Lords' decision in *O'Neill* v *Phillips*, per Lord Hoffmann),[52] but, more importantly, the decision resonates with an increasingly popular yet impoverished view of company law itself. It is submitted that by allowing the imagery of contract and moral significance of private bargaining within company law to go too far, the *Fulham* decision is illustrative of a development that is as potentially pernicious as it was predictable.

Adoption, Homosexuality and the European Convention on Human Rights: *Gas and Dubois* v *France*

Paul Johnson*

On 15 March 2012 the European Court of Human Rights (the Court) issued its first judgment addressing the differential treatment of same-sex and opposite-sex couples in respect of the adoption of a child.[1] The Court held that excluding same-sex couples in civil partnerships, who have no legal right to marry, from adoption provisions available to married opposite-sex couples does not violate rights guaranteed by the European Convention on Human Rights (the Convention). I argue that the Court's reasoning in *Gas and Dubois* v *France* is unpersuasive and unsustainable in light of its wider case law.

BACKGROUND AND FACTS

The two female applicants in *Gas and Dubois* v *France*, Valérie Gas and Nathalie Dubois, are French nationals who have cohabited since 1989. Dubois gave birth in France on 21 September 2000 to a daughter who had been conceived by insemination using an anonymous sperm donor. The child has lived all her life in the applicants' shared home, been co-parented by Gas and Dubois, and has no relationship with her biological father.

On 15 April 2002 the applicants entered into a *pacte civil de solidarité* (PACS) which is a civil partnership agreement, established in Article 515 of the French Civil Code, defined as 'a contract entered into by two individuals of full age, of opposite sex or of the same sex, for the purposes of organising their life together'.[2] Entering into a PACS entails a number of obligations including that the partners live together and lend each other material and other assistance. Those who have contracted a PACS are placed on an equal legal footing with married

52 [1999] 1 WLR 1092. Noted by R. Goddard, [1999] CLJ 487; and J. Payne and D. Prentice, (1999) 115 LQR 487.

*Anniversary Reader in Sociology, Department of Sociology, University of York.

1 *Gas and Dubois* v *France* (Application no 25951/07) 15 March 2012. The judgment was given by the Fifth Section of the Court and, because no request was made under Article 43 of the Convention for referral to the Grand Chamber, the judgment is final. The judgment of 15 March 2012 is currently published only in French and quotations from it in English are my own translation.

2 Loi n° 99-944 du 15 novembre 1999 relative au pacte civil de solidarité.

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couples in respect of certain rights, particularly in relation to health and maternity insurance, life assurance, employees' leave entitlement, and housing tenure. However, a PACS differs from a marriage in that it does not give rise to any kinship or inheritance ties between the partners and dissolving a partnership does not entail judicial divorce proceedings. Couples who have contracted a PACS have no right to jointly adopt a child under French law because full adoption (*adoption plénière*) is restricted to married couples.[3]

On 3 March 2006, Gas applied to the Nanterre Tribunal de Grande Instance for simple adoption (*adoption simple*) of the couple's co-parented child with the consent of Dubois. Simple adoption is defined in French law as a form of adoption that enables a legal parent-child relationship to be established with a person of any age in addition to the original biological parent-child relationship. Simple adoption, unlike full adoption, does not sever the legal relationship between a child and its biological parent. However, under Article 365 of the French Civil Code simple adoption results in the transfer of parental responsibility to the adoptive parent unless the adoptive parent is married to the child's mother or father:

> All rights pertaining to parental responsibility shall be vested in the adoptive parent alone, including the right to consent to the marriage of the adoptee, unless the adoptive parent is married to the adoptee's mother or father. In this case, the adoptive parent and his or her spouse shall have joint parental responsibility, but the spouse shall continue to exercise it alone unless the couple make a joint declaration before the senior registrar of the *tribunal de grande instance* to the effect that parental responsibility is to be exercised jointly.[4]

In light of Article 365 of the Civil Code the public prosecutor lodged an objection to Gas' simple adoption application and, although the Tribunal de Grande Instance observed that the statutory conditions for adoption were met and that it had been demonstrated that the applicants were actively and jointly involved in the child's upbringing, the application was rejected. The ground given for the rejection was that simple adoption would have legal implications 'running counter to the applicants' intentions and the child's interests'[5] because it would transfer parental responsibility to Gas and deprive Dubois of her own parental

3 Full adoption is a form of adoption that terminates the legal relationship between a child and its biological parents and transfers all authority and responsibility for the child to the new adoptive parents. Same-sex couples have no legal right to full adoption because, unable to contract marriage, they are excluded by Article 343 of the French Civil Code which states that full adoption 'may be applied for by a married couple who have not been judicially separated and have been married for more than two years or are both over twenty-eight years of age' (Modifié par Loi n°96-604 du 5 juillet 1996). Article 343-1 of the French Civil Code allows for single adults over the age of 28 to apply for full adoption (Modifié par Loi n°96-604 du 5 juillet 1996). The Court has held that excluding single applicants from applying for adoption under Article 343-1 on the grounds of sexual orientation is a violation of Article 14 taken in conjunction with Article 8 of the Convention (see: *EB* v *France* [GC] (Application no 43546/02) 22 January 2008).

4 Loi no. 2002-305 du 4 mars 2002 relative à l'autorité parentale.

5 *Gas and Dubois* v *France* (dec) (Application no 25951/07) 31 August 2010.

rights.[6] Gas lodged an appeal with the Versailles Court of Appeal in which she and Dubois reaffirmed that they wished to establish simple adoption in order to provide a stable legal framework for the child that reflected the reality of her domestic and parental situation. The applicants argued that the loss of parental responsibility by Dubois could be remedied by means of a complete or partial delegation of parental responsibility by Gas subsequent to simple adoption.[7] The Court of Appeal rejected the appeal on the grounds that the legal consequences of simple adoption would not be in the child's best interests because, under Article 365, the unmarried applicants would be unable to share legal parental responsibility.

THE COMPLAINT TO THE EUROPEAN COURT OF HUMAN RIGHTS

Gas and Dubois complained to the Court that the refusal of Gas request to adopt her partner's biological child violated their rights under Articles 8[8] and 14[9] of the

6 Because simple adoption deprives the biological parent of parental responsibility for a child unless the biological parent is married to the adopter, the Cour de cassation (Supreme Court) established in a similar facts case in 2007 that a same-sex partner of the biological parent of a child cannot be granted simple adoption under Article 365 of the French Civil Code regardless of whether or not the partners have contracted a PACS. The Cour de cassation stated that Article 365 does not constitute a form of discrimination between homosexual and heterosexual couples because it does not distinguish between couples on the grounds of gender or sexual orientation but makes a distinction between those who are married or unmarried. However, the Cour de cassation noted that 'marriage is not open to same-sex couples' and that 'On such issues affecting the status of persons and, more generally, the foundations of our society, it ultimately rests with the legislature to decide whether to amend the texts of our civil code' (1re Chambre civile, Cour de cassation, 20 février 2007, Bull. no 70 & 71).

7 Article 377 of the French Civil Code provides that a 'father and mother, together or separately, may, where the circumstances so require, apply to the judge to have the exercise of their parental responsibility delegated in whole or in part to a third person, a family member, a trusted relative, an approved childcare establishment or a departmental child welfare agency'. Article 377-1, which states that the delegation of parental responsibility may be 'complete or partial', enables biological parents to share parental responsibility with a third party delegate. The argument that the delegation of shared parental responsibility to the biological parent by the adopter following the establishment of simple adoption resolves the problem that simple adoption creates by depriving the biological parent of parental responsibility, has been rejected by the Cour de cassation in a similar facts case: 'the delegation or sharing of parental responsibility . . . as a means of restoring the biological mother's rights [is] contradictory in the context of [simple] adoption, the effect of which [is] to attribute sole parental responsibility to the adoptive parent' (Press release of the Cour de cassation in respect of 1re Chambre civile, Cour de cassation, 20 février 2007, Bull. no 70 & 71). See n 19 below for a discussion of parental delegation under French law.

8 Article 8(1) of the Convention provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. Article 8(2) states that 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

9 Article 14 of the Convention provides that 'The enjoyment of the rights and freedoms set forth in this 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'.

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Convention. They submitted that the reason given for the refusal of the simple adoption application definitively ruled out adoption by same-sex couples because, unlike opposite-sex couples, they cannot contract civil marriage under French law and take advantage of the provisions of Article 365 of the French Civil Code. The applicants therefore claimed that the refusal to grant Gas a simple adoption order interfered with their right to respect for their private and family life guaranteed by Article 8 of the Convention. They further alleged that, because this interference was created by differential treatment based on their sexual orientation, this constituted a form of discrimination contrary to Article 14 taken in conjunction with Article 8 of the Convention.

THE COURT'S ADMISSIBILITY DECISION

On 31 August 2010 the Court declared that the applicants' complaint was admissible.[10] The Court rejected the French Government's submission that the application was inadmissible because the Convention does not provide a right to adopt and the complaint therefore did not fall within the ambit of Article 8. Rather, the Court accepted the applicants' argument that their household, made up of themselves and the child, constituted a family within the meaning of Article 8 of the Convention and that, consequently, their allegation of discrimination on the grounds of sexual orientation fell within the ambit of both the private and family life limbs of Article 8. In support of this the Court invoked the well-established principle that 'sexual orientation falls within the personal sphere protected by Article 8 of the Convention'.[11] Furthermore, the Court stated that because the applicants had raised the child since she was born and were jointly and actively involved in her upbringing their relationship amounted to 'family life' within the meaning of Article 8 of the Convention. This was significant since it was the first time that the Court had recognised that relationships between same-sex partners and a child constituted a 'family' for the purposes of Article 8. It followed the Court's decision in *Schalk and Kopf* v *Austria*, on 24 June 2010, to recognise same-sex partners as a family under Article 8:

> The Court notes that . . . a rapid evolution of social attitudes towards same-sex couples has taken place in many member States . . . In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently the relationship of . . . a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would.[12]

Because of its interpretation of Article 8, the Court deemed the complaint admissible under Article 14. Although Article 14 of the Convention has no

10 *Gas and Dubois* v *France* (dec) n 5 above.
11 *ibid*.
12 *Schalk and Kopf* v *Austria* (Application no 30141/04) 24 June 2010 at [94].

independent existence and complements the other substantive provisions of the Convention – it is not a general anti-discrimination provision – it is applicable when the facts of a complaint fall within the ambit of one or more of the other articles of the Convention.[13] Finding *Gas and Dubois* v *France* admissible under Article 14 can be seen to reflect a growing acceptance by the Court of an approach to sexual orientation complaints argued for by Wintemute, whereby Article 14 is triggered because the grounds for differential treatment (sexual orientation) rather than the opportunity itself (adoption) are recognised to fall under Article 8.[14] At the time of the admissibility decision, some commentators advanced a sanguine interpretation of the Court's evolution of Article 8 and viewed it as a 'hidden but hopeful message' of the Court's intention to expand the rights of same-sex couples in the area of family life.[15]

MERITS AND JUDGMENT

In its review of Article 14 complaints, the Court employs a four-stage analysis to determine whether any difference in treatment complained of amounts to discrimination under the Convention. The first stage of review involves the Court examining whether the complaint falls within the ambit of one of the other substantive provisions of the Convention. Because in *Gas and Dubois* v *France* the Court had determined at the admissibility stage that the complaint did fall with the ambit of Article 8 it proceeded to the second stage of analysis that involved considering whether the alleged reason for the discrimination is one of the grounds listed in Article 14. Although the Convention does not list sexual orientation as a ground, the Court has consistently held that sexual orientation is a ground covered by Article 14 and this stage of analysis was, as is now common, perfunctory.[16] The Court's third stage of review concerns determining whether complainants are in a relatively similar or analogous situation to another class of persons who are being treated more favourably. There are some general problems with this stage of analysis in the Court's case law given that it is often missing from published judgments and, where it does appear, its application has often been inconsistent.[17] As I discuss below, the issue of analogous situation often proves particularly problematic in respect of complaints relating to sexual orientation discrimination. The fourth and final stage of the Court's review involves an analysis of whether a difference in treatment complained of has a reasonable and objective justification. A recent general formulation of the Court's approach at this stage in respect of sexual orientation was provided in *Kozak* v *Poland*:

13 *Smith and Grady* v *the United Kingdom* (Application nos 33985/96 and 33986/96) 27 September 1999, ECHR 1999-VI at [115]. See also: *A.D.T.* v *the United Kingdom* (Application no 35765/97) 31 July 2000, ECHR 2000-IX.

14 R. Wintemute,' "Within the Ambit": How Big is the "Gap" in Article 14 European Convention on Human Rights?' 2004 (4) *European Human Rights Law Review* 366, 371.

15 C. Baldwin, 'The European court's hidden but hopeful message on same-sex marriage' *The Guardian* 29 June 2010.

16 Sexual orientation was established as a ground for the purposes of Article 14 in *Sutherland* v *the United Kingdom* (Application no 25186/94) Commission report 1 July 1997 at [50–51].

17 P. Johnson, *Homosexuality and the European Court of Human Rights* (Abingdon: Routledge, 2012).

> it must be established that there is no objective and reasonable justification for the impugned distinction, which means that it does not pursue a 'legitimate aim' or that there is no 'reasonable proportionality between the means employed and the aim sought to be realised' . . . Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention.[18]

This fourth stage of analysis (the most fundamental stage of review) is significantly absent from the Court's published judgment in *Gas and Dubois* v *France*.

A key factor determining this absence in the Court's judgment was how it approached the question of analogous situation (the third stage of review). The parties had keenly disputed this issue. The Government stated that it could not be established that the applicants were in an analogous situation to opposite-sex couples and were treated differently from them on the grounds of their sexual orientation because opposite-sex couples in a PACS would have met with the same refusal of a simple adoption order as Gas. Thus, the fact that Article 365 of the Civil Code laid down a rule which applied only to married couples did not, the Government contended, amount to discrimination based on sexual orientation. The applicants argued that comparing the situation of same-sex and opposite-sex couples in PACS was inadequate since opposite-sex couples in a PACS could meet the requirements of Article 365 of the Civil Code by marrying. This was not possible for same-sex couples, they argued, because marriage between two women or two men is not currently possible in France. The applicants submitted that the existence of Article 365 meant that a child jointly parented by a same-sex couple could never be adopted by his or her *de facto* parent and this amounted to both direct discrimination against the parents and indirect discrimination against the child based on the parents' sexual orientation.

If the Court had accepted the applicants' claim that their family circumstances were analogous to those of heterosexual married couples in every way apart from the fact that, as same-sex partners, they were prevented from contracting civil marriage, then it would have been forced to examine whether the existence of Article 365 of the French Civil Code created differential treatment on the grounds of sexual orientation amounting to discrimination under the Convention. However, the Court rejected this argument. Rather, the Court accepted the Government's submission that the applicants were in a comparable situation with opposite-sex couples who were unmarried or who had contracted a PACS and, since one partner in such a heterosexual couple would be refused simple adoption because the partners were unmarried, the applicants could not claim that the ground for differential treatment was their sexual orientation. In this sense,

18 *Kozak* v *Poland* (Application no 13102/02) 2 March 2010 at [91–92].

because the Court used unmarried heterosexual couples as the comparator group, rather than married heterosexual couples, it would not recognise that sexual orientation was the key factor determining the differential treatment of the applicants.

Because of the Court's decision at the third stage of review (regarding analogous situation) it was able to avoid progressing to the fourth stage of review that would have involved an analysis of the proportionality of the impugned differential treatment. However, in its submission to the Court, the Government had acknowledged that if a difference in treatment was found to exist between the applicants and married couples this should not be regarded as discriminatory. The Government stated that marriage conferred a particular status on those who entered into it and the absence in domestic law of a right for the applicants to marry was based on legitimate reasons. Furthermore, the Government submitted that the refusal of Gas simple adoption application pursued a legitimate aim, namely the protection of the family based on the bonds of marriage. The refusal to grant the adoption order, the Government contended, was proportionate to the aim pursued since it did not prevent a biological parent from requesting a delegation of parental responsibility, in accordance with Article 377 of the French Civil Code, to an unmarried partner.[19] The applicants responded by stating that the interference with their family life was not proportionate to the aim pursued because, in preventing the establishment of a legal parent-child relationship, the law failed to protect the best interests of the child. They submitted that any parental delegation established under Article 377 of the French Civil Code would be temporary and not grant the full rights of adoption necessary to protect the best interests of the child.[20] Therefore, although the parties themselves disputed the proportionality of the differential treatment, the Court engaged in no review of this aspect of the complaint.

In *Gas and Dubois* v *France* the Court did not consider, therefore, whether there is an objective and reasonable justification for the distinction between

19 Since 2002, Article 377-1 of the French Civil Code has stated that 'a judgment of delegation may provide, for the needs of education of a child, that the father and mother, or one of them, shall share all or part of the exercise of parental authority with the third person delegatee'. This provision allows a biological parent to share parental responsibility with a delegate without being deprived of his or her legal status and authority as a parent. The Cour de cassation established in 2006 that same-sex couples who have contracted a PACS can utilise the provision on parental delegation under Article 377-1 'in the interests of the child'. However, since 2010 the Cour de cassation has effectively restricted parental delegation by requiring that applicants justify how such a measure is absolutely essential for improving the living conditions of children. On 8 July 2010 the Cour de cassation rejected an appeal against a judgment refusing parental delegation to two female partners who had contracted a PACS and each given birth to children that they co-parented. The Cour de cassation stated that although the appellants had 'proved that they had a stable life together since 1989 and that the children were well integrated into the couple and into the family of each of them and that they took care of their own child as the one of the other without making any difference between them' that they had failed to 'demonstrate how the utmost interests of the children would require that the exercise of parental authority should be shared between them and would allow the children to have better conditions of life or a better protection' (09-12.623, Arrêt du 8 juillet 2010, 1ère Civ, Cour de cassation).

20 Any parental delegation established under Article 377-1 of the French Civil Code is temporary since Article 377-2 states that 'In all cases, delegation may come to an end or be removed by a new judgment, where new circumstances are adduced'.

unmarried same-sex and married opposite-sex couples that is created by Article 365 of the French Civil Code. The Court did not examine whether such a distinction is necessary in a democratic society to meet the aim of protecting the existence of families based on marriage. Instead of engaging in such an analysis the Court simply reiterated its judgment in *Schalk and Kopf* v *Austria* that marriage confers special status on those who engage in it and that no right to same-sex marriage can be inferred from Article 14 taken in conjunction with Article 8 of the Convention.[21] Furthermore, the Court restated that contracting states have a margin of appreciation when determining whether to make arrangements for the registration of same-sex partnerships and to differentiate these partnerships from marriage. The emphasis given by the Court to its existing case law on same-sex marriage is curious since the issue of same-sex marriage was not directly relevant to the complaint and the applicants were not seeking access to marriage. This has been mistakenly read by opponents of same-sex marriage as a development of the Court's jurisprudence on marriage.[22]

CONCURRING AND DISSENTING OPINIONS OF THE SITTING JUDGES

Although six of the seven sitting judges voted that the applicants had not suffered a violation of their Convention rights, the concurring and dissenting opinions of four judges reveal that there was no uniformity in views on the substantive issues involved in the complaint.

In a concurring opinion, Judge Costa, joined by Judge Spielmann, stated that the question of whether the best interests of the child were served by Article 365 was unclear but that for the Court to rule on this matter would involve 'succumbing to the sin of the "fourth instance" ' and that he must 'flee' such 'temptation'.[23] Costa stated that it was not the role of the Court to censure the French legislator so radically but, rather, to recognise that contracting states are best placed to organise the institution of the family, relationships between adults and children, and marriage. Regardless of his own reservations, therefore, Costa emphasised the French state's margin of appreciation to legislate in the sphere of adoption law. By assuming this position Costa invites the criticism that the margin of appreciation doctrine is used 'as a substitute for coherent legal analysis of the issues at stake' by the Court.[24] This criticism is supported by the fact that Costa urged the French legislator not to accept the Court's judgment as 'satisfactory' but to review Article 365 in light of the issues raised by the complaint.

In his own concurring opinion, Judge Spielmann joined by Judge Berro-Lefèvre stated that he believed that, contrary to the position adopted by the

21 *Schalk and Kopf* v *Austria* n 12 above.

22 http://www.dailymail.co.uk/news/article-2117920/Gay-marriage-human-right-European-ruling-torpedoes-Coalition-stance.html?ito=feeds-newsxml (last visited 5 July 2012).

23 *Gas and Dubois* v *France* n 1 above, concurring opinion of Judge Costa joined by Judge Spielmann.

24 Lord Lester of Herne Hill, 'Universality versus Subsidiarity: A Reply' 1998 (1) *European Human Rights Law Review* 73, 75.

majority, the applicants were in an analogous position with married couples and were differentiated from them on the grounds of sexual orientation.[25] However, Spielmann and Berro-Lefèvre submitted that they had decided to concur with the majority for two reasons. First, they argued that although the child could not be legally adopted by Gas this 'does not prevent family life from proceeding normally' and that a delegation of parental authority to Gas was possible 'when circumstances require' and 'in the interests of the child' such as 'in case of serious illness or accident affecting the mother'.[26] The claim that family life can proceed 'normally' until a crisis necessitates a temporary change in legal parenting acknowledges (and tacitly supports) the fact that delegation of parental responsibility to a same-sex partner is highly restricted and will only be granted in exceptional cases.[27] The idea that such legal arrangements do not inhibit 'normal' family life is especially unconvincing in light of Spielmann and Berro-Lefèvre's acknowledgement that Article 365 of the French Civil Code is 'problematic' precisely because the 'legal status of the child remains full of uncertainty, which is certainly not in the interests of the child'.[28] The second reason given by Spielmann and Berro-Lefèvre for their judgment is the lack of consensus among contracting states on the issue of same-sex adoption. As I have argued elsewhere, the Court often relies upon consensus analysis as a justification for its failure to evolve homosexual rights under the Convention[29] and this invites the criticism that it 'leaves minorities vulnerable to majoritarian domination'.[30] In this case, Letsas' argument that 'judges who adjudicate on [Convention] rights have a duty to discover and give effect to the *morally best understandings of human rights*, irrespective of contracting states' current consensus'[31] is particularly pertinent given that Spielmann and Berro-Lefèvre acknowledged that the applicants were being treated differently because of their sexual orientation. Yet, instead of insisting that the majority engage in an analysis of the proportionality of the differential treatment Spielmann and Berro-Lefèvre, like Costa, urged the French Parliament to revisit the issue and adapt the text of Article 365 of the Civil Code in light of 'contemporary social realities'.[32]

Judge Villiger dissented from the majority opinion on the basis that it failed to address the best interests of the child.[33] Villiger criticised the judgment for focusing only on the rights of adults and for not considering 'whether the differential treatment at issue is justified from the standpoint of the interests of the

25 *Gas and Dubois* v *France* n 1 above, concurring opinion of Judge Spielmann joined by Judge Berro-Lefèvre.

26 *ibid*.

27 See n 19 above.

28 *Gas and Dubois v France* n 1 above, concurring opinion of Judge Spielmann joined by Judge Berro-Lefèvre.

29 Johnson, n 17 above.

30 L. Hodson, 'A marriage by any other name? Schalk and Kopf v Austria' 2011 (11) *Human Rights Law Review* 170, 177.

31 G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: OUP, 2007) XI.

32 *Gas and Dubois* v *France* n 1 above, concurring opinion of Judge Spielmann joined by Judge Berro-Lefèvre.

33 *ibid*, concurring opinion of Judge Villiger.

child'.[34] He stated that, because he was deeply convinced that shared parenting is in the interests of children, he could find no justification for depriving some children of the full legal protection of joint parenting on the basis of the parents' sexual orientation. Villiger was careful to state that 'I do not claim that the applicants should be allowed to marry' and that he was not 'commenting either on adoption issues'.[35] Rather, he stated 'I simply draw attention to discrimination that adversely affects the interests of the child'.[36] Villiger argued that because no sufficient justification had been offered for preventing simple adoption by same-sex parents under Article 365 this amounted to discrimination that violated the applicants' rights under Article 14 taken in conjunction with Article 8 of the Convention.

ANALYSIS OF THE JUDGMENT

The Court's judgment is problematic for a number of reasons.

First, the judgment demonstrates that although the Court established in *Kozak* v *Poland* that 'if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under [Article 14 of] the Convention'[37] it continues to grant contracting states a wide margin of appreciation to differentiate between individuals solely on the grounds of sexual orientation. The concurring opinion of Judges Spielmann and Berro-Lefèvre explicitly shows that even when sitting judges in the Court recognise that sexual orientation is the sole ground for a difference in treatment they are content to allow contracting states a margin of appreciation rather than to regard such differential treatment as discrimination contrary to the Convention.[38] This type of reasoning is present elsewhere in the Court's case law. For instance, in *Schalk and Kopf* v *Austria* the Court held that, although same-sex and different-sex couples are in an analogous situation in respect of their intimate relationships, the Austrian state had not exceeded its margin of appreciation in differentiating between people on the grounds of sexual orientation when excluding same-sex couples from civil marriage. The Court stated in *Schalk and Kopf* v *Austria* that 'the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background'.[39] Yet the Court's reliance on the margin of appreciation in *Gas and Dubois* v *France* is unsatisfactory because it is invoked as 'a conclusory label' in place of a considered analysis of the circumstances, subject matter and background of the case.[40] In this sense, the judgment fails to explain *why* a difference in treatment based solely on sexual orientation does not amount to discrimination under the Convention. The

34 *ibid*.
35 *ibid*.
36 *ibid*.
37 *Kozak* v *Poland* n 18 above at [91].
38 *Gas and Dubois* v *France* n 1 above, concurring opinion of Judge Spielmann joined by Judge Berro-Lefèvre.
39 *Schalk and Kopf* v *Austria* n 12 above at [98].
40 R. Singh, 'Is there a role for the "Margin of Appreciation" in national law after the Human Rights Act?' 1999 (2) *European Human Rights Law Review* 15, 20.

Court should have provided a reasoned explanation why the existence of Article 365 is necessary in a democratic society and why it is a proportionate response to the aim pursued by the French state, namely the protection of the family based on the bonds of marriage.

Second, and relatedly, the Court's significant emphasis on same-sex marriage in the judgment demonstrates again, as I have argued elsewhere,[41] that it consistently adopts a 'heteronormative' approach to marriage. A consequence of this is that the Court unquestioningly accepts that reserving the 'special status' of marriage for heterosexuals does not amount to discrimination under Article 14 of the Convention. This provides contracting states with an unlimited margin of appreciation to differentiate between opposite and same-sex couples in respect of a wide range of legal rights. In complaints such as *Gas and Dubois* v *France* the Court should engage in an analysis of the necessity of maintaining such differences in treatment in order to promote and protect marriage. The Court has a history of engaging in this type of critical review. In *Karner* v *Austria*, for instance, in which the Austrian Government sought to justify differential treatment based on sexual orientation to meet the legitimate aim of protecting 'the traditional family' the Court held that 'protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment' but that it 'is rather abstract and a broad variety of concrete measures may be used to implement it'.[42] The Court should have followed its own approach in *Karner* v *Austria* and addressed the proportionality of specific measures designed to protect marriage rather than grant contracting states carte blanche authority to exclude same-sex couples in loving, intimate, family relationships from the rights associated with this social institution.

Third, the Court should have engaged in critical scrutiny of the claims made by the state in respect of the best interests of children. The Court should have subjected the argument that the decision to refuse Gas' application for simple adoption was made in the best interests of the child to more stringent review. Such an approach was undertaken in *EB* v *France*,[43] in which the Court rejected the French Government's claim that refusing an application for authorisation to adopt a child by a single homosexual woman had been based solely on a consideration of the adopted child's best interests. Rather, the Court found that a concern with the applicant's homosexual sexual orientation had 'contaminated' the decision-making of the domestic authorities in respect of what was in the best interests of an adopted child. As I have argued elsewhere, *EB* v *France* demonstrates that the Court is willing to engage in a critical review of claims about the best interests of children that often seek to 'mask' heteronormativity and homophobia.[44] Although *Gas and Dubois* v *France* differs from *EB* v *France* – because it concerns the refusal of an application for simple adoption by an individual in a cohabiting relationship rather than by a single person – the

41 P. Johnson, 'Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority' 2011(20) *Social and Legal Studies* 349.

42 *Karner* v *Austria* (Application no 40016/98) 24 July 2003, ECHR 2003-IX.

43 *EB* v *France* [GC] n 3 above.

44 P. Johnson, 'Heteronormativity and the European Court of Human Rights' 2012 (23) *Law and Critique* 43.

dissenting opinion of Judge Villiger supports the view that the Court should have asked the fundamental question of whether depriving a child of a legal bond with a parent on the basis of the parents' sexual orientation is in its best interests.

Fourth, and most importantly, the Court's approach to the question of 'analogous situation' in this case will strike many people as perverse or obtuse. Refusing to compare same-sex couples in a PACS with married opposite-sex couples, when no right exists for same-sex couples to contract marriage, significantly restricts the potential for same-sex couples to advance complaints under Article 14 of the Convention. The Court's wider case law shows that its approach to analogous situation in sexual orientation complaints is problematic. In *Manenc* v *France*, for instance, the Court deemed inadmissible a complaint by a homosexual applicant who, although having contracted a PACS, was deprived of economic benefits afforded to married couples on the basis that he was not in an analogous situation to married persons.[45] *Manenc* v *France* begs the question of why the Court deemed *Gas and Dubois* v *France* admissible but then reached the same conclusion on the question of analogous situation. Yet both judgments show that same-sex couples face a serious problem when attempting to challenge discrimination under Article 14 because of the Court's reluctance to consider same-sex couples as analogous to opposite-sex couples who have contracted marriage. Some will argue that the Court's approach in these cases contradicts its judgment in *Burden* v *the United Kingdom* in which it clearly stated that same-sex couples that have contracted civil partnerships in the United Kingdom are in a similar situation to opposite-sex couples that are married:

> As with marriage, the Grand Chamber considers that the legal consequences of civil partnership . . . which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of co-habitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature . . . [T]here can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand.[46]

The explanation for the divergent approaches in *Burden* v *the United Kingdom* and *Gas and Dubois* v *France* is the difference between the domestic civil partnership legislation in the United Kingdom and France. The Court views the legal conditions of a United Kingdom civil partnership to be similar to a heterosexual marriage and, consequently, finds that the two groups are in an analogous situation. The Court's willingness to recognise same-sex couples and different-sex couples as comparable is dependent, therefore, upon the existence of domestic legislation that establishes their similarity. This is highly unsatisfactory since same-sex couples must wait for a contracting state to establish legal conditions of equality before they can complain to the Court about discriminatory treatment. Therefore, although in *PB and JS* v *Austria* the Court demonstrated that it will

45 *Manenc* v *France* (dec) (Application no 66686/09) 21 September 2010.
46 *Burden* v *the United Kingdom* [GC] (Application no 13378/05) 29 April 2008 at [65].

recognise differential treatment of unmarried homosexual couples and unmarried heterosexual couples as discriminatory under Article 14,[47] it continues to regard any discrimination on the grounds of sexual orientation in respect of rights associated with marriage as beyond the scope of the Convention.

CONCLUSION

In *Gas and Dubois* v *France* the Court missed the opportunity to directly address a simple question: should a contracting state be able to enact and maintain law in respect of adoption that sustains a difference in treatment between homosexual and heterosexual couples solely on the grounds of their sexual orientation? The Court avoided considering this question by focusing on the issue of analogous situation and, in doing so, failed to provide an analysis of the proportionality of legal arrangements that perpetuate such a difference in treatment. When the Court does this it invites the charge that it uses the question of analogous situation to evade scrutinising (and potentially challenging) the status quo of domestic law in contracting states. The concurring opinions of Judges Berro-Lefèvre, Costa and Spielmann support the charge of deliberate evasion in this case. The concurring opinions of these three judges demonstrate that the Court lacked the 'teeth' to confront one of its most powerful contracting states because, although they acknowledged that the majority judgment was unsatisfactory and urged the French legislator to review Article 365 of the French Civil Code, they would not vote in favour of the applicants. Yet it is not the function of the Court to find in favour of contracting states and then politely invite them to ponder at their leisure the legal arrangements that underpin discrimination. Rather, the role of the Court is to recognise breaches of fundamental human rights and mandate legal change to address them. The Convention is conceived as a 'living instrument' and the Court had the opportunity to interpret it 'in the light of present-day conditions'[48] which, as Berro-Lefèvre, Costa and Spielmann acknowledge, consist of familes comprised of same-sex partners and their children. If these three judges had joined Judge Villiger then a majority (by 4-3) would have found in favour of the applicants' complaint. Some will argue that Berro-Lefèvre, Costa and Spielmann showed appropriate judicial restraint at a time when the Court is under considerable criticism by the United Kingdom which, using its current presidency of the Council of Europe, has proposed amendments to the Convention that if adopted would effectively curtail its powers.[49] Others may argue that the Court exercised suitable caution during a time of French presidential election campaigning in which gay and lesbian rights received considerable attention from presidential candidates. In light of the pledge by Socialist Party candidate Francois

47 *P.B. and J.S.* v *Austria* (Application no 18984/02) 22 July 2010.

48 *Tyrer* v *the United Kingdom* (Application no 5856/72) 25 April 1978, Series A no.26 at [31].

49 In 'High Level Conference on the Future of the European Court of Human Rights: Draft Brighton Declaration' written on 23 February 2012, the United Kingdom government proposed reforms that would restrict individual applications to the Court and strengthen the margin of appreciation available to contracting states. See: http://www.guardian.co.uk/law/interactive/2012/feb/28/echr-reform-uk-draft (last visited 5 July 2012).

Hollande to legalise same-sex marriage and adoption if elected, the Court's judgment might generously be understood as the outcome of its optimism about imminent legislative change by the French state. Whilst these explanations may satisfy some, my opinion is that the judgment continues a long-term tendency in the Court to dismiss complaints from gay and lesbian applicants in respect of a wide range of social and civil rights.[50]

The Court has the opportunity to provide a more adequate consideration of the issues raised in *Gas and Dubois* v *France* in a similar facts case currently under review. In *X and Others* v *Austria*,[51] the applicants, two Austrian women in a homosexual relationship and the biological child of one of the women, complain about the existence of law (similar to French law) that prevents the adoption of a child by the same-sex partner of a biological parent.[52] The applicants complain under Article 14 taken in conjunction with Article 8 that they are being discriminated against on the basis of sexual orientation. They argue that there is no reasonable and objective justification for a law that allows the adoption of one partner's child by the other partner if the couple is heterosexual while prohibiting the adoption of one partner's child by the other partner if the couple is homosexual. The application in *X and Others* v *Austria* was lodged on 24 April 2007 and the First Section of the Court held a chamber hearing on 1 December 2011. On 15 June 2012 the First Section of the Court relinquished jurisdiction in favour of the Grand Chamber. With a Grand Chamber judgment now pending, it is to be hoped that the Court will directly address whether there is a reasonable proportionality between the means employed and the aim sought to be realised in respect of laws that differentiate on the grounds of sexual orientation in the sphere of adoption. It is also to be hoped that the Court will apply the principle established in *Kozak* v *Poland*[53] and hold that adoption law that maintains a difference in treatment based solely on sexual orientation is, regardless of the justifications offered, discrimination under the Convention.

50 Johnson, n 17 above.

51 *X and Others* v *Austria* (Application no 19010/07).

52 Article 182 § 2 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch) has been interpreted by the Supreme Court of Austria to exclude the adoption of a child by the same-sex partner of the child's biological parent because it would sever the legal relationship between the biological parent and the child. Article 182 § 2 does not have this effect in respect of heterosexual couples because it provides that 'If the child is adopted by just an adoptive father (an adoptive mother), the relationship shall cease only in respect of the biological father (the biological mother) and his (her) relatives'.

53 *Kozak* v *Poland* n 18 above at [92].