Application No. 25951/07, *Gas & Dubois* v. *France*
European Court of Human Rights, Fifth Section

WRITTEN COMMENTS OF FIDH, ICJ, ILGA-EUROPE, BAAF & NELFA
Submitted on 11 December 2009

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*), ICJ (International Commission of Jurists), ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), BAAF (British Association for Adoption and Fostering), and NELFA (Network of European LGBT Families Associations). Their interest and expertise are set out in their "Application for leave to submit written comments" of 18 Aug. 2009, granted by the President of the Chamber on 7 Sept. 2009, under Rule 44(2) of the Rules of Court.

Introduction

2. This application presents to the Court the question of whether the European Convention on Human Rights permits a Council of Europe member state to maintain legislation that: (a) on the one hand, allows an unmarried male-female couple to have a child through donor insemination, with the child generally having two legal parents (its genetic mother and her male partner, rather than the child's genetic father, the anonymous sperm donor) from the moment of its birth (eg, if the male partner consented to the donor insemination) or shortly thereafter (eg, the male partner might have to recognise the child), with no need for the male partner of its genetic mother to adopt the child; and (b) on the other hand, (i) excludes an unmarried female-female couple from the same access to donor insemination, (ii) after they have obtained access to donor insemination in another Council of Europe member state, provides that the child has only one legal parent (its genetic mother) from the moment of its birth, and (iii) prohibits the female partner of the child's genetic mother from adopting the child and becoming its second legal parent, because only members of a married male-female couple may adopt each other's children. What appears to be a complex issue is in fact relatively simple: (x) how can it be in the best interests of a child born through donor insemination to an unmarried female-female couple to have one only legal parent rather than two legal parents, and (y) given that a child born through donor insemination to an unmarried male-female couple generally has two legal parents from the moment of its birth or shortly thereafter, how can this difference in treatment be justified?

3. Before turning to developments in Council of Europe and other democratic societies, supporting the right of a child born to an unmarried female-female couple to have two legal parents (through the adoption of the child by the female partner of its genetic mother), 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 or legal 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 this application concerns second-parent adoption.** The question of equal access by lesbian and gay individuals to individual adoption, in member states in which this possibility exists, was settled by the Grand Chamber of the Court in *E.B.* v. *France* (22 Jan. 2008). By 14 votes to 3, the Court adopted the following principle, stated succinctly in para. 3 of the dissenting judgment of Judge Costa (who dissented only on the application of the principle to the facts of the case): "the message sent by our Court to the States Parties is clear: a person seeking to adopt cannot be prevented from doing so merely on the ground of his or her homosexuality ... our Court ... considers that a person can no more be refused authorisation to adopt on grounds of their homosexuality than have their parental responsibility withdrawn on those grounds ... I agree." This means that excluding a lesbian or gay individual from the possibility of adopting a child as an unmarried individual, solely because of their sexual orientation, is discrimination violating Article 14 combined with Article 8 (respect for private or family life).

6. It is implicit in the conclusion of these 14 judges that a blanket refusal to place any child with any lesbian or gay individual cannot be justified by reference to four asserted forms of harm to the child: (a) sexual or other physical abuse of the child (it is insulting to lesbian and gay individuals, and a denial of their common humanity, even to mention this possibility, but it underlies the strong public prejudice against adoption by lesbian and gay individuals); (b) psychological problems resulting from being raised by a lesbian or gay individual; (c) the greater likelihood that a child raised by a lesbian or gay individual will itself identify as lesbian or gay as an adult; and (d) the risk that the child will suffer teasing, bullying, harassment or other forms of stigmatisation because it is being raised by a lesbian or gay individual. The scientific consensus that there is no evidence supporting claims (a), (b) and (c), and that the risk of (d) is not sufficient to justify the exclusion of lesbian and gay individuals from adoption was demonstrated in the "Written Comments of FIDH, ILGA-Europe, BAAF & APGL", submitted on 3 June 2005 in *E.B.* v. *France* (App. No. 43546/02), available at http://www.ilga-europe.org (Litigation in the European Courts). These Written Comments will try to avoid unnecessary repetition of information found in the *E.B.* v. *France* Written Comments.[1]

7. Once the conclusion has been reached, in relation to individual adoption, that the welfare of the child is not a reason to exclude lesbian and gay individuals, only one additional question arises in relation to second-parent adoption. If a child is being raised by a same-sex couple, one member of which is the child's genetic and legal parent (or adoptive and legal parent), is there any reason not to permit that parent's partner to adopt the child and become its second legal parent? On the one hand, it is obviously in the best interests of the child to have two legal parents rather than one, because two legal parents will mean two sets of financial support obligations, two sets of inheritance rights, and potentially two sets of survivor pension

[1] For the most recent study, see "*Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften*", http://www.bmj.de/files/-/3813/Zusammenfassung_Lebenssituation_von_%20Kindern_%20in_gleichgeschl_LP.pdf.

benefits. All these future advantages for the child will be in addition to the day-to-day advantages that go with legal parenthood: if a child's legal situation reflects its social reality, then both the parents who are caring for it will be recognised as having parental authority when dealing with schools, hospitals, and immigration officials. Adoption also eliminates the constant worry that, if the genetic and legal mother dies, the child could be taken away from the only other parent it has known, and transferred to another home. It is important to remember that the child's social reality will remain the same, whether or not it has one or two legal parents. The child will remain in the same home. There is no question of "competition" for the child, or its being transferred to an "ideal" set of parents.[2] It is also important to remember that the female partner of the child's genetic and legal mother is the woman with whom (in many cases) the genetic and legal mother planned the birth of the child, who helps her raise the child on a daily basis, and who is for all purposes (other than legal ones) the child's second mother. From the child's perspective, the two women who love her and raise her are already her parents. Allowing second-parent adoption means ensuring that the law conforms to the reality of the child's existence.

8. The only objection to allowing second-parent adoption, in the case of a same-sex couple, is that such an adoption requires a national legal system to start recognising that a child may have two legal mothers or two legal fathers at the same time. Although this is psychologically challenging for ministers, civil servants, legislators, judges, and child welfare professionals, and requires a period of psychological adaptation, can what is at worst moral disapproval of the parents' relationship, and at best discomfort with bringing a legal situation into conformity with a social reality, be sufficient to override what is clearly in the best interests of the child? The remainder of these Written Comments will demonstrate the growing consensus in Council of Europe and other democratic societies that the best interests of the child require the possibility of second-parent adoption in the case of a same-sex couple, and that the best interests of the child must prevail over moral disapproval or temporary discomfort with a child's having two legal mothers or two legal fathers.

I. Legislation regarding second-parent adoption by same-sex couples

9. The evidence from Europe, Canada, the US, Australia and South Africa is that a trend towards full equality for same-sex couples with regard to second-parent and joint adoption has begun. In 1994, when a resolution of the EU's European Parliament called for an end to "any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children",[3] no Council of Europe member state permitted second-parent adoption. As of 1 Dec. 2009, second-parent adoption (eg, adoption by a lesbian woman of her female partner's child by donor insemination) is possible in 10 of 47 member states (21.3%): Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden, and the UK (England, Wales, Scotland).[4] For example, the legislation in England and Wales

[2] Arguments about the domestic and international "supply" of adoptable children, in relation to domestic "demand", discussed in the *E.B.* v. *France* Written Comments, and implicitly rejected by the Court in *E.B.* v. *France*, are therefore irrelevant when the issue is second-parent adoption.

[3] (8 Feb. 1994), OJ [1994] C 61/40 at 42, para. 14.

[4] Belgium, *Loi du 18 mai 2006 modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe*, *Moniteur belge*, 20 June 2006, Edition 2, p. 31128; Denmark, Law No. 360 (2 June 1999), amending Law No. 372

defines a couple who may apply for a second-parent adoption 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".[5] The number of member states could rise to 14 (29.8%), because of the entry into force of Hungary's new Civil Code (1 Jan. 2011, planned legislation in Luxembourg and Slovenia allowing same-sex couples to marry and adopt children jointly, and planned legislation allowing same-sex couples to marry in Portugal.[6] The Portuguese proposal does not yet include joint adoption for same-sex married couples, but Portugal already allows unmarried different-sex couples to adopt jointly.[7] This right should be extended to unmarried same-sex couples, to comply with *Karner* v. *Austria* (24 July 2003).

10. The same trend can be seen in other democratic societies with good human rights records.. In Canada, express legislation or case law permits second-parent adoption by same-sex couples in 10 of 13 provinces and territories, and the Supreme Court's case law on sexual orientation discrimination would probably require equal access in the rest.[8] In the US, in at least 14 of 50 states (California, Colorado, Connecticut, Illinois, Indiana, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Vermont) and the District of Columbia, second-parent or joint adoptions by same-sex couples have been approved by appellate courts or express legislation or both.[9] In Australia, at least 4 of

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(7 June 1989); Finland, Act on Registered Partnerships (950/2001), as amended by Act 391/2009, in force 1 Sept. 2009; 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, *Ley 13/2005, de 1 de julio, por la que se modifica el Codígo Civil en materia de derecho a contraer matrimonio* (Law 13/2005, of 1 July, providing for the amendment of the Civil Code with regard to the right to contract marriage), *Boletín Oficial del Estado,* no. 157, 2 July 2005, pp. 23632-23634, http://www.boe.es/boe/dias/2005-07-02/pdfs/A23632-23634.pdf (in force 3 July 2005), 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, Adoption and Children Act 2002, ss. 50, 51(2) (England & Wales, in force 30 Dec. 2005), Adoption and Children (Scotland) Act 2007, s. 29(3); "*Adopting the Future*", http://www.dhsspsni.gov.uk/adopting_the_future-3.pdf (N. Ireland, June 2006).

[5] Adoption and Children Act 2002, s. 144(4), read with s. 51(2) and s. 144(7).

[6] Hungary, 2009 *évi CXX. törvény a Polgári Törvénykönyvrõl* (Act CXX of 2009 on the Civil Code), art. 3:130.§(2) (adoption by the long-term cohabiting partner of the child's parent); Luxembourg: http://www.gouvernement.lu/gouvernement/programme-2009/programme-2009/programme-gouvernemental-2009.pdf (p. 108); Portugal: http://www.ps.pt/media/ Programa_de_Governo_do_PS.pdf (p. 76); Slovenia: new Family Code, 21 Sept. 2009 draft.

[7] *Lei No. 7/2001 de 11 de Maio, Adopta medidas de protecção das uniões de facto*, [2001] 109 (I-A) Diário da República 2797.

[8] 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.

[9] Legislation: California Statutes, Chapter 893 (14 Oct. 2001), amending Family Code, s. 9000; Colorado Revised Statutes, s. 19-5-203(1), 208(5), 210(1.5), 211(1.5) (2007); Connecticut General Statutes Annotated, s. 45a-724 (2000); DC Code, s. 16-308; New Hampshire Revised Statutes, s. 170-B:4; New Jersey Statutes s. 9:3-50; Oregon Revised Statutes, s. 109.041(2); 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); *Schott* v. *Schott*, 744 N.W.2d 85 (Iowa Supreme Ct. 2008);

the 8 states and territories permit second-parent adoption (or recognise the female partner of the mother of a child born through donor insemination as the second legal parent, or both).[10] And in South Africa, the Constitution has been interpreted as requiring equal access to second-parent adoption (see II. below).

11. Because second-parent adoption by same-sex couples is in the best interests of the children they are raising, this issue has proved easier for legislatures and courts than equal access to legal marriage for same-sex couples. As of 1 Dec. 2009, second-parent adoption is permitted in 10 Council of Europe member states, but same-sex couples may marry in only 5 member states (Belgium, Netherlands, Norway, Spain, Sweden). Similarly, in the US, second-parent or joint adoption is permitted in at least 14 states plus DC, but same-sex couples may marry in only 5 states (Connecticut, Iowa, Massachusetts, New Hampshire, Vermont).

II. Judicial reasoning regarding second-parent adoption by same-sex couples

12. Courts in South Africa, the US, and Germany, like the legislatures mentioned in part I., have concluded that the best interests of children being raised by same-sex couples are served by permitting second-parent adoption. The leading decision to date is that of the Constitutional Court of South Africa on 10 Sept. 2002 in *Du Toit* v. *Minister for Welfare and Population Development*,[11] 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. Although the case concerned the absence of legislation permitting joint adoption by a same-sex couple, it effectively concerned a second-parent adoption: the children had already been placed with the same-sex couple, on the understanding that only one member of the couple could adopt them (the couple would have to decide which member would adopt), and that the children would only have one legal parent.

13. 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 different-sex couple.[12]

14. 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. ...

Adoption of M.A., 930 A.2d 1088 (Maine Supreme Judicial Court 2007); *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).

[10] 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); Victoria, Assisted Reproductive Treatment Act 2008, s. 147 (amending Status of Children Act 1974); Western Australia, Acts Amendment (Lesbian and Gay Law Reform) Act 2002, s. 16 (amending Adoption Act 1994, s. 67).

[11] Case no. CCT40/01.

[12] *Ibid*., paras. 4-7.

[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."

15. 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.

16. Skwewiya J. made the following order in relation to joint adoption: "the omission from section 17(a) of the Child Care Act ...1983 after the word[s] '[by a husband and his wife] jointly' of the words 'or by the two members of a permanent same-sex life partnership jointly' is inconsistent with the Constitution and invalid; ... section 17(a) ... is to be read as though [those] words appear therein ..." In relation to second-parent adoption, his order read: "the omission from section 17(c) of the Child Care Act ... 1983 after the word[s] '[by a married person whose spouse is the parent of the] child' of the words 'or by a person whose permanent same-sex life partner is the parent of the child' is inconsistent with the Constitution and invalid; ... section 17(c) ... is to be read as though [those] words appear therein ..."

17. 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[13] (a decision similar to *Karner* v. *Austria*). 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.[14] 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[15] provide that '[a]pplicants shall not be rejected solely on the basis of homosexuality'].[16] ... [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.[17] ... [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 sexual orientation [lesbian] ..., would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the ... statute's ... purpose ..."[18]

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[13] *Braschi* v. *Stahl Associates Co.*, 543 N.E. 2d 49 (1989)
[14] 660 N.E.2d 397 (1995).
[15] New York Compilation of Codes, Rules and Regulations, Title 18, s. 421.16(h)(2).
[16] 660 N.E.2d at 398.
[17] 660 N.E.2d at 399.
[18] 660 N.E.2d at 405.

18. In Germany, the 2004 legislation allowing same-sex registered life partners to adopt each other's children was challenged as contrary to the German Constitution. On 10 August 2009, the German Federal Constitutional Court upheld the legislation, finding that in its case-law, biological parenthood does not enjoy constitutional supremacy over legal and social-familial parenthood.[19]

III. The Revised European Convention on the Adoption of Children

19. The 1967 European Convention on the Adoption of Children provides, in Art. 6(1), that: "The law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person." As the result of social and legal changes in Europe, the 1967 Convention became out-of-date. Indeed, Sweden in 2002 and the UK in 2005 were forced to denounce it, after they allowed same-sex couples to adopt jointly.[20] The Revised European Convention on the Adoption of Children, opened for signature on 27 Nov. 2008, eliminates this problem:

> Article 7(1): "The law shall permit a child to be adopted: (a) by two persons of different sex (i) who are married to each other, or (ii) ... have entered into a registered partnership together; (b) by one person."
>
> Article 7(2): "States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different-sex couples and same-sex couples who are living together in a stable relationship."

20. Similarly, the 2008 Convention expressly permits second-parent adoption:

> Article 11(1) "The adoption shall terminate the legal relationship between the child and his or her father, mother and family of origin."
>
> Article 11(2) "Nevertheless, the spouse or partner, whether registered or not, of the adopter shall retain his or her rights and obligations in respect of the adopted child if the latter is his or her child ..."

21. The purpose of Article 7 of the 2008 Convention, which is not yet in force, is to recognise the variety of adoption legislation in the Council of Europe member states, without stating a minimum standard for all member states, ie, which forms of adoption, other than by a married different-sex couple or by an individual, member states "must" rather than "may" recognise. In particular, when the Explanatory Report states, at para. 45, that "the right of same-sex registered partners to adopt jointly a child was not a solution that a large number of states parties were willing to accept at the present time", it is not focussing on the case of second-parent adoption of a child that is already being raised by a same-sex couple.

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[19] BVerfG, 1 BvL 15/09 vom 10.8.2009, Absatz-Nr. (1 - 16), http://www.bverfg.de/entscheidungen/lk20090810_1bvl001509.html, para. 14

[20] Explanatory Report, para. 45.

22. Instead, it is the role of the Court, in interpreting the Convention as a "living instrument", to determine when particular forms of adoption "must" be permitted, to avoid discrimination, or failure to respect a child's family life.

V. Applicability of Article 14 combined with Article 8 (family life)

23. If a member state voluntarily creates a procedure allowing married different-sex couples to adopt each other's children, but does not extend this possibility to unmarried same-sex couples, Article 14 is applicable combined with Article 8 (respect for family life). Given the strong arguments for finding that a same-sex couple without children enjoys "family life" under Article 8,[21] it is even clearer that a same-sex couple that is in fact raising a child enjoys "family life".[22]

VI. The existence of a difference in treatment

24. An application of this kind involves three intersecting forms of discrimination. Two of these are direct (they involve unjustifiable differences in treatment), and one is indirect (it involves an unjustifiable failure to treat differently by granting an exemption from a neutral rule).

25. The first form of discrimination is direct discrimination, based on sexual orientation, between unmarried male-female couples, who are allowed access to donor insemination, and to legal parenthood for the male partner of the genetic mother (if he consents to the insemination or recognises the child), and unmarried female-female couples, who are not. This direct discrimination is contrary to the principle adopted by the Court in *Karner* v. *Austria*. If the applicants had been treated in the same way as an unmarried male-female couple, their donor insemination would have taken place in France, there would have been no need to apply for a second-parent adoption, and their child would have had two legal parents.

26. The second form of discrimination is also direct discrimination, based on marital status, between married different-sex couples, who are allowed to adopt each other's children, and unmarried couples (different-sex or same-sex), who are not. The Court has begun to depart from its case law finding that differences in treatment between married different-sex couples and unmarried different-sex couples (that do not affect minor children) are not discrimination, and are permitted by Article 14 combined with Article 8. For example, in *Petrov* v. *Bulgaria* (22 Aug. 2008), the Court found a violation of Article 14 combined with Article 8, because an unmarried man was not allowed to use the prison telephone to contact his female partner. For the Court (para. 55), it was "not readily apparent why married and unmarried partners who have an established family life are to be given disparate treatment as regards the possibility to maintain contact by telephone while one of them is in custody".[23]

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[21] See "Written Comments of FIDH, ICJ, AIRE Centre & ILGA-Europe", submitted on 27 Oct. 2009 in *Chapin & Charpentier* v. *France* (Application No. 40183/07), paras. 4-6, http://www.ilga-europe.org (Litigation in the European Courts).

[22] Cf. *X, Y & Z* v. *UK* (22 April 1997) , para. 37 ("family life" where two persons of same legal sex were raising a child born through donor insemination).

[23] See also *Şerife Yiğit* **v. *Turkey* (20 Jan. 2009) (4-3) (exclusion of unmarried surviving female partner from survivor's pension did not violate Article 8) (to be heard by Grand Chamber on 16 Dec. 2009).**

28. The third form of discrimination is indirect, based on sexual orientation, because, in France, unmarried same-sex couples, who are not legally able to marry, are not exempted from the requirement that they be married to be eligible to adopt each other's children. The obligation to exempt an individual from a neutral rule, to avoid indirect discrimination violating Article 14 combined with another Article, was first identified to *Thlimmenos* v. *Greece* (6 April 2000).[24]

VII. Absence of an objective and reasonable justification

29. 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 only be justified by "particularly serious reasons". In justifying all such differences in treatment, "the 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 ..." (*Karner*, para. 41.)[25]

30. At this stage, it is important to recall an argument against adoption by lesbian and gay individuals, or joint adoption by same-sex couples, that is frequently made, including at the "Joint Council of Europe and European Commission Conference: Challenges in adoption procedures in Europe: ensuring the best interest of the child", held in Strasbourg on 30 Nov 2009. Neither a lesbian or gay individual, nor a same-sex couple, should be allowed to adopt a child, because that child will face an extra difficulty, ie, social prejudice against its parent or parents. The implication of this argument is that children should only be adopted by white, Christian, married different-sex couples, who have no disabilities and can in no significant way be considered "different" from the majority. To avoid imposing extra difficulties on adopted children, they should not be placed with couples one or both of whom are of African origin, Jewish or Muslim. This argument is contrary to the US Supreme Court's persuasive decision in *Palmore* v. *Sidotti*,[26] conflicts with this Court's reasoning in *Smith & Grady*,[27] and was implicitly rejected by this Court in *E.B.* v. *France*. Moreover, it is completely irrelevant to the case of second-parent adoption (the child is already living with a same-sex couple and will not be moving anywhere).

31. Relevant arguments in relation to second-parent adoption are: (a) the need of the couple to demonstrate stability (because a legal relationship should not be established with both members of a couple if that couple is not sufficiently stable);

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[24] On the application of this argument to indirect discrimination against unmarried same-sex couples, see *supra* n. 21, paras. 29-40.

[25] See *supra* n. 21, paras. 4-6, on why *Karner* superseded *Mata Estevez* v. *Spain* (10 May 2001).

[26] 466 U.S. 429 at 433 (1984): "The question, however, is whether the reality of private [racial] biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural [white] mother [because she was cohabiting with a black man]. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

[27] See para. 97: "'"To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes [of heterosexual members of the armed forces] cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the [lesbian and gay members'] rights ... any more than similar negative attitudes towards those of a different race, origin or colour."

and (b) the number of legal parents the child will have after the second-parent adoption. As the Court noted in *Emonet*, para. 81, a marriage certificate is not the sole possible evidence of stability. A form of registered partnership certificate, or a substantial period of cohabitation, could be suitable alternatives. As for the number of parents, second-parent adoption by a same-sex couple involves increasing the number of legal parents the child has from 1 to 2. This situation can therefore be distinguished from the more complicated one in which the child already has 2 genetic and legal parents, and the question is whether or not 1 or 2 "step-parents" (partners or spouses of the 2 genetic and legal parents) should also be legally recognised.

32. One final potential argument must be addressed. In this application, the donor insemination took place in Belgium, because it could not legally be performed in France. Could this be considered a "fraude à la loi", in that the child's parents sought to avoid the negative impact of French law by travelling to Belgium? Putting aside their right to seek medical services in another European Union member state, under European Union law, it is clear from the Court's case law that a child must not be punished for the decisions of its parents, over which it has no control, whether the decision is not to marry (*Marckx* v. *Belgium*, 13 June 1979), to seek to adopt the child (*Pla* v. *Andorra*, 13 July 2004), or to bring the child into the world by using donor insemination that is legally available to them in another country. Article 2(2) of the UN Convention on the Rights of the Child provides: "2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." Council of Europe member states must not use family law to express moral disapproval of the relationship between a child's genetic and legal mother and her female partner.

Conclusion

37. It is discrimination, directly and indirectly based on sexual orientation and marital status, contrary to Article 14 of the Convention combined with Article 8 (respect for family life), to deny a child born to an unmarried female-female couple through donor insemination the possibility of being adopted by the female partner of its genetic and legal mother, when a child born to an unmarried male-female couple through donor insemination generally has two legal parents (its genetic mother and its mother's male partner) from the moment of its birth, or shortly thereafter. The choice of the means to end this discrimination (exempting same-sex couples from the marriage requirement for second-parent adoptions, and accepting evidence of a substantial period of cohabitation instead, as the South African Constitutional Court did in *Du Toit*; accepting a registered partnership certificate; allowing same-sex couples to marry; granting female-female couples the same access to donor insemination as unmarried male-female couples) can be left to member states.

38. In the alternative, it is a violation of a Council of Europe member state's obligations under Article 8 to respect the family life of every child, regardless of the sexual orientation or marital status of its parents, to deny a child born to an unmarried female-female couple through donor insemination the possibility of being adopted by the female partner of its genetic and legal mother.

39. In this case, as in *Mouta* v. *Portugal*, the best interests of the child are so strongly in favour of requiring the possibility of adoption that the emerging consensus

in Council of Europe and other democratic societies, demonstrated above, should be sufficient to support the Court's finding a violation of Article 14 combined with Article 8, or Article 8 on its own.

40. As Professor Nigel Lowe said in his study for the Council of Europe's Committee of Experts on Family Law:

"Children do not live in a vacuum, but within a family and an important part of their protection is that the family unit, no matter what form it takes, enjoys adequate and equal legal recognition and protection. In other words, it is as discriminating to the child to limit legal parenthood or to deny significant carers legal rights and responsibilities as to accord the child a different status and legal rights according to the circumstance of their birth or upbringing."[28]

[28] "A Study into the Rights and Legal Status of Children being brought up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation", CF-JA (2008) 5, 10 March 2009, at p. 3.