Application No. 43546/02, *E.B.* v. *France*
European Court of Human Rights, Second Section

WRITTEN COMMENTS OF FIDH, ILGA-EUROPE, BAAF & APGL
Submitted on 3 June 2005

1. Prof. Robert Wintemute, School of Law, King's College, University of London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), ILGA-Europe (the European Region of the International Lesbian and Gay Association), BAAF (British Agencies for Adoption and Fostering), and APGL (*Association des Parents et futurs parents Gays et Lesbiens*). Their interest and expertise are set out in their "Application for leave to submit joint written comments" of 18 Feb. 2005, granted by the President of the Chamber on 16 March 2005, under Rule 44(2) of the Rules of Court.

Introduction

2. Ms. E.B.'s application presents to the Court the question of whether the European Convention on Human Rights permits a Council of Europe member state (which has voluntarily passed legislation authorising the adoption of children by unmarried individuals, even if only in exceptional cases)[1] to exclude an unmarried individual from the possibility of adopting any child from anywhere in the world, solely because of the individual's sexual orientation, and without regard to the individual's aptitude as a potential adoptive parent. The Court's judgment of 26 Feb. 2002 in *Fretté* v. *France* did not provide a clear answer. The Court held (7-0) that the difference in treatment was based on Mr. Fretté's sexual orientation,[2] and (4-3) that Article (Art.) 14 of the Convention was applicable combined with Art. 8.[3] However, on the question of whether there had been discrimination violating Art. 14 combined with Art. 8 (because there was no objective and reasonable justification for the difference in treatment), the Court's answer was: Yes - 3, No - 1, Abstain - 3.

3. Judges Bratza, Fuhrmann and Tulkens found that the difference in treatment could not be justified,[4] whereas Judge Kuris found it justifiable.[5] As for Judges Costa, Jungwiert and Traja, despite declining to answer the justification question (they had concluded that Art. 14 was not applicable), they observed that "[i]f

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1 *Abdulaziz* (1985), para. 82: "Art. 14 includes ... cases where a person ... is treated ... less favourably than another, even though the more favourable treatment is not called for by the Convention."

2 *Fretté*: Judgment (paras. 32, 37); Concurring Opinion (first paragraph after 1.); Dissenting Opinion (concurring on this point, third and fourth paragraphs after 2.).

3 *Fretté*: Judgment (para. 32); Dissenting Opinion (concurring on this point, paragraphs after 1.); Concurring Opinion (dissenting on this point, paragraphs after 1.). These Written Comments assume that the Court will follow *Fretté* on this point: either the opportunity of adopting a child as an unmarried individual falls "within the ambit" of Art. 8 ("private life" or "family life"), or an individual's sexual orientation falls "within the ambit" of Art. 8 ("private life"). See Robert Wintemute, "'Within the Ambit': How Big *Is* the 'Gap' in Article 14 European Convention on Human Rights?", [2004] *European Human Rights Law Review* 366; *Sidabras* v. *Lithuania* (2004), paras. 47-50.

4 *Fretté*: Dissenting Opinion (paragraphs following 2.).

5 *Fretté*: Judgment (paras. 38-43).

[they] had had to decide one way or another, [they] would have been very hesitant".[6] Thus, in *Fretté*, six of seven judges expressed the view that Art. 14 (combined with Art. 8) had been violated, or that Art. 14 might have been violated if it had been applicable. Yet the public perception of the judgment has been that a Council of Europe member state may, without violating the Convention, categorically exclude all lesbian and gay prospective adoptive parents (who are unwilling to hide their sexual orientations)[7] from any possibility of adopting any child from anywhere in the world. FIDH, ILGA-Europe, BAAF and APGL respectfully urge the Court to reconsider the part of its *Fretté* judgment dealing with the justifiability of the difference in treatment (paras. 34-43), which effectively had the support of only one judge.

4. Before turning to developments in legislation, case law and scientific consensus since *Fretté*, it is essential to distinguish three situations in which a lesbian or gay individual might seek to adopt a child: (i) a lesbian or gay individual seeks to adopt as an unmarried individual, in a member state where adoptions by unmarried individuals are permitted (even if only in exceptional cases), and any partner the individual might have acquires no parental rights as a result of the adoption ("individual adoption"); (ii) one member of a same-sex couple, consisting of two women or two men living together as partners, seeks to adopt the child of the other partner, so that both partners have parental rights vis-à-vis the child ("second-parent adoption"); and (iii) both members of a same-sex couple seek to jointly adopt a child with no prior genetic, legal or social connection with either partner, so that both partners simultaneously acquire parental rights vis-à-vis the child ("joint adoption").

5. **It is important to stress that Ms. E.B.'s case is one of individual adoption**, which is an easier issue for national legislatures and courts, and for this Court. After an individual adoption, the child has only one legal parent (one legal mother or one legal father), whether the parent lives with a partner or not. Individual adoption is thus an easier issue, because it does not involve: (a) the recognition of a same-sex couple or the question of which rights of married different-sex couples should be granted to same-sex couples (eg, access to second-parent or joint adoption); or (b) permitting a child to have two legal mothers or two legal fathers.

6. The distinction between individual adoption and second-parent or joint adoption is crucial because, under the case law of the Court (which reflects the current state of consensus in the Council of Europe member states), it is not acceptable to exclude lesbian and gay individuals, solely because of their sexual orientations, from any opportunity that is made available to heterosexual individuals. This is clear from the Court's judgments in *Smith & Grady* v. *UK* (1999) (employment in the armed forces), *Mouta* v. *Portugal* (1999) (post-divorce custody of a child), and *Karner* v. *Austria* (2003) (succession to a tenancy). The only exceptions under the current state of European consensus might be access to civil marriage, or to a very few opportunities that are limited to married couples (eg, second-parent or joint adoption).

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[6] *Fretté*: Concurring Opinion (third paragraph after 2.).

[7] Lesbian and gay individuals in France can adopt children if, at great personal cost, they hide their sexual orientations and do nothing to rebut the social presumption that every individual is heterosexual. See, eg, "*La justice reconnaît pour la première fois une famille homoparentale*", *Le Monde* (22 septembre 2004): "*Pour adopter leurs deux filles, Sophie et Claire ont dû ainsi dissimuler leur vie de couple pendant plusieurs mois: 'On avait deux appartements pendant toute la démarche. Chacune se rendait seule aux rendez-vous mais nous les préparions ... ensemble*.'"

I. Legal developments since *Fretté* (or not cited to the Court in *Fretté*)

A. Access to individual adoption

7. In *Fretté*, the Court said: "41. It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues [in all quotations, emphasis is added] ..." Yet the French Government did not cite a single example of a Council of Europe member state, other than France, in which express legislation or a decision of the highest court excludes lesbian and gay individuals from individual adoption (where it exists). The only example at the time, cited by Mr. Fretté, was Sweden. However, the Supreme Administrative Court's 1993 decision[8] was implicitly overruled in June 2002, four months after *Fretté*, by legislation granting registered same-sex partners access to second-parent and joint adoption (*infra* para. 12).

8. As of May 2005, FIDH, ILGA-Europe, BAAF and APGL are not aware of a single member state among the 46 member states of the Council of Europe, other than France, in which individual adoption exists but lesbian and gay individuals are excluded by express legislation or a decision of the highest court. In France, discretionary decisions of local officials to refuse an *agrément* (preliminary approval as eligible to adopt) to openly lesbian and gay individuals have consistently been upheld by the *Conseil d'État*, the highest administrative court.[9] In many of the other member states where individual adoption exists, it might in practice be more difficult for lesbian and gay individuals to adopt than for heterosexual individuals or married different-sex couples: (i) individuals might only be allowed to adopt in limited circumstances; (ii) in relation to children from the member state, there might be a strong preference for married different-sex couples; or (iii) there might be obstacles in relation to intercountry adoptions (*infra* paras. 35-36). But what is wrong, inconsistent with European consensus, and contrary to Arts. 14 and 8 of the Convention, is to exclude all lesbian and gay individuals at the beginning of the process, and deny them any chance of attempting to identify a suitable child anywhere in the world, by refusing them an *agrément*, as France does consistently.

9. The same consensus is found in other democratic societies outside of Europe. Individual adoption is open to lesbian and gay individuals in Australia (8 of 8 states and territories), Canada (13 of 13 provinces and territories), South Africa, and the United States (US) (49 of 50 states and the District of Columbia (DC)). The only US exception[10] is Florida (where a 1977 law makes explicit what is implicit in the case law of the *Conseil d'État*: "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual").[11] It is important to note that, until 26 June 2003,[12] Florida criminalised private oral or anal sexual activity between consenting adult men or consenting adult women (*Dudgeon* v. *UK*, 1981, prohibits such

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[8] *Regeringsrättens dom*, RÅ 1993 ref. 102.

[9] *Département de Paris* c. *Fretté* (9 Oct. 1996); *Parodi* c. *Département du Gard* (12 Feb. 1997); *E.B.* c. *Département du Jura* (5 June 2002).

[10] Mississippi Code Annotated s. 93-17-3(2) (amended in 2000), provides that "[a]doption by couples of the same gender is prohibited", but says nothing about adoption by lesbian and gay individuals. Utah excludes any individual who is "residing with another person and ... in a sexual [non-marital] relationship with that person". Utah Code Annotated ss. 78-30-1(3)(b), 78-30-9(3) (amended in 2000).

[11] Florida Statutes ch. 63.042, s. 3.

[12] *Lawrence* v. *Texas* , 539 U.S. 558 (26 June 2003) (these laws violate the US Constitution).

legislation), and that Florida has no legislation at the state level prohibiting discrimination based on sexual orientation in employment (Council Directive 2000/78/EC requires such legislation in all 25 EU member states). As for actual practice, a recent US study found that 60% of public and private (religious and non-religious) adoption agencies had accepted applications from lesbian or gay individuals or same-sex couples (40% had placed a child with such adoptive parents).[13]

B. Access to second-parent and joint adoption

10. This strong evidence of consensus in European and other democratic societies with regard to individual adoption did not convince the majority of the Court in *Fretté* (*supra* para. 7). This was perhaps because the "silence" of national legislatures was considered ambiguous. In *Dudgeon* on blanket criminalisation of male-male sexual activity, and *L. & V.* v. *Austria* (2003) on a higher age of consent to such activity, it was possible to show that the challenged legislation had once existed in almost every member state, and had gradually been repealed in the majority of member states. But in *Fretté*, it was impossible to demonstrate the gradual repeal of laws excluding lesbian and gay individuals from individual adoption, because no such laws have ever existed in Europe.

11. To clarify the consensus in democratic societies with regard to the easier issue of individual adoption, it is useful to examine the recent but pronounced trend with regard to the currently more difficult issues of second-parent and joint adoption (which are not before the Court). In the case of second-parent and joint adoption, national legislatures and courts have been "forced to speak". This is because legislation that expressly limits second-parent and joint adoption to married different-sex couples can only be extended to same-sex couples by new legislation, or by judicial interpretation or invalidation of existing legislation.

12. The evidence from Europe, Canada, the US, Australia and South Africa (not cited to the Court in *Fretté*, apart from the Netherlands) is that a gradual trend towards full equality for same-sex couples with regard to second-parent and joint adoption has begun. In 1994, when a European Parliament resolution called for an end to "any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children",[14] no Council of Europe member state permitted second-parent or joint adoption. By late 2005, second-parent adoption (eg, adoption by a lesbian woman of her female partner's child by donor insemination) should be possible in 8 of 46 member states (an increase from 4 to 8 since Feb. 2002): Denmark, Germany, Iceland, the Netherlands, Norway, Spain, Sweden, and the UK (England and Wales).[15] Of these member states, Denmark, Germany, Iceland and Norway do not yet allow joint adoption (simultaneous adoption by both same-sex partners) or consecutive adoption (adoption by one same-sex partner of the other

[13] "Adoption by Lesbians and Gays: A National Survey of Adoption Agenc[ies] ...", The Evan B. Donaldson Adoption Institute, New York, NY (29 Oct. 2003), http://www adoptioninstitute.org.

[14] (8 Feb. 1994), OJ [1994] C 61/40 at 42, para. 14.

[15] Denmark, Law No. 360 (2 June 1999), amending Law No. 372 (7 June 1989); Germany, *Lebenspartnerschaftsgesetz*, para. 9(7) (amended by Law of 15 Dec. 2004); Iceland, Law No. 52/2000, amending Law No. 87/1996; Netherlands, Act of 21 Dec. 2000, *Staatsblad* 2001, nr. 10; Norway, Law No. 36 (15 June 2001), amending Law No. 40 (30 April 1993); Spain, *Proyecto de Ley por la que se modifica el Código Civil en materia de derecho a contraer matrimonio* (passed by *Congreso de los Diputados* 21 April 2005, sent to *Senado*), Aragón *Ley* 2/2004 (3 May 2004), Basque Country *Ley* 2/2003 (7 May 2003), Catalonia *Llei* 3/2005 (8 April 2005), Navarra *Ley Foral* 6/2000 (3 July 2000); Sweden, SFS 2002:603; UK (England & Wales), Adoption and Children Act 2002, ss. 50, 51(2) (in force 30 Dec. 2005).

partner's already adopted child),[16] whereas the Netherlands, Spain, Sweden and the UK (England and Wales) allow, or soon will allow, joint and consecutive adoption. The UK legislation defines a couple who may apply to adopt jointly as: "(a) a married couple, or (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship".[17] Pending bills could make Belgium the 9th member state to permit second-parent adoption (5th for joint adoption).[18]

13. In other democratic societies, the trend is even more pronounced. In Canada, express legislation or case law permits second-parent or joint adoption by same-sex couples in 10 of 13 provinces and territories (4 since Feb. 2002), and the Supreme Court's case law on sexual orientation discrimination would probably require equal access in the rest.[19] In the US, courts in 25 of 50 states and DC have interpreted existing legislation as authorising second-parent or joint adoptions.[20] In 9 of these states (2 since Feb. 2002) and DC, such adoptions have been approved by appellate courts or express legislation or both.[21] In Australia, 3 of the 8 states and territories (3 since Feb. 2002) permit second-parent and joint adoption.[22] And in South Africa, the Constitution requires equal access to both (*infra* para. 15).

II. Judicial reasoning since *Fretté* (or not cited to the Court in *Fretté*)

14. In *Fretté*, the Court said: "42. ... [T]he national authorities ... were ... entitled to consider that the right to be able to adopt ... was limited by the interests of children eligible for adoption ..." In contrast, courts in South Africa, the US, and the UK, like the legislatures mentioned in part I., have concluded that the best interests of children are served by making the pool of potential adoptive parents as large as possible, and by not excluding any qualified adult because of characteristics (eg. sexual orientation) that bear no relation to their ability to provide good parental care.

15. Most decisions of national courts concerning access of lesbian and gay individuals to adoption deal with the currently more difficult issues of second-parent and joint adoption. However, the reasoning of these courts applies with even greater force to the easier case of individual adoption. Since *Fretté*, the most significant decision has been that of the Constitutional Court of South Africa on 10 Sept. 2002 in

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[16] At least for all or most children adopted by one partner from another country.

[17] Adoption and Children Act 2002, s. 144(4).

[18] See http://www.lalibre.be/article.phtml?id=10&subid=90&art_id=223027 (1 June 2005).

[19] Legislation: British Columbia, Manitoba, Newfoundland, Northwest Territories, Ontario (amended by Statutes of Ontario 2005, chapter 5, ss. 7, 32), Québec, Saskatchewan. Case law: Alberta, New Brunswick, Nova Scotia. See Robert Wintemute, "Sexual Orientation and the Charter" (2004) 49 *McGill Law Journal* 1143, 1157-58, http://www.journal.law.mcgill.ca/abs/vol49/4winte.pdf.

[20] (15 Dec. 2004), http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=399.

[21] Legislation: California Statutes, Chapter 893 (14 Oct. 2001), amending Family Code, s. 9000; Connecticut General Statutes Annotated, s. 45a-724 (2000); 15A Vermont (Vt.) Stat. Ann. s. 1-102(b) (1995). Case law: *Sharon S.* v. *Superior Court of San Diego County*, 73 P.3d 554 (California Supreme Ct. 2003); *In re M.M.D.*, 662 A.2d 837 (DC Ct. of Appeals 1995); *In re Petition of K.M. and D.M.*, 653 N.E.2d 888 (Illinois Appellate Ct. 1995); *Adoption of M.M.G.C.*, 758 N.E.2d. 267 (Indiana Ct. of Appeals 2003); *In re Adoption of Tammy*, 619 N.E.2d 315 (Massachusetts Supreme Judicial Ct. 1993); *In re Adoption ... by H.N.R.*, 666 A.2d 535 (New Jersey Superior Ct. Appellate Division 1995); *In re Dana*, 660 N.E.2d 397 (New York Ct. of Appeals 1995); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pennsylvania Supreme Ct. 2002); *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. Supreme Ct. 1993).

[22] Australian Capital Territory, Parentage Act 2004, Schedule 1 (amending Adoption Act 1993, s. 18); Tasmania, Relationships (Consequential Amendments) Act 2003, Schedule 1 (amending Adoption Act 1988, s. 20); Western Australia, Acts Amendment (Lesbian and Gay Law Reform) Act 2002, s. 16 (amending Adoption Act 1994, s. 67).

Du Toit v. *Minister for Welfare and Population Development*,[23] holding (11-0) that the South African Constitution requires that an unmarried same-sex couple be allowed to adopt children jointly in the same way as a married different-sex couple.

16. The applicants, two women who had lived as partners for 5 years, went through a standard process of screening by social workers, including psychological testing and home visits. "It was at all times made clear ... that the adopted children would be moving into a family structured around a permanent lesbian life partnership." Within two months, both applicants were accepted as adoptive parents, and ... a sister and brother aged 6 and 2 ... were placed with them. The two women challenged South African legislation permitting only one of them to adopt the children, because they were not a married couple.[24]

17. Acting Justice Skweyiya, writing the unanimous judgment, found that South African legislation conflicted with s. 28(2) of the Constitution ("A child's best interests are of paramount importance in every matter concerning the child."): "21. ... [T]he impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same-sex life partnerships ... Their exclusion surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development ... 22. Excluding [them] from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle enshrined in section 28(2) ... The impugned provisions ... deprive children of the possibility of a loving and stable family life ... This is a matter of particular concern given the social reality of the vast number of parentless children in our country."

18. Skwewiya J. also found that the legislation conflicted with the right to be free from discrimination based on sexual orientation (Constitution, s. 9(3)): "26. ... But for their sexual orientation which precludes them from entering into a marriage, they fulfil the criteria that would otherwise make them eligible jointly to adopt children ..." He found (at para. 37) no justification for the interference with the principle that the best interests of children are paramount, or with the right to equality.

19. Courts in the US have taken a similar view of "the best interests of the child". A leading example is the New York Court of Appeals, the state's highest court. In 1989, it interpreted housing legislation as allowing a surviving same-sex partner to succeed to the tenancy of an apartment[25] (a decision similar to *Karner* v. *Austria*, 2003). In *In re Dana* (1995), the New York Court built on its 1989 decision by interpreting adoption legislation as permitting second-parent adoption by same-sex couples.[26] Chief Judge Kaye, writing for the majority, began by observing that "[u]nder the New York adoption statute, a single [unmarried] person can adopt a child ... Equally clear is the right of a single homosexual to adopt [New York state regulations provide that '[a]pplicants shall not be rejected solely on the basis of homosexuality'].[27] ... [T]he ... legislative purpose -- the child's best interest -- ... would certainly be advanced ... by allowing the two adults who actually function as a child's parents to become the child's legal parents.[28] ... [An interpretation] ... that would deny children like ... Dana the opportunity of having [her] two [female] de facto parents become [her] legal parents, based solely on [her] biological mother's

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[23] Case no. CCT40/01, http://www.concourt.gov.za/files/dutoit/dutoit.pdf.
[24] *Ibid*., paras. 4-7.
[25] *Braschi* v. *Stahl Associates Co.*, 543 N.E. 2d 49 (1989)
[26] 660 N.E.2d 397 (1995).
[27] 660 N.E.2d at 398.
[28] 660 N.E.2d at 399.

sexual orientation [lesbian] ..., would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the ... statute's ... purpose ..."[29]

20. The approach in South Africa and the US is reflected in two 1997 decisions of UK courts (cited in *Fretté*). In *T, Petitioner* (individual adoption by gay man living with his male partner for 10 years), Scotland's highest court held that "[t]he suggestion that it is a fundamental objection to an adoption that the proposed adopter is living with another in a homosexual relationship finds no expression in the language of the [Scottish] statute, and ... conflicts with the [welfare of the child] rule".[30] Similarly, in *Re W* (individual adoption by lesbian woman living with her female partner for 10 years), the High Court, Family Division, interpreted the England and Wales statute as "permit[ting] an adoption application to be made by a single [unmarried] applicant, whether he or she at that time lives alone, or cohabits in a heterosexual, homosexual or even an asexual relationship with another person ... Any other conclusion would be both illogical, arbitrary and ... discriminatory in a context where the court's duty is to give first consideration to the ... welfare of the child ..."[31]

III. Scientific studies, and statements by professional bodies and child welfare organisations, regarding lesbian and gay parenting

21. In *Fretté*, the Court said: "42. ... [T]he scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date." It is not clear where the Court found this division, because the French Government did not cite a single scientific study regarding children raised by lesbian mothers or gay fathers. There have been more than 50 reputable scientific studies, which are unanimous that children suffer no negative consequences from being raised by lesbian or gay parents, compared with children raised by heterosexual parents.

22. Evidence of scientific consensus is relevant to whether, under Art. 14 combined with Art. 8, there is an objective and reasonable justification for differences in treatment based on sexual orientation, in relation to access to individual adoption. However, it is important for the Court to focus on what kind of scientific consensus would constitute such a justification, and on who must establish the existence of this consensus. FIDH, ILGA-Europe, BAAF and APGL respectfully submit that: (i) because "particularly serious reasons" are needed to justify a difference in treatment based on sexual orientation, there would have to be a clear scientific consensus that children raised by lesbian or gay parents are significantly more likely to suffer problems than children raised by heterosexual parents; (ii) that the onus is on the French Government to establish the existence of such a consensus by citing published studies; and (iii) that the French Government cannot discharge this onus because there are (to the knowledge of FIDH, ILGA-Europe, BAAF and APGL) no reputable studies finding a greater likelihood of problems.

23. First, the Court has made it clear that differences in treatment based on sexual orientation are analogous to differences in treatment based on race (*Smith & Grady* v. *UK*, 1999, para. 97), religion (*Mouta* v. *Portugal*, 1999, para. 36), and sex (*L. & V.* v. *Austria*, 2003, para. 45), and can therefore only be justified by "particularly serious reasons". In justifying all such differences in treatment, "the

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[29] 660 N.E.2d at 405.
[30] [1997] Scots Law Times 724, 732 (Inner House of Court of Session).
[31] [1997] 3 All England Reports 620, 627.

margin of appreciation afforded to States is narrow ... It must ... be shown that it was necessary in order to achieve [the State's] aim to exclude certain categories of people ..." (See *Karner* v. *Austria*, 2003, para. 41.) This means that, under the Convention, there is a strong presumption against the validity of a difference in treatment based on sexual orientation, and in favour of requiring lesbian and gay individuals to be treated in the same way as heterosexual individuals. Before this presumption can be rebutted, the Court should require the same level of scientific consensus that it would require for a national rule excluding from individual adoption (or any other opportunity) all Roma, all Muslims, or all women, regardless of their individual merit.

24. Second, under Art. 14 combined with Art. 8, the burden of providing a justification is on the respondent government, which is seeking to defend the difference in treatment it has made. This means that the onus is on the French Government to present scientific studies that "prove harm", rather than on the lesbian or gay individual seeking to adopt to present studies that "prove absence of harm". The presumption that differences in treatment based on sexual orientation are contrary to the Convention, derived from the Court's case law, should be strengthened by a second presumption flowing from common humanity: that a lesbian or gay adoptive parent, like any other human being, will love their child and do their utmost to give their child the best possible upbringing. It is demeaning to require lesbian and gay individuals to prove that members of their group have the same capacity to be good parents as heterosexual individuals, just as it would be demeaning to require Roma, Muslims, or women to produce studies showing that they are just as honest, intelligent or reliable as non-Roma, Christians, or men.

25. Requiring governments to provide objective scientific evidence to justify a difference in treatment, under Art. 14, is essential to protect a minority against discrimination, because it ensures that the difference in treatment does not reflect a social prejudice against the minority. The most deep-seated and harmful social prejudice against lesbian and gay individuals is that they cannot be trusted to care for children, because they will sexually or otherwise abuse them, engage in sexual activity in front of them, "make them" become lesbian or gay themselves, etc. A government can easily disguise the fact that a decision is based on this social prejudice through vague assertions about "uncertainty", the "best interests of the child", or the "*principe de précaution*".[32] The Court should insist that the French Government produce scientific evidence to justify its difference in treatment.

26. Third, the French Government will find it extremely difficult to produce such evidence, because (to the knowledge of FIDH, ILGA-Europe, BAAF and APGL) all reputable scientific studies have shown that the children of lesbian and gay parents are no more likely to suffer from emotional or other problems than the children of heterosexual parents. In 1995, the American Psychological Association issued a review (cited in *Fretté*) of 43 empirical studies, which concluded that "[n]ot a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents".[33] Two 2001 reviews (not cited in *Fretté*) reached the same conclusion. Two US sociologists analysed 21 studies published between 1981 and 1998, and concluded that "[b]ecause every

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[32] See Thomas Stone, "... The [ECtHR's] Implicit Use of the Precautionary Principle in *Fretté* ...", (2003) 3 Connecticut Public Interest Law Journal 271, 292 ("[u]se of the precautionary principle in a human rights context is inappropriate"), http://www.law.uconn.edu/journals/cpilj.

[33] See *Lesbian and Gay Parenting*, Summary of Research Findings (Conclusion), Annotated Bibliography (list of 43 studies), http://www.apa.org/pi/parent.html.

relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's 'best interest'".[34] Likewise, Sweden's Commission on the Situation of Children in Homosexual Families examined 40 international studies, together with studies it had commissioned in Sweden. The Commission concluded that: "children with homosexual parents have developed psychologically and socially in a similar way to the children with whom they were compared. ... Children growing up in a loving environment ... are well equipped to handle ... conflicts [in relation to peer groups because of their parents' sexual orientation]. Nor have any differences emerged ... between homosexual and heterosexual parents regarding their ability to offer children nurturing and care."[35]

27. Similar results can be found in studies by other European researchers, in Belgium,[36] France,[37] Spain,[38] and the United Kingdom.[39] In the Netherlands, a recent study (the largest to date, published in 2004, after *Fretté*) compared children in 100 two-mother families with children in 100 mother-father families and found "no differences between the psychological adjustment of children in lesbian and those in heterosexual families".[40]

28. Since 30 Jan. 2002 (the date the Court adopted its *Fretté* judgment prior to publication on 26 Feb. 2002), a growing number of professional bodies and child welfare organisations have considered the scientific evidence and have concluded (or reaffirmed their earlier position) that lesbian and gay individuals should be allowed equal access to individual, second-parent or joint adoption. The American Academy of Pediatrics (60,000 members) published its policy statement on second-parent adoption on 2 Feb. 2002, observing that: "a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual."[41] On 14 April 2002, the North American Council on Adoptable Children amended its 1998 position statement to read: "Children should not be denied a permanent family because of the sexual orientation of potential parents. Everyone with the potential to successfully parent a child in ... adoption is entitled to fair and equal consideration."[42] In Nov. 2002, the American Psychiatric Association (35,000 members) approved its position statement on second-parent or joint adoption, stating that: "Numerous studies over the last three

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[34] Judith Stacey & Timothy Biblarz, "(How) Does the Sexual Orientation of Parents Matter?", (2001) 66 American Sociological Review 159, 176.

[35] "Children in Homosexual Families", SOU 2001:10, http://www.homo.se/upload/homo/pdf_homo/sou2002-10_summary.pdf (English), http://www.regeringen.se/sb/d/135/a/608 (full Swedish version).

[36] Dr. Katrien Vanfraussen, Vrije Universiteit Brussel, http://www.vub.ac.be/ONLE/Katrien.html.

[37] Dr. Stéphane Nadaud, "*Approche psychologique et comportementale des enfants vivant en milieu homoparental*", *thèse* no. 3053, Université de Bordeaux 2 (*médecine*) (2000).

[38] Prof. María del Mar González, Universidad de Sevilla, co-author of "*... [D]esarrollo infantil y adolescente en familias homoparentales*", report for *Oficina del Defensor del Menor de la Comunidad de Madrid*, http://www.dmenor-mad.es (*Publicaciones*, *Estudios e Investigaciones* 2002).

[39] Prof. Susan Golombok, City University (London), http://www.city.ac.uk/psychology/research/fcrc/staff/golombok.html; Dr. Fiona Tasker, Birkbeck College, University of London, http://www.psyc.bbk.ac.uk/people/academic/tasker_f.

[40] Dr. Henny Bos, *Parenting in Planned Lesbian Families* (Univ. of Amsterdam Press, 2004), 108, http://www.aup.nl/do.php?a=show_visitor_book&isbn=9056293672.

[41] "Policy Statement", (2002) 109 *Pediatrics* 339, http://www.aap.org/policy/020008.html.

[42] "Gay and Lesbian Adoptions and Foster Care", http://www.nacac.org/pub_statements.html.

decades consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents. This research indicates that optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults."[43] And in July 2004, the American Psychological Association (150,000 members) adopted a resolution on lesbian and gay parents reaffirming its opposition to sexual orientation discrimination in adoption, first stated in 1976: "There is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children ...; ... Research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish; ... the APA opposes any discrimination based on sexual orientation in matters of adoption ..."[44]

29. Statements of this kind by professional bodies and child welfare organisations, since *Fretté*, are not confined to the US. On 15 May 2002, BAAF (British Agencies for Adoption and Fostering, the UK's leading non-governmental organisation in this area) stated its strong support for an amendment to adoption legislation that would extend joint adoption to unmarried different-sex or same-sex couples (passed in Nov. 2002, *supra* para. 12): "It ... seems contrary to this basic principle [the child's welfare], and unhelpful for children, to restrict the categories of people who may adopt [jointly]. In the past, agencies have rightly been criticised for having 'blanket bans' on certain classes of people, for example on grounds of age or weight. There is currently a shortage of adopters for all children apart from very young healthy babies. In order to find adoptive families for all the children who need them the net must be cast as wide as possible. In practice children are already placed with unmarried couples [because one member of] an unmarried couple can currently adopt. In these cases both parents usually share the care of the child on a daily basis but they have a very different and unequal legal relationship with the child, as only one adult can be the legal parent. We believe that it is much better for children placed with unmarried couples to be able to have the lifelong parent/child relationship with both adults equally, both emotionally and practically, rather than with one parent."[45] This statement reaffirmed its earlier evidence to the UK Parliament: "We reiterate [our] concern ... at the failure ... to amend the law by allowing two people living in a stable union - whether heterosexual or homosexual - to adopt [jointly]."[46]

30. Similarly, on 6 Aug. 2003, the Canadian Psychological Association issued a press release announcing the CPA's conclusions that: "[a]vailable evidence indicates that the children of gay and lesbian parents do not differ significantly from the children of heterosexual parents with regard to psychosocial and gender development and identity ... [and that] [s]tatements that children of gay and lesbian parents have more and significant problems in the areas of psychosocial or gender development and identity than do the children of heterosexual parents have no support

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[43] See http://www.psych.org/edu/other_res/lib_archives/archives/200214.pdf. Likewise, the American Academy of Child and Adolescent Psychiatry "opposes any discrimination based on sexual orientation against individuals in regard to their rights as custodial or adoptive parents". See "Policy Statement" (June 1999), http://aacap.org/publications/policy/ps46.htm (not cited in *Fretté*).

[44] "Resolution", http://www.apa.org/pi/lgbc/policy/parentschildren.pdf.

[45] "Briefing Note", http://www.baaf.org.uk/info/lpp/law/adbillbrief05_02.pdf.

[46] "Memo. of Evidence" (9 Nov. 2001), http://www.baaf.org.uk/info/lpp/law/newbillevidence.pdf.

from the scientific literature."[47] And on 31 Jan. 2005, in Spain, the *Colegio Oficial de Psicólogos de Madrid* published a declaration on second-parent and joint adoption by same-sex couples: "*Según los estudios científicos existentes ... no puede afirmarse que los niños educados por familias homoparentales sufran perjuicios en su desarrollo psicológico*". ["According to existing scientific studies ... it cannot be claimed that children raised by lesbian or gay families suffer harm in their psychological development."][48]

31. Because critics of the scientific studies cannot cite any contradictory studies by reputable researchers, they generally confine themselves to criticising the methodology of the studies: the number of children in each study is small, and the families have not been selected randomly. The authors of the studies would readily concede that their samples are generally small and not statistically representative, due to the difficulty of identifying the incidence of lesbian or gay identity in national populations. However, these limitations do not reduce the cumulative weight of the findings of the studies as a whole, especially bearing in mind that the onus is on governments to "prove harm", not on lesbian and gay individuals to produce methodologically ideal studies that "prove absence of harm". Moreover, a new study published in 2004 does draw on a random statistically representative national sample of more than 12,000 US adolescents, and confirms the consensus of the prior research. Comparing 44 adolescents aged 12 to 18 parented by same-sex couples with 44 parented by different-sex couples, the study "found that the personal, family, and school adjustment of adolescents living with same-sex parents did not differ from that of adolescents living with opposite-sex parents. ... [and] that adolescent self-esteem did not vary as a function of family type. ... [W]e found no differences ... in measures of personal adjustment, such as depressive symptoms and anxiety; in measures of school adjustment, such as academic achievement [or] trouble in school ...; or in measures of the qualities of family relationships, such as ... care from adults and peers, neighborhood integration, or parental warmth."[49]

32. The rigid position of French administrative officals and courts, on access by lesbian and gay individuals to individual adoption, is probably a result of ignorance of the scientific studies discussed above, and of the influence of a branch of French psychoanalytic theory which believes that a child must have maternal and paternal references in the home in order to construct its psychological identity.[50] This theory is completely abstract and untested, because it is not based on empirical studies of real parents and real children. And because it amounts to an assertion that children need maternal and paternal references to "learn to be heterosexual", it is intuitively suspect. The vast majority of lesbian and gay individuals were raised by heterosexual parents, and the vast majority of individuals raised by their mothers alone are heterosexual, despite the absence of a paternal reference. Moreover, this theory was implicitly rejected by the American Psychoanalytic Association on 16 May 2002 (after *Fretté*): "the salient consideration in decisions about parenting, including ... adoption ... is the best interest of the child. Accumulated evidence suggests the best interest of the child requires attachment to committed, nurturing and competent parents. Evaluation of an individual or couple for these parental qualities should be determined without prejudice regarding sexual orientation. Gay and lesbian

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[47] "Press Release", http://www.cpa.ca/documents/GayParenting-CPA.pdf.

[48] See http://www.copmadrid.org/view_article.asp?id=61&cat=13.

[49] Wainwright, Russell & Patterson, "Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents", (2004) 75 *Child Development* 1886, 1895.

[50] Martine Gross, *Que sais-je? L'homoparentalité* (Paris, Presses Univ. de France, 2003), 90-100.

individuals and couples are capable of meeting the best interest of the child and should be afforded the same rights and should accept the same responsibilities as heterosexual parents. ..."[51]

IV. Estimates of the number of children in need of adoptive parents

33. In *Fretté*, the Court said: "42. ... there are not enough children to adopt to satisfy demand." In principle, the number of adoptable children should be completely irrelevant. The mere fact that an opportunity is limited cannot be a justification for excluding, in a discriminatory way, others who are just as well qualified to enjoy that opportunity. The fact that only 46 lawyers (out of the hundreds of thousands of lawyers in the Council of Europe member states) can be judges of the European Court of Human Rights at any one time, could never justify a rule excluding women from the possiblity of becoming a judge of the Court. It would be irrelevant that the vast majority of women lawyers could never enjoy this opportunity, or that applications from women would increase the "competition" for men aspiring to be judges at the Court. Similarly, in deciding whether it is justifiable to exclude lesbian and gay individuals from individual adoption, it should be irrelevant whether the "supply" of adoptable children is greater or less than the "demand" from prospective adoptive parents, or that applications from lesbian and gay individuals would increase (very slightly) the "competition" for heterosexual individuals. If "demand" exceeds "supply", governments and adoption agencies may use non-discriminatory criteria to place children with applicants, according to the applicants' individual merit and their suitability as adoptive parents for the particular child.

34. In any case, it is simply not credible that "demand" for children exceeds "supply" with regard to all children in need of adoptive parents, within and outside Europe. Within Europe, "demand" only exceeds "supply" with regard to white, healthy babies with no apparent disabilities. In every Council of Europe member state, there are children in state care or foster homes who are: older than 4; are from an ethnic minority; have siblings; have a disability (including being HIV-positive); have experienced abuse or have behavioural problems; or are otherwise "less desirable". In Russia, *Pravda* reported that the number of orphans and foster children increased from 496,300 in 1994 to 867,800 as of 1 Jan. 2003, and that 90% are orphans for social reasons, rather than because of the death or disablement of their parents.[52] It is government policy in the UK (and possibly in Russia and other member states), if not in France, to seek permanent adoptive parents for older children living in state care or foster homes.

35. Outside Europe, besides the 118,000 children awaiting adoption in the US (as of 30 Sept. 2003),[53] there are millions of children in developing countries who could be adopted by lesbian and gay individuals in France. A report published in July 2002 (after *Fretté*), and commissioned by the US Agency for International Development, UNICEF (the United Nations Children's Fund) and UNAIDS (the Joint United Nations Programme on HIV/AIDS), estimates the number of orphans (children under 15 who have lost one or both parents) in 2005 as:[54]

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[51] "Position Statement on Gay and Lesbian Parenting", http://www.apsa.org/ctf/cgli/parenting.htm.
[52] (13 May 2004), http://csbbs.pravda.ru/main/2004/05/13/53888.html.
[53] See http://www.acf.hhs.gov/programs/cb/dis/afcars/publications/afcars_stats.htm.
[54] "Children on the Brink 2002", Appendix I, http://www.dec.org/pdf_docs/PNACP860.pdf.

Estimated orphans, 2005	maternal	paternal	**double**	total
Africa	19,370,000	26,454,000	6,906,000	52,730,000
Asia	21,580,000	43,023,000	3,038,000	67,641,000
Latin America	2,162,000	6,027,000	333,000	8,522,000
Total	43,113,000	75,504,000	**10,277,000**	128,894,000

On the one hand, many of these children will be cared for by their surviving parent, or through a formal or informal adoption by a relative, neighbour or other adult in their country of origin. On the other hand, it is unlikely that all of them will find such care, and it must be remembered that these figures do not include children whose birth parents are both alive, but neither of whom is willing or able to care for them. Thus, it seems likely that if an openly lesbian or gay individual in France were granted the necessary *agrément*, and had sufficient time, money and determination to overcome the administrative hurdles to intercountry adoption, they would find a child in need of adoptive parents for whom they could provide a good home. Even if they did not succeed, they would have been given the same chance as a heterosexual individual to conduct a worldwide search for a suitable child.

36. Adopting as an unmarried individual is not a complete bar to intercountry adoption. A significant number of countries permit children to be adopted by unmarried individuals, eg, China, Colombia, Guatemala, Haiti, India, Jamaica, Kazakhstan, the Philippines, Russia, Ukraine and Vietnam.[55] It is true that some countries might not be willing to send a child for adoption by an openly lesbian or gay individual. Indeed, China has required unmarried applicants to swear that they are not lesbian or gay. But the Court should disregard the fact that an openly lesbian or gay individual in a Council of Europe member state might have to hide their sexual orientation from officials in the child's country of origin. Most countries in Africa, Asia and Latin America do not comply with the standards of the Convention with regard to sexual orientation discrimination. Neither the Court nor any Council of Europe member state can prevent sexual orientation discrimination in non-European countries. However, the Court should not permit Council of Europe member states to rely on the possibility of such discrimination as a justification for maintaining sexual orientation discrimination in their own legislation or practices.[56]

Conclusion

37. As long as the opportunity of applying to adopt a child as an unmarried individual exists in France for heterosexual individuals (whether or not they are living with a different-sex partner), Arts. 14 and 8 of the Convention do not permit French administrative officials and courts to exclude openly lesbian and gay individuals (whether or not they are living with a same-sex partner), solely because of their sexual orientations.

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[55] See http://www.dfes.gov.uk/adoption/intercountry/factsheets.shtml.

[56] Spain, Sweden and the UK have no exceptions for intercountry adoption in their existing or planned legislation on second-parent and joint adoption for same-sex couples. The Netherlands made an exception in 2000, but on 9 March 2005 announced plans to repeal it. See also *supra* para. 12 (consecutive adoption).