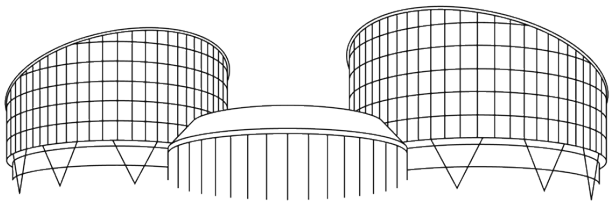

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF HARROUDJ v. FRANCE

(Application no. 43631/09)

JUDGMENT

STRASBOURG

4 October 2012

FINAL

04/01/2013

This judgment is final but it may be subject to editorial revision.

In the case of Harroudj v. France,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 11 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 43631/09) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Ms Katya Harroudj ("the applicant"), on 10 August 2009.

2. The applicant was represented by Mr M. Bescou, a lawyer practising in Lyons. The French Government ("the Government") were represented by their Agent, Ms. E. Belliard, Head of the Legal Department, Ministry of Foreign Affairs.

3. The applicant alleged that there had been a violation of Articles 8 and 14 of the Convention.

4. On 15 September 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1962 and lives in Villeurbanne.

6. Zina Hind was born on 3 November 2003 in Algeria and was abandoned immediately by her biological mother, who gave birth anonymously. As her father was also unknown, Zina Hind became a ward of

the Algerian State on 3 December 2003. The director of social services in Boumerdès (Algeria) was appointed as her guardian.

7. On 13 January 2004 the President of the court of Boumerdès granted the applicant, then aged 42 and unmarried, the right to take the child Zina Hind into her legal care (*kafala*). He also authorised Zina Hind to leave Algeria and settle in France.

8. In a decision of 19 January 2004, the President of the court of Bordj Menaïel (Algeria) admitted a request for the child to take the same name and authorised the change from Zina Hind to Hind Harroudj.

9. Hind Harroudj arrived in France on 1 February 2004. Since then she has been living with the applicant and the applicant's mother.

10. On 8 November 2006 the applicant applied for the full adoption of Hind. In support of her request she argued that to enable Hind to be adopted was the solution most consistent with "the best interests of the child", within the meaning of Article 3 § 1 of the Convention on the Rights of the Child of 20 November 1989 and Article 1 of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

11. In a judgment of 21 March 2007 the Lyons *tribunal de grande instance* dismissed her application for adoption, after noting that *kafala* gave her parental authority, enabling her to take any decisions in the child's interest. The court found that *kafala* gave the child the protection to which all children were entitled under the international conventions. It further pointed out that, under Article 370-3 of the French Civil Code (see paragraph 23 below), a child could not be adopted if the law of his or her country prohibited adoption, which it did in the case of Hind, as the Algerian Family Code stipulated: "adoption is prohibited by the *Sharia* and by legislation" (see paragraph 17 below). The applicant appealed against that judgment.

12. In a judgment of 23 October 2007 the Lyons Court of Appeal upheld the judgment of the court below:

> "Article 370-3, second paragraph, of the Civil Code, inserted by the Law of 6 February 2001 on Intercountry Adoption, stipulates: 'Adoption of a foreign minor may not be ordered where his or her personal law prohibits that institution, unless the minor was born and resides habitually in France'.
>
> The choice-of-law rule, in so far as it refers to the personal law, is not discriminatory and is compliant with Articles 8 and 14 of the European Convention on Human Rights and with international law; Article 4 (a) of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption provides that adoption may take place only if the competent authorities of the State of origin have established that the child is adoptable, this not being the case where adoption is prohibited.
>
> Hind Harroudj was born in Algeria.

Article 46 of the Algerian Family Code authorises *kafala*, but prohibits adoption. Under French law, simple or full adoption creates a legal parent-child relationship for the benefit of the adopters and cannot be equated with *kafala*. The Algerian Family Code does not provide for any exception to the prohibition of adoption where the child has no established parentage. The executive decree of 13 January 1992 on changes of name does not establish parent-child relationships, as the holder of the right of *kafala* retains the status of guardian.

The *kafala* system preserves the child's interests by conferring legal status on the care provided by guardians. It is expressly recognised by Article 20 § 3 of the Convention on the Rights of the Child of 20 November 1989. Islamic law makes other provision for the inheritance of property. Accordingly, the above-mentioned provisions do not run counter to the child's best interests."

13. The applicant lodged an appeal on points of law. Under Articles 8 and 14 of the Convention, she relied on Hind's right to respect for her family life, submitting that it was in the child's interest for a legal parent-child relationship to be established between them, and that her inability to adopt Hind entailed a disproportionate interference with her own family life. She argued that the fact of denying her the right to adopt had the effect of establishing a difference in treatment in respect of the child's family life on account of the child's nationality and country of origin, as children born in countries which did not prohibit adoption could be adopted in France.

14. In a judgment of 25 February 2009 the Court of Cassation dismissed her appeal on points of law:

"After noting that the choice-of-law rule in Article 370-3, second paragraph, of the Civil Code, referring to the personal law of the adopted child, was consistent with the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption – the application of which is intended only for adoptable children, excluding those whose country of origin prohibits adoption – the Court of Appeal did not establish any difference in treatment in respect of the child's family life or disregard the right to respect for the latter, in finding that Article 46 of the Algerian Family Code prohibited adoption but authorised *kafala* and in rejecting the application for adoption, in so far as *kafala* was expressly recognised by Article 20, paragraph 3, of the New York Convention of 26 January 1990 [adopted on 20 November 1989] on the Rights of the Child, as preserving, on a par with adoption, the child's best interests. ..."

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. *Kafala*

1. The legal arrangement of kafala *in Islamic law*

15. Adoption, emanating from classical Roman law, which based it on the "imitation of nature" (the principle of *adoptio naturam imitatur* in the Institutes of Justinian) creates, between the adopter and the adoptee, a legal relationship that is identical to that existing between parent and child. Although certain States make a distinction between several levels of adoption (most often between full adoption and simple adoption), this characteristic is always present.

16. Under Islamic law adoption is prohibited (*haraam*). However, the right is accorded a special institution: *kafala* or "legal care". In Muslim States, with the exception of Turkey, Indonesia and Tunisia, *kafala* is defined as a voluntary undertaking to provide for a child and take care of his or her welfare, education and protection.

17. The procedural arrangements for establishing *kafala* depend on the domestic law of each Muslim State. The relevant provisions of the Algerian Family Code thus read as follows:

Article 46

"Adoption (*tabanni*) is prohibited by the *Sharia* and by legislation."

Article 116

"*Kafala* is an undertaking to assume responsibility for supporting, educating and protecting a minor child in the same manner as a father would care for his son. It is established by a legal act."

Article 117

"*Kafala* is granted upon appearance before the judge or notary, with the child's consent when he or she has a father and mother."

Article 118

"The holder of the right of *kafala* (the *kafil*) must be a Muslim, a sensible and upright person, and be in a position to support the fostered child (the *makfoul*), with the capacity to protect him or her."

Article 119

"The fostered child may be of known or unknown parentage."

Article 120

"The fostered child shall retain his or her original legal parent-child relationship if of known parentage. Otherwise, Article 64 of the Civil Status Code shall be applied in respect of the child."

Article 124

"Should the father and mother, or one of them, request the reinstatement under their guardianship of the fostered child, it will be for the child, provided he or she is of an age of discernment, to choose whether or not to return to his parents.

If the child is not of such an age, he may be returned only with the judge's authorisation, taking into account the interests of the fostered child."

2. Reference to kafala *in international instruments*

18. Articles 20 and 21 of the United Nations Convention on the Rights of the Child, of 20 November 1989, read as follows:

Article 20

"1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, Kafala of Islamic law, adoption, or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

Article 21

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

19. The relevant provisions of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, adopted in the context of the Hague Conference on Private International Law, read as follows:

"The States signatory to the present Convention,

Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, ...

Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children, ...

Have agreed upon the following provisions"

Article 1

"The objects of the present Convention are -

(a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law; ...

(c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention."

Article 2

"...

2. The Convention covers only adoptions which create a permanent parent-child relationship."

Article 4

"An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -

(a) have established that the child is adoptable;

(b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests; ..."

20. The relevant provisions of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, also adopted in the context of the Hague Conference on Private International Law, read as follows:

Article 1

"(1) The objects of the present Convention are -

(a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;

(b) to determine which law is to be applied by such authorities in exercising their jurisdiction;

(c) to determine the law applicable to parental responsibility;

(d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;

(e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

(2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child."

Article 3

"The measures referred to in Article 1 may deal in particular with –

...

(c) guardianship, curatorship and analogous institutions;

(d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

(e) the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;

..."

Article 4

"The Convention does not apply to -

...

(b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

..."

3. Comparative law

21. Out of the twenty-two Contracting States of which a comparative law study has been made (Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Denmark, Finland, "the former Yugoslav Republic of Macedonia", Georgia, Germany, Greece, Ireland, Italy, the Netherlands, Russia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom), where, as a result of historical factors, either the majority of the population is traditionally Muslim or there are sufficiently large Muslim communities, none of them regard *kafala* established abroad as adoption. In cases where the domestic courts have recognised the effects of *kafala* granted in a foreign country, they have always treated it as a form of guardianship or curatorship, or as placement with a view to adoption.

22. In the domestic law of the States examined by the Court, the choice-of-law rules in matters of adoption tend to vary. They can be divided into four groups: (a) States giving preference to the forum State (where the adoption takes place); (b) States giving preference to the adoptee's national law; (c) States giving preference to the adopter's national law; (d) States taking a cumulative approach (requiring that the conditions of both the adoptee's and the adopter's national laws be satisfied). In nine States (Belgium, Denmark, Finland, Greece, Ireland, the Netherlands, the United Kingdom, Sweden and Switzerland), the adoptee's national law does not constitute, whether in theory or in practice, an obstacle to adoption. However, in some of these States (Finland, Switzerland, Denmark, Sweden, Belgium), the domestic legislation or practice show a certain reticence towards the adoption of children from countries prohibiting adoption – for example, by imposing additional conditions in such cases. In Belgium a specific provision was thus inserted in the Code of Private International Law in December 2005, referring to "cases where the applicable law in the child's State of origin recognises neither adoption, nor placement with a view to adoption". The removal of a child to Belgium with a view to adoption and the adoption itself are not prohibited, but are subject to a strict procedure, requiring in particular a report to be sent by the child's State of origin to the Belgian authorities, proof of consent if the child has reached the age of twelve, and an agreement between the authorities of both States (State of origin and Belgium) to entrust the child to its adoptive parents.

B. French law

23. Law no. 2001-111 of 6 February 2001 inserted new provisions in the Civil Code concerning intercountry adoption, including the new Article 370-3 in Chapter III (Choice-of-law rule concerning the legal parent-child relationship established by adoption and the effect in France of

adoptions granted abroad) in Title VIII on legal parent-child relationships by adoption. The Article reads as follows:

Article 370-3 (inserted by the Law of 6 February 2001)

"The requirements for adoption are governed by the national law of the adopter or, in case of adoption by two spouses, by the law which governs the effects of their marital relationship. Adoption, however, may not be granted where it is prohibited by the national laws of both spouses.

Adoption of a foreign minor may not be ordered where his or her personal law prohibits that institution, unless the minor was born and resides habitually in France ..."

24. Law no. 2003-1119 of 26 November 2003 on immigration control, foreign residents in France and nationality amended Article 21-12 of the Civil Code, concerning acquisition of French nationality by declaration. It now reads as follows:

Article 21-12

"A child who was the subject of a simple adoption by a person of French nationality may, until the age of majority, declare, in the manner provided for in Articles 26 et seq. hereof, that he opts for the status of French national, provided he resides in France at the time of his declaration.

However, the obligation of residence is dispensed with where the child was adopted by a French national who does not have his habitual residence in France.

The following may also opt for French nationality under the same conditions:

1° A child who, for at least five years, has been in foster care in France and brought up by a French national or who, for at least three years, has been entrusted to the child welfare service.

2° A child in foster care in France and brought up in conditions that have allowed him to receive, for at least five years, a French education, from either a public body, or a private body satisfying the characteristics determined by a decree issued after consultation of the *Conseil d'Etat*."

25. Decree no 93-1362 of 30 December 1993 pertaining to declarations of nationality, and to decisions of naturalisation, redintegration, and of loss, forfeiture and withdrawal of French nationality (amended by decree no. 2010-527 of 20 May 2010) reads as follows:

Article 16

"In order to make the declaration provided for in Article 21-12 of the Civil Code, the applicant shall provide the following documents:

...

(4) Where the applicant is a child who has been fostered in France and raised by a French national, the certificate of French nationality, civil registration certificates, any documents emanating from the French authorities that show the said foster parent has French nationality and any document proving that the child was placed in foster care in France and has been raised by that person for at least five years; ..."

26. Before the Law of 6 February 2001, the ordinary courts and the Court of Cassation had adopted a flexible position, allowing the conversion of *kafala* into adoption subject to the consent of the minor's representative "having regard to the effects attached by French law to adoption and, in particular, in the case of full adoption, to the complete and irrevocable nature of the severance of the relationship between the minor and his blood relatives or the guardianship authorities of his country of origin" (Court of Cassation, First Civil Division, 10 May 1995, no. 93-17634). Following the enactment of the law, the Court of Cassation changed its position, quashing the judgments of courts of appeal which had granted simple adoption in respect of Moroccan and Algerian children in the *kafala* care of French couples (Court of Cassation, First Civil Division, 10 October 2006, no. 06-15264 and no. 06-15265). That solution has remained constant since then (see, for example, Court of Cassation, First Civil Division, 9 July 2008, no. 07-20279; Court of Cassation, First Civil Division, 28 January 2009, no. 08-10034; and more recently, Court of Cassation, First Civil Division, 15 December 2010, no. 09-10439).

27. In reports of 2004 and 2005, and in an opinion of 2007, the Children's Advocate and the High Council for Adoption drew attention to the administrative difficulties encountered for the fostered child (access to visas, welfare rights) as a result of the lack of a legal parent-child relationship with the foster parent and to the difficulties of acquiring nationality. The report on adoption by J.-M. Colombani, deposited on 19 March 2008, noted that any evolution of the legal aspects of the situation appeared difficult and proposed cooperation with the two main countries concerned (Algeria and Morocco) especially with a view to adapting the conditions for the granting of a visa on a family reunification basis. The report explained that the Franco-Algerian Agreement of 27 December 1968 enabled children in *kafala* care to benefit from a family reunification measure in France provided that the other conditions for such a measure were met (income, housing). In 2010 the French Ombudsman called on the legislature to reconsider the question of *kafala*, advocated that children placed by judicial decision in *kafala* care should, at a minimum, be eligible for simple adoption and requested the abolition "of the five-year period of residence required by Article 21-12 of the Civil Code for French nationality to be sought by children placed by judicial decision in *kafala* care and raised by a French national, the possession of nationality being the only means for such children to become adoptable". Lastly, two private member's Bills, one on the adoption of children lawfully placed in *kafala* care, tabled by

Senator A. Milon on 10 March 2011, the other on abandoned children and adoption tabled by Member of Parliament M. Tabarot on 8 February 2012, have been registered with the Presidency of the National Assembly and with that of the Senate. The aim of the Bills is for placement in *kafala* care by judicial decision or non-judicial decision (the Milon Bill) to be equated with simple adoption.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicant complained about her inability to adopt a child of Algerian nationality, Hind, who had been placed in her *kafala* care. She argued that the refusal to recognise a legal parent-child relationship between her and Hind, whom she regarded as her own daughter, constituted a disproportionate interference with her family life. The relevant Convention provision reads as follows:

Article 8

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

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

A. Admissibility

29. The Government raised the objection that domestic remedies had not been exhausted. In their submission, the applicant could not complain of her inability to adopt Hind since she had not sought to obtain French nationality for the child, under Article 21-12 of the Civil Code. They stipulated that she could have made such a request from 1 February 2009 as the child had been in her care since 1 February 2004.

30. The applicant disputed that objection, taking the view that the argument was ineffective in the light of the Court's case-law.

31. The Court observes that the alleged interference with the applicant's family life concerns her inability to adopt a child, with all the ensuing consequences, including the deprivation of a means of immediate

acquisition of French nationality. The Court finds that this objection is closely connected to the merits of the applicant's complaint. Moreover, the Government raised part of the relevant arguments in their submissions on the merits. Consequently, the Court decides to join this objection to the merits.

32. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

33. The applicant submitted that her inability to adopt Hind constituted an interference with her family life. She asserted that, even though she had been able, by judicial decision, to give the child her surname, her inability to obtain recognition of a legal parent-child relationship was incompatible with Article 8 of the Convention. She pointed out that Hind was born in Algeria but that she had no family ties in that country since her biological parents remained unknown. Having arrived in France at the age of three months, and having been brought up in that country, the girl had also developed all her cultural, social and emotional associations there.

34. In the applicant's submission, the fact that the domestic authorities did not recognise the legal parent-child relationship between her and her child constituted an interference with her right to respect for her family life. She explained, first, that in the event of her death, this non-recognition would preclude Hind from living with Mrs A., the applicant's mother, whom the girl regarded as her grandmother. She added that the girl would be excluded from any right to inherit on intestacy. Lastly, she acknowledged that it was possible for the child to apply for French nationality, but only after five years of residence in France.

In her view, this interference did not pursue any legitimate aim and the child's interest, on account of its fundamental nature, prevailed over the State's interest in maintaining good diplomatic relations with countries prohibiting adoption. She alleged in this connection that it did not appear from the developments in Belgian and Swiss legislation, which permitted the adoption of a child in *kafala* care, that there had been any diplomatic tensions *vis-à-vis* Islamic-law jurisdictions.

35. The Government began by arguing that the refusal to grant the adoption did not constitute an interference with the applicant's "family life" – the existence of which nevertheless had to be admitted in view of the age at which the child had been placed in her care and the fact that they had lived together continuously – on the ground that it did not hinder the

effective continuance of that "family life". The applicant had been granted rights in respect of the child which enabled her to act in the child's best interests in a family context, including the right to take care of the child and represent her in civil acts or before the courts (they referred to Article 390 of the Civil Code, on the effect of guardianship under French law).

36. In addition to the fact that the applicant had not been deprived of the possibility of having an effective family life, the Government denied having failed to fulfil their positive obligations inherent in respect for such family life. Whilst the denial of adoption prevented the creation of a legal parent-child relationship, that decision was consonant with the child's best interests and with the need to balance competing interests.

37. The Government pointed out that the Convention did not guarantee a right to adopt and that adoption had to take account of the child's best interests: adoption meant "providing a child with a family, not a family with a child" (they referred to *Fretté v. France*, no. 36515/97, § 42, ECHR 2002-I, and *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, § 151, ECHR 2004-V). The Government indicated that it would not be in the child's interest to be granted a status of adoptee that was not recognised under the child's personal law in his or her country of origin and that would give rise to choice-of-law issues. They further observed that, under the New York Convention on the rights of the child, *kafala* was recognised as one of the arrangements for the care of children abandoned by their family, in accordance with the interests of the child concerned. In addition, although the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption was not applicable in the present case, it would be difficult for France, a party to that treaty, not to have regard at least to the spirit thereof: that convention required parties to verify that the child was adoptable under the law of his or her country of nationality.

38. The Government lastly referred to the possibilities for a child in *kafala* care to obtain the status of adoptee, pointing out that the prohibition of adoption in such cases was not absolute. Article 370-3 of the Civil Code permitted the adoption of a minor whose personal law prohibited adoption if the child was born and resided habitually in France. This exception was justified by the fact that the child would automatically become French upon reaching the age of majority, under Article 21-7 of the Civil Code. Moreover, pursuant to Article 21-12 of the Civil Code, a child in foster care and raised for at least five years by a French national was entitled to apply for French nationality. The Government observed that the applicant had not taken any steps with a view to obtaining French nationality for the child placed in her care. Lastly, the Government emphasised that Article 370-3, paragraph 2, of the Civil Code, which referred only to minors, did not prevent the adoption of a child upon his or her majority.

39. On a very alternative basis, and if the Court were to take the view that there had been an interference with the applicant's family life, the Government, in addition to their previous arguments concerning positive obligations, considered it to be proportionate. The entitlement to French nationality after five years of residence in France made adoption possible, to the extent that it could be seen after that period of time that adoption would not run counter to the interests of the child, having regard to the child's integration in the society which recognised adoption and in which he or she would clearly be continuing to live.

2. The Court's assessment

(a) Applicable principles

40. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290*,* and *Pini and Others*, cited above, § 149).

41. The Court further reiterates that the Convention and its Protocols must be interpreted in the light of present-day conditions (see *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31; *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; and *Moretti and Benedetti v. Italy*, no. 16318/07, § 61, 27 April 2010). In this context, as the Court has previously found, the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt (see *E.B. v. France* [GC], no. 43546/02, 22 January 2008). This does not, however, rule out the possibility that States parties to the Convention may nevertheless have, in certain circumstances, a positive obligation to enable the formation and development of family ties (see, to this effect, *Keegan*, cited above, § 50, and *Pini and Others*, cited above, §§ 150 et seq.). According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and establish legal safeguards that render possible the child's integration in his family (see *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 119, 28 June 2007).

42. The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in

particular the rules concerning the international protection of human rights. As regards, more specifically, the positive obligations that Article 8 lays on the Contracting States in this matter, they must be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989 (ibid., § 120).

43. Whether the question is approached from the aspect of a positive obligation of the State – to adopt reasonable and appropriate measures to protect the rights of the individual under paragraph 1 of Article 8 – or from that of a negative obligation – an "interference by a public authority", which must be justified under paragraph 2 –, the principles to be applied are quite similar.

44. The Contracting States will usually enjoy a wide margin of appreciation if the public authorities are required to strike a balance between competing private and public interests or Convention rights. This applies all the more where there is no consensus within the member States of the Council of Europe as to the relative importance of the interest at stake or as to the best means of protecting it (see *Evans v. the United Kingdom* [GC], no. 6339/05, §§ 77-81, ECHR 2007-I, and *Shavdarov v. Bulgaria*, no. 3465/03, §§ 46-48, 21 December 2010).

45. The Court further reiterates that its task is not to substitute itself for the domestic authorities, but rather to review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A; *Mikulić v. Croatia*, no. 53176/99, § 59, ECHR 2002-I; and *P., C. and S. v. the United Kingdom*, no. 56547/00, § 122, ECHR 2002-VI).

(b) Application to the present case

46. The Court first observes that the Government did not dispute the existence of family life between the applicant and Hind, in view of the child's age at the time of her placement in care and the fact that they had been living together continuously (see paragraph 35 above).

47. The Government denied, however, that the inability to adopt Hind constituted an "interference" with the applicant's family life. The Court shares that view. It observes in this connection that the applicant did not complain of any major hindrance to the continuance of her family life but argued that to ensure respect for the latter it was necessary to equate *kafala* with full adoption and thus to recognise a legal parent-child relationship, this being excluded by Article 370-3 of the Civil Code where the child's country of origin prohibited adoption. In those circumstances, the Court finds it more appropriate to examine the complaint in terms of positive obligations. In this connection, the Court would draw a distinction between, on the one hand, the situation in the present case, where the law of the respondent State merely refuses to equate *kafala* with adoption and refers to the child's personal law to determine whether such adoption is possible,

and, on the other, the situation in the *Wagner and J.M.W.L.* judgment (cited above), where it decided that the Luxembourg courts, in refusing to grant enforcement of an adoption decision by a Peruvian court, had disregarded the legal status validly created abroad, in an unreasonable manner, and had thus breached Article 8 of the Convention. The Court reiterates that the notion of "respect" as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 72, ECHR 2002-VI).

48. As to the margin of appreciation afforded to the State, the Court first observes that it can be seen from the comparative-law study that no State equates *kafala* with adoption but that, in French law and in other jurisdictions, it produces effects that are comparable to those of guardianship, curatorship or placement with a view to adoption. Furthermore, the information gathered as to whether prohibition by a child's national law constitutes an obstacle to adoption has revealed varied and nuanced situations in the legislation of the different States. There is no clear measure of common ground between the member States (see paragraphs 21 and 22 above). Consequently, the margin of appreciation afforded to the French authorities should be regarded as broad.

49. In rejecting Hind's adoption in the present case, the domestic courts relied on Article 370-3, paragraph 2, of the Civil Code, which precludes a foreign child's adoption where it is illegal under the child's personal law.

They also referred to the New York Convention on the rights of the child, Article 20 of which expressly recognises *kafala* of Islamic law as a form of "alternative care", on a par with adoption. The Court notes that the same Article mentions, among the criteria influencing the choice of the most suitable form of protection for a child, his or her ethnic, religious, cultural and linguistic background. It further observes that Article 21 of the same convention, specifically concerning adoption, indicates that "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration" (see paragraph 18 above).

The Court of Cassation has, moreover, observed that Article 370-3 of the Civil Code is consistent with the Hague Convention of 29 May 1993, with its concern to prevent "the abduction, the sale of, or traffic in children",

even if that convention concerns only adoptions "which create a permanent parent-child relationship" (Article 2 § 2), and has emphasised that such adoptions can take place only if the competent authorities of the State of origin have established that the child is adoptable (Article 4 (a); see paragraph 19 above).

Lastly, *kafala* falls expressly within the scope of the Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (see paragraph 20 above).

50. It transpires from the foregoing that the applicant met with a refusal largely on account of a concern to abide by the spirit and purpose of international conventions. The Court is of the view that the recognition of *kafala* by international law is a decisive factor in assessing how States deal with it in their national laws and envisage any choice-of-law issues that may arise.

51. Furthermore, the Court notes that the judicial grant of *kafala* is fully recognised by the respondent State and that it produces effects in that country that are comparable in the present case to those of guardianship, since the child, Hind, had no known parentage when she was placed in care. In that connection, the domestic courts emphasised the fact that the applicant and the child had the same surname, as a result of the relevant legal procedure, and that the applicant exercised parental authority, entitling her to take any decision in the child's interest. Admittedly, as *kafala* does not create any legal parent-child relationship, it has no effects for inheritance and does not suffice to enable the child to acquire the foster parent's nationality. That being said, there are means of circumventing the restrictions that stem from the inability to adopt a child. In addition to the name-change procedure, to which the child was entitled in the present case on account of her unknown parentage in Algeria, it is also possible to draw up a will with the effect of allowing the child to inherit from the applicant and to appoint a legal guardian in the event of the foster parent's death.

The various points examined above show that the respondent State, applying the international conventions that govern such matters, has put in place a flexible arrangement to accommodate the law of the child's State of origin and the national law. The Court notes that the prohibition of adoption stems from the choice-of-law rule in Article 370-3 of the Civil Code but that French law provides the means to alleviate the effects of that prohibition, based on the objective signs of a child's integration into French society. Firstly, the choice-of-law rule is expressly set aside by the same Article 370-3 in cases where "the minor was born and habitually resides in France". Secondly, this choice-of-law rule is deliberately circumvented by the possibility for the child to obtain French nationality, within a reduced period of time, and thus to be adopted, when he or she has been in the care of a French national. The Court observes in this connection that the respondent

State argued, without being contradicted, that Hind could already benefit from such a possibility.

The Court takes the view that by gradually obviating the prohibition of adoption in this manner, the respondent State, which seeks to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin, has shown respect for cultural pluralism and has struck a fair balance between the public interest and that of the applicant.

52. In those circumstances, and after dismissing the Government's objection as to non-exhaustion of domestic remedies, which do not encompass the acquisition of French nationality, the Court finds, having regard to the State's margin of appreciation in such matters, that there has been no breach of the applicant's right to respect for her family life. Accordingly, there has been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 8 AND 14 OF THE CONVENTION TAKEN TOGETHER

53. The applicant alleged that, by referring to the child's personal law, which did not permit adoption, the provisions of the French Civil Code created unjustified discrimination on grounds of national origin. She relied on Article 14 of the Convention, of which the relevant part reads as follows:

Article 14

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... national ... origin ..."

54. The Government submitted that the alleged difference in treatment stemmed from an objective factor related to the child's personal law and in accordance with the child's best interests and that it was proportionate to the aim pursued.

55. In the Court's view, the gravamen of the applicant's complaint under Article 14 of the Convention is her inability to adopt Hind on account of the child's personal law. That issue has been examined under Article 8 and no violation thereof has been found. In those circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins to the merits* the Government's objection of non-exhaustion of domestic remedies and *dismisses* it;

2. *Declares* the application admissible;

3. *Holds* that there has been no violation of Article 8 of the Convention;

4. *Holds* that no separate issue arises under Article 14 of the Convention.

Done in French, and notified in writing on 4 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President