



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

GRAND CHAMBER

CASE OF ŞERİFE YİĞİT v. TURKEY

(Application no. 3976/05)

JUDGMENT

STRASBOURG

2 November 2010

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

In the case of Şerife Yiğit v. Turkey,

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

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Josep Casadevall,
Corneliu Bîrsan,
Nina Vajić,
Anatoly Kovler,
Dean Spielmann,
Renate Jaeger,
Sverre Erik Jebens,
David Thór Björgvinsson,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Ann Power,
Işıl Karakaş, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 16 December 2009 and on 8 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 3976/05) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Ms Şerife Yiğit (“the applicant”), on 6 December 2004.

2. The applicant, who had been granted legal aid, was represented by Mr M.S. Tanrikulu and Mr N. Kırık, lawyers practising in Diyarbakır and Hatay respectively. The Turkish Government (“the Government”) were represented by their Agent.

3. Relying on Article 8 of the Convention, the applicant alleged that, having lived in a “religious marriage” (*imam nikâhı*) with her partner, with whom she had six children, she had been unable to claim retirement benefits (survivor's pension) or health insurance (social security) cover on her

partner's death in 2002, unlike the children born of the relationship, which was not recognised by the law or the national courts.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 20 January 2009 a Chamber of that Section, composed of the following judges: Françoise Tulkens, Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Danutė Jočienė, Dragoljub Popović, András Sajó and Işıl Karakaş, and also of Sally Dollé, Section Registrar, delivered a judgment in which it held by four votes to three that there had been no violation of Article 8 of the Convention.

5. On 14 September 2009, following a request from the applicant dated 7 April 2009, a panel of the Grand Chamber decided to refer the case to the Grand Chamber under Article 43 of the Convention.

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 of the Rules of Court.

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 16 December 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs Ş. AKİPEK,	<i>Counsel,</i>
Mr M. ÖZMEN,	<i>Co-Agent,</i>
Mrs A. EMÜLER,	
Mrs M. AKSEN,	
Mr T. TAŞKIN,	<i>Advisers;</i>

(b) *for the applicant*

Mr M.S. TANRIKULU,	
Mr N. KIRIK,	<i>Counsel,</i>
Mr İ. SEVİNÇ,	<i>Adviser.</i>

The Court heard addresses by Mr Kırık, Mr Tanrikulu, Mrs Akipek and Mr Özmen.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1954 and lives in İslahiye.

10. She was the partner of Ömer Koç (Ö.K.), a farmer whom she married in a religious ceremony in 1976 and with whom she had six children. Ö.K. died on 10 September 2002. The applicant stated that on that date, while she and her partner had been making preparations for an official marriage ceremony, Ö.K. had died following an illness.

A. Proceedings before the District Court

11. On 11 September 2003 the applicant brought proceedings before the İslahiye District Court on her own behalf and on behalf of her daughter Emine seeking rectification of the entry concerning her in the civil status register. She requested that her religious marriage to Ö.K. be recognised and that her daughter be entered in the register as the deceased's daughter.

12. In a judgment of 26 September 2003 the District Court refused the applicant's request concerning her religious marriage but granted the request for Emine to be entered in the register as Ö.K.'s daughter. As no appeal was lodged, the judgment became final.

B. Proceedings before the Labour Court

13. On an unspecified date the applicant requested the Hatay retirement pension fund (“Bağ-Kur”) to award her and her daughter Emine a survivor's pension and health insurance cover on the basis of her late partner's entitlement. The fund refused the request.

14. On 20 February 2003 the applicant applied to the İslahiye Labour Court to have that decision set aside. On 20 May 2003 the latter decided that it had no jurisdiction *ratione loci* and that the case should be heard by the Hatay Labour Court.

15. In a judgment of 21 January 2004 the Hatay Labour Court, in a ruling based on the judgment of the İslahiye District Court, found that the applicant's marriage to Ö.K. had not been validated. Accordingly, since the marriage was not legally recognised, the applicant could not be subrogated to the deceased's rights. However, the court set aside the retirement fund's decision in so far as it related to Emine and granted her the right to claim a pension and health insurance cover on the basis of her deceased father's entitlement.

16. On 10 February 2004 the applicant appealed on points of law to the Court of Cassation. She argued that the extract from the civil status register

stated that she was the wife of Ö.K., who was registered in the village of Kerküt. She explained that in 1976 she had married Ö.K. in accordance with custom and practice. The couple had had six children. The first five children had been entered in the civil status register in 1985 under their father's name, while the last child, Emine, born in 1990, had been entered under her mother's name in 2002. The applicant asserted that, unlike her six children, she had been unable to claim a pension or health insurance cover based on her deceased partner's entitlement.

17. In a judgment of 3 June 2004, served on the applicant on 28 June 2004, the Court of Cassation upheld the impugned judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legislation

1. Civil Code

18. Article 134 of the Civil Code provides:

“A man and a woman who wish to contract a marriage must apply together to the civil status registrar in the place of residence of either one of them.

The civil status registrar [who is to perform the ceremony] shall be the mayor in the case of a municipality, or the official whom he or she has designated for the purpose, or the *muhtar* in the case of a village.”

19. Articles 135 to 144 of the Civil Code lay down the substantive and formal conditions governing the solemnisation of marriage between men and women.

20. Article 143 of the Code reads as follows:

“At the close of the [civil] marriage ceremony the official shall issue the couple with a family record book.

No religious ceremony may be performed without the family record book being produced.

The validity of the [civil] marriage is not linked to the performance of a religious ceremony.”

21. Article 176 § 3 of the Civil Code concerning maintenance payments provides that maintenance in the form of an allowance or periodic payments ceases to be due when the recipient remarries or one of the two parties dies, or if the recipient is living in a *de facto* marital relationship outside marriage, is no longer in financial need or has an immoral lifestyle.

2. Criminal Code

22. The sixth paragraph of Article 230 of the Criminal Code reads as follows:

“Any person who solemnises a religious marriage without having seen the document certifying that a marriage ceremony was performed in accordance with the law shall be liable to a term of imprisonment of between two and six months.”

3. Code of Obligations

23. Article 43 of the Code of Obligations concerns the determination of compensation awards depending on the circumstances and the seriousness of the fault. Article 44 of the Code deals with reductions in compensation awards. Article 45 concerns awards for damages following a death: persons deprived of financial support as the result of a death must receive compensation for loss of income.

4. Social Security Act

24. Section 23(b) and (c) of the Social Security Act (Law no. 506) lists the persons eligible for a survivor's pension on the death of a spouse (where a civil marriage has taken place).

25. Sections 32 to 34 of the General Health and Social Security Act (Law no. 5510) set out the circumstances in which the persons entitled under the deceased (where there was a civil marriage) may claim a survivor's pension, and the method used to calculate the amount.

5. Law no. 5251 of 27 October 2004 on the organisation and functions of the Directorate-General for the Status of Women

26. The aim of this Law is to safeguard women's social, economic, cultural and political rights and to combat all forms of discrimination against women and improve their level of educational attainment.

6. Law no. 3716 of 8 May 1991 on the correct recording of the parentage of children born within or outside marriage and those born of a relationship not based on a marriage certificate

27. As its title indicates, this Law (repealed on 16 May 1996) dealt with the recording in the civil status register under the father or mother's name of children born within or outside civil marriage and with the regularisation of the situation of children whose parents had not contracted a civil marriage. The new Civil Code, which entered into force on 8 December 2001, no longer distinguishes between children born within and outside marriage.

B. Case-law

1. Court of Cassation

28. In a judgment of 28 May 2007 (E. 2007/289, K. 2007/8718), the Twenty-First Division of the Court of Cassation quashed a first-instance judgment on the ground that a woman married in accordance with religious

rites should be paid compensation under Articles 43 and 44 of the Code of Obligations following the death of her partner in a work-related accident.

29. In a judgment of 11 September 1990 (E. 1990/4010, K. 1990/6972), the Tenth Division of the Court of Cassation set aside a first-instance judgment awarding compensation to a woman living in a religious marriage following the death of her partner in a work-related accident. After reiterating that marriage was a legal institution, that a religious union between two persons of opposite sex could not be recognised as a marriage and that section 23(c) and (b) of the Social Security Act (Law no. 506) guaranteed compensation only to the children born of a marriage or a union other than marriage, the Court of Cassation ruled that the children were entitled to social security cover following the death of their father, but that the father's partner was not. The court held that in the absence of legislation on the subject, the social security agency could require the woman in question to repay the sums wrongly paid to her after her partner's death.

30. By a judgment of 11 December 2003 (E. 2003/14484, K. 2003/14212), on the basis of Article 176 § 3 of the Civil Code, the Third Division of the Court of Cassation set aside a judgment of the lower court on the ground that a former husband was no longer required to pay maintenance to his ex-wife since the latter was living in a *de facto* marital relationship with another man, albeit without a marriage certificate, and the couple had a child together.

31. In a judgment of 6 June 2000 (E. 2000/3127, K. 2000/4891) the Fourth Division of the Court of Cassation overturned a criminal court ruling acquitting an imam who had performed a religious marriage ceremony without first checking the document proving that a civil marriage had taken place in accordance with the law.

2. Supreme Administrative Court

32. In a judgment of 17 October 1997 (E. 1995/79, K. 1997/479) the General Assembly of the plenary Supreme Administrative Court (*Danıştay Dava Daireleri Genel Kurulu*) upheld a first-instance judgment, thereby overturning the judgment of the Tenth Division of the Supreme Administrative Court, on the ground that the children and surviving partner from a religious marriage should be awarded compensation after their father and partner was accidentally killed (by police bullets fired on the fringes of a demonstration). The General Assembly observed that the action had been brought by the surviving partner on her own behalf and that of her children, that four children had been born of the relationship, resulting from a religious marriage, and that following the man's death, the children and their mother had been deprived of his financial support (*destekten yoksun kalma tazminatı*). It pointed out that, while domestic law did not afford protection to or validate such a union, the couple had had children together whose births had been recorded under the parents' names in the civil status register

and the deceased had supported the family financially. Accordingly, it awarded compensation to the children and their mother on account of the man's death.

3. *Observations on the domestic law and case-law*

33. As cohabitation on the basis of religious marriage is a social reality, the courts apply two principles of civil liability in awarding compensation to women whose partner in a religious marriage has died:

(a) compensation for pecuniary and non-pecuniary damage (*maddi ve manevi tazminat*) on the basis of Articles 43 and 44 of the Code of Obligations;

(b) compensation for loss of financial support (*destekten yoksun kalma tazminatı*) following a death, on the basis of Article 45 of the Code of Obligations.

34. In the specific context of Article 176 § 3 of the Civil Code, the legislation refers to couples living together as *de facto* man and wife without having contracted a civil marriage. In practice, this means religious marriage, and there is no requirement to continue paying maintenance to the other party in the situations contemplated (see paragraph 21 above). However, the Court of Cassation does not award the two types of compensation referred to in the previous paragraph in the case of same-sex or adulterous relationships, which are deemed to run counter to morals (see, for example, the judgment of the Twenty-First Division of the Court of Cassation of 11 October 2001 (E. 2001/6819, K. 2001/6640)).

35. The legislature does not recognise any form of opposite-sex or same-sex cohabitation or union other than civil marriage. The domestic courts interpret the law very strictly. The fact that the general principles articulated in the Civil Code and the Code of Obligations are applied cannot be viewed as tacit or *de facto* recognition of religious marriage. Although the domestic courts award surviving partners compensation on the basis of general principles of civil liability – which cannot be equated with the principles governing social security or civil marriage – they never grant them survivor's pensions or social security benefits based on the deceased partner's entitlement.

C. Background to the case

1. *History*

36. Under Islamic law, a religious marriage requires the presence of two male witnesses (or one man and two women). The marriage is solemnised simply by the couple exchanging vows in the presence of the witnesses, without the need for a cleric (imam or equivalent) to be present or for an official document to be drawn up. Under the Ottoman empire, following a

decision taken by the supreme Sunni religious authority, the Sheikh-ul-Islam, the presence of an imam or a *kadı* (judge) became compulsory for all marriage ceremonies, on pain of penalties. This practice became widely established, and nowadays the presence of an imam is required. Muslim marriages also include a pecuniary element in the form of a dowry (*mahr*).

37. Islamic law, save in some specific circumstances (for instance, the death of the husband), recognises repudiation (*talâk*) as the sole means of dissolving a marriage. This is a unilateral act on the part of the husband, who dismisses his wife and thereby severs the marital bond. It entails the husband explicitly repudiating his wife by saying the required form of words three times to her (for example: “I repudiate you” or “You are repudiated”).

2. *The Republic*

38. The Turkish Republic was founded on a secular basis. Before and after the proclamation of the Republic on 29 October 1923, the public and religious spheres were separated through a series of revolutionary reforms: the abolition of the caliphate on 3 March 1923; the repeal of the constitutional provision declaring Islam the religion of the State on 10 April 1928; and, lastly, on 5 February 1937, an amendment to the Constitution according constitutional status to the principle of secularism (see Article 2 of the 1924 Constitution and Article 2 of the Constitutions of 1961 and 1982). The principle of secularism was inspired by developments in Ottoman society in the period between the nineteenth century and the proclamation of the Republic (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, §§ 30-32, ECHR 2005-XI).

39. One of the major achievements of the Civil Code was the institution of compulsory monogamous civil marriage between men and women, requiring religious marriages to be preceded by a civil ceremony. The new Civil Code, which entered into force on 8 December 2001, does not cover any forms of cohabitation other than marriage. The national parliament chose not to enact legislation in this sphere.

3. *The Religious Affairs Directorate*

40. According to the Religious Affairs Directorate (*Diyanet İşleri Başkanlığı*), imams, who are appointed by the Directorate, are expressly required to verify that the future husband and wife have been married by a civil status registrar. The “religious” ceremony before an imam appointed by the Directorate is a mere formality which entails little solemnity. The civil marriage takes precedence over the religious marriage.

III. COMPARATIVE LAW

41. Of the thirty-six countries surveyed in a comparative-law study, fourteen (Cyprus, the Czech Republic, Denmark, Finland, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Spain and the United Kingdom) recognise varying forms of religious marriage. Exclusively religious marriages are not recognised and are treated on the same footing as cohabitation in the following countries: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Estonia, France, Georgia, Germany, Hungary, Luxembourg, Moldova, Monaco, the Netherlands, Romania, Serbia, Slovenia, Switzerland, “the former Yugoslav Republic of Macedonia” and Ukraine.

42. Of the thirty-six countries surveyed, four (France, Greece, Portugal and Serbia) expressly recognise cohabitation. In other countries, although such arrangements are not expressly recognised, they produce legal effects to one degree or another. This is the case in Austria, Belgium, the Czech Republic, Denmark, Hungary, Italy, the Netherlands, Slovenia and Switzerland. However, the majority of States do not recognise cohabitation at all (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Finland, Georgia, Germany, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Poland, Romania, “the former Yugoslav Republic of Macedonia”, Ukraine and the United Kingdom).

43. In twenty-four countries (Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Ireland, Luxembourg, Moldova, Monaco, the Netherlands, Poland, Romania, Serbia, Slovenia, Spain, Switzerland, “the former Yugoslav Republic of Macedonia” and Ukraine), the national legislation allows the surviving spouse, subject to certain conditions, to claim benefits based on the deceased's social security entitlements. Of these countries, only six (Austria, Belgium, France, Hungary, the Netherlands and Spain) extend this right to cohabitants. In most of the member States of the Council of Europe, only married couples who have contracted a civil marriage qualify for health insurance cover on the death of one of the partners; hence, cohabitants are not eligible.

44. In Denmark, Hungary, the Netherlands, Portugal, Slovenia and Spain a survivor's pension may be awarded to a surviving cohabitant in certain circumstances. In the vast majority of countries which have a survivor's pension, cohabitants are not eligible to receive it.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

A. The Chamber judgment

45. Before the Chamber, the Government raised an objection of failure to exhaust domestic remedies. They pointed out that the applicant had brought proceedings before the İslahiye District Court seeking recognition of her religious marriage to her deceased partner. The action had been dismissed by the court and the applicant had not appealed against that decision to the Court of Cassation.

46. In its judgment, the Chamber dismissed the Government's preliminary objection, reasoning as follows:

“19. The Court observes that the applicant complained that her application concerning her deceased partner's retirement pension and health insurance rights had been rejected by the Hatay Labour Court on 21 January 2004. That judgment was upheld by the Court of Cassation judgment of 3 June 2004, served on the applicant on 28 June 2004. The applicant lodged her application with the Court on 6 December 2004, that is to say, within the six-month time-limit laid down by Article 35 § 1 of the Convention. Accordingly, the Government's objection must be dismissed.”

B. The parties' submissions

47. The Government reiterated the same preliminary objection before the Grand Chamber.

48. The applicant maintained that she had exhausted domestic remedies, pointing out that she had applied unsuccessfully to the domestic courts for a survivor's pension and social security benefits based on her partner's entitlement.

C. The Court's assessment

49. The Court observes that after the death of her partner the applicant first lodged an action with the İslahiye District Court seeking rectification of the entry concerning her in the civil status register, with a view to having her religious marriage recognised and having her daughter registered as her partner's daughter. She subsequently lodged another action, this time with the Hatay Labour Court, seeking to obtain a survivor's pension and social security benefits based on her late partner's entitlement. Hence, by complaining in substance of her inability to obtain those benefits the applicant made use, without success, of an appropriate and available remedy before the Hatay Labour Court, whose judgment was upheld by the Court of Cassation.

50. Accordingly, the Grand Chamber agrees with the Chamber's conclusion. It reiterates in that regard that an applicant must have made normal use of domestic remedies which are likely to be effective and sufficient and that, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, ECHR 2009-..., and *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009-...). It follows that the Government's objection as to non-exhaustion of domestic remedies must be dismissed.

II. THE NATURE OF THE APPLICANT'S COMPLAINT

51. The Grand Chamber observes that the Chamber examined the applicant's complaint from the standpoint of Article 8 of the Convention only. However, it should be reiterated that the scope of the Grand Chamber's jurisdiction in cases submitted to it is limited only by the Chamber's decision on admissibility (see *Perna v. Italy* [GC], no. 48898/99, § 23, ECHR 2003-V, and *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III). Within the compass thus delimited, the Grand Chamber may deal with any issue of fact or law that arises during the proceedings before it (see *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 29, Series A no. 172; *Philis v. Greece (no. 1)*, 27 August 1991, § 56, Series A no. 209; *Guerra and Others v. Italy*, 19 February 1998, § 44 *in fine*, *Reports of Judgments and Decisions* 1998-I; and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 48, ECHR 2009-...).

52. Furthermore, since the Court is master of the characterisation to be given in law to the facts of the case, it is not bound by the characterisation given by the applicant or the Government. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by the parties and even under a provision in respect of which the Court had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Scoppola*, cited above, § 54; *Powell and Rayner*, cited above, § 29; and *Guerra and Others*, cited above, § 44). By virtue of Article 43 of the Convention, it is the whole case, embracing all aspects of the application previously examined by the Chamber, which is referred to the Grand Chamber to be decided afresh by means of a new judgment (see, among other authorities, *Göç v. Turkey* [GC], no. 36590/97, § 36, ECHR 2002-V). The Grand Chamber may proceed in the same manner in the present case.

53. For that reason the Grand Chamber invited the parties, in their observations and pleadings before it, to also address the issue of compliance in the instant case with Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. In the light of their submissions, it

considers it necessary to first examine the applicant's complaint from the standpoint of those provisions.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

54. In connection with the invitation referred to in the preceding paragraph the applicant submitted that the refusal of the domestic courts to award her a survivor's pension and social security benefits based on her deceased partner's entitlement had been in breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Article 14 of the Convention 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.”

Article 1 of Protocol No. 1 provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions...

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Applicability of Article 14 taken in conjunction with Article 1 of Protocol No. 1

55. Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. Its application does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV, and *Koua Poirrez v. France*, no. 40892/98, § 36, ECHR 2003-X; see also *Fretté v. France*, no. 36515/97, § 31, ECHR 2002-I and the case-law cited therein).

56. As regards the applicability of Article 1 of Protocol No. 1, the Court ruled in *Stec and Others v. the United Kingdom* ((dec.) [GC], nos. 65731/01 and 65900/01, §§ 42-56, ECHR 2005-X) that this provision did not oblige States to put in place a social security or pension scheme; however, if a Contracting State had in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment

of contributions – that legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.

57. In the instant case the applicant complained that she had been deprived of a survivor's pension and social security benefits based on her deceased partner's entitlement on discriminatory grounds covered, in her view, by Article 14, namely her status as a woman married in accordance with religious rites.

58. The Court notes that, under the national social security legislation, only persons married in accordance with the Civil Code inherit their late spouse's social security entitlements. It further observes that, according to the settled case-law of the domestic courts, based on the ordinary law on civil liability as defined in the relevant provisions of the Civil Code and the Code of Obligations, a retirement pension and social security benefits cannot be awarded to a surviving partner where there has been no civil marriage. However, the Court points to its own case-law to the effect that, although Article 1 of Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14 (see *Stec and Others*, cited above, § 55). In the instant case the applicant complained that she had not been awarded a retirement pension and social security benefits based on her late partner's entitlement on discriminatory grounds for the purposes of Article 14 of the Convention.

59. Consequently, Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 is applicable in the present case.

B. Compliance with Article 14 taken in conjunction with Article 1 of Protocol No. 1

1. The parties' submissions

(a) The Government

60. The Government began by pointing out that the regulation of marriage, which was compatible with Article 12 of the Convention, fell within the State's margin of appreciation. Civil marriage was clearly defined by the provisions of the Civil Code. Only persons who had contracted a civil marriage could enjoy the corresponding rights. That was why the applicant's application to the Hatay Labour Court seeking to benefit from her deceased partner's social security entitlements had been rejected on account of the absence of a civil marriage. Entitlement to a survivor's pension and social security benefits was not governed by the rules on inheritance laid down by the Civil Code. Under the domestic social security

legislation, the lawful surviving partner of a civil marriage and his or her children could inherit such entitlement.

61. Next, the Government stressed the importance of the principle of secularism, which was enshrined in the Constitution. It was not possible to attach legal consequences to the application of religious rules. The legislature's aim was to prevent religious marriages and protect the most important building-block of society, namely the family. As a secular State, Turkey did not recognise religious marriages. In a similar situation where the woman rather than the man was in employment, the latter would not be awarded a survivor's pension or social security benefits on her death. Religious marriage placed women at a disadvantage compared to men. In order to prevent discrimination and grant the same rights to women and men, the law required religious marriages to be preceded by a civil ceremony. The law governing civil marriage did not impose any particular restrictions on the right to marry, neither could the legislature oblige persons who were living together to marry in accordance with the Civil Code.

62. In the Government's submission, the domestic authorities had not subjected the applicant to discriminatory treatment compared to other persons in a similar situation. There was no provision of domestic law which entitled a "surviving life companion" or "surviving partner" to receive a survivor's pension or social security benefits as the deceased's successor. The main difference between religious and civil marriage was that the former was not recognised by the law. Religious marriages were not registered. Persons wishing to enter into such a union were free to do so, but only after they had contracted a civil marriage. Article 230 of the Criminal Code made it a punishable offence to solemnise a religious marriage before the civil ceremony. The object of that provision was to protect women against polygamy. If religious marriages were to be considered lawful all the attendant religious consequences would have to be recognised, for instance the fact that a man could marry four women. The only means of preventing that was to promote civil marriage and not to attach rights to religious marriage. A further legal argument militated against religious marriage, namely the principle of presumption of paternity, which was based on the existence of a civil marriage. Furthermore, the recognition of a child by his or her father did not entail regularisation of the latter's religious marriage. The applicant had had the opportunity to contract a civil marriage in order to secure entitlement to a survivor's pension and social security benefits in the event of her partner's death.

63. Lastly, the Government submitted that a distinction needed to be made between a claim for damages under private law and an application for a survivor's pension and other social security benefits under the rules of public law. Under the latter, entitlement to such benefits required the existence of a legal relationship. As religious marriage was not recognised

the applicant could not legally claim a survivor's pension or social security benefits based on her late partner's entitlement. Granting such rights to persons living in religious marriages would be tantamount to encouraging religious marriage. Under domestic law, the introduction of a claim for damages did not depend on the persons concerned being related. Admittedly, the courts accepted that a fiancée or close friend who had cared for the deceased or a person who had suffered a loss of income as a result of the death could be awarded damages; however, in such situations Turkish law provided for compensation irrespective of the existence of a religious or civil marriage.

(b) The applicant

64. During the hearing, without making an explicit complaint in that regard, the applicant stated that, as she herself had been born of a religious marriage, her name had not been entered in the civil status register until 15 October 2002. The delay in being registered was the reason why she had been unable to contract a civil marriage with Ö.K. As a woman married in accordance with custom and practice, she submitted that the domestic courts had rejected her claim for social security benefits on the death of her partner because she had not contracted a civil marriage.

65. The applicant did not regard her application as tending towards the recognition of religious marriage or polygamy. The Civil Code recognised religious marriages provided that they were solemnised after a civil ceremony had been performed. While she was aware of the relevant provision of the Criminal Code, she had doubts as to its effectiveness (see paragraph 22 above). In her view, religious marriage was a social reality throughout Turkey. Furthermore, her situation could have been regularised on the basis of the amnesty laws which were enacted regularly with a view to ensuring that children born outside marriage could be entered in the civil status register.

66. During the hearing the applicant stated that she had always paid her own medical expenses rather than being covered by her partner, as she had never had entitlement through him.

2. The Court's assessment

(a) Relevant general principles

67. According to the Court's settled case-law, discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-XII). A difference in treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Larkos*

v. *Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I). The provisions of the Convention do not prevent, in principle, Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the difference in treatment which results for the statutory category or group as a whole can be justified under the Convention and its Protocols (see, *mutatis mutandis*, *Ždanoka v. Latvia* [GC], no. 58278/00, § 112, ECHR 2006-IV).

68. In other words, Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention (see *Ünal Tekeli v. Turkey*, no. 29865/96, § 51, ECHR 2004-X).

69. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (see *Thlimmenos*, cited above, § 44).

70. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (see *Marckx v. Belgium*, 13 June 1979, § 33, Series A no. 31; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 72, Series A no. 94; and *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 72, *Reports* 1996-IV). That margin is wider when it comes to the adoption by the State of general fiscal, economic or social measures, which are closely linked to the State's financial resources (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008-..., and *Petrov v. Bulgaria*, no. 15197/02, § 55, 22 May 2008). However, it is ultimately for the Court to decide, in the light of the circumstances of the case in question, whether such measures are compatible with the State's obligations under the Convention and its Protocols (see *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98, and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, *Reports* 1997-VII).

71. As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see *D.H. and Others*, cited above, § 177; *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 57, ECHR 2005-XII; and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III).

72. With regard to Article 12 of the Convention, the Court has already ruled that marriage is widely accepted as conferring a particular status and

particular rights on those who enter it (see *Burden*, cited above, § 63, and *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000). The protection of marriage constitutes, in principle, an important and legitimate reason which may justify a difference in treatment between married and unmarried couples (see *Quintana Zapata v. Spain*, Commission decision of 4 March 1998, Decisions and Reports (DR) 92, p. 139). Marriage is characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a man and woman who cohabit (see *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI, and *Lindsay v. the United Kingdom* (dec.), no. 11089/84, 11 November 1986). Thus, States have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security (see, *mutatis mutandis*, *Burden*, cited above, § 65).

(b) Application of the above principles to the present case

(i) Whether the civil or religious nature of a marriage can be a source of discrimination prohibited by Article 14

73. It is not disputed in the instant case that the applicant, although not lawfully married, lived in a monogamous relationship with her partner for twenty-six years until his death, and that she had six children with him. According to the judgment of the Hatay Labour Court (see paragraph 15 above), the applicant's claim for a survivor's pension and social security benefits based on her late partner's entitlement was rejected because she had not contracted a civil marriage. The fact that the applicant, who was born of a religious marriage, had not been registered at birth does nothing to alter this.

74. The applicant considered herself to be in a situation comparable to that of a widow in a civil marriage. She fulfilled all the legal requirements for claiming the benefits in question apart from the fact that her marriage had been religious rather than civil in nature.

75. While contending that the national courts had not subjected the applicant to discriminatory treatment in relation to other persons in a similar situation, the Government took the view in particular that her situation, as a person married according to religious rites, could not be likened to that of a wife married in accordance with the Civil Code. The refusal of the domestic courts to award the benefits in issue to the applicant had been based on the law, the justification for which was twofold: the protection of women, particularly through efforts to combat polygamy, and the principle of secularism.

76. Accordingly, the Court must now examine whether the nature of a marriage – that is, whether it is civil or religious – can be a source of discrimination prohibited by Article 14.

77. In that regard the Court points out that Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic (“status”) by which persons or groups of persons are distinguishable from each other (see *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23). The characteristics in question are enumerated in Article 14.

78. However, the list set out in that provision is illustrative and not exhaustive, as is shown by the words “any ground such as” (in French “*notamment*”) (see *Engel and Others v. the Netherlands*, 8 June 1976, § 72, Series A no. 22; *James and Others*, cited above, § 74; and *Luczak v. Poland*, no. 77782/01, § 46, ECHR 2007-XIII). Furthermore, discrimination prohibited by Article 14 may also be on the ground of “other status” (“*toute autre situation*” in French). As the nature of a marriage – that is, whether it is civil or religious – does not feature as such in the list of possible grounds of discrimination contemplated by Article 14, the Court must examine whether it might come under the heading of “other status”.

79. In that regard the Court has ruled in previous cases that children born outside marriage were discriminated against compared to those born within a civil marriage, as the difference in treatment was based solely on the former's “status” as children born out of wedlock (see, among many other authorities, *Marckx*, cited above; *Mazurek v. France*, no. 34406/97, ECHR 2000-II; and *Inze v. Austria*, 28 October 1987, Series A no. 126). The Court has adopted similar reasoning in finding that a refusal to grant access rights in respect of a child on the sole ground that the child was born out of wedlock was discriminatory (see, for example, *Sahin v. Germany* [GC], no. 30943/96, § 87, ECHR 2003-VIII). Likewise, the Court considers that the absence of a marriage tie between two parents is one of the aspects of personal “status” which may be a source of discrimination prohibited by Article 14.

80. These considerations apply, *mutatis mutandis*, to the instant case, given that it has not been disputed that the difference in treatment to which the applicant was subjected with regard to the benefits in question was based solely on the non-civil nature of her marriage to her partner.

(ii) *Whether there was an objective and reasonable justification for the difference in treatment*

(α) Legitimate aim

81. The Court must now ascertain whether the difference in treatment in question pursued a legitimate aim. In that connection, taking into account the importance of the principle of secularism in Turkey, the Court notes that in adopting the Civil Code in 1926, which instituted monogamous civil marriage as a prerequisite for any religious marriage, Turkey aimed to put

an end to a marriage tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men. For the same reason it introduced the principle of gender equality in the enjoyment of civic rights, particularly in relation to divorce and inheritance, and prohibited polygamy. Marriage in accordance with the Civil Code is specifically aimed at protecting women, for instance by laying down a minimum age for marriage and establishing a set of rights and obligations for women (in particular in the event of the dissolution of the marriage or the death of the husband).

82. In the light of the foregoing, the Court accepts that the difference in treatment in question primarily pursued the legitimate aims of protecting public order and protecting the rights and freedoms of others.

(β) Reasonable relationship of proportionality between the means employed and the aim sought to be realised

83. As to whether there was a reasonable relationship of proportionality, it should be noted that the fact that the applicant had not contracted a civil marriage and had not regularised her situation had adverse legal consequences for her. Hence, she did not have the status of heir which would have entitled her to claim a survivor's pension and social security benefits on her partner's death. At the hearing the applicant pointed out that she had paid her own medical expenses while her partner was alive and that the latter had paid contributions into the “*Bağ-Kur*” retirement pension fund.

84. The Court notes, however, that the applicant was aware of her situation and knew that she needed to regularise her relationship in accordance with the Civil Code in order to be entitled to benefits on her partner's death. The Civil Code requires a binding legal document to be issued in order for a civil marriage to be valid and to produce effects *vis-à-vis* third parties and the State. Thus, at the close of the official marriage ceremony, a family record book is handed over to the married couple. The Civil Code states clearly that no religious marriage may be solemnised in the absence of the family record book (see paragraph 20 above). In order to ensure that the pre-eminence of civil marriage is observed the respondent State also provides for criminal sanctions against any person who solemnises a religious marriage without first ascertaining that a civil ceremony has taken place (see paragraph 22 above). For its part, the Religious Affairs Directorate – the authority recognised by the legislature in this sphere – expressly requires its imams to verify that the couple intending to marry have already contracted a civil marriage before a civil status registrar.

85. The present case is therefore clearly distinguishable from that of *Muñoz Díaz v. Spain* (no. 49151/07, 8 December 2009), in which the Court observed that the Spanish authorities had recognised the applicant – a

member of the Roma community who had married in accordance with Roma rites – as her partner's “spouse”. The woman in question and her family had been issued with a family record book and been granted large-family status; the mother, as a spouse, and her six children had also been in receipt of health-care assistance. The Court therefore took the view that the applicant's good faith as to the validity of her marriage, confirmed by the authorities' official recognition of her situation, had given her a legitimate expectation of being entitled to a survivor's pension. Finally, when the applicant had got married according to Roma rites and traditions, it had not been possible in Spain, except by making a prior declaration of apostasy or of affiliation to a different faith, to be married otherwise than in accordance with the rites of the Catholic Church.

86. Unlike the situation in *Muñoz Díaz*, the applicant in the present case could not argue that she had a legitimate expectation of obtaining a survivor's pension and social security benefits on the basis of her partner's entitlement (see paragraph 58 above). Furthermore, the rules laying down the substantive and formal conditions governing civil marriage are clear and accessible and the arrangements for contracting a civil marriage are straightforward and do not place an excessive burden on the persons concerned (see paragraph 18 above). The applicant has never maintained otherwise. What is more, she had a sufficiently long time – twenty-six years – in which to contract a civil marriage. There is therefore no justification for her assertion that the efforts she allegedly undertook to regularise her situation had been hampered by the cumbersome nature or slowness of the administrative procedures. As to whether the civil status registrar could or should have regularised her situation of his or her own accord on the basis of the amnesty laws enacted in relation to children born outside marriage (see paragraph 27 above), the Court notes that, while the State may regulate civil marriage in accordance with Article 12 of the Convention, this does not mean that it can require persons within its jurisdiction to contract a civil marriage. The Court further notes, as did the Government, that the amnesty laws in question are not aimed at regularising religious marriages but at improving the situation of children born out of relationships which are not legally recognised, or outside the bonds of marriage.

87. In the light of these considerations, the Court concludes that there was a reasonable relationship of proportionality between the impugned difference in treatment and the legitimate aim pursued. There was therefore an objective and reasonable justification for the difference in question.

88. There has accordingly been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

89. On the basis of the same complaint as the one under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, the applicant further alleged a breach of her right to respect for her family life within the meaning of Article 8 of the Convention, the relevant parts of which provide:

“1. Everyone has the right to respect for his ... 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 ... the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. The Chamber judgment

90. The Chamber noted the existence in the present case of “family life” within the meaning of Article 8 (see paragraph 27 of the Chamber judgment). It held that there had been no violation of that provision because the difference complained of had pursued a legitimate aim and been based on objective and reasonable grounds, namely the protection of the traditional family based on the bonds of marriage (see paragraph 30 of the judgment).

B. The parties' submissions

91. The Government agreed with the Chamber's conclusion, taking the view that Article 8 did not impose an obligation on the Contracting States to adopt a special regime for couples living together without having contracted a civil marriage.

92. The applicant reiterated her allegations.

C. The Court's assessment

1. Whether there was “family life”

93. By guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family. The existence or non-existence of “family life” is essentially a question of fact depending upon the real existence in practice of close personal ties (see *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII).

94. Article 8 applies to the “family life” of the “illegitimate” family as it does to that of the “legitimate” family (see *Marckx*, cited above, § 31, and *Johnston and Others v. Ireland*, 18 December 1986, § 55, Series A no. 112).

The notion of the “family” is not confined solely to marriage-based relationships and may encompass other *de facto* “family” ties where the parties are living together outside of marriage (see *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290, and *Al-Nashif v. Bulgaria*, no. 50963/99, § 112, 20 June 2002). A child born out of such a relationship is *ipso jure* part of that “family” unit from the moment and by the very fact of his birth. Thus there exists between the child and his parents a bond amounting to family life (see *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII).

95. Furthermore, questions of inheritance and voluntary dispositions between near relatives appear to be intimately connected with family life. Family life does not include only social, moral or cultural relations, for example in the sphere of children's education; it also comprises interests of a material kind, as is shown by, amongst other things, the obligations in respect of maintenance and the position occupied in the domestic legal systems of the majority of the Contracting States by the institution of the reserved portion of an estate. Whilst inheritance rights are not normally exercised until the estate-owner's death, that is at a time when family life undergoes a change or even comes to an end, this does not mean that no issue concerning such rights may arise before the death: the distribution of the estate may be settled, and in practice fairly often is settled, by the making of a will or of a gift on account of a future inheritance; it therefore represents a feature of family life that cannot be disregarded (see *Marckx*, cited above, § 52, and *Merger and Cros v. France*, no. 68864/01, § 46, 22 December 2004).

96. In addition, when deciding whether a relationship can be said to amount to “family life”, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have children together (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 36, *Reports* 1997-II, and *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C).

97. In its judgment in the present case, the Chamber held that Article 8 of the Convention was applicable, for the following reasons:

“27. In the instant case the Court observes that the applicant entered into a religious marriage (*imam nikâhı*) in 1976 with Ö.K. The couple had six children, the first five of whom were entered in the civil register under the father's name, while the last child was entered under the applicant's name. It is not contested by the parties that the applicant and her children lived with Ö.K. until his death in 2002. The Court considers that it does not have jurisdiction to rule on the place or role of religious marriage in Turkish law and its social consequences. It simply notes that the applicant, Ö.K. and their children lived together in such a way that they constituted a ‘family’ within the meaning of Article 8 of the Convention.”

98. The Grand Chamber fully agrees with this finding.

2. *The applicant's right to respect for her "family life"*

99. The Court must therefore determine whether, in the particular circumstances of the present case, the choice by the State to confer a particular status on civil marriage as distinct from religious marriage resulted in interference with the applicant's "family life" within the meaning of Article 8 of the Convention. It will do so in the light of the reasoning it adopted in relation to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (see paragraphs 81 to 88 above).

100. It should be reiterated in this regard that the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A). Furthermore, in the sphere of the State's planned economic, fiscal or social policy, on which opinions within a democratic society may reasonably differ widely, that margin is necessarily wider (see, *mutatis mutandis*, *James and Others*, cited above, § 46). This applies also in the present case (see paragraph 82 above).

101. As to the applicant, she chose, together with her partner, to live in a religious marriage and found a family. She and Ö.K. were able to live peacefully as a family, free from any interference with their family life by the domestic authorities. Thus, the fact that they opted for the religious form of marriage and did not contract a civil marriage did not entail any penalties – either administrative or criminal – such as to prevent the applicant from leading an effective family life for the purposes of Article 8. The Court therefore finds no appearance of interference by the State with the applicant's family life.

102. Accordingly, the Court is of the view that Article 8 cannot be interpreted as imposing an obligation on the State to recognise religious marriage. In that regard it is important to point out, as the Chamber did (see paragraph 29 of its judgment), that Article 8 does not require the State to establish a special regime for a particular category of unmarried couples (see *Johnston and Others*, cited above, § 68). For that reason the fact that the applicant does not have the status of heir, in accordance with the provisions of the Civil Code governing inheritance and with the domestic social security legislation, does not imply that there has been a breach of her rights under Article 8.

103. In conclusion, there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;
3. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 2 November 2010.

Vincent Berger
Jurisconsult

Jean-Paul Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Rozakis and Kovler are annexed to this judgment.

J.-P.C.
V.B.

CONCURRING OPINION OF JUDGE ROZAKIS

Together with the majority of the Grand Chamber, I voted in this case in favour of non-violation on both counts (Article 14 taken in conjunction with Article 1 of Protocol No. 1, and Article 8 of the Convention). However, I would like to express, through this concurring opinion, certain points of disagreement regarding the reasoning that the majority followed in reaching the conclusion that there had been no violation.

In dealing with the question of alleged discrimination under Article 14 taken in conjunction with Article 1 of Protocol No. 1, the Court was apparently influenced by the applicant's argument that the issue to be examined in the circumstances of the case was that she had been denied a survivor's pension and social security benefits because of her status as a woman married in accordance with religious rites, and that the authorities' conduct in that regard had discriminated against her since the Turkish State recognised civil marriage as the sole basis for legal entitlement to social security benefits. On the basis of this approach the Turkish Government maintained, in response to her arguments, that the difference in treatment between couples married only in accordance with religious rites and couples married in accordance with the requirements of domestic civil law was justified given the importance of the principle of secularism, and pursued the legislature's aim of "de-legitimising" religious marriage which, *inter alia*, placed women at a disadvantage compared to men and allowed polygamy.

As a consequence, the line followed by the Court in its judgment was that the elements to be compared (the comparators) in the exercise of establishing whether in the circumstances there had been discrimination in breach of Article 14 of the Convention were religious marriage on the one hand and civil marriage on the other. This was the core distinction which led the Court to find that the difference in treatment had a legal basis and a legitimate aim and was proportionate to the aim pursued. And this is where I differ in my consideration of the case.

I believe that the issue in this case, *in Convention terms*, is not religious marriage and its differences *vis-à-vis* civil marriage. Religious marriage is the backdrop, *la toile de fond*, which allowed the couple made up of the deceased man and his partner, the applicant, to live together monogamously for twenty-six years and have six children. The real comparators to be taken into account in our assessment should have been a long-standing and stable family relationship outside marriage on the one hand, and marriage, as understood by the domestic legal system, on the other. In other words, the elements to be compared are long-standing cohabitation and marriage, rather than religious marriage and civil marriage.

If these two elements are the comparators, then we should examine whether the distinction which the Turkish State makes between persons

married only in a religious ceremony (who are to be considered, under Turkish law, as “unmarried”), and couples married in a civil ceremony, justifies the different treatment afforded by the State's legislation to the latter. And here I accept that the Convention case-law confers a particular status and particular rights on those who enter into a marital relationship. As it was correctly stated in paragraph 72 of the judgment, “[t]he protection of marriage constitutes, in principle, an important and legitimate reason which may justify a difference in treatment between married and unmarried couples. ... Marriage is characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a man and a woman who cohabit. ... Thus, States have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security.”

For the above reasons, and considering that the comparators in the present case are stable cohabitation outside marriage and marriage itself, I accept that compliance with the Convention case-law must lead us to the conclusion that in the circumstances of the case the absence of social security benefits to the detriment of our applicant's interests is not contrary either to Article 14 (read in conjunction with Article 1 of Protocol No. 1) or to Article 8 of the Convention. Nevertheless, in view of the new social realities which are gradually emerging in today's Europe, manifested in a gradual increase in the number of stable relationships outside marriage, which are replacing the traditional institution of marriage without necessarily undermining the fabric of family life, I wonder whether this Court should not begin to reconsider its stance as to the justifiable distinction that it accepts, in certain matters, between marriage on the one hand and other forms of family life on the other, even when it comes to social security and related benefits.

CONCURRING OPINION OF JUDGE KOVLER

(Translation)

I accepted – not without some hesitation – the Grand Chamber's argument to the effect that States have a certain margin of appreciation to treat differently couples who have contracted a civil marriage and those who have not, particularly in matters falling within the realm of social policy, including pensions and social security. As the applicant's complaints focus on her right to claim a survivor's pension and social security benefits based on the entitlement of her late “partner” (within the meaning of the domestic legislation) rather than the right to claim an “ordinary” (old-age) pension, the domestic courts' refusal to award her the benefits in question was based on well-defined domestic-law provisions and her situation was therefore foreseeable. Accordingly, there was an objective and reasonable justification for the impugned difference in treatment and the latter did not amount to a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Of course it is regrettable that the respondent State, to judge by the information supplied by the two parties, did not allow the applicant to claim an ordinary pension. Viewed objectively, this lack of any social welfare provision for widows who contracted a religious marriage is an infringement of the freedom of choice as to the form taken by “family life”, since, as the Court has stressed on numerous occasions, the notion of the “family” is not confined solely to marriage-based relationships and may encompass other *de facto* “family” ties where the parties are living together outside of marriage (see paragraph 94 of the judgment, with further references). But the applicant's complaints do not relate to this aspect of Article 8 of the Convention.

What I cannot agree with in the text of the judgment are the Court's pronouncements on marriage under Islamic law.

I think it would have been wiser to refrain from making any assessment of the complexity of the rules of Islamic marriage, rather than portraying it in a reductive and highly subjective manner in the short section entitled “History” (see paragraphs 36-37), where what is left unsaid speaks louder than what is actually said. Hence, to state that “Islamic law ... recognises repudiation (*talâk*) as the sole means of dissolving a marriage”, such repudiation being “a unilateral act on the part of the husband”, and not to mention that the woman can also seek a divorce, for instance if her husband is unable to maintain the family, is to present only half the picture.

Had the Court really been interested in the financial position of the applicant, whose complaints it reclassified, it could have analysed in greater detail in its judgment the financial relationship between married couples under Islamic law. The husband has to pay a dowry, which belongs to the

wife unless she agrees otherwise (Koran, 4:4); after divorce, the man cannot claim back the dowry unless the woman agrees to it (Koran, 2:229); the woman can obtain a divorce by buying back her freedom (Koran, 2:229); finally, men and women are each entitled to a share of the inheritance (Koran, 4:7, 4:11 and 4:32). This analysis would have enabled the Court to give a more qualified interpretation of the “legitimate aim” of the 1926 Turkish Civil Code, instead of denouncing “a marriage tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men” (see paragraph 81). The language of politicians and NGOs is not always appropriate to the texts adopted by an international judicial body. Unfortunately, in another case (*Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II), the Court had already, in my view, committed a serious error by passing judgment on the Islamic system of values (see my concurring opinion in that case), when it could easily have refrained from such a demonstration of ideological activism.

The European Convention on Human Rights is not the only instrument of its kind. The Universal Islamic Declaration of Human Rights (21 *Dhul Qaidah* 1401 – 19 September 1981) also contains certain provisions (in particular Article XX on the rights of married women) which, had the Court taken them into account, would have prevented it from reaching hasty conclusions which I regret being obliged to adopt together with the rest of the text of the judgment. I would like to see the European Court of Human Rights take a more anthropological approach in the positions it adopts, by “not just exploring difference, but exploring it differently” (“*non seulement penser l'autre, mais le penser autrement*”) (see, in particular, C. Eberhard, *Le droit au miroir des cultures – Pour une autre mondialisation*, Paris, 2010). Otherwise, the Court is in danger of becoming entrenched in “eurocentric” attitudes.