation in interpretation of this Article. In particular, the Court mentioned: "*This Court must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society."* [49]

63. In a more recent case, the Court reaffirmed that, *"Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple such as*

[48] *See Philip Leach*, p. 391.
[49] *See B and L v UK*, §36.

the applicants' access to marriage". [50] Therefore, no separate issue arises under Article 14 in conjunction with Article 12. [51]

V. ALLEGED BREACH OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL 1

The respondent did not violate Article 14 in conjunction with Article 1 of Protocol 1

64. The first applicant also claimed that the domestic authorities have, by not recognising their marriage, violated her right to property, denying her the opportunity to have access to the second applicant's bank account, insurance payments, and to inherit after her death. In terms of this part of the application, the Government first and foremost underlines that the second applicant is still alive, and that the claimed violations are thus purely hypothetical.

65. Further to this, the Government reaffirms that according to the legislation of the Republic of Utopin, the applicants' marriage is not legally recognised, even though they have lived together on permanent basis. According to the Court's well-established position, as presented above, the state does not have an obligation to provide cohabiting same-sex couples with legal recognition of their relationship. Consequently, the State cannot be required to provide them with the relevant social security opportunities, including survivors' benefits, available for those in registered marriage.

66. In this respect, the Government refers to the Court's position, according to which an issue arises under Article 14 only if there is no objective and reasonable justification for the difference in the treatment of persons in relevantly similar situations. The Contracting State enjoys a margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify a difference of treatment. This margin is usually wide when it comes to general measures of economic or social strategy. [52]

67. Thus, not all forms of different treatment can be considered as 'discriminative' in the meaning of Article 14. The traditional concept of family plays a significant role in normal operation and self-determination of Utopin society. It is promoted by the Government and occupies a central place in Utopin social policy. The Court has continuously held that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one.[53] Therefore, when the state, prioritizing social objectives,

[50] *See Shalk and Kopf v Austria,* §§ *61*-63.
[51] *See B and L v UK,* §43.
[52]*See Burden v UK,* § 60.
[53] *See Walker v UK,* § 33.

decides to promote the idea of traditional family by *inter alia* providing it with a higher standard of state support and social security in comparison with other types of stable relationship, it still does not exceed any acceptable margin of appreciation. [54]

68. The Government further emphasises that the same approach is adopted concerning unmarried different-sex couples. Therefore, the applicant, as a partner in an unmarried couple, can't be guaranteed the rights, including property rights, equal to those living in legally recognised marriages. In this regard, the Court has already ruled that marriage is widely accepted as conferring a particular status and particular rights on those who enter it. Thus, States have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security. [55]

69. The Grand Chamber of this Court reiterated this position in the *Burden v UK* case, where it found that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits. Since *"marriage remains an institution which is widely accepted as conferring a particular status on those who enter it".* [56]

70. Moreover, the Government draws the Court's attention to the fact that in both the Utopin Republic and Foretia, in case of death intestate, both children and spouses have the right to inherit. If there are no children, the next of kin (in this case the parents) together with the spouse will have the right to inherit. This means that the children will inherit the entire property of the second applicant after her death. The first applicant, as the only legal guardian of the children, will have the access to the second applicant's property necessary for the twins' care.

VI. JUST SATISFACTION CLAIM

71. At the outset, the Government reiterates that the applicants' claim in its relevant parts is not within the jurisdiction of the Court, as the applicants have not met the requirements of Article 35 of the Convention. Therefore, the applicants' complaints must be determined inadmissible (*see* more detailed in§§ 1-34). Even if it is supposed that the requirements of Article 35 of the Convention have been satisfied by the applicants, the Government refers to Article 41 of the Convention. According to which, the main condition for affording just

[54] *See Burden and Burden v UK*, [GC] § 60.
[55] *See ŞerifeYiğit v. Turkey*, [GC] § 72.
[56] *See Burden v UK*, [GC] §60.

satisfaction by the Court is the finding of a violation of the Convention or the Protocols thereto. Consequently, no award can be made for damage caused by events or situations that have not been found to constitute a violation of the Convention. [57]

72. In this regard, the Government reiterates that in the current case there is no violation of the applicants' Conventional rights, and therefore the applicants' claim for compensation of just satisfaction must be rejected. However, if the Court finds that there have been violations of the Convention, the Government submits that, in any event, the finding of a violation would constitute in itself sufficient just satisfaction.

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