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

CASE OF ODIÈVRE v. FRANCE

(Application no. 42326/98)

JUDGMENT

STRASBOURG

13 February 2003

In the case of Odièvre v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mr I. CABRAL BARRETO,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Mr M. PELLONPÄÄ,
Mrs H.S. GREVE,
Mrs S. BOTOUCHAROVA,
Mr M. UGREKHELIDZE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 9 October 2002 and 15 January 2003,

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

PROCEDURE

1. The case originated in an application (no. 42326/98) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Ms Pascale Odièvre ("the applicant"), on 12 March 1998.

2. The applicant, who had been granted legal aid, was represented by Mr D. Mendelsohn, a member of the Paris Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged that the fact that her birth had been kept secret with the result that it was impossible for her to find out her origins amounted to a violation of her rights guaranteed by Article 8 of the Convention and discrimination contrary to Article 14.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 16 October 2001, after a hearing on admissibility and the merits (Rule 54 § 4), it was declared admissible by a Chamber of that Section, composed of the following judges: Mr L. Loucaides, President, Mr J.-P. Costa, Mr P. Kūris, Mrs F. Tulkens, Mr K. Jungwiert, Mrs H.S. Greve, Mr M. Ugrekhelidze, and also of Mrs S. Dollé, Section Registrar. On 24 June 2002 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to the relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicant and the Government each filed written observations on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 October 2002 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr F. ALABRUNE, Assistant Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,

Ms L. DELAYE, *magistrat* on secondment
to the Human Rights Division,
Legal Affairs Department, Ministry of Foreign Affairs,

Ms C. D'URSO, *magistrat*,
Department of European and International Affairs,
Head of the Institutional, Legal and Contentious
Issues Office,

Ms C. BRIAND, senior administrative attaché,
Social Action Department,
Ministry of Employment and Solidarity,

Ms M.-C. LE BOURSICOT, Secretary-General,
National Council for Access to Information
about Personal Origins *Counsel*;

(b) *for the applicant*

Mr D. MENDELSOHN, member of the Paris Bar, *Counsel*,

Ms O. ROY, Reader at the University of Paris X, *Adviser*.

The applicant was also present in Court.

The Court heard addresses by Mr Mendelsohn, Mr Alabrune and Ms Roy and their replies to the judges' questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a French national who lives in Paris.

10. She was born in the fourteenth administrative district of Paris on 23 March 1965. Her mother requested that the birth be kept secret and completed a form at the Health and Social Security Department abandoning her after signing the following letter:

> "I abandon my child Berthe Pascale. I certify that I have been informed that after one month the abandonment of my child will become irreversible and that the authorities reserve the right to have her adopted.
>
> I decline the assistance that has been offered to me.
>
> I request that this birth be kept secret.
>
> I certify that I have received the form setting out information on abandonment.
>
> Paris, 24.5.[deleted] Berthe"

11. The applicant was placed with the Child Welfare Service at the Health and Social Services Department (*Direction de l'action sanitaire et sociale* – "the DASS") and registered on 1 July 1965 under no. 280326 as being in the care of the *département* of Seine. Subsequently, a full adoption order was made on 10 January 1969 in favour of Mr and Mrs Odièvre, under whose name she is now known. The operative provisions of the Paris *tribunal de grande instance*'s judgment ordering her adoption read as follows:

> "... The operative provisions of the judgment to be delivered shall be entered in the prescribed manner and time ... in the register of births, deaths and marriages held at the town hall of the fourteenth administrative district of Paris;
>
> This entry shall serve as the child's birth certificate;
>
> The original birth certificate and the birth certificate drawn up pursuant to Article 58 shall at the public prosecutor's behest be endorsed with the word 'adoption' and shall be deemed to be null and void."

12. In December 1990 the applicant consulted her file as a person formerly in the care of the Children's Welfare Service of the *département* of

Seine and managed to obtain non-identifying information about her natural family:

> "Record of information on a child admitted to the Saint-Vincent-de-Paul Hospital and Nursing Home provided by: CONFIDENTIAL
>
> *Date of admission* [date deleted]
>
> *Detailed explanation of the reasons for the child's admission (if the child has been or may be abandoned, provide full information on such matters as the mother's, and if possible the father's, physical appearance, mental outlook, health, social background and occupation in order to enable the authorities to find the best possible placement)*
>
> Abandonment: The parents have been cohabiting for seven years. Two children have been born of their relationship: an elder child, who is 21 months old, and Pascale, whom the mother has today abandoned and placed in our care. The couple have been put up by a woman for two years, but she now faces eviction. The father is a Spanish national and works as a painter and decorator. His monthly wage is approximately 1,200 [French] francs. He is married and has a legitimate daughter, who is being brought up by her mother. According to Pascale's mother, her partner refuses to have anything to do with Pascale and says that he cannot take on this new burden. She (Ms Berthe) appears to have no will of her own and is content to go along with her partner's wishes. She has not visited her daughter at the clinic, saying that she does not wish to become attached. She did not see her daughter until today and greeted their separation with total indifference. Ms Berthe does not work and looks after her son and her landlady's child.
>
> A request has been made for the birth to remain secret.
>
> *Description of the mother*: 1.63 m tall, slim, regular features, clear-skinned, heavily made-up brown eyes, long, thick brown hair, in good health, ambivalent attitude, very limited intellect.
>
> *Description of the father*: average height, blond hair, brown eyes, in good health, sober.
>
> Pascale was born 1 3/4 months premature and weighed 1,770 grams. She now weighs 3,100 grams. Her stay in the incubator room at ... was trouble-free. She has now reached term and presents no neurological or organic anomalies. Information noted on the medical certificate supplied to the nursery department.
>
> 25 May ... Birth certificate requested
>
> 14 June ... Certificate appended
>
> 18 June ... Proposal for category A registration."

13. On 27 January 1998 the applicant applied to the Paris *tribunal de grande instance* for an order for the "release of information about her birth and permission to obtain copies of any documents, birth, death and marriage certificates, civil-status documents and full copies of long-form birth certificates". She explained to the court that she had learned that her natural

parents had had a son in 1963 and two other sons after 1965, that the DASS had refused to give her information concerning the civil status of her siblings on the ground that disclosure would be a breach of confidence, and that, now that she knew of her siblings' existence, she was entitled to seek an order for the release of information about her own birth.

14. On 2 February 1998 the court registrar returned the case file to the applicant's lawyer with the following letter of explanation:

> "Following examination of your file by Mrs B., Vice-President of the First Division, it appears that the applicant should consider applying to the administrative court to obtain, if possible, an order requiring the authorities to disclose the information, although such an order would in any event contravene the law of 8 January 1993."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. A brief historical background to the system of anonymous births in France and its evolution

15. The *mater semper certa est* rule has not found acceptance in French law. There is an ancient tradition in France that enables newborn babies to be abandoned in accordance with a set procedure. The practice can be traced back to the time of Saint Vincent de Paul, who introduced the use of the *tour*, a sort of revolving crib housed in the wall a charitable institution. The mother would place the child in the crib and ring a bell. On that signal someone on the other side of the wall would cause the *tour* to pivot and collect the infant. The aim of Saint Vincent de Paul in setting up the Foundlings Home (*Œuvre des Enfants trouvés*) in 1638 was to prevent infanticide, abortion and babies being exposed.

The Revolution introduced a reform making medical care available to expectant mothers who wished to abandon their children anonymously. In 1793 the Convention passed the following provision:

> "The Nation shall bear all the costs of the mother's labour and provide for all her needs during her stay, which will continue until she has fully recovered from her confinement. All information about her shall be treated in the strictest confidence."

The system of abandonment in the *tour* was abolished by a law of 27 June 1904 which introduced the "open office" (*bureau ouvert*) system (the office was open day and night so that the mother could leave her child there secretly, without disclosing her identity; at the same time she could be given information about the consequences of abandoning the child and offered assistance). The tradition of assisting anonymous births led the Vichy government to adopt the Legislative Decree of 2 September 1941 on the protection of births. The legislative decree allowed the mother to give birth anonymously and to receive free medical care during the month

preceding and the month following the birth in any public hospital able to provide her with the care her condition required. That provision was repealed and subsequently reintroduced by decrees of 29 November 1953 and 7 January 1959, before being amended in 1986 and becoming first Article 47 of the Family and Welfare Code and then the current Article L. 222-6 of the Social Action and Families Code:

> "The costs of accommodation and confinement of women who, on being admitted to a public institution or approved private institution, request that their identity remain secret shall be borne by the Child Welfare Service in the *département* in which the institution's head office is located.
>
> At their request or with their agreement the women referred to in the first sub-paragraph shall receive psychological support and practical advice from the Child Welfare Service.
>
> The first sub-paragraph shall apply without any means of identification being required or inquiry conducted.
>
> If the name of the child's father or mother has been recorded in a birth certificate issued within the period prescribed by Articles 55 et seq. of the Civil Code, there shall be no legal entitlement to have the costs of accommodation and confinement paid for by the Service."

The system of anonymous births was embodied in Law no. 93-22 of 8 January 1993 "amending the Civil Code as regards civil status, the family and the rights of the child and instituting the office of family judge", which introduced new provisions concerning the secret abandonment of children. For the first time, choosing to give birth in secret had an effect on the determination of filiation, as Articles 341 and 341-1 of the Civil Code created an estoppel defence to proceedings to establish maternity: there was no mother in the legal sense of the word:

> "An action to establish maternity may be brought subject to the application of Article 341-1. The child bringing the action shall be required to prove that he or she is the child to whom the alleged mother gave birth. The case may be proved only by strong presumptions or circumstantial evidence.
>
> On giving birth, the mother may request that her admission to hospital and identity shall remain secret."

In addition to Article L. 222-6 of the Social Action and Families Code setting out the procedure for anonymous and secret births – which are generally known as "births by an unidentified person" (*accouchement sous X*) and are related for filiation purposes to the aforementioned Articles 341 and 341-1 of the Civil Code – information about a child's origins may also be confidential under another provision. Provided the child is less than a year old, its parents may entrust it to the Child Welfare Service and request that their identity be kept secret (former Article 62-4 of the Family and Welfare Code, which later became Article L. 224-5 (4) of the Social Action

and Families Code). The filiation stated in the civil-status documents is annulled and a fictitious birth certificate, known as a provisional civil-status certificate, issued in lieu.

16. Since the adoption of the law of 1993, several official reports have suggested that a reform of the system of anonymous births would be desirable.

As far back as 1990 a report by the *Conseil d'Etat*, entitled "Status and protection of the child", proposed the setting up of a mediatory body, "the Council for Tracing Family Origins", to allow information to be communicated and contact to be established between the persons concerned, provided the interested parties consented. The *Conseil d'Etat* thus emphasised the need for a prior consensual basis before secret information about a child's origins could be disclosed. In that connection, it noted the difficulties inherent in searching for a parent ("this task is rendered all the more difficult by the fact that the administrative authorities currently follow a wide variety of practices with regard to the secrecy of origins. No method for tracing relatives can be established in these conditions. Nonetheless, one consistently finds in practice that a certain amount of information is collected and preserved and, in theory, it could be used. However, it will only become usable if a uniform, clear and simple procedure for collecting and preserving the confidential information relied on is established beforehand"); it also observed that professional secrecy obligations constituted a serious impediment to tracing. For that reason it proposed a compromise that would enable professionals to disregard their confidentiality obligations if they considered it appropriate for the purposes of enabling family origins to be established. In short, the *Conseil d'Etat* proposed that children should be given a limited right of access to information regarding the identity of their progenitors through the intermediary of a specially created structure that would be responsible for ascertaining the wishes of the parents and facilitating a psychological *rapprochement* of the parties.

In 1995 a report by Mr Mattéi entitled "Children from here, children from elsewhere – Adoption without borders" proposed preserving the system of secret births, but suggested that it might be possible for non-identifying information to be gathered.

The report of the parliamentary inquiry committee presided over by Laurent Fabius entitled "Rights of the child, uncharted territory", which was made public on 12 May 1998, proposed reforming the system of anonymous births in these terms:

> "It is possible to envisage information on the child's biological filiation being kept with a public institution. Confidential information could be disclosed during the child's minority on a joint application by the mother and child. The right to make such an application could be made subject to conditions concerning the child's capacity or as to minimum age. The right would only be exercisable by the child in person, not its legal representative. Once the child has reached the age of 18, the information would

automatically cease to be confidential at the child's request, subject to the mother being informed. In any event, disclosure of the confidential information would be incapable of having any effect on the parental ties the child already enjoyed. ...

A system of this type could initially be established for cases of anonymous births and secret abandonment and subsequently extended, once the legislature considered it appropriate, to births following medically assisted procreation."

A report by Irène Théry entitled "Couples, filiation and parenthood today – The challenges posed to the law by changes in family and private life", which was submitted to the Minister of Justice and the Minister for Employment and Solidarity on 14 May 1998, made the following proposal:

"In view of the extremely serious consequences of anonymous births, which deprive the child of both its paternal and maternal filiation, we propose repealing Article 341-1 of the Civil Code. Putting the child up for adoption voluntarily and responsibly appears to be a more balanced and less painful course for the child."

A report by Professor Françoise Dekeuwer-Défossez entitled "Modernising family law: proposals for a law adapted to the realities and aspirations of our times", which was submitted to the Minister of Justice on 14 September 1999, provides a résumé of the lively debate on the legitimacy of secrecy. It proposes retaining the system of anonymous births, repealing Article 62-4 of the Family and Welfare Code and encouraging a reversible implementation of a right for mothers to give birth "discreetly" by, for instance, the creation of a body or the appointment of referents who would be responsible for keeping confidential the mother's identity if she has so requested and would also act as mediators.

B. Law no. 2002-93 of 22 January 2002 on "access by adopted persons and people in State care to information about their origins"

17. This statute is the final stage in the process of reform described above. It does not call into question the right to give birth anonymously but allows arrangements to be made for disclosure of identity subject to the mother's and the child's express consent being obtained. It does, however, abolish the parents' right to request confidentiality under Article L. 224-5 of the Social Action and Families Code. The main provisions of the statute provide as follows:

Section 1

"A Chapter VII worded as follows shall be added to Part IV of Book I of the Social Action and Families Code:

'...

National Council for Access to Information about Personal Origins

Article L. 147-1 – A National Council, established under the auspices of the Minister for Social Affairs, shall be responsible for facilitating, in liaison with the *départements* and overseas authorities, access to information about personal origins in accordance with the conditions set out in this chapter.

It shall inform the *départements*, the overseas authorities and approved adoption agencies about the procedure for the collection, communication and preservation of the information referred to in Article L. 147-5, and about the arrangements for attending to and assisting persons who wish to trace their origins, the natural parents and adoptive families concerned by their search, and about arrangements for attending to and assisting women who wish to benefit from the provisions of Article L. 222-6. ...

It shall be composed of a judicial member of the national legal service, a member of the administrative courts, representatives of the ministers concerned, a representative of the authorities from the *départements*, three representatives of women's rights associations, a representative of adoptive families associations, a representative of associations of children in State care, a representative of associations that campaign for the right to know one's origins, and two public figures who are particularly qualified to hold office as a member of the Council as a result of their professional experience and skills obtained in the medical, paramedical or welfare spheres.

Article L. 147-2 – The National Council for Access to Information about Personal Origins shall receive:

(1) Requests for information about the child's origins from:

– the child itself if the child has attained its majority;

– the child's legal representatives or, with their agreement, the child itself, if the child is a minor;

– the child's guardian if the child has attained its majority but has a guardian;

– the child's direct adult descendants if the child is deceased;

(2) Declarations by the natural mother authorising disclosure of her identity, or, as the case may be, by the natural father authorising disclosure of his identity;

(3) Declarations of identity by their ascendants, descendants and siblings;

(4) Requests by the natural father or natural mother to be informed whether the child has sought to trace them.

Article L. 147-3 – Requests for access to information about one's origins shall be made in writing to the National Council for Access to Information about Personal Origins or the president of the council for the *département*; such requests may be withdrawn at any time in like manner.

A natural father or natural mother who makes an express declaration that he or she waives confidentiality and an ascendant, descendant or sibling of the natural

father or natural mother who declares his or her identity shall be informed that the declaration will not be communicated to the person concerned unless that person makes a request for access to information about his or her origins.

Article L. 147-4 – The Council shall communicate to the president of the council for the *département* copies of all requests and declarations received pursuant to Article L. 147-2.

Article L. 147-5 – In order to be able to deal with requests made to it, the Council shall collect copies of evidence relating to the identity of:

(1) The woman who has requested that her identity and the fact of her admission to a health institution to give birth remain secret and, if applicable, the person named by her at that time as the father of the child;

(2) Any person or persons who have requested that their identity remain secret when their child was taken into State care or was put up for adoption with an approved adoption agency;

(3) The parents of any child whose name was not disclosed to the registrar of births, deaths and marriages when the birth certificate was issued.

Health institutions, the *département* services and approved adoption agencies shall furnish the National Council on request with copies of evidence relating to the identity of the persons referred to in the preceding sub-paragraphs and any information that does not breach confidence regarding such identity concerning the natural mother's or natural father's health, the child's origins and the reasons for which and circumstances in which the child was placed with the Child Welfare Service or an approved adoption agency.

In order to be able to process requests made to it, the Council shall also collect from the Central Adoption Authority, the International Adoption Mission or approved adoption agencies any information which they are able to obtain from the authorities of the child's country of origin in addition to the information initially received.

Article L. 147-6 – After ensuring that the request remains valid, the Council shall communicate to the persons referred to in Article L. 147-2 (1) the natural mother's identity:

– if it already has in its possession an express declaration waiving confidentiality in respect of the mother's identity;

– if the mother's wishes have been verified and she has not expressly stated that she wishes to keep her identity secret;

– if one of its members or a person appointed by it has been able to obtain the mother's express consent without interfering with her private life;

– if the mother has died, provided that she has not expressed a contrary intent following a request for access to information about the child's origins. In such cases,

one of the members of the Council or a person appointed by it shall advise the mother's family and offer it assistance.

If the natural mother has expressly consented to disclosure of her identity or has died without refusing to allow her identity to be disclosed after her death, the Council shall disclose to the child who has made a request for access to information about its personal origins the identity of the persons referred to in Article L. 147-2 (3).

... [a like provision follows with respect to the natural father]

The Council shall furnish the persons referred to in Article L. 147-2 (1) with any information, other than information revealing the identity of the natural father or natural mother, it shall have received from the health institution, the *département* services and the bodies referred to in the fifth sub-paragraph of Article L. 147-5 or obtained from the natural father or natural mother, without interfering with their private lives, by a member of the Council or a person appointed by it.

Article L. 147-7 – Access by a person to information about his or her origins shall have no effect on that person's civil status and filiation. It shall not create any right in favour of or impose any obligation on anyone whomsoever.

Article L. 147-8 – The public prosecutor shall furnish the National Council on request with the information contained in the original birth certificates when such certificates are deemed to be null and void pursuant to Article 354 of the Civil Code.

...' ”

Section 2

“I. The following sub-paragraph shall be inserted at the beginning of Article L. 222-6 of the Social Action and Families Code:

'Any woman who, when giving birth, asks a health institution to keep the fact of her admission and her identity secret shall be informed of the legal consequences of her request and of the importance of knowing one's origins and history. She shall therefore be invited to leave, if she so agrees, information about her and the father's health, the child's origins and circumstances of the birth, and, in a sealed envelope, her identity. She shall be informed that she may at any time waive confidentiality regarding her identity and that otherwise her identity may only be disclosed in the circumstances set out in Article L. 147-6. She shall also be informed that she may at any time state her identity in a sealed envelope or add to the information given at the birth. The child's first names and, if applicable, a note that they were given by the mother, and the child's sex as also the date, place and time of birth shall be noted on the outside of the envelope. These formalities shall be attended to by the persons referred to in Article L. 223-7, whose names shall be furnished by the director of the health institution. In default, the director shall be responsible for attending to the formalities.' ”

Section 3

"...

II. Article L. 223-7 of that Code shall be reintroduced as follows:

'Article L. 223-7 – For the purposes of the application of Article L. 222-6, in each *département*, the president of the council of the *département* shall appoint at least two members from his or her staff with responsibility for liaising with the National Council for Access to Information about Personal Origins, making arrangements without delay for the provision of the psychological counselling and practical advice to which women are entitled, receiving at the birth the sealed envelope referred to in the first sub-paragraph of Article L. 222-6, providing the mother with the information prescribed in Article L. 224-5 and collecting the information on the health of the natural father and natural mother, the origins of the child and the reasons for which and circumstances in which the child was placed with the Child Welfare Service or an approved adoption agency. They shall also ensure that arrangements are made for psychological counselling to be provided to the child.

These members of staff shall attend an initial training programme and refresher courses to enable them to perform their duties. The training shall be organised by the National Council for Access to Information about Personal Origins which, in accordance with arrangements to be set out by decree, will provide them with regular back up.' "

C. Other relevant provisions

18. Civil Code

Article 354

"Within fifteen days of the date on which it becomes final, the full adoption order shall, at the request of the public prosecutor, be entered in the register of births, deaths and marriages held in the locality where the adopted child was born.

The entry shall state the date, time and place of birth, the child's sex and first names as set out in the adoption order, and the first names, surnames, date and place of birth, occupation and home address of the person or persons adopting the child. The entry shall contain no details of the child's real filiation.

The entry shall take the place of the adopted child's birth certificate.

The original birth certificate and, where applicable, the birth certificate delivered pursuant to Article 58 shall, at the behest of the public prosecutor, be endorsed with the word 'adoption' and deemed to be null and void."

Article 356

"Adoption shall confer on the child a filiation that shall replace its original filiation, since the adopted child ceases to be a member of its blood family ..."

D. Comparative law

19. It is relatively rare for mothers to be entitled to give birth anonymously under European domestic legislation, as Italy and Luxembourg stand alone in not imposing a statutory obligation on the natural parents to register a newborn child or to state their identity when registering it. Conversely, many countries make it obligatory to provide the names, not only of the mother, to whom the child is automatically linked, but also of the father. The countries concerned are Norway, the Netherlands, Belgium, Germany and Spain (where section 47 of the Law on civil status, which allowed mothers to have the words "mother unknown" entered in the register of births, deaths and marriages, was held to be unconstitutional in a decision of the Supreme Court in 1999), Denmark, the United Kingdom, Portugal, Slovenia and Switzerland.

The current trend in certain countries is towards the acceptance, if not of a right to give birth anonymously, then at least of a right to give birth "discreetly". An example of this is provided by Belgium, where a debate has begun, largely as a result of the large number of women crossing the border to give birth anonymously in France. In an opinion delivered on 12 January 1998 the Consultative Committee on Bioethics set out the two lines of argument that were defensible from an ethical standpoint: the first considered it unacceptable for children to be brought into the world without parents; for that reason its proponents proposed that facilities for "giving birth discreetly" should be provided, without completely closing the door on all attempts to trace the parents. Proponents of the second line of argument considered that the ethical dilemma posed by the right to give birth anonymously did not result from the need to resolve the conflict arising out of the clash between the respective rights of "the child to filiation" and "the mother in distress", but from the more fundamental confrontation of two values: the life of the child on the one hand and the right of everyone to know his or her natural mother on the other. They contended that in the face of that dilemma, the primary concern had to be the protection of the life and of the development of the child. For that reason, they considered that giving birth anonymously was perfectly legitimate and acceptable from an ethical standpoint. Likewise, in Germany, in view of the rising number of abandoned newborn infants, the first "baby box" (*Babyklappe*) – a system that allows the mother to leave her child, ring a bell and leave without giving her identity – was installed in Hamburg approximately two years

ago. Since then, other "baby boxes" have been installed in other towns. In May 2002 a bill on anonymous births was rejected by the *Bundestag*. On 21 June 2002 the *Land* of Baden-Württemberg introduced a further bill in the *Bundesrat* which was submitted to the relevant committees for presentation to the *Bundestag*. Yet another example is provided by Hungary, where mothers may decide to remain anonymous by abandoning their newborn child in a special, unsupervised room in the hospital.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

20. The Government asked the Grand Chamber to review the Chamber's admissibility decision. They contended that in the event of a refusal by the Commission for Access to Administrative Documents (CADA) to provide the applicant with identifying information on her natural mother she should seek judicial review by the administrative courts (see "Relevant domestic law and practice" in the Court's admissibility decision of 16 October 2001 in the present case). Accordingly, although the provisions of domestic law that established and protected the right of mothers to keep their identity secret when giving birth meant that that remedy had little prospect of success, the applicant could have pleaded an alleged incompatibility of domestic law with the provisions of the Convention, which was directly applicable in the French legal system.

21. The Court observes that in its decision of 16 October 2001 the Chamber dismissed the Government's preliminary objection of a failure to exhaust domestic remedies, which was identical to the objection now before the Grand Chamber, in the following terms:

> "... the Court notes that Law no. 78/753 of 17 July 1978 on the right of access to administrative documents entitles anyone who has had a request for information turned down by the authorities under sections 6 and 6 *bis* of the Law to apply to the CADA. However, it is clear from the opinions that have been issued by that body that disclosure of documents held by the authorities will be refused if the mother has expressly stated that she wishes her identity to remain secret. Any subsequent application to the administrative court will also be to no avail, again as a result of the statutory right to confidentiality protected by section 6 of the aforementioned Law. Thus, in the absence of any convincing explanation from the Government showing that the remedy to which they have referred is 'effective' and 'adequate' and in view of the unequivocal nature of the natural mother's request for secrecy, the Court holds that the remedy at the applicant's disposal was not, in the instant case, an ordinary remedy and sufficient to enable her to obtain details of her identity as a human being."

22. The Court reiterates that the Grand Chamber is not precluded from deciding in appropriate cases questions concerning the admissibility of an

application under Article 35 § 4 of the Convention, as that provision enables the Court to dismiss applications it considers inadmissible "at any stage of the proceedings". Thus, even at the merits stage and subject to Rule 55 of the Rules of Court, the Court may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see *Pisano v. Italy* [GC] (striking out), no. 36732/97, § 34, 24 October 2002).

23. However, notwithstanding the national authorities' responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention, the Court is of the view that no criticism may attach to the applicant in the instant case for failing to take her complaint to the administrative courts, since, as the Government themselves have admitted, such an application was bound to fail owing to the statutory protection of the right to confidentiality. The Government are not unaware of the applicant's determination to establish the identity of her natural mother and cannot rely on a particularly wide interpretation of the subsidiarity principle to call her to task for failing to plead a violation of her rights under Article 8 of the Convention when those rights were not recognised in domestic law and have only become so, subject to certain conditions, since the adoption of the law of 22 January 2002 (see paragraph 17 above), almost four years after the applicant lodged her application with the Commission. In these circumstances, the Court sees no reason to reconsider the decision to dismiss the preliminary objection which the Government raised before the Chamber.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. The applicant complained that she was unable to obtain identifying information about her natural family and had thereby been prevented from finding out her personal history. She alleged a violation of Article 8 of the Convention, which provides:

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

A. Applicability of Article 8

1. The parties' submissions

25. The applicant maintained that her request for information about strictly personal aspects of her history and childhood came within the scope of Article 8 of the Convention. Establishing her basic identity was an integral part not only of her "private life", but also of her "family life" with her natural family, with whom she hoped to establish emotional ties were she not prevented from doing so by French law.

26. The Government excluded the latter possibility, contending that the guarantee of the right to respect for family life under Article 8 presupposed the existence of a family (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31). Although the case-law did not require cohabitation between the various members of the "family", there had to be at the very least close personal ties. The existence of ties demonstrating an emotional relationship between two beings and a desire to pursue that relationship was essential so far as the Convention institutions were concerned. The Convention institutions had even held that in the absence of close personal ties between those concerned a mere biological link was insufficient to constitute family life within the meaning of Article 8. Thus, the Commission had expressed the opinion that the situation in which a person donated sperm only to enable a woman to become pregnant through artificial insemination did not of itself give the donor a right to respect for family life with the child (see *M. v. the Netherlands*, no. 16944/90, Commission decision of 8 February 1993, Decision and Reports 74, p. 120). In the instant case, the Government maintained that no family life within the meaning of Article 8 of the Convention existed between the applicant and her natural mother, as the applicant had never met her mother, while the latter had at no point expressed any interest in the applicant or regarded her as her child. The applicant's natural mother had expressly manifested an intention to abandon the applicant and had agreed to her adoption by others. Only the applicant's family life with her adoptive parents could come within the scope of Article 8.

27. The Government did not deny that the notion of private life, which is also referred to in Article 8 of the Convention, could sometimes encompass information enabling a person's physical or social identity to be established. They observed that in *Gaskin v. the United Kingdom* (judgment of 7 July 1989, Series A no. 160), the applicant, who had been taken into care at a very early age, wished to consult the confidential case records that had been compiled by the local authorities containing reports by everyone connected with the care proceedings. He was not able to gain access to all the information in his file as some of the contributors refused to provide him

with information they had given in confidence. In the present case, the French State had not refused to furnish the applicant with information but had taken into account her mother's refusal from the beginning to allow her identity to be disclosed. As in *Gaskin*, the application in the present case concerned two competing interests: the applicant's interest in finding out her origins and the interest of a woman who from the outset did not wish to be regarded as the applicant's mother in preserving her private life. However, the applicant's request did not concern information on "highly personal aspects of [her] childhood, development and history", as her aim was to make contact with her siblings, whose existence she had only discovered on becoming an adult and whom she had never met. The Government said in conclusion that, as it stood, the applicant's request did not come within the scope of "private life" within the meaning of Article 8 of the Convention, as it concerned information relating to a natural family from which she had been separated since birth following her mother's decision to abandon her.

2. The Court's assessment

28. In the instant case, the Court notes that the applicant's purpose is not to call into question her relationship with her adoptive parents but to discover the circumstances in which she was born and abandoned, including the identity of her natural parents and brothers. For that reason, it considers it necessary to examine the case from the perspective of private life, not family life, since the applicant's claim to be entitled, in the name of biological truth, to know her personal history is based on her inability to gain access to information about her origins and related identifying data.

29. The Court reiterates in that connection that "Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. ... The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life" (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I). Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see *Mikulić v. Croatia*, no. 53176/99, §§ 54 and 64, ECHR 2002-I). Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. That provision is therefore applicable in the instant case.

B. Compliance with Article 8

1. The parties' submissions

(a) The applicant

30. The applicant said that she defended the rights of the child. In France it was possible to act as if the mother did not exist, whereas in most countries in the world birth automatically created parental ties between the mother and the child she had brought into the world. By a legal fiction and because she had expressly sought confidentiality, the applicant's mother was deemed never to have given birth. The applicant described how difficult it was for her to live without knowing her original identity and complained not only of the arbitrary interference in her life as an ordinary citizen caused by the system used to preserve confidentiality, but also of culpable failure on the part of the domestic authorities through their refusal to disclose the requested information even though it was available in the file.

31. The applicant maintained that giving birth anonymously was not a woman's right, but an admission of failure. She said that women who asked for the birth and their identity to be kept secret found themselves in that position mainly through a lack of autonomy, problems related to youth, difficulties in gaining access to the job market, the isolation and financial predicament of single-parent families and domestic violence. In her submission, an anonymous birth therefore constituted an act of violence that was easily avoidable: concerns for the health of mother and child could be addressed without any need to rely on a right to confidentiality that would prevent the child from finding out its origins. In most cases the distress of a mother who was unable to care for her child could be alleviated by providing her with the necessary help or enabling her to make her child available for adoption, not by promising her anonymity. The days when women did not express their feelings after abandoning a child were over. Many women had now formed associations. Society had been given an insight into the trauma that followed from their accounts of their experiences. Despite appearances to the contrary, the child often represented an “emotional investment”, the page was rarely turned and life did not simply go on as if nothing had happened. The argument that it was necessary to reassure the mother in order to prevent infanticide was a thing of the past and unconvincing when the situation in countries which did not allow mothers to give birth anonymously was examined. The health of mother and child was protected in many countries without resorting to a right to confidentiality which prevented the child from ever being able to find out its origins.

32. In the applicant's submission, the fact that the child was taken into care and could be adopted speedily had absolutely no bearing on the issue of confidentiality, since those consequences followed directly from the child's abandonment, whether or not the mother requested anonymity. It was the irrational fear of certain adoptive parents and adoption agencies that had encouraged the belief that children without a past were easier to adopt. However, adoptive parents could easily be reassured if they were reminded that legal filiation by a full adoption order was irrevocable. As to the emotional tie, an understanding by the adoptive parents of their child's desire to know his or her natural parents and support for him or her in that quest could only serve to strengthen it.

33. The search for common ground between irreconcilable points of view had led to the current proposal to replace the right to give birth anonymously with a right to confidentiality that could be waived *ex post facto*. However, surely a woman's freedom ended where the child's freedom began? The applicant referred to the *Gaskin* principle that a system that made access to case records conditional on obtaining the contributors' consent would only comply with the principle of proportionality if it made an independent body responsible for taking the final decision regarding access to the records in the event of the contributor failing to answer or withholding consent. In the applicant's submission, in a society which emphasised responsibility for procreation, a natural mother, who even if she was not willing to assume the maternal role could not refute maternity, was not necessarily deserving of the same protection as the third-party contributors referred to in *Gaskin*. In the instant case, no arrangements had thus far been made to trace the mother and establish whether she still refused to see her daughter. While the setting up of such a procedure was proposed in the law of 22 January 2002, it would in no way lessen the harm that had already been done. However, worse still, in the applicant's submission, was the fact that the new law reaffirmed the notion of secret births, as the mother's right to confidentiality was solemnly restated. The legislature had endeavoured to forestall the claims of children born of anonymous parents and had opted for the course that was the least consistent with the expressed aim. With that piece of legislation, France had made do with warding off the offensive in a way that did nothing to temper the rigours of secrecy, as the new legislation now added but one right, namely the right to seek the mother. Searches had to be made through the National Council for Access to Information on Personal Origins, which had to ensure that the mother whose identity it was required to keep confidential consented to its disclosure to her child. The system set up by the law of 2002 thus continued to mark a blind preference for the mother's alleged interests, in manifest contempt of the rights of the child: the Council was not empowered to analyse the reasons for the mother's refusal, to assess whether they were legitimate or, above all, to ignore a refusal which it

considered to have been unreasonable. No final decision could be taken to disclose confidential information after weighing up the relevant interests if the mother continued to withhold her consent. The innovations in the new legislation thus continued to fall foul of the provisions of the Convention, since the mother's statutory right to confidentiality remained intact and was incompatible with the principle of proportionality.

34. The applicant argued that the right to respect for her private life meant that she had an even more meritorious claim to a right of access to her file than the applicant in *Gaskin*, cited above. Furthermore, the validity of her claim was confirmed by the Court's decision in *Mikulić*, cited above, in which the Court had found in favour of the child in a dispute involving the competing rights of the child and one of its parents and had condemned the inefficiency of the Croatian courts that had left the child in a state of prolonged uncertainty regarding its personal identity.

35. Lastly, the applicant criticised France for its isolated stance on the subject. Admittedly, in *X, Y and Z v. the United Kingdom* (judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II), which concerned a conflict between the right of a child born through medically assisted procreation and the anonymity promised to the sperm donor, the Court had ruled that the respondent State had a wide margin of appreciation, as the law on that subject was in a transitional phase. However, the problem posed by secret births was very different: a State could not be afforded a margin of appreciation if, despite the fact that the child's best interest was at stake, it chose to differ from the shared views of the member States of the Council of Europe on the subject. Such was the position with France's legislation on the right to give birth anonymously, even after the enactment of the law of 22 January 2002.

(b) The Government

36. The Government maintained that a woman's right to request that the birth and her identity be kept secret was laid down by Article 341-1 of the Civil Code and amounted to an interference prescribed by law. The interference pursued a legitimate aim, namely alleviating the distress of mothers who did not have the means of bringing up their children. By affording them the option of confidentiality, the French State sought to encourage women in that position to give birth in favourable conditions, rather than alone with the attendant risk that they may not tend to the child's needs. Such situations of distress were by no means rare in France (the number of births to mothers of unknown identity was approximately 600 a year). The Government observed that until the 1960s, when the applicant's natural mother had taken the decision to request that her identity remain secret, neither contraception nor abortion were legal in France. Nowadays, there were three main categories of women who chose to give birth anonymously: young women who were not yet independent, young women

still living with their parents in Muslim families originating from North African or sub-Saharan African societies in which pregnancy outside marriage was a great dishonour, and isolated women with financial difficulties (the youngest, many of whom were under 25, were single mothers; many of the older women were over 35 and for the most part separated or divorced or had been abandoned, some being victims of domestic violence, with several children to look after). As to what drove women to seek confidentiality, the Government said that the stated reasons sometimes concealed more serious problems, such as rape or incest, which were not always revealed by those concerned.

Thus, according to the Government, the system took both the mother's and the child's health into account and pursued a public-health objective, which, by protecting the mother's private life, enabled the rights and freedoms of others to be preserved. It enabled the mother to benefit from proper medical facilities and the child to receive all necessary care. Furthermore, the fact that the child was taken into care as a result meant that it could be adopted without delay.

37. With regard to the proportionality of the interference, the Government said that a request by the child to be given access to information about its identity could come into conflict with the freedom which all women enjoyed to decline their role as mother or to assume responsibility for the child. Under French law, maternity was considered an aspect of private life and received statutory protection on that account (Article 9 of the Civil Code). On the basis of that provision, the Court of Cassation had held that it was a breach of the right to respect for private life to publish, without her consent, information that a woman was pregnant, even though her condition was visible in public. In its judgment in *Gaskin*, the Court had reiterated the importance of keeping official files confidential if reliable information was to be obtained and third parties protected. The Court had also held that, in view of the State's margin of appreciation, a system that made access to records conditional on the consent of the contributors being obtained could in principle be compatible with Article 8. It had thus ruled that the State enjoyed a margin of appreciation in the event of a conflict between two private interests. That margin of appreciation was enlarged in the instant case by the fact that no European consensus on the issue of a child's access to information about its origins existed. The Government asserted that traditionally only Italy and Luxembourg had joined France in allowing mothers to withhold their identities at the time of the birth. Elsewhere, a debate had begun in recent years in various countries in which the legislation did not permit mothers to give birth anonymously, with a view to possible changes being made to the system. In Belgium a bill that would enable expectant mothers to request that the birth remain secret had been put before the Senate on 30 September 1999 and reintroduced with amendments on 28 May 2002. In Germany a bill proposing measures

regulating anonymous births had been lodged in June 2002. It appeared that Austria had lifted a ban on anonymous births by a law of 7 March and a decree of 27 June 2001.

38. The Government observed that, even before the adoption of the law of 2002, the French legislation had sought to reconcile the competing interests in three respects.

(i) By trying to encourage mothers to assume responsibility for the birth of their children

Alternative systems offering psychological and social support had long been established by law to encourage mothers to keep their children despite the difficult position in which they found themselves. Former Article 62 of the Family Code had imposed a duty on social services to inform mothers of the various measures available to assist them in bringing up their children themselves. Social services were also under a duty to inform mothers of the time-limits and conditions that had to be complied with if they wished to take their children back.

(ii) By affording such children access to certain information

The right to obtain non-identifying information about their mother, father and even other members of their natural family had been made generally available to abandoned or adopted children by the law of 17 July 1978, thus enabling them to reconstruct their personal histories.

(iii) By providing that the mother could waive confidentiality

Since the enactment of a law of 5 July 1996 it had become easier for mothers to waive a decision to request confidentiality, as provision had been made for a mother who had requested confidentiality under Article 62 of the Family Code to be informed that in addition to supplying non-identifying information she could reveal her identity by contacting the president of the council of the *département*, who would keep her identity secret until such time as it was expressly requested by the child or her descendants.

Through all those provisions domestic law had struck a careful balance between the woman's interest in not disclosing the birth and the child's interest in gaining access to information about its origins.

39. The Government submitted, lastly, that the law of 2002 had considerably reinforced the prospects of securing a waiver of confidentiality. The applicant was free to make use of the provisions of the new legislation and to apply to the National Council for Access to Information about Personal Origins. The machinery established under the legislation satisfied the proportionality requirements contained in the Court's case-law, as the French State took into account the child's interest by regulating access to information about the child's origins while making it easier for the mother to waive confidentiality. Firstly, the mother was invited, as soon as she had given birth, to leave particulars of her identity in a sealed envelope together with non-identifying information, to which the child would have access if it wished. Secondly, considerable efforts were

made to trace the mother and to seek her consent to disclosure of her identity to the child. Professional help was also available, both to persons trying to discover their origins and to the natural parents. The Government submitted that a fair balance had therefore been struck between the competing interests.

2. The Court's assessment

40. The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23). The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation (see *Mikulić*, cited above, § 58).

41. The applicant complained that France had failed to ensure respect for her private life by its legal system, which totally precluded an action to establish maternity being brought if the natural mother had requested confidentiality and, above all, prohibited the Child Welfare Service or any other body that could give access to such information from communicating identifying data on the mother.

42. In the Court's opinion, people "have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development". With regard to an application by Mr Gaskin for access to the case records held on him by the social services – he was suffering from psychological trauma as a result of ill-treatment to which he said he had been subjected when in State care – the Court stated:

> "... confidentiality of public records is of importance for receiving objective and reliable information, and ... such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer

or withholds consent." (*Gaskin*, cited above, p. 20, § 49; see also *M.G. v. the United Kingdom*, no. 39393/98, § 27, 24 September 2002)

In *Mikulić*, cited above, the applicant, a 5-year-old girl, complained of the length of a paternity suit which she had brought with her mother and the lack of procedural means available under Croatian law to enable the courts to compel the alleged father to comply with a court order for DNA tests to be carried out. The Court weighed the vital interest of a person in receiving the information necessary to uncover the truth about an important aspect of his or her personal identity against the interest of third parties in refusing to be compelled to make themselves available for medical testing. It found that the State had a duty to establish alternative means to enable an independent authority to determine the paternity claim speedily. It held that there had been a breach of the proportionality principle as regards the interests of the applicant, who had been left in a state of prolonged uncertainty as to her personal identity (§§ 64-66).

43. The Court observes that Mr Gaskin and Miss Mikulić were in a different situation to the applicant. The issue of access to information about one's origins and the identity of one's natural parents is not of the same nature as that of access to a case record concerning a child in care or to evidence of alleged paternity. The applicant in the present case is an adopted child who is trying to trace another person, her natural mother, by whom she was abandoned at birth and who has expressly requested that information about the birth remain confidential.

44. The expression "everyone" in Article 8 of the Convention applies to both the child and the mother. On the one hand, people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life. The child's vital interest in its personal development is also widely recognised in the general scheme of the Convention (see, among many other authorities, *Johansen v. Norway*, judgment of 7 August 1996, *Reports* 1996-III, p. 1008, § 78; *Mikulić*, cited above, § 64; and *Kutzner v. Germany*, no. 46544/99, § 66, ECHR 2002-I). On the other hand, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied. In the present case, the applicant's mother never went to see the baby at the clinic and appears to have greeted their separation with total indifference (see paragraph 12 above). Nor is it alleged that she subsequently expressed the least desire to meet her daughter. The Court's task is not to judge that conduct, but merely to take note of it. The two private interests with which the Court is confronted in the present case are not easily reconciled; moreover, they do not concern an adult and a child, but two adults, each endowed with her own free will.

In addition to that conflict of interest, the problem of anonymous births cannot be dealt with in isolation from the issue of the protection of third parties, essentially the adoptive parents, the father and the other members of

the natural family. The Court notes in that connection that the applicant is now 38 years old, having been adopted at the age of four, and that non-consensual disclosure could entail substantial risks, not only for the mother herself, but also for the adoptive family which brought up the applicant, and her natural father and siblings, each of whom also has a right to respect for his or her private and family life.

45. There is also a general interest at stake, as the French legislature has consistently sought to protect the mother's and child's health during pregnancy and birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure. The right to respect for life, a higher-ranking value guaranteed by the Convention, is thus one of the aims pursued by the French system.

In these circumstances, the full scope of the question which the Court must answer – does the right to know imply an obligation to divulge? – is to be found in an examination of the law of 22 January 2002, in particular as regards the State's margin of appreciation.

46. The Court reiterates that the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring "respect for private life", and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see *X and Y v. the Netherlands*, cited above, p. 12, § 24).

47. The Court observes that most of the Contracting States do not have legislation that is comparable to that applicable in France, at least as regards the child's permanent inability to establish parental ties with the natural mother if she continues to keep her identity secret from the child she has brought into the world. However, it notes that some countries do not impose a duty on natural parents to declare their identities on the birth of their children and that there have been cases of child abandonment in various other countries that have given rise to renewed debate about the right to give birth anonymously. In the light not only of the diversity of practice to be found among the legal systems and traditions but also of the fact that various means are being resorted to for abandoning children, the Court concludes that States must be afforded a margin of appreciation to decide which measures are apt to ensure that the rights guaranteed by the Convention are secured to everyone within their jurisdiction.

48. The Court observes that in the present case the applicant was given access to non-identifying information about her mother and natural family that enabled her to trace some of her roots, while ensuring the protection of third-party interests.

49. In addition, while preserving the principle that mothers may give birth anonymously, the system recently set up in France improves the prospect of their agreeing to waive confidentiality, something which, it will

be noted in passing, they have always been able to do even before the enactment of the law of 22 January 2002. The new legislation will facilitate searches for information about a person's biological origins, as a National Council for Access to Information about Personal Origins has been set up. That council is an independent body composed of members of the national legal service, representatives of associations having an interest in the subject matter of the law and professional people with good practical knowledge of the issues. The legislation is already in force and the applicant may use it to request disclosure of her mother's identity, subject to the latter's consent being obtained to ensure that her need for protection and the applicant's legitimate request are fairly reconciled. Indeed, though unlikely, the possibility that the applicant will be able to obtain the information she is seeking through the new Council that has been set up by the legislature cannot be excluded.

The French legislation thus seeks to strike a balance and to ensure sufficient proportion between the competing interests. The Court observes in that connection that the States must be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling those interests. Overall, the Court considers that France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents.

Consequently, there has been no violation of Article 8 of the Convention.

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

50. The applicant maintained that confidentiality, as protected in France, amounted to discrimination on the ground of birth that was incompatible with Article 14 of the Convention, which provides:

> "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."

51. Owing to the prohibition to which she was subject, the applicant argued that she had been a victim of restrictions on her capacity to receive property from her natural mother, irrespective of any benefit she might derive as a result of her adoption. She relied on *Marckx* (cited above), saying that the Court had held that it was discriminatory for the applicant in that case to be totally denied inheritance rights solely because of the nature of the parental tie.

52. The Government said that there had been no difference in treatment in the instant case. The situation of a child that had been abandoned by its

mother was not comparable to that of other children whose parents had assumed responsibility for them. Criticism would only be warranted if there was a difference in treatment between children born in the circumstances referred to in Article 341-1 of the Civil Code. However, that was not the case, as the same rules applied to all children wishing to find out their origins after their mothers had asked for their identities to be kept secret.

53. The Government submitted in the alternative that if the Court was to find that the child had been discriminated against on grounds of birth owing to the non-disclosure at the mother's request of information about the child's origins, the difference in treatment was justified, both because Article 341-1 of the Civil Code pursued a legitimate aim and because there was a reasonable relationship of proportionality between the means used and the aim pursued. The Government referred in that respect to their previous arguments.

54. The Court reiterates that, according to the established case-law of the Convention institutions, Article 14 only complements the other substantive provisions of the Convention and its 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 that extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter. The Court observes that the facts of the instant case fall within the scope of Article 8 of the Convention (see paragraph 29 above) and that, accordingly, Article 14 is applicable.

55. Furthermore, 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 *Salgueiro Da Silva Mouta v. Portugal*, no. 33290/96, § 26, ECHR 1999-IX).

56. The Court notes that at the heart of the applicant's complaint under Article 14 of the Convention lies her inability to find out her origins, not a desire to establish a parental tie that would enable her to claim an inheritance. The Court considers that in the circumstances of the present case, although presented from a different perspective, the applicant's complaint that she has been discriminated against by the non-disclosure of her mother's identity is in practice the same as the complaint it has already examined under Article 8 of the Convention. In any event, the Court considers that the applicant has suffered no discrimination with regard to her filiation, as, firstly, she has parental ties with her adoptive parents and a prospective interest in their property and estate and, secondly, she cannot claim that her situation with regard to her natural mother is comparable to that of children who enjoy established parental ties with their natural mother.

For the foregoing reasons, the Court holds that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

FOR THESE REASONS, THE COURT

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

2. *Holds* by ten votes to seven that there has been no violation of Article 8 of the Convention;

3. *Holds* by ten votes to seven that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 February 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

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

(a) concurring opinion of Mr Rozakis;
(b) concurring opinion of Mr Ress joined by Mr Kūris;
(c) concurring opinion of Mrs Greve;
(d) joint dissenting opinion of Mr Wildhaber, Sir Nicolas Bratza, Mr Bonello, Mr Loucaides, Mr Cabral Barreto, Mrs Tulkens and Mr Pellonpää.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE ROZAKIS

I am fully in agreement with the conclusion reached by the majority of the Grand Chamber that there has been no violation of Article 8 of the Convention in this case. Yet I would like to express a different point of view with regard to the reasoning which led to that conclusion, and more particularly with regard to the weight that the majority attaches to the margin of appreciation enjoyed by the French State in the circumstances of the case.

I do not deny of course that, in the absence of common European standards on matters of child abandonment in conditions of secrecy and anonymity, France enjoys a certain margin of appreciation in determining the modalities of divulging information on the identity of the parties; and the Court correctly refers to it. Yet, it seems to me that, in its reasoning, the Court has overstressed this particular aspect of the margin of appreciation (see, for instance, the last sentence of paragraph 45, paragraph 46, and the last part of paragraph 49), to the detriment of showing that it has struck a proper and satisfactory balance between the limited margin of appreciation enjoyed by France and the test of necessity (necessary in a democratic society), which for me is the crucial test to be applied in the circumstances of the case. Indeed, when, as in the present case, the Court has in its hands an abundance of elements leading to the conclusion that the test of necessity is satisfied by itself and embarks on a painstaking analysis of them, reference to the margin of appreciation should be duly confined to a subsidiary role.

If one reads the judgment carefully, one realises that the Court has proceeded to an analysis of the competing interests involved, applying explicitly or implicitly its own case-law in order to find which of the competing interests of the applicant, on the one hand, and of democratic society on the other are more worthy of protection and for which reasons. It has clearly taken into consideration the following facts: (a) that at the time she made a request to the authorities for information on her parents' whereabouts, the applicant was an adult, not a minor. As a consequence, the privileged position enjoyed by children under the case-law (where "[t]he child's vital interest in its personal development is ... widely recognised in the general scheme of the Convention" – see paragraph 44 of the judgment), was not a relevant factor in the circumstances of the case; (b) that, as a consequence of the first conclusion, the adult's interest in enjoying her private (or family life) must be weighed, on a footing of equality, with the similar interests of the other persons involved – namely, the mother, the brothers and the adoptive family – who should also have their say in the circumstances of this case (the Court rightly states that "non-consensual disclosure could entail substantial risks, not only for the mother herself, but also for the adoptive family which brought up the applicant, and her natural

father and siblings, each of whom also has a right to respect for his or her private and family life"); (c) that a more general interest also dictated the stance taken by France on this matter, namely the avoidance of "illegal abortions and children being abandoned other than under the proper procedure. The right to respect for life, a higher-ranking value guaranteed by the Convention, is thus one of the aims pursued by the French system" (see paragraph 45 of the judgment).

Against that background, the Court had to balance the important interests concerned and decide whether France had had due regard to each of them and, more particularly, the interests of the applicant. I think that the answer given by the Court is the right one. In circumstances where the protected interests seem to be equally important under the Convention, and where more general interests and higher values must prevail over the individual interests, the solution adopted by France to the obvious dilemma seems to be pertinent and sufficient: the applicant was given access to non-identifying information about her mother and natural family "that enabled her to trace some of her roots, while ensuring the protection of third-party interests" (see paragraph 48 of the judgment), while with the adoption of the new law of 22 January 2002 the applicant's search for her biological origins may be facilitated by applying to the newly established National Council for Access to Information about Personal Origins.

It clearly transpires from the above analysis of the elements taken into consideration that the Court dealt substantively with the merits of the case and that, in real terms, the margin of appreciation played a relatively marginal role in this assessment. Yet, as I have already stated, the wording of the judgment may convey a misleading impression, and undermine the principle enunciated in *Mikulić v. Croatia* (no. 53176/99, ECHR 2002-I), and reiterated in the present judgment, namely that the applicable principles where either positive or negative obligations under Article 8 are concerned are similar: "In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests, and in both contexts the State enjoys a certain margin of appreciation" (see paragraph 40 of the judgment).

CONCURRING OPINION OF JUDGE RESS JOINED BY JUDGE KŪRIS

(Translation)

I entirely agree with the majority's reasoning, but there are one or two points I should like to underline.

1. While recognising the child's fundamental right to receive information about its biological origins and ascendants under Article 8 of the Convention, the State authorities may, in accordance with Article 8 § 2, nevertheless implement measures that are designed to protect the rights of others and the general interest. It is clearly in the general interest for appropriate measures to be taken to improve the situation of mothers in distress and to protect children's lives by reducing so far as possible the number of abortions, whether legal or illegal. That, to my mind, is an overriding consideration that may prevail over a child's right to know its origins. The majority do not suggest that all States should resort to a system of anonymous births to resolve that conflict. There are various ways in which they may do so through appropriate measures. The State's margin of appreciation is not restricted to the use of but one method. The majority, with whom I agree, have reached a decision that concerns only France, not other countries, which are free to use different means, while seeking to limit as far as possible the conflict between the general interest and the individual rights of the mother and child.

2. The issue as to whether the system of anonymous births has actually reduced the number of abortions is but one aspect of that conflict. The procedure also provides an apposite response to the very deep distress felt by the mother, even if and precisely when she does not wish to have an abortion. Those are two concerns which the statute addresses and the one is supported by the other. Even though it has not been established that the number of abortions has in fact dropped as a result of the introduction of this measure – which in any event has been available in France for a considerable time – it nonetheless seems to me to be justified by the need to avoid such distress and abortions. The mother's distress may stem from a variety of reasons and be expressed in a wholly unpredictable manner. As is noted in the judgment, the French Government have provided a number of examples. It is difficult to see how a system of virtually automatic adoption organised by the State authorities, coupled with the cessation of the natural father's and natural mother's entire legal responsibility for the child, could constitute an equivalent alternative. It is true that it would protect the essence of the right to know one's origins. However, it is impossible to exclude the risk that, in order to avoid being faced with the inconvenience and moral responsibility to which such a birth gives rise, a woman in that

situation will resort to abortion (legal or illegal); indeed, such an outcome would be relatively likely.

3. The State's concern to protect life and to reduce the number of cases of voluntary termination of pregnancy – which are in principle regarded in certain Council of Europe countries, such as Germany, as "illegal", even if the State does not have criminal-law measures to prevent such abortions in the initial stage of pregnancy – is a legitimate aim. It is unnecessary in the present case to decide whether the notion of life under Article 2 of the Convention also includes the life of the unborn child. Article 8 § 2 permits the State to take into consideration in its pursuit of the general interest the protection of life after conception for reasons related to such matters as general morals, health or demography. Even if, as is stated in the dissenting opinion, the number of abortions in the member States of the Council of Europe has remained stable in recent years (without taking into account abortions caused by the use of post-conception medication such as the "morning-after pill"), that stability depends on various factors that are capable of influencing public opinion. It does not prevent States from implementing measures in the general interest to reduce the number of abortions. Furthermore, statistical data cannot be the only yardstick for deciding whether or not such an interference is justified. Implicit in a law such as that applicable in France is also a value judgment, as it recognises the situation of deep distress in which the mother finds herself and the need to save the child's life; that judgment may be decisive for the whole of society.

4. There is not merely a conflict between the child's right to know its origins and the mother's interest in keeping her identity secret. A further factor to be taken into account is the State's interest in offering a solution to mothers in distress while at the same time protecting the life of the unborn child. The State has to take into account those three aspects. It would be too simple to reduce the conflict solely to the relationship between the mother and child after the latter's birth. In my opinion, in cases of multiple relationships such as the present one, the State enjoys a margin of appreciation. The concern to avoid or reduce the number of abortions is an aspect of the protection of life, and is closely connected to the situation of the mother and her unborn child. The State is entitled in such situations of distress for the mother to give precedence to her interest over the child's right to know its origins. The introduction of the system in which anonymity, that is to say confidentiality, shall cease on a decision by a commission may have disastrous consequences for the entire system and the protection of life. Persons who seek disclosure at any price, even against the express will of their natural mother, must ask themselves whether they would have been born had it not been for the right to give birth anonymously. That concern serves and may legitimately serve as the basis for the State's decision to introduce and uphold such a system.

CONCURRING OPINION OF JUDGE GREVE

Introductory remarks

While I share the reasoning and the conclusions reached by the majority in this case, I nonetheless find it important to focus in greater detail on some of the problems it raises.

The ideal situation, as I see it, would be for each and every adopted child to be able invariably to get to know the identity of its parents and to learn the circumstances under which it became eligible for adoption. It ought to be expected that every society will make proper efforts to secure the translation of this ideal into reality in as many cases as possible. It should in this context be expected that society will provide counselling for expectant mothers who contemplate abandoning their unborn child, and will keep a minimum of records making it possible for the mother to trace her child should she become willing to disclose her identity in the future. The circumstances of real life are, however, not always sufficiently benign for ideal situations to exist in all cases.

It is appreciated that a case like the present only materialises when – after all is said and done – a woman refuses to forgo her anonymity *vis-à-vis* the unborn child. The refusal may take two different forms: the woman may, against all good advice to the contrary, decline to reveal her identity or she may insist that she will not give this information if it is up to a commission (or anyone other than herself) to decide whether it is reasonable at a future point in time for her still to withhold this vital information from her child. If the expectant mother can be counselled to take a less rigid position, there would be no case like the one at hand.

In all likelihood there are not many cases of this kind in Europe today. Thus, in contradistinction to the opinion expressed by the minority in their dissenting opinion, I think that one will look in vain for information of relevance to the case in, for instance, abortion statistics from States Parties to the Convention. Neither changes in the numbers of abortions nor the limited references to the reasons that lead women to decide on an abortion are likely to be of any assistance. All that is known in terms of figures is that there are a number, albeit small, of clandestine births each year, with the children being abandoned. Such cases represent grave personal tragedies.

The interests involved in the case

The present case, in common with every other case judged by the Court, entails a conflict of competing interests. *In casu* there are conflicting interests between mother and child, and as far as the child is concerned

there are also different interests present at the prenatal stage and after the child has been born safely.

Before elaborating on this, I find it appropriate to emphasise what I understand to be a commitment by the Court to uphold and strengthen previous Court decisions regarding certain basic principles of interest in the present case.

For one, the Court remains committed to respect, protect and promote equality between children born within and without wedlock (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31). Most children born to women now withholding their identity are likely to have been conceived out of wedlock, but that issue is not relevant to the decision made by the Court in this case. The Court by its decision in this case makes no distinction between children, whatever the marital status of its parents at birth: married to one another, married but not to one another, not married or one married and one not married.

Secondly, the Court does not alter by its decision in this case its existing case-law according to which a Contracting State may violate the Convention either by an act or an omission (see, among other authorities, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 17, § 32, and *Gaskin v. the United Kingdom*, judgment of 7 July 1989 Series A no. 160, pp. 16-17, § 41, where "the substance of the [applicant's] complaint is not that the State has acted but that it has failed to act").

Thirdly and finally, the Court does not change by its decision in the present case the case-law it established in *Gaskin* concerning a positive obligation flowing from Article 8 of the Convention where a fair balance of rights has to be sought. *Gaskin* concerned the applicant's right to access to case records for the period during his childhood when, after his mother's death, he had been taken into public care and boarded out with various foster parents. The United Kingdom authorities made the consent of contributors to case records a precondition of disclosure to the applicant. It was not a condition that consent could not be unreasonably withheld. The Court found that such a system in principle was compatible with obligations under Article 8, but only complied with the principle of proportionality if an independent authority decided whether access was to be granted if contributors failed to answer or withheld consent. As no such procedure was available to the applicant in *Gaskin* the Court found a violation of Article 8.

In the present case the Court addresses a distinctly different and more complex issue than the one handled by the Court in *Gaskin*. Here, the Court distinguishes between two relevant stages: the first stage is represented by the prenatal period, delivery and the time immediately after the child is born; the second stage is the time after the child has been born safely. At the second stage the interests of both the child and its mother fall under Article 8 of the Convention. At the prenatal stage, at the time of

delivery and immediately afterwards both the mother and the child/the unborn child have rights under Articles 2 and 3 of the Convention also. With reference to the latter there is no need in this context to decide whether a child *in utero* is separately protected under Article 2 of the Convention or through its mother, the old maxim "*infans conceptus pro nato habetur quoties de commodis ejus agitur*" is respected either way. In *Gaskin* the Court addressed only issues arising at the second stage when the child had already been born safely. For this reason the judgment in *Gaskin* offers no guidance concerning the main issues in the present case, namely the rights of both child and mother at the prenatal stage and an act or omission by the State at that selfsame stage.

In the present case the French authorities' decision (whether it is considered an act or an omission) was taken at the prenatal stage, but had repercussions after the applicant had been born safely.

The act can be described as offering the mother an opportunity to give birth in conditions that are as safe as possible with the benefit of medical assistance, even if she refuses to leave her name and details of her whereabouts under a procedure that makes them open to future disclosure without her consent and is adamant that she wants to abandon her baby. In my opinion, this is a State decision that respects the rights of both mother and child before the birth, when counselling to persuade the mother to leave a record of her whereabouts behind even if she wants to let the child go for adoption has failed or where she has refused to come forward for such counselling. It should go without saying that I do, of course, fully support and encourage the provision by society of the best possible counselling services to pregnant women in distress and of general information to women who may find themselves in such a situation. That, however, does not alter the core of the problem, that is, the task of balancing competing interests that the Court is called upon to perform in a case in which a woman refuses to forsake anonymity. It makes no difference in this respect whether the issue of anonymity is left open to be decided in the future by some specially qualified decision-making body. The point at issue is that the pregnant woman remains adamant that she will not opt for safe labour if access to medical assistance is linked inextricably to her having to renounce her anonymity.

The Court moreover, recognises that the right to life is superior to any other right – all other rights are about giving quality to that very life. This brings the child's own two competing interests into perspective as well. The primary interest of the child is to be born and born under circumstances where its health is not unnecessarily put at risk by birth in circumstances in which its mother tries to secure secrecy even when that means that she will be deprived of professional assistance when in labour. The mother will also be at high risk when she gives birth clandestinely if she faces the slightest complications. To preserve the mother's life and/or health a "safe" abortion

in a properly equipped hospital may seem a better option than a birth without professional assistance. Whatever else may be said about abortion, it represents at minimum an ethical problem, and no society should in the name of the promotion of human rights be forced to leave a woman with abortion as the only apparent safe option. A clandestine abortion may put the mother's health and even her life in jeopardy. At the prenatal stage the mother's and the child's interests basically converge.

Medical assistance and law enforcement

Pregnancy is not an illness. In Europe today pregnancy represents at most a physical challenge to the woman and child, but labour often also entails a clear need for medical assistance – and it is not predictable when there will be no such need. By and large women are recommended – for reasons of medical safety – to give birth in hospitals with professional medical assistance. It will be recalled that the medical profession is called upon to heal, to alleviate suffering and to comfort the medically distressed, it is not a means to be used to ensure compliance with conditions that sound counselling is unable to bring about. Even under the laws of war a mortal enemy in urgent need of medical assistance is entitled to this, and the provision of medical aid cannot by itself be construed as a human rights violation. Nor is there any other situation in Europe today where the law recognises, not to say encourages, a situation in which medical aid may be denied in order to force a person in need of it to comply with other needs or rights of other people. It would indeed be a dramatic step backwards if pregnant women should again be forced to accept a different enforcement practice. Basic medical assistance is, when available, in itself a human right not to be revoked by society to achieve some unrelated other social goal. The Court's case-law in several Turkish cases has made it plain that a denial of medical assistance may entail State responsibility under Articles 2 and 3 of the Convention. A pregnant woman denied unconditional medical aid – as far as medically irrelevant conditions are concerned –could in my opinion potentially give rise to a violation of Articles 2 and 3 of the Convention.

Conclusion

The ideal situation is and will remain that even a woman who is pregnant under difficult circumstances – which characterises the situation at issue in the present and similar cases where women today have opted for anonymity when giving birth – should be able to give birth under circumstances that ensure her and her baby's safety and make it possible for the child to know the mother's identity, even if it is immediately adopted by a new family. When, however, a woman for whatever reason finds that this is not an option in her case – which it may be difficult for anyone else fully to

appreciate – human rights should nonetheless militate in favour of her being able to give birth under circumstances that ensure her and her baby's safety, even if she insists on remaining anonymous *vis-à-vis* the child. It would be plainly inhumane to invoke human rights to force a woman in this situation to choose between abortion or a clandestine birth; the latter always holds a potential of jeopardising the mother's and/or the child's health and, if worst comes to worst, could be life threatening and/or result in the child being stillborn.

JOINT DISSENTING OPINION OF JUDGES WILDHABER, Sir Nicolas BRATZA, BONELLO, LOUCAIDES, CABRAL BARRETO, TULKENS AND PELLONPÄÄ

(Translation)

We disagree with the majority's opinion that there has been no violation of Article 8 of the Convention and wish to explain our reasons for so doing.

1. In the instant case, without calling into question her relationship with her adoptive parents, the applicant complained that she had been unable to obtain disclosure of identifying information about her natural family and had thereby been prevented from finding out her personal history. After dismissing the Government's preliminary objection on the ground that any domestic remedy was bound to fail as a result of the statutory right to total confidentiality (see paragraph 23 of the judgment), the Court proceeded to examine, firstly, whether Article 8 of the Convention was applicable and, secondly, whether it had been complied with.

2. As regards the *applicability* of Article 8, the Court decided, firstly, that it was "necessary to examine the case from the perspective of private life, not *family life*", since the applicant's purpose was "not to call into question her relationship with her adoptive parents but to discover the circumstances in which she [had been] born and abandoned, including the identity of her natural parents and brothers" (see paragraph 28 of the judgment). While we regard the majority's conception of family life by reference to filiation as being too narrow, we agree that the Court did not need to examine whether there had been a breach of the applicant's right to respect for her family life in the present case, as in any event the facts clearly disclosed an issue over her right to respect for her private life.

3. As regards the issue of *private life*, which was, therefore, the only one to be found applicable by the Court, we entirely agree with the majority's statement in accordance, *inter alia*, with *Mikulić v. Croatia* (no. 53176/99, §§ 54 and 64, ECHR 2002-I): "Birth, and in particular the circumstances in which a child is born, form part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention" (see paragraph 29 of the judgment, *in fine*). As the Court has previously acknowledged, the right to respect for family life includes the right to personal development and to self-fulfilment. Since the issue of access to information about one's origins concerns the essence of a person's identity, it constitutes an essential feature of private life protected by Article 8 of the Convention; as the Court recognised, that provision is therefore applicable in the present case. Even for adopted children, being given access to information about one's origins and thereby acquiring the ability to retrace one's personal history is a

question of liberty and, therefore, human dignity that lies at the heart of the rights guaranteed by the Convention.

4. As regards *compliance* with Article 8, this is a situation in which there are competing rights or interests: on the one hand, the child's right to have access to information about its origins and, on the other, the mother's right, for a series of reasons specific to her and concerning her personal autonomy, to keep her identity as the child's mother secret. Other interests may also come into play, such as the need to protect the health of mother and child during pregnancy and at the birth, and the need to prevent abortion or infanticide.

5. In the instant case, while reiterating that Article 8 does not merely compel States to abstain from arbitrary interference but that "in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life" (see paragraph 40 of the judgment), the Court found that the applicant's complaint was not so much that the State had interfered with her rights under the Convention, but that it had not complied with its duty to act. In other words, "the substance of the [applicant's] complaint is not that the State has acted but that it has failed to act" (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 17, § 32). In these circumstances, the Court had to examine whether the State was in breach of its positive obligation under Article 8 of the Convention when it turned down the applicant's request for information about her natural mother's identity. Its task was not therefore to verify whether the interference with the applicant's right to respect for her private life was proportionate to the aim pursued but to examine whether the obligation imposed on the State was unreasonable having regard to the individual right to be protected, even if there are similarities between the principles applicable in both cases as regards the balance to be struck between the rights of the individual and of the community (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49, and *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, p. 56, § 31).

6. In order to decide that issue, the Court must examine whether a fair balance has been struck between the competing interests. It is not, therefore, a question of determining which interest must, in a given case, take absolute precedence over others. In more concrete terms, the Court is not required to examine whether the applicant should, by virtue of her rights under Article 8, have been given access to the information regarding her origins, whatever the consequences and regardless of the importance of the competing interests or, conversely, whether a refusal of the applicant's request for the information in question was justified for the protection of the rights of the mother (or, for instance, for the protection of the rights of others or in the interests of public health). It must perform a "balancing of

interests" test and examine whether in the present case the French system struck a reasonable balance between the competing rights and interests.

7. That is the nub of the problem. As a result of the domestic law and practice, no balancing of interests was possible in the instant case, either in practice or in law. In practice, French law accepted that the mother's decision constituted an absolute defence to any requests for information by the applicant, irrespective of the reasons for or legitimacy of that decision. In all circumstances, the mother's refusal is definitively binding on the child, who has no legal means at its disposal to challenge the mother's unilateral decision. The mother thus has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance. This, therefore, is not a multilateral system that ensures any balance between the competing rights. The effect of the mother's absolute "right of veto" is that the rights of the child, which are recognised in the general scheme of the Convention (see *Johansen v. Norway*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, and *Kutzner v. Germany*, no. 46544/99, ECHR 2002-I), are entirely neglected and forgotten. In addition, the mother may also by the same means paralyse the rights of third parties, in particular those of the natural father or the brothers and sisters, who may also find themselves deprived of the rights guaranteed by Article 8 of the Convention. In view of these considerations, we cannot be satisfied by the majority's concession that "the applicant was given access to non-identifying information about her mother and natural family that enabled her to trace some of her roots while ensuring the protection of third-party interests" (see paragraph 48 of the judgment).

8. At various points, the Court seems to regard the fact that the applicant is an adopted child as decisive (see paragraphs 43, 44 and 49 of the judgment), thereby implying that in the circumstances her search for her natural mother – who had abandoned her at birth – was superfluous and even unhelpful. We do not share that view. It has been shown that adopted children often consider it their duty to trace their original parents. Even if it has been adopted, a child who is unable to gain access to any type of information about its family origins is made to endure a form of suffering, and that suffering may leave scars. As to the need to protect the adoptive parents, a factor also relied on by the majority, there is nothing in the case file to suggest that they were opposed to the applicant's actions.

9. As regards the general interest, the Court relied, *inter alia*, on the need to avoid illegal abortions (see paragraph 45 of the judgment). However, it should be noted that at present there is no reliable data to support the notion that there would be a risk of an increase in abortions, or even of cases of infanticide, if the system of anonymous births was abolished. In addition, that risk has to be assessed in the light of the situation obtaining in countries which do not operate a system of anonymous births. It has not been established, in particular by statistical

data, that there has been a rise in the number of abortions or cases of infanticide in the majority of the countries in the Council of Europe that do not have legislation similar to that existing in France. In many countries, and indeed in France, the development of contraception and family planning has played a significant role in raising awareness among prospective parents. As to the "right to respect for life, a higher-ranking value guaranteed by the Convention" relied on by the majority, which they say is "thus one of the aims pursued by the French system" (see paragraph 45, *in fine*), we cannot accept the proposition implicit therein, namely that within all the countries in the Council of Europe the French system is the only one that ensures respect for the right to life as guaranteed by Article 2 of the Convention.

10. Lastly, like the Government, the majority advanced the argument that the State enjoyed a margin of appreciation in the choice of the means calculated to secure compliance with Article 8 in the sphere of relations between individuals and that that margin was greater in the instant case in view of the diversity of practice to be found among the legal systems and traditions and the fact that parents were resorting to indirect means of abandoning their children (see paragraphs 46 and 47 of the judgment).

11. Turning, firstly, to the *margin of appreciation* itself, its extent may depend not only on the right or rights concerned but also, as regards each right, on the very nature of the interest concerned. Thus, certain aspects of the right to private life are peripheral to that right, whereas others form part of its inner core. We are firmly of the opinion that the *right to an identity*, which is an essential condition of the right to autonomy (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and development (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I), is within the inner core of the right to respect for one's private life. Accordingly, the fairest scrutiny was called for when weighing up the competing interests.

12. Secondly, in our view, the suggestion that the States had to be afforded a margin of appreciation owing to the absence of a *common denominator* between their domestic laws simply does not tally with the extracts of comparative law on which the Court itself relies. Thus, as the Court notes: "It is relatively rare for mothers to be entitled to give birth anonymously under European domestic legislation" (see paragraph 19 of the judgment). Further, it observes that the current trend in certain countries is towards the acceptance "if not of a right to give birth anonymously, then at least of a right to give birth 'discreetly' ". Those are two entirely different situations.

13. In fact, no other legislative system is so weighted in favour of the protection of maternal anonymity – a birth in secret followed by the abandonment of the child in secret – as that formalised and institutionalised in France by the Civil Code and the Family and Social Welfare Code. As

the Government acknowledged (see paragraph 37 of the judgment), only two countries, Italy (Article 73 of the Civil Code) and Luxembourg (Article 57 of the Civil Code) do not make it mandatory for the mother's name to be entered on the birth certificate. In such cases, confidentiality therefore only attaches to the identification appearing on the birth certificate and does not prevent the maternal filiation between the natural mother and the child from being established at a later date. In addition, in Italy the law of 1983 on adoption guarantees confidentiality as regards the child's origins unless the judicial authorities grant express authorisation for disclosure. In Spain section 47 of the Law on civil status, which allowed mothers to have the words "mother unknown" entered in the register of births, deaths and marriages, was declared unconstitutional by the Supreme Court in a judgment of 21 September 1999.

14. In contrast, certain countries expressly recognise the right "to know". Thus, in Germany the right for everyone to know their origins was established as a fundamental right of the personality, based on the general right to dignity and free development, by the Federal Constitutional Court in a judgment of 31 January 1989. The practice of providing "baby boxes" (*Babyklappe*), to which the Court refers in its judgment (see paragraph 19), which attracted widespread media attention, nonetheless remains a marginal phenomenon and the proposal to legalise them has attracted sharp criticism. In Switzerland, the right for everyone to know their origins has been recognised under the Federal Constitution since 1992 as a right of the personality and, in the event of adoption, Article 138 of the Ordinance on civil status provides that persons with an interest in obtaining information entered on the original birth certificate must obtain authorisation from the cantonal supervisory authority. The same rule applies in the Netherlands, where the Supreme Court, in its *Valkenhorst* judgment of 15 April 1994, recognised the child's general right to its personality, including the right to know the identity of its natural parents, and opened the door in this sphere to the process of weighing up the various rights and interests at stake.

15. Lastly, the majority argue that there is a lack of consensus, but fail to refer to the various international instruments that play a decisive role in achieving a consensus and which seek to ensure a balance between competing rights in individual cases. Thus, the United Nations Convention on the Rights of the Child of 20 November 1989 provides that a child has from birth "as far as possible, the right to know his or her parents" (Article 7). Likewise, the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, which has been ratified by France, provides that the competent authorities of a Contracting State shall ensure that information held by them concerning a child's origins, in particular information concerning the identity of his or her parents, as well as the child's medical history, shall be preserved. The competent authorities are also required to ensure that the child or his or her

representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State (Article 30). In Recommendation 1443 (2000) of 26 January 2000 ("International adoption: respecting children's rights") the Parliamentary Assembly of the Council of Europe invited the States to "ensure the right of adopted children to learn of their origins at the latest on their majority and to eliminate from national legislation any clauses to the contrary".

16. In these circumstances, by relying on the alleged diversity of practice among the legal systems and traditions (and even going so far as to take into account parliamentary bills that are no more than mere proposals) as justification for the margin of appreciation and for declaring the mother's absolute right to keep her identity secret compatible with the Convention, the majority have stood the argument concerning the European consensus on its head and rendered it meaningless. Instead of permitting the rights guaranteed by the Convention to evolve, taking accepted practice in the vast majority of countries as the starting-point, a consensual interpretation by reference to the virtually isolated practice of one country (see paragraph 47 of the judgment) is used to justify a restriction on those rights.

17. With regard to striking a fair balance between the competing interests, we consider the approach adopted by the Court in *Gaskin v. the United Kingdom* (judgment of 7 July 1989, Series A no. 160, p. 20, § 49), which it followed in *M.G. v. the United Kingdom* (no. 39393/98, 24 September 2002) to be relevant.

> "In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent."

18. If the system of anonymous births is to be retained, an *independent authority* of that type should have the power to decide, on the basis of all the factual and legal aspects of the case and following adversarial argument, whether or not to grant access to the information; such access may in appropriate cases be made conditional, or subject to compliance with a set procedure. In the present situation, in the absence of any machinery enabling the applicant's right to find out her origins to be balanced against competing rights and interests, blind preference was inevitably given to the

sole interests of the mother. The applicant's request for information was totally and definitively refused, without any balancing of the competing interests or prospect of a remedy.

19. The majority of the Court seek to distinguish *Gaskin*, as well as *Mikulić*, on the grounds that the issue of "access to information about one's origins and the identity of one's natural parents" is not of the same nature as that of access to "a case record concerning a child in care" (*Gaskin*) or to "evidence of alleged paternity" (*Mikulić*) (see paragraph 43 of the judgment). We do not find the distinction drawn by the majority between the three cases to be convincing; still less do we consider it to be a distinction which justifies the Court in arriving at a different result in the present case. In particular, to assert that the issue in *Gaskin* concerned only access to information in care records is in our view seriously to understate what was there at stake, the Court accepting in its judgment that the case file "contained information concerning highly personal aspects of the applicant's childhood, development and history", which "could constitute his principal source of information about his past and formative years" (*Gaskin*, cited above, p. 15, § 36). Moreover, even if the situation in the present case may be regarded as distinct from that in the earlier cases, the interests of the present applicant in discovering her origins appear to us to be at least as strong, and arguably stronger, than those previously considered by the Court and to require to be given correspondingly strong weight in any fair balance of the competing interests.

20. Law no. 2002-93 of 22 January 2002 on access by adopted persons and people in State care to information about their origins, which provides, *inter alia*, for a National Council for Access to Information about Personal Origins to be set up, clearly recognises the need for the balance between the competing interests to be restored. Although it does not call into question the right to give birth in secret, it does represent a step forward on the issue of access to information about one's origins. As the Court noted in its judgment, that statute, which is of immediate application, may now enable the applicant to request disclosure of her mother's identity, provided – and we consider this point to be capital – her mother's consent is forthcoming (see paragraph 49 of the judgment). It will be noted, firstly, that the mother is merely invited to supply identifying information and is under no obligation to do so (Article L. 222-6 of the Social Action and Families Code, introduced by section 2 of the law of 22 January 2002); secondly, she may at all times refuse to allow her identity to be disclosed, even after her death (Article L. 147-6 of the Social Action and Families Code, introduced by section 1 of the law of 22 January 2002). The new legislation does not vest the National Council it sets up (or any other independent authority) with any power to take a final decision ordering disclosure in the light of the competing interests in the event that the mother continues to withhold her consent, thereby definitively depriving the child of its right to establish the

identity of its natural family. The initial imbalance is perpetuated, as the right to access to information about one's personal origins ultimately remains within the mother's sole discretion. Furthermore, although they note that the new legislation was passed four years after the application was lodged with the Commission (see paragraph 23 of the judgment) and that the applicant is now 38 years old, the majority fail to take into account the situation that existed *before* the enactment of the law of 22 January 2002 and the applicant's inability to make any request whatsoever prior thereto (see, *mutatis mutandis*, *M.G. v. the United Kingdom*, cited above, § 31).

21. Unlike the majority, we therefore consider that in the instant case the French legislation has not struck a fair balance between the interests concerned (see paragraph 49, *in fine*) and that there has been a violation of Article 8 of the Convention. Accordingly, we find that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8.