CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF WAGNER AND J.M.W.L. v. LUXEMBOURG

(Application no. 76240/01)

JUDGMENT

STRASBOURG

28 June 2007

FINAL

28/09/2007

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 Wagner and J.M.W.L. v. Luxembourg,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr A. KOVLER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 18 January and 7 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 76240/01) against the Grand Duchy of Luxembourg lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Luxembourg national, Ms Jeanne Wagner, and her child, J.M.W.L., of Peruvian nationality ("the applicants"), on 15 November 2000.

2. The applicants complained, on the basis of Articles 8 and 14 of the Convention, of a breach of their right to respect for their family life and of discriminatory treatment, owing to the non-recognition in Luxembourg of the Peruvian decision pronouncing the full adoption of the second applicant by the first applicant. They also claimed, on the basis of Article 6 of the Convention, that they had been deprived of their right to a fair hearing.

3. By a decision of 5 October 2006, the Chamber declared the application admissible.

4. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 January 2007 (Rule 59 § 3 of the Rules of Court).

There appeared before the Court:

– *for the Government*
Mr L. Schaack, *avocat*,
Mr F. Moyse, *avocat*, *Counsel*;

– *for the applicants*
Mr J.-P. Noesen, *avocat*, *Counsel*.

The Court heard addresses by the parties' representatives as well as their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1967 and 1993 respectively and are resident in Luxembourg.

6. On 6 November 1996 the Family Court of the province of Huamanga (Peru) pronounced the adoption of the second applicant, then aged three years and previously declared abandoned, by the first applicant. The judge listed the various stages of the adoption procedure which had been completed in accordance with the legal conditions. By the judgment the child acquired the status of daughter of the first applicant, ceased to belong to her blood family and henceforth bore the forenames and names J.M.W.L. In accordance with the legal conditions and the agreement drawn up between the technical secretariat for adoptions in Peru and the Luxembourg-Peru Association, the latter was declared responsible for monitoring the child and, if necessary, for the legalisation of the adoption in Luxembourg.

7. The judgment of the Family Court of the province of Huamanga was declared enforceable – according to the certificate issued by that court on 14 December 1996 – and entered in the civil status register of Ayacucho-Huamanga.

8. In May 1997 the first applicant, who lived alone in Luxembourg with the adopted child, gave birth to a daughter. On 13 November 2006 her lawyer stated that she was now the mother of four children attending school and still lived in Luxembourg.

A. Proceedings instituted before the civil courts for a declaration that the Peruvian judgment pronouncing full adoption was enforceable in Luxembourg

9. On 10 April 1997 the applicants brought proceedings against the Attorney General's Department before the Luxembourg District Court. They requested the court to declare that the Peruvian judgment was enforceable in the Grand Duchy as though it were a judgment ordering full adoption delivered by the competent Luxembourg court; they stated that the purpose of the application for enforcement was to ensure that the child could be registered in the civil status register in the Grand Duchy, acquire the

nationality of her adoptive mother and be granted definitive leave to remain in Luxembourg.

1. Judgment of the District Court of 11 February 1998

10. On 11 February 1998 the District Court declared the application for enforcement admissible as it had been properly submitted by originating summons. In that regard, the court stated the following:

> "An application for enforcement of a foreign judgment is a principal legal claim different in nature from the application that gave rise to the foreign judgment. The court dealing with the application for enforcement does not examine the merits of the application submitted to the foreign court, but confines itself to verifying that the decision satisfies the relevant international procedural requirements. The application for enforcement of an adoption judgment, which is different in nature from the application to adopt, is not subject to the objection procedure in [the relevant article] of the Code of Civil Procedure, under which applications to adopt may be made by petition ..."

11. The court decided that a court dealing with an application for enforcement of an adoption judgment delivered by a foreign court must first of all ascertain whether the foreign court was competent by reference to the rules determining its jurisdiction. On that point, the court concluded that the adoption had been pronounced by the court that was competent according to Article 370 of the Luxembourg Civil Code.

12. As for the law applicable to the merits of the case, the court first of all recalled the positions taken by the parties to the proceedings.

Thus, the Attorney General's Department maintained that the court should ascertain whether the foreign court had applied the law designated by the Luxembourg system of private international law. As the adoptive parent was of Luxembourg nationality, the conditions for adoption were governed by Luxembourg law; and Article 367 of the Luxembourg Civil Code did not permit full adoption by an unmarried person. The Attorney General's Department concluded that in pronouncing full adoption by the first applicant, as an unmarried person, the Peruvian court had failed to apply Luxembourg law.

The applicants were of the view that the court should confine itself to examining whether the adoption pronounced in Peru had been made according to the procedures prescribed by the laws of Peru. They submitted, in particular, that the final paragraph of Article 370 of the Luxembourg Civil Code must be interpreted as meaning that "the Luxembourg international rule on conflict expressly recognises as valid an adoption made abroad by an authority competent under the laws of that country, ... provided that the local procedure and local provisions were complied with".

The court decided that the final paragraph of Article 370 of the Civil Code introduced a rule on jurisdiction and also maintained its rules on the conflict of laws. It added that according to Article 370 of the Civil Code the

adoption by the first applicant, of Luxembourg nationality, was governed by Luxembourg law with respect to the requisite conditions for adoption. The court concluded that the court dealing with an application to enforce the decision must ascertain whether the adoption had been pronounced in accordance with Luxembourg law with respect to those conditions.

13. The court then stated that it had adjourned the deliberations on 11 November 1997 to enable the parties to submit their observations on the following preliminary questions which it proposed to refer to the Constitutional Court:

> "1. The law on adoption, more particularly Article 367 of the Civil Code, allows a married couple to adopt a child fully and prohibits full adoption by an unmarried person. Is that law consistent with Article 11(3) of the Constitution, which provides that 'the State guarantees the natural rights of human beings and the family' and Article 11(2) of the Constitution, which states that 'Luxemburgers are equal before the law'?
>
> 2. Is the right to found a family a natural right of human beings and the family?
>
> 3. Is the right to found an adoptive family a natural right of human beings and the family?
>
> 4. Does the right to found a family include the right to found a single-parent family?
>
> 5. Is the right to found a family a right of only married human beings?
>
> 6. Does the principle of equality before the law allow full adoption to be authorised for married persons to the exclusion of unmarried persons?
>
> 7. Do Articles 11(2) and (3) of the Constitution establish rights of an unmarried person to full adoption on the same terms as those applicable to a married couple?"

14. The court confirmed that it must examine the correct application of Article 367 of the Civil Code and its conformity with the Constitution before adjudicating on the application for enforcement. In order to do so, the court requested the applicants to clarify their actual family situation, on the following grounds:

> "By submissions of 15 December 1997 Ms Jeanne Wagner's representative maintained that the Wagner family existed in fact and in law and that it was not a single-parent family. He also submitted that nowadays 'the more general acceptance by society of unmarried cohabitation has led to an increase in the number of children living in a single home with a father and mother who are not married. It is less and less certain that the parents need to be married in order for the child to grow up in a home with a father and a mother'.
>
> If those submissions have any meaning, Ms Jeanne Wagner is living as part of a couple without being married.

... The assertion of the existence of a family which is not a single-parent family is new and not substantiated by any evidence.

The social inquiry report of 6 August 1997, which was submitted to the court on 28 October 1997, states that Ms Jeanne Wagner gave birth to a daughter in May 1997. That report on the adaptation of the adopted child in her new family in Luxembourg examines only the relationship between the mother and the child. It does not mention the existence of a man in Ms Wagner's home or any relationship between the adopted child and Ms Wagner's partner.

The pre-adoption report drawn up on 30 April 1996, also by social worker [B.], states as the general reason for adopting the conviction that 'children are the purpose of life'. Ms Wagner was approaching her thirtieth birthday and decided 'not to wait to meet the ideal man in order to have children but to adopt a child on her own, in the knowledge that her family would help her ...'

As the reason for adopting a Peruvian child, the social worker observed that in Luxembourg Ms Wagner encountered many obstacles, mainly the fact that she was not married. 'The only country which has an agreement with Luxembourg and which consents to adoption by an unmarried woman is Peru and thus Ms Wagner contacted the Luxembourg-Peru Association and prepared the file through that association'. The social worker recommended that the adoption should be approved, as the child found a welcoming home 'within that “single-parent” family'.

The reports filed by the applicant therefore mention only a family consisting of the mother and two children.

It is important to refer to the Constitutional Court questions which are appropriate to the adoptive parent's actual family situation. Adoption by a family consisting of an unmarried couple may receive a different reply from that given to adoption by an unmarried mother living alone. It is therefore for the adoptive parent to establish her actual family situation and to establish that her family is not a single-parent family.”

15. The hearing was resumed on 10 March 1998.

2. Judgment of the District Court of 1 April 1998

16. In its judgment of 1 April 1998, the court first of all set out the views expressed by the applicants in relation to the proposed preliminary questions. Thus, the applicants, first, emphasised that the court was dealing with an application for enforcement and not an application to adopt and, second, took issue with the proposed questions because they emphasised the rights of the mother, whereas the real issue was the rights of the child adopted following the Peruvian judgment. The applicants also observed that the first applicant had given birth to a child in May 1997, and proposed the following preliminary questions:

“1. Is the right to secure from the Luxembourg courts recognition of a family relationship validly established abroad for the purposes of securing recognition that the adopted child has the same political and civil rights as a biological child of the adoptive mother a natural right of the human being, and more particularly of an adopted child?

2. In so far as Article 367 of the Luxembourg Civil Code must, in spite of the substance of Article 370, final paragraph, be considered to constitute an obstacle to the recognition of a full adoption lawfully made abroad by an unmarried mother of Luxembourg nationality, and must be so considered in spite of the substance of Articles 7 and 21 of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989, as approved by the Law of 20 December 1993, does not the principle of equality before the law set forth in Article 11(3) of the Constitution require recognition of that full adoption in so far as such recognition is necessary in order for the adopted child to be able to enjoy all her political and civil rights to the same extent as her biological collaterals?

Does the principle of equality before the law allow a difference in treatment to be created by the law, in particular with respect to the entry of the adoption in the civil status register, the issuing of the certificate of nationality and the situation regarding succession, in complete legal certainty between a non-marital child and an adopted child of the same mother?"

17. The court then gave judgment in the following terms:

"The court must ascertain whether the conditions prescribed by Luxembourg law for adoption were satisfied at the time when the adoption was pronounced by the Peruvian judge. In fact, Ms Wagner is an unmarried woman who, according to Article 367 of the Civil Code, cannot undertake a full adoption. The question that arises is therefore whether the prohibition on full adoption by an unmarried person is compatible with the constitutional rights in Article 11(3) and (2), that is to say, any rights enjoyed by the mother, and not by the child.

When ensuring that the decision to be enforced satisfies the relevant international procedural requirements, the court must examine whether the foreign court was in a position to pronounce the adoption by reference to the conditions on adoption provided for by the relevant Luxembourg legislation.

The establishment of a constitutional right to adopt without discrimination between married persons and unmarried persons does not preclude the specific assessment of the physical and mental situation of the persons wishing to adopt and of their capacity to raise and contribute to the development of a child. It may be that the right to family life is not recognised where the best interests of the child would be in danger. The existence of a right is distinct from its actual exercise.

As Ms Wagner is an unmarried woman not living as part of a couple, the questions which correspond to her family situation relate to a single-parent family.

The questions envisaged by the court on 11 November 1997 are therefore relevant to the outcome of the dispute.

Examination of the existence of "a right to secure recognition" in Luxembourg "of a legal parent-child relationship validly established abroad" assumes that the valid creation of an adoptive parent-child relationship within the meaning of Luxembourg law is established. The first preliminary question proposed by Ms Wagner is irrelevant, as the lawfulness of the Peruvian adoption has not been established.

Examination of the second question proposed must be reserved. As matters now stand, the questions envisaged by the court on 11 November 1997 should be referred."

3. Judgment of 13 November 1998 of the Constitutional Court

18. On 13 November 1998 the Constitutional Court declared the questions numbered 2 to 7 (paragraph 13 above) inadmissible. As for the first question, it decided that Article 367 of the Civil Code was not contrary to the Constitution, for the following reasons:

> "**Regarding Article 11(3) of the Constitution:**
>
> ... Article 11(3) of the Constitution states that the State guarantees the natural rights of human beings and the family;
>
> ... natural rights are those flowing from human nature and exist, even without a legislative text; ... applied to the family, they include the right to procreate and the right to live together;
>
> ..., in parallel, the legislature has established, by adoption, a substitute legal parent-child relationship which, while it demands proper motives on the part of the adoptive parents, must above all be advantageous for the person adopted;
>
> ... [adoption] has its basis in positive law and not in natural law; ... it is therefore for the legislature to put in place all the conditions and limits necessary for its proper functioning and satisfying the interests of society and of the adoptive family;
>
> **Regarding Article 11(2) of the Constitution:**
>
> ... Article 11(2) of the Constitution provides that 'all Luxemburgers are equal before the law';
>
> ... that constitutional principle, which is applicable to every individual affected by Luxembourg law if personality rights are concerned, is not to be understood in an absolute sense, but requires that all those in the same factual and legal situation be treated in the same way;
>
> ... the specific treatment is justified if the difference in condition is effective and objective, if it is in the public interest and if the extent of its application is not unreasonable;
>
> ... the specific treatment is lawful in the present case as it is based on a genuine distinction resulting from the civil status of the persons, on an increased guarantee in favour of the adopted child as a result of the number of persons holding parental authority in the case of married persons and on reasonable proportionality owing to the fact that simple adoption remains available to an unmarried person in compliance with the procedural and substantive requirements provided for by law;"

4. Judgment of the District Court of 2 June 1999

19. On 2 June 1999 the district court dismissed the application for enforcement, on the ground that the Peruvian adoption judgment had been delivered contrary to the Luxembourg law applicable according to the rule on the conflict of laws set forth in Article 370 of the Civil Code.

20. The court upheld the argument of the Attorney General's Department that the Peruvian judge had not applied Luxembourg law by pronouncing full adoption by an unmarried Luxembourg woman.

21. The court concluded that there was no need to consider whether the Peruvian decision was contrary to public policy. In that regard, however, it made the following observation:

> "... according to the pre-adoption social inquiry report of 30 April 1996, Ms Wagner chose to adopt in Peru, through the Luxembourg-Peru Association, since Peru permits adoption by an unmarried woman, whereas she encountered various obstacles to adoption in Luxembourg, mainly because she was not married.
>
> Ms Wagner therefore decided to obtain indirectly, by enforcement of the adoption in Peru, what she was unable to obtain directly by an application to adopt in Luxembourg. However, a judgment obtained by circumventing the statutory requirements cannot be enforced."

22. The court then dealt with the second preliminary question which had been proposed by the applicants at the earlier hearing:

> "The judgment of April 1998 reserved the alternative preliminary question proposed by Ms Wagner. In the event that Article 367 of the Civil Code precluded full adoption, Ms Wagner proposed that the Constitutional Court should examine whether the principle of equality allowed a difference in treatment to be created by law, notably with respect to the entry of the adoption in the civil status registers, the issuing of a certificate of nationality and the situation regarding succession between the non-marital child and the adoptive child of the same mother. In her submissions lodged after the decision of the Constitutional Court, Ms Wagner maintained that proposal for a preliminary question..
>
> Under [the relevant section] of the ... Constitutional Court (Organisation) Act, a court before which a party has raised a question relating to the constitutionality of a law is not required to refer the matter to the [Constitutional] Court if the question is wholly unfounded or if the [Constitutional] Court has already ruled on a question having the same subject-matter.
>
> ... As the [Constitutional] Court decided [in its judgment of 13 November 1998] that adoption was not a constitutional right but was a matter for legislation, and on the basis that the law may introduce a distinction between persons having different civil status, the preliminary question proposed by Ms Wagner is wholly unfounded.
>
> The question also seeks to secure a review of the compatibility of the law on adoption, which prohibits full adoption by an unmarried person, with the principle of equality and the right to family life. The [Constitutional] Court held that biological filiation and adoptive filiation were different in nature, the former coming under natural law protected by the Constitution and the latter created by the legislature. It also decided that the principle of equality applied to those in the same factual and legal situation.
>
> As an adoptive child is in a legal and factual situation distinct from that of a non-marital child and as the principle of equality assumes that the situation of the persons is the same, the proposed question is unfounded.

There is thus no reason to refer the question to the Constitutional Court..”

23. Lastly, the court rejected the argument put forward by the applicants on the basis of the Convention on the Rights of the Child, for the following reasons:

“Ms Wagner maintains that public policy and the Convention on the Rights of the Child require that the adoption decision be enforced. As the best interests of the child are to be a primary consideration, in application of Article 3 of the Convention, the adopted child should have the same rights as her 'biological' sister, the mother's non-marital child.

The interests of the child may be assessed by the legislature. Luxembourg law accepts that it is in the interests of children to be fully adopted by a married couple and not by an unmarried person. The court must therefore apply that statutory provision.”

5. Judgment of the Court of Appeal of 6 July 2000

24. On 7 July 1999 the applicants appealed against the judgments of 11 February 1998, 1 April 1998 and 2 June 1999.

25. They requested the Court of Appeal to declare the judgment of the Huamango Family Court of 6 November 1996 enforceable in Luxembourg and to order that the forthcoming judgment be entered in the civil status registers.

26. In support of their appeal, the applicants maintained first of all that Article 367 of the Civil Code – a rule of strictly territorial application determining the conditions of an application for full adoption coming within the jurisdiction of the Luxembourg courts – was not a reason to dismiss an application for enforcement of a foreign decision, since the court dealing with the application to enforce the decision had no power of review and was not empowered to alter the effects of the adoption pronounced by the Peruvian court. They further maintained that under Article 370, final paragraph, of the Civil Code a foreign adoption decision could be enforced in Luxembourg provided it had been delivered by a competent court according to the rules on the conflict of laws and the procedures of the country of origin. Thus, the final paragraph of Article 370 was not a simple rule on jurisdiction but a rule on the conflict of laws.

27. The applicants also maintained their request that the preliminary question which they had formulated before the district court be referred to the Constitutional Court.

28. In a section entitled “Public policy implications”, the applicants contended that the procedure for securing recognition of the effects of a full adoption pronounced abroad differed from the procedure for pronouncement of an adoption in Luxembourg, so that the impact of the questions of public policy arose in different terms and did not have the same weight. Next, relying on the Convention on the Rights of the Child, they submitted that

the best interests of the child consisted in favouring the effects of a full adoption, in particular the right to acquire Luxembourg nationality and to share in the succession of the adoptive family on the same basis as a legitimate or non-marital child. While they acknowledged that a new simple adoption could be made in Luxembourg, they emphasised that it would grant less substantial rights to the child, particularly in relation to succession and the acquisition of Luxembourg nationality. In the applicants' submission, it was specifically public policy that required enforcement, so that the adoptive child would be granted the same rights as her biological sister and so that legal calm rather than uncertainty would reign in the families. They cited a decision of the district court, which, in a different context, had held that an interference with the right for the father and mother to maintain relations with their children was not justified by one of the objectives set forth in Article 8 § 2 of the Convention. They contended that in this case the judgment at first instance – which gave priority to Luxembourg law over an international convention as a ground for refusing to order enforcement – penalised the minor child and was incompatible with Article 8 of the Convention.

29. By judgment of 6 July 2000 the applicants' appeal was declared unfounded. The Court of Appeal held, in the first place, the following:

> "By way of preliminary point, it should be observed that while foreign judicial decisions on the status of persons enjoy immediate substantive effectiveness in the Grand Duchy of Luxembourg, provided only that they satisfy the relevant international procedural requirements, they none the less may and even must be enforced in order to render them incontestable and enforceable by execution and to enable the acts necessary to enforce them to be carried out.
>
> In this case, recognition of the Peruvian adoption decision is sought, not only to ensure that the adopted child has the same succession rights as those recognised by Luxembourg law to a legitimate or non-marital child, but also to avoid problems arising in the future as a result of the fact that the child has not lost Peruvian nationality by the effect of her adoption in her country of origin and, in the absence of a decision recognising the foreign judgment, does not acquire Luxembourg nationality, at least for the time being, and cannot in those circumstances benefit from the advantages conferred on nationals of the countries of the European Union."

30. The Court of Appeal then analysed the scope and significance of the final paragraph of Article 370 of the Civil Code and reached the following conclusion:

> "The [District] Court was correct to take the view that the Luxembourg court dealing with the application to enforce the Peruvian judgment must ascertain whether the adoption was made in conformity with the Luxembourg rules on the conflict of laws, as provided for in Article 370 of the Civil Code, and to dismiss the application on the ground that the Peruvian judgment pronouncing full adoption in favour of an unmarried Luxembourg national is in flagrant contradiction with the Luxembourg law on the conflict of laws, which provides that the conditions for adoption are governed by the national law of the adoptive parent.

It is therefore unnecessary to examine further the other conditions required for enforcement, namely conformity to international public policy and circumvention of the law."

31. The Court of Appeal also concluded that the applicants were wrong to rely on the Convention on the Rights of the Child, for the following reasons:

"Article 7 of that Convention, approved by the Law of 20 December 1993, provides in paragraph 1 that the child is to be registered immediately after birth and is to have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 21 provides that States Parties that recognise and/or permit the system of adoption are to ensure that the best interests of the child shall be the paramount consideration, and sets out the obligations placed on the Contracting States in that regard (paragraphs (a) and (b) of that article).

The Court agrees with the Attorney General's representative, who maintains ... that Articles 7 and 21 cannot be applied directly in order to secure recognition of a foreign full adoption decision pronounced in breach of our national laws.

...

The [applicants] are wrong to rely on the abovementioned Articles of the Convention to secure recognition of a foreign adoption made in compliance with its legal rules, which, it is emphasised, are very strict, but in breach of Luxembourg law, which rightly or wrongly maintains the principle that full adoption by an unmarried person is prohibited, since Article 21 does not require the States Parties to alter their national legislation in that sense, *a fortiori* because it is not established that such a change in the legislation would be in the paramount interest of the child, quite apart from any political or moral considerations which influence the legislative choices according to current thinking.

Article 7, on which the applicants rely, concerns at most only the effects of the adoption, but has no bearing on whether an adoption decision satisfies the relevant international procedural requirements. ..."

32. Last, the Court of Appeal considered that the first-instance court had been correct not to deem it appropriate to refer the preliminary question formulated by the applicants to the Constitutional Court.

6. Judgment of the Court of Cassation of 14 June 2001

33. On 8 December 2000 the applicants appealed on a point of law.

34. On 14 June 2001 the Court of Cassation dismissed the appeal, for the following reasons:

"The first ground of appeal,

alleging *"breach, if not misapplication of the law, in the present case of Article 370, final paragraph of the Civil Code, which provides that in the event of conflict between the rules of competence prescribed respectively by the national law of the adoptive*

parent and by that of the adopted child, the adoption is validly concluded according to the procedure prescribed by the law of the country in which the adoption took place and before the authorities competent under that law, in that the judgment considered that the word 'procedure' had only the meaning of 'procedural rule' and did not include the substantive conditions whereas, first part*, the text of Article 370 speaks in unequivocal terms of 'procedures' and not restrictively of 'procedural rules', so that the scope of the legislative text cannot be restricted by the implicit addition thereto of words which it does not contain, in this case the word 'rule';* second part *the word 'procedure' employed by the legislature in the specific context of the final paragraph of Article 370 is not limited to procedural rules in the strict sense, but covers both the latter and the substantive rules, and therefore legal 'procedures' in the broad, flexible and general sense, the legislature having clearly displayed its intention to properly encompass in the word 'procedure' both the substantive conditions and procedural conditions properly so called";*

But ... in agreeing with the court of first instance that the Peruvian full adoption decision was delivered in contradiction to the Luxembourg law on the conflict of laws, which provides in paragraph 2 of Article 370 of the Civil Code that the conditions that must be satisfied in order to adopt are governed by the national law of the adoptive parent, the Court of Appeal made a correct application of the law without being in breach of the legislative text referred to in the two parts of the ground of appeal;

... it follows that the ground of appeal cannot be upheld;

The second ground of appeal,

alleging *"misapplication, if not violation of Article 8 of the [Convention], which provides that there is to 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, and of Article 89 of the Constitution, which provides that every judgment must state the reasons on which it is based, in that the judgment did not even examine the appellants' plea based on Article 8 paragraph 2 of the [Convention], when the best interests of the child ought to have led the decision under appeal, on the assumption that Article 370, final paragraph, of the Civil Code is not to be interpreted as meaning that an adoption lawfully concluded abroad cannot be repudiated, to refuse to apply the Luxembourg domestic rule, which prevents an unmarried woman of Luxembourg nationality from fully adopting a minor child, in such a way as to apply Luxembourg law to her, and that the intention of the Luxembourg legislature to require an unmarried woman to marry if she wishes to undertake full adoption of a child, in such a way as to ensure that that child enjoys all the privileges attached to Luxembourg and Community nationality constitutes an unnecessary interference with family life ..."*

But ... first, the Court of Appeal was not required to respond to the ground of appeal set out in the document initiating the appeal under the heading "Public policy implications", as that question had become devoid of purpose by the very effect of its decision not to apply the foreign law;

..., second, owing to their dubious, vague and imprecise nature, the arguments relating to Article 8 paragraph 2 of the Convention on Human Rights contained in the document initiating the appeal did not constitute a ground of appeal requiring a response;

Whence it follows that the plea cannot be upheld."

B. Proceedings before the administrative courts under the Hague Convention of 29 May 1993 on protection of children and cooperation in respect of intercountry adoption

35. On 5 August 2003 the applicants requested the Minister for the Family, Social Solidarity and Youth to take the necessary measures to enable the adoption pronounced by the Peruvian judgment of 6 November 1996 to be entered as a full adoption recognised by the Luxembourg authorities in the civil status register with competence *ratione territoriae* in application of the Hague Convention of 29 May 1993.

36. On 12 August 2003 the Minister declared that the provisions of the Hague Convention were not applicable to the applicants' request.

37. On 13 September 2003 the applicants sought judicial review of that decision.

38. By judgment of 19 January 2004 the administrative court of first instance (*Tribunal administratif*) annulled the ministerial decision, for the following reasons:

"...the [Hague Convention of 29 May 1993] was adopted by Luxembourg law on 14 April 2002 and entered into force on 1 November 2002 in the Grand Duchy of Luxembourg, on which date it is common ground that the Convention was already in force with respect to Peru;

... from 1 November 2002 the Hague Convention has therefore been in force between the two countries concerned by the present case: Peru, the State of origin, and the Grand Duchy of Luxembourg, the receiving State, as defined in Article 2 of the Convention;

... the Convention states in Article 41 that it is to *'apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin'*;

... Article 14 of the Convention states that '[p]ersons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence';

... it follows from the Explanatory Report drawn up by Mr G. Parra-Aranguren, the Venezuelan representative in the proceedings of the 17th Hague Conference which culminated in the Convention of 29 May 1993, and more particularly paragraphs 584 and 585 thereof (doc. Parl. 4820, page 95), that a second paragraph had indeed been envisaged at a particular time during the drafting of what became Article 41, but that

that paragraph was abandoned for the reasons explained more fully in that report as follows: '*584. Working document no. 100, submitted by the Permanent Bureau, suggested a second paragraph for the article with the following text: "A Contracting State may at any time by declaration extend the application of Chapter V (Recognition) to other adoptions certified by the competent authority of the State of the adoption as having been made in accordance with the Convention". The idea behind the proposal was to give a rule to answer the question as to the validity of adoptions already made in the Contracting States when a State becomes a Party to the Convention.*

585. Some participants considered that proposal ambiguous and suggested its deletion or its clarification, at least, but others sustained it. The Observer for the International Commission on Civil Status observed that it was unnecessary and dangerous, because the formulation might permit a wicked conclusion, if interpreted a contrario*, since the natural consequence of a State becoming a Party to the Convention is to recognise adoptions already made in the Contracting States. Therefore, the "declaration" provided by the second paragraph could be interpreted as permitting the non-recognition of such adoptions and, for this reason, the proposal was rejected'; ...*

... for the purposes of application *ratione tempore* it is appropriate to distinguish the situation of the application properly so called of the Convention in the words of Article 41 concerning adoption procedures to be initiated and that relating to adoptions previously carried out, which by definition no longer have to follow the procedure provided for in Article 14 of the of the Convention, and raising more particularly aspects of recognition and re-entry on the competent registers of civil status;

... although the text of Article 41 gives rise to no doubt concerning the applicability of the Convention in all cases where an application referred to in Article 14, in initial act of the procedure there referred to, was received after the entry into force of the Convention in the receiving State and in the State of origin, reliance on that Convention for other aspects relating more particularly to the recognition and entry of adoptions previously carried out in the State of origin do not fall directly under the wording of Article 41;

... the fact that two States, by definition the State of origin and the receiving State, have become parties to the Convention and have adopted it in such a way that it has entered into force in both States means that these States have thereby adopted the provisions of the Convention as being henceforth required to be the general law, at a superior level, having to govern the respective relationships concerning the nationals of both States in adoption matters;

... the adoption of such a superior general law in adoption matters consists by the very organisation of the Convention, in the light of the objectives which it pursues, a *favor adoptioni* to which these two States have thus subscribed in the best interests of the adoptive children concerned;

... it follows that an application for recognition and entry in the relevant registers of civil status of an adoption carried out before the entry into force of the Convention in the State of origin is governed by the provisions of the Convention contained more particularly in Chapter V, entitled "Recognition and effects of the adoption", from the time when the relevant application, submitted not with a view to adoption but with a

view to recognition and entry of an adoption which has already taken place, was submitted after the entry into force of the Convention in the receiving State and the State of origin;

... the applicant has also placed on the file a certificate issued by the competent authority of the Contracting State in which the adoption took place, capable of being read as being consistent with the Convention;

... it follows from all the foregoing developments that the contested ministerial decision was wrong ... to refuse to undertake a more thorough examination of the abovementioned application of 5 August 2003 by rejecting the application of the provisions of the Hague Convention of 29 May 1993, which had been in force between Peru and the Grand Duchy of Luxembourg since 1 November 2002;

... the contested ministerial decision must therefore be annulled for violation of the law;

... since preference should be given to any solution found at a non-contentious level and since the Minister did not afford herself the opportunity to examine the merits of the application in question more thoroughly, the case should be sent back to the Minister for further consideration ...;"

39. On appeal by the Minister for the Family, Social Solidarity and Youth, the higher administrative court (*Cour administrative*) on 1 July 2004 varied the judgment of the administrative court of first instance and declared the action for annulment unfounded, for the following reasons:

"Upon reading the Hague Convention, it must be found that there is no clause as to the possible application of the provisions of that Convention in a case where, at the time of the facts, that is during the implementation of the adoption procedure, it was ratified by only one of the States involved in an intercountry adoption and entered into force only in that State. On the contrary, Article 41 of the Hague Convention expressly states that '[t]he Convention shall apply in every case where an application pursuant to Article 14 [of the Convention] has been received after the Convention has entered into force in the receiving State and the State of origin'. Furthermore, it should be observed that Article 14 of the Convention obliges persons wishing to adopt a child in another State to apply first of all to the Central Authority in the State of their habitual residence, and thereby to take the first step in an intercountry adoption procedure.

In the light of those clear and precise provisions, it is impossible to grant the application as submitted to the Minister for the Family by the present respondents and seeking to have the Hague Convention applied to an intercountry adoption procedure which took place at a time when the Hague Convention was in force only with respect to the State of origin of the child to be adopted, namely, Peru, and not with respect to the receiving State of that child, namely, the State in which the adoptive mother was resident, that is, Luxembourg.

That finding is supported by the fact that the mechanism as put in place by the Hague Convention, with the specific aim of ensuring recognition in the receiving State of an adoption carried out in the State of origin, is based on close cooperation between the competent authorities of both States thus concerned ...

> The fact that the certificate of conformity issued by the Peruvian central authority concerning the abovementioned adoption decision is similar to that required by ... the Hague Convention, for the purpose of ensuring that the adoption carried out in one of the Contracting States of the Hague Convention is recognised in the other Contracting States, does not in itself suffice to render the provisions of the Convention applicable and to ensure that the adoption carried out in Peru is recognised in Luxembourg, since by definition that certificate was unable to attest that all the formalities provided for by the Hague Convention had been complied with, since the procedure regulated in that Convention as being mandatory could not be followed when Luxembourg was not a party to the Convention at the time when the adoption procedure took place in Peru."

C. Simple adoption procedure

40. In their observations, which were received at the Court on 18 February 2005, the applicants stated that they would "lodge in the near future an applicant for simple adoption according to Luxembourg law, as a precautionary measure". At the hearing before the Court, they stated that that application had in the meantime led to a simple adoption judgment (delivered on an unspecified date) which did not take account of the full adoption pronounced in Peru.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Law and practice relating to adoption

1. International texts

a) Convention on the Rights of the Child, adopted by the General Assembly of the United Nations in its Resolution 44/25 of 20 November 1989

41. This Convention, which entered into force in Luxembourg and Peru before the facts, provides the following in its relevant Articles.

Article 3

> "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

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

Article 21

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

(a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognise that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs."

b) Recommendation 1443 (2000) of the Parliamentary Assembly of the Council of Europe

42. The relevant extracts of Recommendation 1443 (2000), entitled "International adoption: respecting children's rights", read as follows:

"The Assembly ... fiercely opposes the current transformation of international adoption into nothing short of a market regulated by the capitalist laws of supply and demand, and characterised by a one-way flow of children from poor states or states in transition to developed countries. It roundly condemns all crimes committed in order to facilitate adoption, as well as the commercial tendencies and practices that include the use of psychological or financial pressure on vulnerable families, the arranging of adoptions directly with families, the conceiving of children for adoption, the falsification of paternity documents and adoption via the Internet.

It wishes to alert European public opinion to the fact that, sadly, international adoption can lead to the disregard of children's rights and that it does not necessarily serve their best interests. In many cases, receiving countries perpetuate misleading notions about children's circumstances in their countries of origin and a stubbornly prejudiced belief in the advantages for a foreign child of being adopted and living in a

rich country. The present tendencies of international adoption go against the UN Convention on the Rights of the Child, which stipulates that if a child is deprived of his or her family the alternative solutions considered must pay due regard to the desirability of continuity in the child's upbringing and to his or her ethnic, religious, cultural and linguistic background. ..."

2. National legislation and case-law

a) Full adoption

43. The principles and effects of full adoption may be summarised as follows (see G. Ravarani, "La filiation", *Feuille de liaison de la conférence Saint-Yves* no. 75, March 1990).

i. *Conditions to be satisfied by the adoptive parents*

44. As a matter of principle, adoption is by a married couple. Thus, Article 367 of the Civil Code provides as follows:

"An application to adopt may be made by a married couple who are not judicially separated, one of whom is at least twenty-five and the other at least twenty-one years old, on condition that the adoptive parents are fifteen years older than the child whom they propose to adopt and that the child to be adopted is under the age of sixteen."

45. Full adoption by a single person is an exceptional situation. The law provides for only one possibility: that of full adoption applied for by a spouse in favour of the child of his or her spouse.

ii. *Effects of full adoption*

46. Article 368 of the Civil Code provides as follows:

"Adoption shall confer on the adopted child and on his or her descendants the same rights and obligations as though he or she were born of the marriage of the adoptive parents. That legal parent-child relationship shall replace his or her original parent-child relationship and the adopted child shall cease to belong to his or her blood family ..."

47. The adoptive parents alone are invested, with respect to the adopted child, with all the rights of parental authority.

48. Prior to the Law of 23 December 2005, adoption conferred on the child the surname of the husband. Since that Law, the effect of Article 57 in conjunction with Article 368-1 of the Civil Code is that the adoptive couple choose the name to be given to the adopted child; the child may acquire either the name of his or her father, or the name of his or her mother, or both names together, in whichever order the adoptive parents may choose, with a maximum of one name for each parent.

49. The child has the same inheritance rights in respect of his or her adoptive parents as the legitimate children. From a taxation point of view,

the adoptive child is not required to pay inheritance tax where he or she inherits in the direct line.

50. Under section 2(1) of the Law of 22 February 1968 on nationality, as amended, a child who has been fully adopted by a Luxemburger obtains Luxembourg nationality. Bill no. 5620 on Luxembourg nationality, which is currently before Parliament, confirms the terms of that provision.

51. The same mutual maintenance obligations are created between the adoptive parents and the adopted child as those existing between blood relatives.

52. The transcription of the adoption judgment takes the place of a birth certificate for the adopted child. It contains no indication of the child's original filiation. The original birth certificate is marked "adoption".

b) Simple adoption

53. The principles and effects of simple adoption may be summarised as follows (G. Ravarani, op. cit.).

54. Although it constitutes the general rule for adoption, simple adoption is much rarer than full adoption. It normally occurs only where full adoption is impossible, for example where the person to be adopted is over the age of 16 or where the person wishing to adopt is single.

i. *Conditions to be satisfied by the adoptive parents*

55. The conditions are the same as in the case of full adoption, except that simple adoption by one person is possible. More than one person cannot adopt the same child, except in the case of a married couple. Article 344 of the Luxembourg Civil Code provides the following:

> "An application to adopt may be made by any person over the age of twenty-five."

ii. *Effects of simple adoption*

56. While simple adoption in many respects resembles full adoption – it confers a new family on the adopted child –, it differs from full adoption on one essential point: the adopted child does not lose his or her family of origin. Article 358 of the Civil Code provides as follows:

> "The adopted child shall remain in his or her family of origin and keep all his or her rights within that family, including hereditary rights."

57. Like full adoption, simple adoption has the effect of integrating the adopted child into his or her new family. However, the adopted child is not fully assimilated to a biological descendant, even though a link of kinship is created between the adoptive parent and the adopted child. The law further provides that this link extends to the adopted child's descendants (Article 361 of the Civil Code). Since the law makes no specific provision in that regard, however, it must be acknowledged that the adoption does not create

a link of kinship between, on the one hand, the adopted child and the ascendants of the adoptive parent and, on the other, the adopted child's collaterals.

58. As regards parental authority, Article 360 of the Civil Code sets forth the following provisions:

> "The adoptive parent alone has, with respect to the adopted child, all the rights of parental authority, including the right to administer the adopted child's estate and to consent to the adopted child's marriage.
>
> Where the adoption was by a married couple or where the adoptive parent is the spouse of the adopted child's father or mother, the rights referred to in the preceding paragraph shall be exercised in accordance with the rules applicable to the legitimate father and mother.
>
> Where there is only one adoptive parent or where one of the two adoptive parents dies, the adopted child's estate shall be administered in accordance with the law and under the supervision of the court.
>
> Where the adoptive parent or the survivor of the adoptive parents dies, is declared absent or loses the right to exercise parental authority, a guardianship order shall be made."

59. Article 359 of the Civil Code provides that simple adoption confers the adoptive parent's name on the adopted child. In the event of adoption by a married couple, the same rules as those applicable to full adoption apply.

60. Article 363 of the Civil Code establishes the principle that the adopted child and his or her descendants have the same inheritance rights in the adoptive parent's family as a legitimate child. Conversely, the following exceptions are applicable.

– Under Article 363, the adopted child and his or her descendants are not entitled to receive a reserved portion of the estate of the adoptive parent's ascendants.

– If the adopted child dies without descendants or a surviving spouse, the assets given by the adoptive parent or inherited under the adoptive parent's estate revert to the adoptive parent or to his or her descendants, provided that those assets still exist in kind at the time of the adopted child's death. If the adoptive parent has died and left no descendants, those assets belong to the adopted child's relatives (that is to say, his or her descendants or the members of his or her family of origin), to the exclusion of the adoptive parent's other heirs (Article 364). The other assets left by the adopted child go to his or her family and not to the adoptive parent's family (Article 364). Article 364 paragraph 2 provides that "if, during the lifetime of the adoptive parent and after the death of the adopted child, the children or descendants left by the adopted child die without issue, the adoptive parent [may recover the assets which he or she had given to the adopted child], but the right to do so is personal to the adoptive parent and cannot be transferred to his or her heirs, even in the descending line."

– As for the tax regime applicable to the succession, whereas children who have been fully adopted are treated in the same way as the legitimate descendants, Article III of the Law of 13 July 1959 amending the rules on adoption, the fiscal provisions of which have not been repealed, draws a distinction between different categories of persons who have been the subject of simple adoption: those in the first category listed (namely (i) adopted childs who are the children of a first marriage of the adoptive parent's spouse and those children's descendants, and also non-marital children adopted by their progenitor and those children's descendants; (ii) adopted childs who are children of persons killed by enemy action or war orphans; (iii) adopted childs who during their minority and for six years or less have received care and assistance without interruption from the adoptive parent, and their descendants; and (iv) adopted childs whose adoption was applied for before they reached the age of 16 and their descendants) are treated in the same way as legitimate descendants. Those in the second category (namely, all those not specially listed by the law) do not enjoy the same tax advantages; the law treats them as nephews and nieces, with the consequence that tax at 9% is applicable in their case.

61. Under section 2(2) of the Law of 22 February 1968 on Luxembourg nationality, as amended, a child aged under 18 who has been the subject of simple adoption by a Luxemburger acquires Luxembourg nationality where he or she is stateless or where, following the adoption, he or she loses his or her nationality of origin by operation of the foreign law.

Under sections 19 and 20 of that Law, a child who was the subject of simple adoption by a Luxemburger and who at that time did not lose his or her nationality of origin may acquire the status of Luxemburger by opting to do so, provided that he or she has been habitually resident in the Grand Duchy during the year preceding the declaration of intent to exercise the option and has been habitually resident there for at least five consecutive years.

Section 2 of Bill no. 5620 on Luxembourg nationality, which is currently before Parliament, provides as follows:

> "A child under the age of 18 who has been the subject of simple adoption by a Luxemburger ... shall acquire Luxembourg nationality; ..."

62. The adopted child and his or her descendants have a duty to maintain the adoptive parent if he or she is in need, and the adoptive parent has a duty to maintain the adopted child and his or her descendants. If the adopted child dies without leaving descendants, his or her estate has an obligation to maintain an adoptive parent who is in need at the time of the adopted child's death (Article 362 of the Civil Code).

63. Unlike the position in the case of full adoption, there is no need to draw up a new document which does not state the adopted child's original filiation. The adopted child keeps his or her original birth certificate, but it –

and, where appropriate, his or her marriage certificate and the documents relating to the civil status of his or her legitimate descendants born before the adoption – will bear a note in the margin indicating the adoption.

c) Conflict of laws

64. Article 370 of the Luxembourg Civil Code provides the following:

> "Adoption is open to Luxemburgers and to foreigners.
>
> The conditions that must be satisfied in order to adopt are governed by the national law of the adoptive parent or parents.
>
> In the case of adoption by a married couple who are of different nationalities or are stateless persons, the applicable law is that of the place of joint habitual residence at the time of the application to adopt. The same law is applicable where one of the spouses is a stateless person.
>
> The conditions that must be satisfied in order to be adopted are governed by the national law of the adopted child, save where the adoption confers the nationality of the adoptive parent on the adopted child, in which case the conditions are governed by the national law of the adoptive parent.
>
> The effects of the adoption are governed by the national law of the adoptive parent or parents. Where the adoption is by a married couple who are of different nationalities or are stateless persons, or where one spouse is a stateless person, the applicable law is that of the place where both spouses were habitually resident at the time when the adoption took effect.
>
> In the event of conflict between the rules on competence laid down by the national law of the adoptive parent and that of the adopted child, the adoption is validly concluded according to the procedures prescribed by the law of the country in which the adoption took place and before the authorities competent under that law."

d) Case-law on the recognition of an adoption pronounced abroad

65. In a recent case a married couple had obtained from the Attorney General's Department a certificate attesting that they satisfied all the statutory conditions to undertake a full adoption in Peru. The husband died during the proceedings and the widow obtained from the Attorney General's representative a certificate of eligibility to adopt on her own behalf, so that the Peruvian authorities were inclined to entrust the child to her. The Luxembourg District Court declared the widow's application to adopt inadmissible, on the ground, *inter alia*, that the document attesting to her eligibility to adopt had not been drawn up by the competent authority of the receiving State. However, in a judgment of 28 June 2006, the First Division of the Court of Appeal, sitting as a civil court, decided as follows:

> "... the appellant produced the documents relating to the adoption pronounced in Peru ..., namely the adoption decision ... and also the certificate of conformity of the

adoption with the Hague Convention referred to in Article 23(1) of [the Hague Convention].

It follows from that certificate of conformity, issued on 15 February 2005, that the Peruvian authorities were mistaken as to the identity of the competent authority of the receiving State ..., which is the district court of the place of residence of the future parent(s) and not the Attorney General's representative attached to that court, ... as to the nature of the document issued on 4 January 2005 by the Attorney General's representative, which was to be understood as a certificate of eligibility to adopt ... and not as a document expressing the agreement of the central authority of the receiving State that the adoption procedure could continue ...

However, according to [the Hague Convention], the certificate referred to in Article 23 guarantees the international effectiveness of the adoption. It is the irrebuttable proof of the lawfulness of the adoption decision, recognition of which in the Contracting States can be refused only if the adoption is manifestly contrary to its policy in the light of the best interests of the child ... Contrary to the general rule, whereby foreign decisions relating to the status and capacity of persons, which are not required to be enforced, are subject to an *ex post facto* control ascertaining the competence of the foreign authority and the correctness of the procedure followed, and also the competence of the law applied to the merits in accordance with the rules on the conflict of laws of the receiving country and, last, public policy, the convention system of recognition by operation of law ascertains exclusively the conformity of the adoption with public policy within the meaning of the private international law of the receiving State ...

In order for an adoption to be manifestly contrary to public policy within the meaning of the private international law of the requested State, it must constitute a flagrant breach of the fundamental values and principles of that State. Furthermore, even if it is established, that breach should still be tempered by consideration of the best interests of the child. Recognition cannot be refused on the ground that the certificate drawn up by the authorities of the country of origin disregards a breach, even a very serious breach, of the provisions of the Convention. ...

The mistakes made by the Peruvian authorities as to the Luxembourg authorities .. and as to the scope of the certificate of eligibility to adopt issued ... by the Attorney General's representative constitute a serious breach of the provisions of the Convention, but have no bearing on the fundamental principles which govern adoption in Luxembourg law. The fact that the Peruvian decision has the effects of a Luxembourg full adoption, notably by severing the child's pre-existing filiation and by its irrevocable nature, is not prejudicial to Luxembourg's international public policy.

Under the terms of Article 370, paragraph 5, of the Civil Code, the effects of the adoption are governed by the national law of the adoptive parent or parents. Article 26 of the [Hague Convention] varies that provision by providing that the recognition of an adoption includes not only recognition of the filiation between the child and his or her adoptive parents and parental responsibility for the child, but also the termination of the pre-existing filiation between the child and his or her mother and father, if, as in the present case, the adoption has that effect in the State where it was made. That particular effect of adoption cannot be called into question in the requested State. In addition, Article 26(2) requires that any State in which a full adoption produces its effects is to confer on the child rights equivalent to those resulting from the provisions of its own law on full adoption, irrespective of the law applicable in that State to the

effects of the adoption ... That may have the effect of requiring the receiving State to recognise the termination of the ties between the child and his or her family of origin, even if such an effect would not be produced if the adoption had taken place in that State. The aim was to give the child the most favourable status ...

As it must be recognised by operation of law, the Peruvian adoption decision produces binding effects. ...”

3. Elements of comparative law

a) The capacity of unmarried persons to adopt under the laws of the member States

66. Among the forty-six member States of the Council of Europe, none prohibits adoption by unmarried persons outright.

67. Ireland and Italy accept adoption by unmarried persons in very exceptional circumstances. Iceland and Lithuania permit unmarried persons to adopt a child in “exceptional circumstances”.

68. A second group of countries permit adoption by unmarried persons, but only if certain conditions are met. Thus, in Armenia, only unmarried women may adopt; in Malta, an unmarried man cannot adopt a female child.

69. In a third group of countries, including Luxembourg, adoption by unmarried persons is permitted generally, but their capacity to adopt is limited to an adoption which does not entail the termination of the family ties with the family of origin. Thus, in Georgia, Lithuania and Russia, adoption by an unmarried person does not terminate the relationship with the original parent of the opposite sex to that of the adoptive parent.

70. In the other European countries there are no restrictions on adoption by unmarried persons.

b) The effects of recognition of an adoption judgment delivered abroad in the laws of the member States

71. The member States do not confer the same effects on an adoption judgment delivered abroad. While some States accept that the judgment delivered abroad produces the same effects in the internal legal order as it would produce in the State in which it was delivered, other States will authorise the parties to make application for the effects to be “adapted” to domestic law and, last, a third group of States will accept the production of effects only according to their own domestic law.

72. A panorama of comparative law makes it possible to group the member States in two distinct categories:

i. *States which would refuse even to recognise the foreign judgment in circumstances such as those of the present case*

73. First, in Ireland and Italy the refusal would be based on the prohibition of full adoption by single persons.

74. Second, in certain Nordic countries the refusal would be based on a prohibition on principle of adoption carried out according to the procedure followed in the present case by the first applicant. Where a Danish, Finnish, Icelandic or Swedish citizen wishes to adopt a child abroad, he or she must first seek authorisation from the national authorities of his or her own country before being able to contact the authorities of the State in which he or she wishes to adopt a child. Where that prior authorisation is lacking, the domestic laws of the Nordic countries uniformly provide that the judgment delivered abroad will not be recognised.

ii. *States which would agree to recognition of the foreign judgment in circumstances such as those of the present case*

75. In some States the foreign judgment would produce the effects determined by the domestic law of the State in which it was delivered (that is the case in Switzerland and Estonia).

76. Next, in other States, the effects of the foreign judgment could be adapted to national law (that is the case in the Netherlands).

77. Last, in the majority of States the foreign judgment would produce only the effects determined by the national laws of the countries in which it would be enforced. Thus, irrespective of the effects which a judgment may produce in the country in which it was delivered, in the domestic law of the member States it will produce only the effects authorised by national law. The national court will therefore have to adapt the foreign adoption to one of the modes of adoption recognised by domestic law. The foreign adoption will therefore produce the same effects as an adoption under domestic law. That is so, in particular, in Germany, Belgium, Bulgaria, Croatia, Spain, France, Malta, Portugal and Romania.

B. Elements relating to the proceedings before the Luxembourg courts

1. Guiding principles of the proceedings before the tribunals of fact

78. Among the guiding principles of the proceedings, Article 62 of the new Code of Civil Procedure, which entered into force on 16 September 1998, provides as follows:

> "The court may invite the parties to provide any legal explanations which it may deem necessary for the outcome of the case."

2. Direct applicability of the Convention in domestic law

79. The rights guaranteed by the Convention and the Protocols thereto may be invoked directly before the Luxembourg courts. Thus, the Court of Cassation has ruled as follows (Cass. 17.1.1985, no. 2/85):

"... the rules laid down in Articles 8 and 14 of the Convention, read together, not only create obligations on the part of the Contracting States but also produce direct effects in the internal legal order for individuals and confer on litigants individual rights which the national courts must safeguard."

THE LAW

I. THE ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

80. The applicants complained that they had not received a fair hearing, in so far as the national courts had failed to respond to their plea relating to Article 8 of the Convention. They relied in that regard on Article 6 of the Convention, which provides:

" In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by [a] tribunal ..."

A. The parties' arguments

1. The applicants

81. The applicants took issue with the courts for having attempted to ignore their argument based on Article 8 of the Convention by failing to respond to it.

82. They asserted that they had consistently claimed before the national courts that the fact that the enforcement of the Peruvian judgment had been made subject to the condition that the mother should marry constituted an interference with their private life which was incompatible with Article 8 § 2 of the Convention.

83. The applicants took the view that there was no rule in Luxembourg positive law that defined the criteria according to which a plea had to be submitted and maintained that if the tribunals of fact had considered that their plea was unclear they ought to have requested the applicants to provide further particulars, in accordance with Article 62 of the new Code of Civil Procedure.

84. Last, they submitted that for a century the Luxembourg case-law had accepted that international law resulting from a treaty which had been signed and ratified, such as the European Convention on Human Rights, took precedence over the rules of national law; yet in the present case the Court of Cassation had considered that the tribunals of fact were not

required to examine the compatibility of their ruling with Article 8 § 2 of the Convention. Thus, relying in particular on *Dulaurans v. France* (no. 34553/97, §§ 33 and 34, 21 March 2000), the applicants took issue with the tribunals of fact for having failed to examine their plea properly and with the Court of Cassation for having endorsed that ruling, employing reasoning containing a manifest contradiction.

85. The applicants concluded that the proceedings at issue did not satisfy the standards of quality required by Article 6 of the Convention.

2. The Government

86. The Government were of the view that the plea at issue which the applicants had submitted to the tribunals of fact was neither clear nor precise.

87. The Government further submitted that it was not the Court of Cassation's place to undertake an investigation in order to clarify that plea and thus to make up for the applicants' shortcomings.

88. Last, the Government observed that the applicants had relied in their submissions on arguments based on international public policy; in the Government's submission, from the time when the tribunals of fact had decided that Luxembourg law had not been observed by the Peruvian judge in the context of the Luxembourg rules on the conflict of laws, any arguments centred on international public policy became devoid of purpose. The Government reiterated that "while Article 6 § 1 obliges courts to give reasons for their decisions, that obligation cannot be understood as requiring a detailed answer to every argument" (*Fourchon v. France*, no. 60145/00, § 22, 28 June 2005), and submitted that in the present case it had been unnecessary to give specific reasons for the decision reached regarding that argument. In addition to that conclusion of pure logic, according to the Government, it was also the case that the Court was not required to adjudicate on errors of fact or of law made by the domestic courts.

B. The Court's assessment

89. The Court reiterates that the right to a fair trial as guaranteed by Article 6 § 1 of the Convention includes, in particular, the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33), this right can only be seen to be effective if the observations are actually "heard", that is duly considered by the trial court. In other words, the effect of Article 6 is, among others, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are

relevant (see *Perez v. France* [GC], no. 47287/99, § 80, ECHR 2004-I, and *Albina v. Romania*, no. 57808/00, § 30, 28 April 2005).

90. The Court reaffirms, moreover, that while Article 6 § 1 obliges the courts to give reasons for their judgments, it cannot be understood as requiring a detailed answer to every argument put forward by the parties. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (see *Ruiz Torija v. Spain*, judgment of 9 September 1994, Series A no. 303-A, § 29, and *Helle v. Finland*, judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII, § 55).

91. In the present case the applicants raised before the Court of Appeal, in a part entitled "Public policy implications", a ground of appeal challenging the compatibility of the judgment at first instance with Article 8 of the Convention. They took issue with the first-instance court for having given Luxembourg law precedence over the international conventions in refusing to order enforcement of the Peruvian adoption decision. In its judgment of 6 July 2000 the Court of Appeal failed to respond, even in substance, to that ground of appeal.

92. In so far as the Government explained that the applicants' argument lacked clarity and precision, the Court is compelled to note at the outset that the Court of Appeal failed to avail itself of the possibility – provided by Article 62 of the new Code of Civil Procedure – to invite the applicants to provide further particulars of their ground of appeal. Incidentally, the Court considers that that plea, set out in writing in the document initiating the appeal, was formulated in sufficiently clear and precise terms. The applicants, relying on Article 8 of the Convention, had stated that in their view the judgment at first instance penalised the minor child and that public policy specifically required that the Peruvian adoption decision be enforced. The applicants had also cited a previous decision which, admittedly in a different context, had held that an interference with the right for the father and mother to maintain a relationship with their children was not justified by one of the objectives set forth in Article 8 § 2 of the Convention.

93. In its judgment of 14 June 2001 the Court of Cassation upheld the solution reached by the tribunals of fact. It decided, first, that the Court of Appeal was no longer required to respond to the ground of appeal put forward by the applicants in the document initiating the appeal under the heading "Public policy implications", as that question had become devoid of purpose by the very effect of their decision not to apply the foreign law and,

second, that the argument relating to Article 8 of the Convention set out in the document initiating the appeal, "owing to its doubtful, vague and imprecise nature, did not constitute a ground of appeal requiring a response".

94. The Court must ascertain whether, in this case, the solution adopted by the national authorities could reasonably be justified in the light of Article 6 of the Convention.

95. The Court of Appeal had decided that the first-instance court had been correct to dismiss the application for enforcement of the foreign judgment which had pronounced a full adoption by an unmarried Luxembourg national, on the ground that the Peruvian decision was inconsistent with the Luxembourg law on the conflict of laws, which provides that the conditions for adoption are governed by the national law of the adoptive parent. The Court of Appeal had concluded that it was unnecessary to examine the other conditions of enforcement, including the conditions of conformity to international public policy.

96. The Court must bear in mind that, even though the courts cannot be required to state the reasons for rejecting each argument of a party (see *Ruiz Torija*, cited above, § 29), they are nonetheless not relieved of the obligation to undertake a proper examination of and respond to the main pleas put forward by that party (see, *mutatis mutandis, Donadze v. Georgia*, no. 74644/01, § 35, 7 March 2006). Where, in addition, those pleas deal with the "rights and freedoms" guaranteed by the Convention and the Protocols thereto, the national courts are required to examine them with particular rigour and care.

97. In the present case, the Court is of the opinion that the question of the incompatibility of the decision at first instance with Article 8 of the Convention – in particular from the aspect of its conformity to international public policy – was among the main pleas put forward by the applicants and thus required a specific and explicit response. The Court of Appeal failed to respond to the ground of appeal alleging that public policy specifically required, on the basis of Article 8 of the Convention, that the Peruvian adoption decision be enforced. The Court of Cassation, moreover, upheld that decision reached by the tribunals of fact, in spite of having previously held that the Convention had direct effects in the Luxembourg legal order (paragraph 79 above).

98. In the light of the foregoing considerations, the Court considers that the applicants were not given an effective hearing by the domestic courts, which failed to guarantee their right to a fair hearing, within the meaning of Article 6 § of the Convention. Accordingly, there has been a violation of that provision.

II. THE ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, TAKEN ON ITS OWN

99. The applicants alleged that the Luxembourg authorities' refusal to grant enforcement of the judgment of the Peruvian court pronouncing the full adoption of the child infringed their right to family life. They relied on Article 8 of the Convention, which provides as follows:

> "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 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. The parties' arguments

1. The applicants

100. The applicants took issue with the Luxembourg authorities for not recognising the family tie which they had validly created by the full adoption judgment pronounced in Peru.

101. They maintained, above all, that the following various elements must be observed.

102. Before the first applicant, a number of unmarried women had been able to adopt children in Peru without difficulty. During the 1970s and up to the early 1990s it had been possible to go to the registration officer with a translation of the Peruvian full adoption judgment and have the judgment entered in the register without applying for enforcement of it. The decisions which had concluded a full adoption in Peru were thus given recognition by operation of law by the Luxembourg registration officers. It was against that background that the first applicant, acting in good faith, had taken steps to adopt in Peru.

103. The second applicant, whose biological mother had died, had been placed in an orphanage because of the ill-treatment she had received in her family of origin.

104. The first applicant – with a certificate issued by the Luxembourg Attorney General's representative attesting to her eligibility to adopt – ensured that she had scrupulously carried out all the steps in the procedure provided for by the Peruvian legislation to adopt the child, then aged three. Thus, in particular, she had spent several weeks in the locality of the court competent to pronounce the adoption. The Peruvian court had pronounced full adoption, after establishing that all the legal conditions were satisfied.

105. It had not therefore been the first applicant's intention to fraudulently circumvent the provisions of the law or to launch a crusade in favour of adoption by unmarried persons.

106. In 1994 the practice of entering Peruvian full adoption judgments in the Luxembourg civil status registers had been abruptly abolished. The applicants, sadly, had no longer been able to take advantage of that practice; their case had been the first to be subject to review by the Luxembourg judicial authorities.

107. The applicants were at pains to point out that the Court of Appeal, in a differently composed division from that which had sat in their case, had recently taken a different approach with respect to the recognition of a full adoption pronounced abroad. In that other case, a married couple had obtained a certificate attesting that they satisfied all the statutory conditions to carry out a full adoption in Peru. The husband had died during the course of the proceedings and the Peruvian authorities had agreed to entrust the child to the wife alone. Although the Luxembourg District Court had declared the widow's application to adopt inadmissible, the Court of Appeal had decided that as the Peruvian adoption judgment had to be recognised by operation of law, it produced binding effects (paragraph 65 above).

108. As to the merits, the applicants maintained that the refusal to enforce the Peruvian judgment pronouncing full adoption constituted an "interference" with their right to respect for their family life. Although, on account of the full adoption validly effected in Peru, the ties between the child and her family of origin had been severed, with the consequence that she no longer had a biological family, the tie formed between the two applicants as a result of that foreign adoption was denied by the Luxembourg legal order. Failing enforcement of the Peruvian decision the child would continue, so far as the Luxembourg authorities were concerned, to bear her Peruvian name and was regarded, under the tax laws, as being the responsibility of the first applicant without being fully recognised as her daughter. A residence permit must therefore be applied for from the Ministry of Justice at regular intervals, and could one day be refused. While it was true that in the meantime a simple adoption judgment had been delivered in favour of the applicants, those problems had nonetheless not been resolved.

109. The applicants acknowledged that the interference could be considered to be "in accordance with the law" in view of the interpretation of the domestic law as presented by the national courts.

110. On the other hand, they disputed the "necessity" of the interference. Contrary to the Government's contention, the interference had not been necessary for the purpose of determining whether a full adoption, effected contrary to the Luxembourg law by an unmarried person, was prohibited; in the applicants' submission, the impugned interference with their family life consisted precisely in the denial of a family tie legitimately acquired abroad.

The refusal to recognise the full adoption made the child a victim, although the child could not be penalised for the acts carried out by her adoptive mother. By way of example, the applicants pointed out that the minor child must be issued with residence permits on a regular basis and could not be entered in her mother's passport. Furthermore, if, when she had reached the age of 16, the minor child should wish to pursue an occupational apprenticeship, she would not benefit from the Community preference and would thus not obtain a work permit unless it were proved that an equivalent candidate could not be found on the employment market in the European Union. The applicants concluded that the child was in a legal vacuum, since she no longer had any ties with her family of origin and the refusal to order enforcement of the full adoption prevented the creation of a substitute family tie with her adoptive mother. The applicants emphasised that this problem had not been resolved by the simple adoption recently granted: the sole purpose of simple adoption was to create a supplementary family tie which did not include the genuine, unrestricted integration of the adopted child into the adoptive family. While those consequences were not harmful for a child whose ties with the family of origin persisted, the effects were harmful in the present case, where the child had lost the tie with her family of origin but that tie could not be replaced by a new tie with her adoptive mother.

111. The applicants concluded that the fact that the Luxembourg authorities refused to recognise an adoption legitimately concluded in another State Party to an international convention without being able to invoke what were indeed the best interests of the child constituted an interference with their family life which was not justified on any of the grounds set forth in Article 8 § 2.

112. The applicants submitted that the Grand Duchy of Luxembourg had a "positive obligation" to recognise the existence of an adoptive family tie resulting from a court judgment which had become final and which had been delivered in a country that shared the system of values of the majority of member States of the Council of Europe, in normal and legitimate circumstances and in conformity with the law of that country. Thus, a civil-status situation created legitimately in another State should be recognised by operation of law. The applicants, finding support in that regard in the ruling of an administrative court of first instance (paragraph 38 above) and in that of a division of the Court of Appeal (paragraph 107 above), were of the opinion that Luxembourg's ratification of the Hague Convention had placed it under an obligation to recognise the adoption pronounced in Peru. The only permitted restriction of that positive obligation to recognise the obligation validly concluded abroad was that of the right of the child.

2. The Government

113. The Government did not dispute that family life was at issue in the present case, even though the family in question was a limited family, consisting of an unmarried mother and an adopted child. In so far as the question of the recognition of the Peruvian adoption by the Luxembourg courts had arisen when the applicants were already living together, the Government considered that the concept of "family" was established.

114. On the other hand, the Government denied that there had been any "interference" by the public authorities with the effective exercise of the applicants' right to a family life. The Luxembourg authorities had not in any way attempted to prevent or prohibit the applicants from living together. In that regard, the Government submitted that the applicants alleged not a direct interference with the actual exercise of their family life, but administrative obstacles affecting the child whose full adoption had not been recognised; the Government emphasised, moreover, that the bill on the reform of the law on nationality provided for absolute equality between children, whether adopted or not, with respect to access to nationality. In the Government's submission, the interference by the legislature consisted in the present case in the fact that it required that a foreign judgment effecting adoption be recognised according to the procedures of Luxembourg private international law. The fact of requiring enforcement of a judgment was recognised in all States as a clear and necessary prerogative, for the purpose of ascertaining that the judgment was compatible with the fundamental rules governing the organisation of society and of the State.

115. On the assumption that there had been an "interference", the Government maintained that the interference was "necessary" in order to protect Luxembourg international public policy, in that it made it possible to determine whether a rule of Luxembourg law – the rule prohibiting full adoption, contrary to Luxembourg law, abroad, by an unmarried person – had or had not been observed. In that regard, the Government emphasised the margin of appreciation left to States to define what type of family – single-parent family or two-parent family – afforded the greater protection to the child. Thus, in the present case, the interference was proportionate to the aim pursued, namely, the protection of the adopted child. The legislature had placed limits on full adoption so that such adoption, which entailed a definitive break with the adopted child's family of origin and the adopted child's full and entire entry into the new family, did not adversely affect the adopted child, or, moreover, any children of the adoptive family. The Government concluded that an interference, if it must be described as such, by the Luxembourg legislature with the applicants' family life was lawful in a democratic society in order to prevent an adoption effected in any circumstances whatsoever – and possibly in circumvention of Luxembourg law – from adversely affecting the child and the parent. In that regard, the Government emphasised that the very essence of a procedure for

recognition of a foreign adoption by the Luxembourg courts was to ascertain that the child's ties with his or her family of origin had been severed without the child sustaining irremediably harmful emotional or economic consequences.

116. As to whether or not the State bore a "positive obligation", the Government maintained that, in so far as no family life had pre-existed the application to adopt the child, which had been made in a manner contrary to Luxembourg public policy, the State was under no positive obligation to protect the creation of a family tie before that tie could even be recognised. In the Government's submission, Article 8 could not afford the possibility of circumventing the legislation of a country by imposing *de facto* the protection of family life before the State in question had been able to pronounce *de jure* on the recognition of a family tie in conformity with its national legislation. In their observations of 29 December 2004, the Government further explained that the question was whether effective "respect" for the applicants' family life obliged Luxembourg to enhance the status of the adoptive parent and the adopted child. Observing that the Court had consistently held that Article 8 implied the right of a parent to measures capable of reuniting him or her with his or her child, the Government asserted that in the present case no problem of reunification arose, since the emotional ties established by the fact that the applicants lived together had not been challenged. The Government added that the Luxembourg legislature could not be criticised for having made the adopted child's situation uncomfortable, as the procedure for recognition of a foreign judgment was intended to enable the State to ascertain that Luxembourg's public international policy was respected. The Government referred to the Court's case-law to the effect that the Convention did not guarantee a right to adopt as such and went on to list the positive obligations defined by the Court in *Marckx v. Belgium* (judgment of 13 June 1979, Series A no. 31), *Johnston and others v. Ireland* (judgment of 18 December 1986, Series A no. 112) and *Eriksson v. Sweden* (judgment of 22 June 1989, Series A no. 156). The Government submitted that it could not be inferred from that case-law that Luxembourg was under any obligation, in relation to adoption, to amend its legislation in order to allow recognition of a foreign judgment which had approved the full adoption of a child by an unmarried mother, when in Luxembourg simple adoption was the only form of adoption available to an unmarried person.

B. The Court's assessment

1. Applicability of Article 8 of the Convention

117. The Court reiterates that "[b]y guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family" (see *Marckx*,

cited above, § 31, and *Johnson v. the United Kingdom*, judgment of 24 October, *Reports* 1997-VII, § 62). In the present case, the applicant has acted as the minor child's mother in every respect since 1996, so that "family ties" exist "*de facto"* between them (see, *mutatis mutandis*, *X, Y and Z v. the United Kingdom*, judgment of 22 April 1997, *Reports* 1997-II, vol. 35, § 37). The Court further observes that the Government do not dispute that a family tie has been established between the two applicants. It follows that Article 8 is applicable.

2. Compliance with Article 8 of the Convention

118. 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 that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Pini and others v. Romania*, nos 78028/01 and 78030/01, § 149, ECHR 2004-V (extracts)).

119. According to the principles set out by the Court in its 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 establish legal safeguards 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).

120. The Court considers that the positive obligations that Article 8 lays on the Contracting States in this matter must be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989 (see, *mutatis mutandis*, *Maire v. Portugal*, no. 48206/99, § 72, ECHR 2003-VII).

121. The Court reiterates, moreover, that although "the right to adopt was not included as such among the rights guaranteed by the Convention" (see *Fretté v. France*, no. 36515/97, § 29, ECHR 2002-I), "the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention" (see *Pini and Others*, cited above, § 140, and *X. v. France*, no. 9993/82, Commission decision of 5 October 1982, Decisions and Reports (DR) 31, p.241).

122. The Court observes at the outset that the present case must be distinguished from the *Fretté* case. In this case the first applicant did not have an application for authorisation to adopt rejected but was refused enforcement of a Peruvian judgment which, following a rigorous procedure, had pronounced a full adoption and which, moreover, had been declared enforceable in Peru.

123. Whether the question is approached from the aspect of a positive obligation of the State – to adopt reasonable and adequate measures to

protect the rights of the individual under paragraph 1 of Article 8 – or from that of a negative obligation – an "interference by a public authority", which must be justified under paragraph 2 –, the principles to be applied are quite similar. Although the Luxembourg courts' refusal to grant enforcement of the Peruvian judgment is the result of the absence in the Luxembourg legislation of provisions allowing an unmarried person to obtain full adoption of a child, the Court considers that that refusal represented in this case an "interference" with the right to respect for the applicants' family life (see, *mutatis mutandis*, *Hussin v. Belgium*, no. 70807/01, 6 May 2004).

124. Such an interference constitutes a breach of Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims set forth in the second paragraph of that provision and is "necessary in a democratic society" in order to attain them. "Necessity" implies an interference that is based on a pressing social need and, in particular, is proportionate to the legitimate aim pursued.

125. In the present case, the Court finds that the interference was indisputably based on Articles 367 and 370 of the Luxembourg Civil Code and was therefore "in accordance with the law".

126. In the Court's eyes, there is no reason to doubt that the refusal to order enforcement of the Peruvian adoption judgment was meant to protect the "health and morals" and the "rights and freedoms" of the child. It does not seem unreasonable that the Luxembourg authorities should display prudence when they determine whether the adoption was made in accordance with the Luxembourg rules on the conflict of laws. On that point, the Court reiterates the terms of Recommendation 1443 (2000) of the Parliamentary Assembly of the Council of Europe, entitled "International adoption: respecting children's rights" (see paragraph 42 above).

127. In order to determine whether the impugned measures were "necessary in a democratic society", the Court must consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, among other authorities, *Kutzner v. Germany*, no. 46544/99, § 65, ECHR 2002-I).

128. The Court reiterates at the outset that in the area at issue the Contracting States enjoy a wide margin of appreciation (see, *mutatis mutandis*, *Stjerna v. Finland*, judgment of 25 November 1994, Series A no. 299-B, § 39). In addition, the Court's task is not to substitute itself for the competent Luxembourg authorities in determining the most appropriate policy for regulating the adoption of children, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see, among other authorities, *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, § 55, and *Stjerna*, cited above, § 39). The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and the context; in

this respect one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, *mutatis mutandis*, *Rasmussen v. Denmark*, judgment of 28 November 1984, Series A no. 87, § 40).

129. The Court observes that in the sphere in question the situation is at an advanced stage of harmonisation in Europe. An examination of the legislation of the member States shows that adoption by unmarried persons is permitted without restriction in most of the forty-six countries (see paragraph 70 above).

130. In this case, a practice existed before the facts in issue, whereby Peruvian judgments pronouncing full adoption were recognised by operation of law in Luxembourg. Thus – and the Government do not dispute this –, several unmarried women had been able to have such a judgment entered in the Luxembourg civil status registers without seeking enforcement of those judgments. The first applicant therefore took steps in good faith with a view to adopting in Peru. As the applicant had complied with all the rules laid down by the Peruvian procedure, the court pronounced the full adoption of the second applicant. Once in Luxembourg, the applicants could legitimately expect that the civil status registrar would enter the Peruvian judgment on the register. However, the practice of entering judgments had been suddenly abolished and their case was submitted for review by the Luxembourg judicial authorities.

131. Those authorities dismissed the application for enforcement submitted by the applicants, relying on the application of the Luxembourg rules on the conflict of laws, which provide that the conditions for adoption are governed by the national law of the adoptive parent, in this case Article 367 of the Civil Code, which provides that an application for full adoption can be made only by a married couple. The courts concluded that there was no need to examine the other conditions of enforcement, which included compliance with international public policy.

132. The Court considers that the decision refusing enforcement fails to take account of the social reality of the situation. Accordingly, since the Luxembourg courts did not formally acknowledge the legal existence of the family ties created by the Peruvian full adoption, those ties do not produce their effects in full in Luxembourg. The applicants encounter obstacles in their daily life and the child is not afforded legal protection making it possible for her to be fully integrated into the adoptive family.

133. Bearing in mind that the best interests of the child are paramount in such a case (see, *mutatis mutandis*, *Maire*, cited above, § 77), the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention. However, the national authorities refused to recognise that situation, making the Luxembourg conflict rules take precedence over the social reality and the situation of the

persons concerned in order to apply the limits which Luxembourg law places on full adoption.

134. The Government explain that the legislature set limits on full adoption so that such adoption – which entails a definitive break with the adopted child's family of origin and his or her full and entire entry into the new family – will not be harmful to the adopted child. In the circumstances of the present case, the Court does not find that argument convincing: as the second applicant had been declared abandoned and placed in an orphanage in Peru, it was precisely the interests of the child that stood against the refusal to recognise the Peruvian adoption judgment.

On that point, the Court notes, moreover, that a division of the Court of Appeal recently took the best interests of the child into consideration and decided, in a slightly different legal and factual context, that a Peruvian adoption judgment pronounced in favour of a Luxembourg woman should be recognised by operation of law. In the judgment in question, the Court of Appeal emphasised, *inter alia*, the need to give the child the most favourable status. The Court of Appeal further stated that the fact that the Peruvian decision produced the effects of a Luxembourg full adoption, in particular by severing the child's pre-existing legal parent-child relationship and by its irrevocable nature, was not prejudicial to Luxembourg's international public policy (see paragraph 65 above).

135. The Court concludes that in this case the Luxembourg courts could not reasonably refuse to recognise the family ties that pre-existed *de facto* between the applicants and thus dispense with an actual examination of the situation. Reiterating, moreover, that the Convention is "a living instrument and must be interpreted in the light of present-day conditions" (see, among other authorities, *Johnston and Others*, cited above, § 53), the Court considers that the reasons put forward by the national authorities – namely, the strict application, in accordance with the Luxembourg rules on the conflict of laws, of Article 367 of the Civil Code, which permits adoption only by married couples – are not "sufficient" for the purposes of paragraph 2 of Article 8.

136. In the light of the foregoing, the Court considers that there has been a violation of Article 8 of the Convention.

III. THE ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8

137. The applicants claimed that the refusal to enforce the Peruvian adoption judgment constituted a violation of Article 14 of the Convention in conjunction with Article 8, those Articles reading as follows:

Article 14

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

Article 8

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

A. The parties' arguments

1. The applicants

138. The applicants maintained in the first place that the child, who had not chosen her situation, had been the subject of unjustified discrimination. Although an adoptive mother had been designated for her in all conscience and according to a well-organised procedure by the authorities of her country of origin, the adoptive tie was denied by the Luxembourg courts. The minor child thus suffered discrimination by comparison with another Peruvian child who had been adopted by a Luxembourg married couple and whose family ties had been recognised in Luxembourg, even if the couple had subsequently separated or if one of the parents had subsequently died.

139. The refusal to order enforcement exposed the second applicant to obstacles on a daily basis. For example, as she did not have Luxembourg nationality, she was required to obtain a visa in order to visit Switzerland, whereas Community nationals had no need of such a visa. Nor had the day-to-day problems been resolved by the fact that in the meantime she had had the advantage of a simple adoption, since the resulting legal treatment continued to operate to her disadvantage.

140. As for the first applicant, she asserted that she indirectly suffered, on a daily basis, the obstacles suffered by her child. Thus, she was required to carry out all the administrative procedures resulting from the fact that the child did not have Luxembourg nationality.

141. Next, she submitted that, as an unmarried person, she suffered discrimination by comparison with a married person who sought to adopt. Owing to a simple question of civil status, an unmarried person with the same capacity to bring up children as a married person would have only restricted opportunities to adopt; yet the fact of being married did not afford better guarantees to the adopted child. Also, the first applicant contended that distinction based on a question of civil status was not based on a relevant criterion. In her submission, the only truly relevant criterion in

adoption matters should be that of the capacity of the adoptive parent to bring up children.

142. Last, the first applicant saw no justification for the prohibition on full adoption by unmarried persons, since a simple adoption was available to the same unmarried persons. She questioned why what the national authorities deemed to be the harmful consequences of full adoption by an unmarried person ceased to apply in the case of simple adoption.

2. The Government

143. The Government observed that Article 14 of the Convention had no independent existence and concluded that there had been no violation of that provision, since, in their view, there had been no violation of Article 8 of the Convention.

144. In the alternative, the Government maintained that the second applicant could not claim to have suffered discrimination, as her situation was the same as that of other Luxembourg and foreign children.

145. Nor, in the Government's submission, could the first applicant claim to be a victim of a violation of Article 14. There was indeed a difference in regime between simple adoption and full adoption, but that difference was not discriminatory because it was the consequence of the status of the parents – married or unmarried – in the eyes of the national legislation.

146. According to the Government, the refusal to recognise the foreign judgment pronouncing the full adoption of a child by an unmarried person pursued, by way of legitimate aim, that of protecting the child. The aim was to afford the child every opportunity to grow up in his or her new family in the presence of two parents capable of helping the child to realise his or her full potential.

147. The refusal was also proportionate to the aim pursued, since it did not constitute for the adoptive parent and the adopted child an obstacle to simple adoption. The justification for the difference between the two adoption regimes was objective and reasonable in that it was based on the idea that two parents were more capable of taking in a child – who was often foreign and had therefore been uprooted – who, by full adoption, had just become part of the new family. In that regard, the Government emphasised that "the State must see to it that the persons chosen to adopt are those who can offer the child the most suitable home in every respect" (*Fretté*, cited above, § 42) and that the Court's role was not to substitute itself for the competent domestic authorities in regulating the care of children and the rights of those children's parents, but rather to review under the Convention the decisions that those authorities had taken in the exercise of their power of appreciation (*Hokkanen*, cited above, § 55).

B. The Court's assessment

1. Applicability of Article 14 of the Convention

148. As the Court has consistently held, Article 1 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or other of the latter (see, among many other authorities, *Mizzi v. Malta*, no. 26111/02, § 126, ECHR 2006-... (extracts), and *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, § 33).

149. In the present case the Court has declared Article 8 of the Convention applicable (see paragraph 117 above) and has even concluded that there was a breach of that provision (see paragraph 136 above). The facts therefore fall within the ambit of Article 8 of the Convention and Article 14 of the Convention may apply in conjunction with Article 8 (see, *mutatis mutandis*, *Mizzi*, cited above, §§ 127 and 128).

2. Compliance with Article 14 of the Convention

150. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see *Mazurek v. France*, no. 34406/97, § 46, ECHR 2000-II).

151. In this case the second applicant is in a similar situation to that of any child who has been the subject in Peru of a full adoption judgment entailing the severance of the ties with his or her family of origin and whose adoptive parent has sought to have that judgment enforced under Luxembourg law. As for the first applicant, she is in a similar situation to that of any other person seeking recognition in Luxembourg of a full adoption judgment delivered in her favour in Peru.

152. For the purposes of Article 14 of the Convention, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, in particular, *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, § 24, and *Mazurek*, cited above, § 48).

153. The Court considers, for the reasons set out above (see paragraph 126 above), that it cannot be excluded that the aim invoked by the Government may be considered legitimate.

154. It remains to be ascertained whether, so far as the means employed are concerned, the introduction of a difference in treatment between children, according to whether or not the foreign full adoption judgment is recognised in Luxembourg, appears to be proportionate and appropriate to the aim pursued.

155. In spite of the fact that the applicant followed all the steps required by the Peruvian procedure in good faith and that, in addition, the social worker recommended the adoption in Luxembourg (see paragraph 14 above), the full adoption judgment delivered in Peru was not recognised by the Luxembourg authorities. The consequence of this refusal to order enforcement is that the second applicant suffers on a daily basis a difference in treatment by comparison with a child whose full adoption is recognised in Luxembourg. It is an inescapable finding in this case that the child's ties with her family of origin have been severed but that no full and entire substitute tie exists with her adoptive mother. The second applicant is therefore in a legal vacuum which has not been remedied by the fact that simple adoption has been granted in the meantime (see paragraph 40 above).

156. It follows in particular that, not having acquired Luxembourg nationality, the second applicant does not have the advantage of, for example, Community preference; if she wished to serve an occupational apprenticeship she would not obtain a work permit unless it were shown that an equivalent candidate could not be found on the European employment market. Next, and above all, for more than ten years the minor child has had to be regularly given leave to remain in Luxembourg and has had to obtain a visa in order to visit certain countries, in particular Switzerland. As for the first applicant, she indirectly suffers, on a daily basis, the obstacles experienced by her child, since she must, *inter alia*, carry out all the administrative procedures resulting from the fact that the former has not obtained Luxembourg nationality.

157. The Court does not find any ground in the present case to justify such discrimination. That conclusion is particularly valid in that, before the facts in issue, other Peruvian children adopted by unmarried mothers obtained a full adoption judgment by operation of law in Luxembourg. In addition, the Court must reiterate that a division of the Court of Appeal recently decided, in a slightly different legal and factual context, that a Peruvian adoption decision pronounced in favour of the Luxembourg woman in that case must be recognised by operation of law (see paragraph 65 above).

158. In any event, the Court considers that the second applicant cannot be blamed for circumstances for which she is not responsible (see, *mutatis mutandis*, *Mazurek*, cited above, § 54). It must be noted that, because of her status as a child adopted by a Luxembourg unmarried mother who has not obtained recognition in Luxembourg of the family ties created by the

foreign judgment, she is penalised in her daily existence (see paragraph 156 above).

159. The foregoing factors are sufficient for the Court to conclude that there was not a reasonable relationship of proportionality between the means employed and the aim pursued.

160. Accordingly, there has been a violation of Article 14 of the Convention in conjunction with Article 8.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 of the Convention;

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

3. *Holds* that there has been a violation of Article 14 of the Convention in conjunction with Article 8;

...

Done in French, and communicated in writing on 28 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President