

IN THE EUROPEAN COURT OF HUMAN RIGHTS

X. against Poland (application no. 20741/10)

WRITTEN COMMENTS

Submitted jointly by

FIDH (Federation 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)**

KPH (Campaign Against Homophobia),

NELFA (Network of European LGBTIQ* Families Associations)

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By mail and fax

I. Introduction

1. These written comments are submitted on behalf of ILGA Europe (The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), FIDH (Federation Internationale des ligues des Droits de l'Homme), KPH (Campaign Against Homophobia), NELFA (Network of European LGBTIQ* Families Associations) and ICJ (International Commission of Jurists), pursuant to the leave granted by the President of the First Section per letter of 19 June 2019. The third-party interveners present the Court with established principles, theory and relevant case law with the view to assisting the Court in its determination of the following question:

“Whether refusal by the national authorities of a Contracting Party, including its courts, to grant a parent custody of his or her children on the grounds of his or her sexual orientation constitutes prohibited discrimination in the enjoyment of Convention rights, contrary to Article 14 of the Convention, read in conjunction with Article 8.”

2. In that regard, the third-party interveners set forth the current status of play of the case law related but not limited to child custody decisions where one or both of the parents are lesbian, gay, bisexual, transgender or intersex (LGBTI) individuals. The third-party interveners urge the Court to further build upon its recent jurisprudence in which it asserted and protected the rights of LGBTI persons by drawing on its approach to consider the European Convention on Human Rights as a living instrument that needs to be interpreted in the light of present-day conditions.

II. Prohibition of discrimination based on sexual orientation at the international level

3. Human rights are universal and indivisible, meaning that they apply to everybody. The most known and important affirmation of this principle stems from the Universal Declaration of Human Rights (UDHR), and it has since then been further codified in relevant treaties enshrining human rights and containing key commitments - implicitly or explicitly - to uphold the human rights of every person.¹
4. Under international human rights law, LGBTI individuals are entitled to enjoy equality, equal protection of the law, and non-discrimination² in law and practice. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both contain a protected ‘other status’ clause that has been repeatedly interpreted to include sexual orientation.³ For example, the Committee on Economic Social and Cultural Rights (CESCR) has affirmed that “other status” in the non-discrimination clause of the ICESCR in Article 2, paragraph 2, includes

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html>; Council of Europe, Commissioner for Human Rights, *Human Rights and intersex people*, issue paper, April 2015, <https://rm.coe.int/16806da5d4>.

² The May 2015 Update Report of the United Nations High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. [A/HRC/29/23](#), for example, states: “[a]pplication of international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. All human beings, irrespective of their sexual orientation and gender identity, are entitled to enjoy the protection of international human rights law with respect to the rights to life, security of person and privacy, to freedom from torture and ill-treatment, discrimination and arbitrary arrest and detention, and to freedom of expression, association and peaceful assembly, and all other civil, political, economic, social and cultural rights”, § 9.

³ The main non-discrimination clauses in the ICCPR are Article 2 and Article 26. Article 2 must be read together with all other rights in the Covenant while Article 26 provides a stand-alone prohibition on discrimination generally.

sexual orientation, and that “States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights”.⁴ In *Toonen v. Australia*,⁵ the Human Rights Committee held that the reference to “sex” in Articles 2, paragraph 1, and 26, is to be taken as including sexual orientation.

5. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have repeatedly urged States to tackle both direct and indirect discrimination against all persons, including LGBTI people.⁶ They have called on States to ensure that laws, policies and programmes executed by State authorities do not discriminate against these individuals.⁷
6. Nevertheless, the protection and enforcement of these universal and indivisible rights remain for certain communities a never ending battlefield. With regard to the LGBTI community, the ongoing struggle for preserving their rights was described as follows by Navi Pillay, the then United Nations High Commissioner for Human Rights in 2012:

*"[...] deeply embedded homophobic attitudes, often combined with a lack of adequate legal protection against discrimination on grounds of sexual orientation and gender identity, expose many LGBT people of all ages and in all regions of the world to egregious violations of their human rights. They are discriminated against in the labour market, in schools and in hospitals, and mistreated and disowned by their own families."*⁸

7. Despite the progress that has already been made in recent decades, there is, however, still much room for improvement, as many members of the LGBT community throughout Europe face discrimination, both in law and in practice.

III. Prohibition of discrimination based on sexual orientation in the case-law of the European Court of Human Rights

8. In line with international human rights law, the case-law of the European Court of Human Rights has established that lesbian, gay and bisexual people are entitled to enjoy equality before the law and equal protection of the law on the basis of equality and non-discrimination.⁹ The principle of equality before the law and equal protection of the law and the right to be free from discrimination are at the core of the values that the Convention seeks to guarantee. They are enshrined in Article 14 of the Convention, which, albeit not freestanding, sets out the right to the enjoyment of Convention rights without discrimination.¹⁰ Protocol no. 12 to the Convention unequivocally provides a freestanding

⁴ Committee on Economic, Social and Cultural Rights General Comment 20 (2009), para. 32.

⁵ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8.7.

⁶ See E/C.12/GC/20, paras 7-11; and CCPR/C/PER/CO/5, para. 8.

⁷ OHCHR Discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/29/23, para. 41.

⁸ Office of the UN High Commissioner for Human Rights, *Born free and equal - Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

⁹ The May 2015 Update Report of the United Nations High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. [A/HRC/29/23](#), for example, states: “[a]pplication of international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. All human beings, irrespective of their sexual orientation and gender identity, are entitled to enjoy the protection of international human rights law with respect to the rights to life, security of person and privacy, to freedom from torture and ill-treatment, discrimination and arbitrary arrest and detention, and to freedom of expression, association and peaceful assembly, and all other civil, political, economic, social and cultural rights”, § 9.

¹⁰ Article 14 provides that, “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin,

right not to be subjected to discrimination.¹¹

9. The ECtHR has repeatedly held that, "...differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons¹²... Where a difference in treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow. Differences based solely on considerations of sexual orientation are unacceptable under the Convention." The ECtHR, for example, has repeatedly confirmed that the prohibition of discrimination under Article 14 of the European Convention on Human Rights: "duly covers questions related to sexual orientation and gender identity".¹³
10. Furthermore, the fact that there is "a predisposed bias on the part of the heterosexual majority against a homosexual minority" does not amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.¹⁴ Thus, discrimination on the grounds of sexuality/sexual orientation is considered 'suspect' and subject to 'particularly severe scrutiny'.

IV. Right to Family life for LGBTI parents

11. The Court has confirmed that parent-child ties and custody cases fall under Article 8, and applies to LGBTI parents¹⁵. Most recently, in *Bayev v Russia*¹⁶, albeit the case involved the right to freedom of expression, ECtHR acknowledged the commitment to family values by LGBTI community members and in so doing reinforced the notion that the right to "family life" would equally apply to them. It referred to the steady flow of cases coming to its attention on various aspects of family life (access to marriage, parenthood and adoption), in effect rejecting the Government's argument that exercising freedom of expression on this question could devalue or otherwise adversely affect the existence of "traditional families" or compromise their future¹⁷.

association with a national minority, property, birth or other status."

¹¹ Article 1 of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 177 reads as follows: "(1) The enjoyment of any right set forth by law 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. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1." The Explanatory Report to Protocol 12 explains that "20. The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included. It is recalled that the ECtHR has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in the case of *Salgueiro da Silva Mouta v. Portugal*)."

¹² *X v. Austria* [GC], nos. 19010/07, judgment 19 February 2013, para.99. See also: *E.B. v. France* [GC], no. 43546/02, judgment 22 January 2008, para 91, 93 and 96; *Kozak v. Poland*, no. 1310/02, judgment 2 March 2010, para 92; *Karner v. Austria*, no.40016/98, judgment 24 July 2003, paras 37, 41, and 42; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, judgment 9 January 2003, para 45; *Smith and Grady*, nos. 33985/96 33986/96, judgment 27 September 1999, para 90; and *Salgueiro da Silva Mouta*, no. 33290/96, judgment 21 December 1999, para 36.

¹³ *Identoba v. Georgia*, no. 73235/12, 12 May 2015, judgment, para 96.

¹⁴ *S.L. v. Austria*, no. 45330/99, judgment, 9 January 2003, para 44.

¹⁵ *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, Eur. Comm'n H.R. (1999).

¹⁶ *Bayev and Others v. Russia*, (Applications nos. 67667/09 and 2 others), 20 June 2017

¹⁷ *Ibid*, para 70.

12. One of the most commonly raised objections to the parental rights of LGBTI persons is the well-being of children. However, a number of scientific studies have shown that the children of lesbian and gay parents are not disadvantaged in comparison to those of heterosexual parents.¹⁸

13. The Explanatory Memorandum by Mr Jonas Gunnarsson, included in the Report ‘Private and family life: achieving equality regardless of sexual orientation’¹⁹, which led to the adoption, by the Parliamentary Assembly of the Council of Europe (PACE), of Resolution 2239 (2018) ‘Private and family life: achieving equality regardless of sexual orientation’²⁰, highlighted:

“Children in rainbow families had similar numbers of friends, similarly positive school experiences, similar family lifestyles and similar symptoms of anxiety or depression to their peers. LGBT parents were found to be very committed to parenthood, and supported and encouraged their children a lot. The same vulnerabilities affected children in rainbow families as other children, for example if their parents had divorced.”²¹

14. It further noted, that: “research consistently shows that it is not same-sex parents but societies that are not accepting of diversity that harm children in these families. We must base our public policy decisions as regards rainbow families, not on misconceived notions of “traditional” families as the only, irreplaceable, family format that can provide a healthy upbringing for a child – a notion that can also be harmful to children in single-parent families and in blended (step-)families – but on the need both to ensure acceptance of the diverse families, whether “traditional” or “non-traditional”, that exist in all our societies, and to promote a discrimination-free environment for all parents and children.”²²

15. Indeed, as this Court established in the case of *Karner v. Austria*:

“The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. [...] as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people”²³.

16. On many occasions, Article 8 has been read in conjunction with Article 14 since discrimination on the grounds of sexual orientation usually interferes with the practical aspects of homosexual emotional and sexual behaviour, such as the emergence of a relationship or a family, private sexual relations or the desire to have children, Article 8 of the ECHR on the right to respect private and family is the appropriate and preferred means of protection when it comes to the protection of the rights of LGBT persons in various aspects of family life.

¹⁸ Written submissions to the European Court of Human Rights in the case of *E.B. v France*, by APGL, BAAF, FIDH and ILGA-Europe, 3 June 2005, paras 26 and 29. Available online <https://ilga-europe.org/resources/guide-european-institutions/council-europe/lgbt-rights/ECtHR/interventions>:

¹⁹ Explanatory Memorandum by Mr Jonas Gunnarsson included in Report ‘Private and family life: achieving equality regardless of sexual orientation’ (Doc. 14620), drafted on 21 September 2018.

²⁰ Parliamentary Assembly of the Council of Europe (PACE), of Resolution 2239 (2018) ‘Private and family life: achieving equality regardless of sexual orientation’, adopted by PACE on 10 October 2018

²¹ *Ibid*, para 49.

²² *Ibid*, para 52.

²³ *Karner v. Austria*, (Application no. 40016/98), 24 July 2003, para 41.

17. The ECtHR has for example analysed on the basis of Articles 8 and 14 ECHR the status of same-sex couples wishing to marry or enter into a legally recognized partnership, which resulted in a ground-breaking judgment, with this Court asserting that the absence of a legal framework recognizing homosexual relationships violates the right to respect for private and family life, as provided in Article 8 ECHR.²⁴
18. The Court has also held that the problem with stereotyping of a certain group in society lies in the fact that it prohibits the individualised evaluation of their capacity and needs.²⁵

V. Relevant case-law at the regional level

V.1 ECtHR

19. For the purposes of the present written comments, the third-party interveners will set forth the most relevant case law by the Court in addressing discriminatory treatment in parental authority.
 - a) **Salgueiro da Silva Mouta v. Portugal**²⁶
20. This case, decided by the ECtHR on 21 December 1999, is of particular importance to the determination of the present case given the similarity of the facts raised. Salgueiro da Silva Mouta, the applicant, married his (former) wife in 1983. The couple had a daughter in 1987. However, a few years later Salgueiro da Silva Mouta separated from his wife to live with a man. During the divorce proceedings, the applicant agreed to his former wife to have custody over their daughter. However, he eventually petition for an order to obtain custody over the child, which the Lisbon Family Affairs Court granted to him.²⁷
21. However, the ruling was appealed to the Court of Appeal, which, in turn, ruled solely on the basis of the written proceedings at first instance, assessing the facts differently from the lower court and awarding parental responsibility to the mother. The Court of Appeal considered, among other things, that “*custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this*”. Consequently, the order granted by the Lisbon Family Affairs Court was set aside by the Court of Appeal on the ground that “*the child should live in a family environment, a traditional Portuguese family, which was certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife.*”²⁸ The Court of Appeal further stated that the father “*had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.*”
22. In its assessment, the Court found that the issue of parental responsibility fell within the scope of Article 8 and that there was an interference with the applicant’s family life.²⁹ Further, the ECtHR reiterated that in the enjoyment of Convention rights Article 14 affords

²⁴ ECtHR, *Oliari and other v Italy*, 21 July 2015, nos. 18766/11 and 36030/11.

²⁵ *Carvalho Pinto de Sousa Morais v. Portugal*, App. No. 17484/15.

²⁶ *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, Eur. Comm’n H.R. (1999).

²⁷ *Ibid*, para 10.

²⁸ *Ibid*, para 14.

²⁹ *Ibid*, para 22.

protection against differential treatment to persons in the same situation, and that the applicant was indeed treated differently on the basis of his sexual orientation without an objective and reasonable justification.³⁰ The Court stated clearly that the concept of 'sexual orientation' is undoubtedly covered by Article 14 of the ECHR and reiterated in that connection that the list set out in that provision is illustrative and not exhaustive, as the words "any ground such as" (in French "*notamment*") show.

23. The Court concluded that Article 8 in conjunction with Article 14 was violated because the difference in treatment was not proportionate to the aim of the protection and best interests of the child, and that the Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the ECHR.

b) E.B. v France³¹

24. The applicant was a lesbian woman in a stable relationship with another woman. She applied for authorisation to adopt a child. One of the domestic authorities' grounds for rejection of her application for authority to adopt was the lack of a paternal figure in the household. The ECtHR considered that this had "led to an arbitrary refusal and ha[d] served as a pretext for rejecting the applicant's application on grounds of her homosexuality."³²
25. Importantly, in Court's opinion the fact that the applicant's homosexuality featured to such an extent in the reasoning of the domestic authorities was significant. It observes that "the manner in which certain opinions were expressed was indeed revealing in that the applicant's homosexuality was a determining factor". In particular, the Court noted "that in his opinion ... the psychologist from the children's welfare service recommended that authorisation be refused, referring to, among other things, an "unusual attitude [on the part of the applicant] to men in that men are rejected".³³
26. The Court observed that "the inescapable conclusion is that her sexual orientation was consistently at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings³⁴. Recalling *Salgueiro da Silva Mouta v. Portugal*, it concluded that "in rejecting the applicant's application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention".³⁵

V.2 Inter-American Court of Human Rights ("IACtHR")

27. The landmark case of *Atala Riffo y Niñas v. Chile*³⁶ is the first case in which the IACtHR found that the American Convention on Human Rights (ACHR) prohibited discrimination on the basis of sexual orientation.

³⁰ *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, Eur. Comm'n H.R. (1999), para 26 -28.

³¹ *E.B. v. France [GC]*, no. 43546/02, 22 January 2008

³² *Ibid.*, para 73

³³ *Ibid.*, para 85

³⁴ *Ibid.*, para 88

³⁵ *Ibid.*, para 96.

³⁶ *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, InterAm. Ct. H.R. (ser. C) No. 239, 72-93 (Feb. 27, 2012).

In this case, Ms. Karen Atala Riffo, the applicant, married her husband in 1993. The couple had had three daughters, M., V., and R., born in 1994, 1998 and 1999, respectively.³⁷ In 2002, the couple separated but agreed that Atala would maintain the care and custody of the children. Atala's new partner, Ms. Emma de Ramón moved in Atala's house to live with her, the three daughters and Atala's son from a former marriage. The father of the daughters thereupon filed a custody suit with the Juvenile Court of Villarica.³⁸ On appeal, the Supreme Court of Chile granted the father permanent custody.³⁹ The Supreme Court based its decision on the best interests of the children, and concluded that Atala could not retain custody because she had put her own interests over those of her children by choosing to live with her lesbian partner. These living arrangements would potentially confuse the daughters since a male father was absent from the home and replaced by another female.⁴⁰ The Supreme Court further held that it preferable that the children grew up "*within the bosom of a family that is structured normally and appreciated in the social environment, according to the proper traditional model*".⁴¹

28. In its assessment, the IACtHR examined: (i) the scope of the right to equality and non-discrimination, (ii) sexual orientation as a category protected by Article 1(1) of the American Convention, (iii) whether in this case there was a difference in treatment based on sexual orientation, (iv) whether said difference in treatment constitutes discrimination. For the purposes of assessing the latter the Court decided that it would strictly assess the reasons given to justify the said difference in treatment, taking into consideration the children's best interest and the alleged risk and damage to the girls.
29. The IACtHR unanimously found violations of the right to equal protection (Article 24), and the right to privacy (Article 11), both in conjunction with general obligation to respect rights in Article 1(1) of the ACHR.⁴² The IACtHR held in that regard that that general obligation is owed "*to all persons ..., without any discrimination for reasons of ..., or any other social condition*".
30. Consequently, given the fact that the grounds as set out in Article 1 did not include sexual orientation, the IACtHR had to determine if such a ground was covered as a 'social condition' by the ACHR. As with the ECtHR, the IACtHR's established approach to interpretation is that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. It viewed this evolving interpretation as consistent with the general rules of interpretation set forth in Article 29 of the ACHR, as well as those established in the Vienna Convention on the Law of Treaties.
31. As the list in Article 1 of the ACHR was merely illustrative, the IACtHR held that the term 'any other social condition' should be interpreted in the manner most favourable for the human being and in light of the evolution of fundamental rights in contemporary international law. Relying on international human rights law, as well as jurisprudence of the ECtHR, the IACtHR concluded that the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice that discriminated based on a

³⁷ *Ibid*, para 30.

³⁸ *Ibid*, para 31.

³⁹ *Ibid*, para 54.

⁴⁰ *Ibid*, paras 55-56.

⁴¹ *Ibid*, para 56.

⁴² *Ibid*, paras 85-90.

person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.

VI. Relevant case-law on custody and visitation rights from national jurisdictions

32. A number of national courts have considered the custodial rights of gay and lesbian parents, affirming their right to equal access to children without discrimination based on sexual orientation.
33. Italian courts routinely find that custodial rights of parents cannot be affected based on one's sexual orientation. The Italian Supreme Court of Cassation has ruled that a child may be put in the exclusive custody of his mother regardless of the sex of her partner⁴³. Specifically, the Court noted that "there is no scientific certainty or experience, but the mere prejudice that it is harmful to the balanced development of the child to live in a family centered on a homosexual couple". The Court of Genoa has also ruled that the sexual orientation of a parent and the fact that they may live with a partner of the same sex mustn't affect decisions made regarding a child's guardianship.⁴⁴
34. The Paris Court of Appeal awarded custody to a lesbian mother living with another woman without any restriction. The Court relied on the fact that the homosexual relationship was "not contrary to the interests of the child", in particular because "the attitude of the companion was unequivocal with regard to the child".⁴⁵
35. In the case of *Pablo-Gualberto v. Gualberto*, the father argued that the mother should not be granted custody on the basis of her immorality, due to an alleged same-sex relationship. The Supreme Court of the Philippines noted that the principle of the best interest of the child informed national jurisprudence concerning minors and was the paramount consideration in decisions concerning parental custody. The Court found that sexual orientation alone did not prove parental neglect or incompetence. To deprive the mother of custody, the father had to establish that her "moral lapses" had an adverse impact on the welfare of the child⁴⁶.
36. In the case of *S.N.E., Appellant, v. R.L.B.*⁴⁷ concerning custody rights of a lesbian mother, the Supreme Court of Alaska found that the fact that the child's mother was a lesbian had not affected the child adversely nor was it likely to do so. It relied on the evidence showing that the child's development while living with the mother had been excellent, and held that it was impermissible to rely on any real or imagined social stigma attaching to mother's status as a lesbian.
37. In a case concerning visitation rights of the gay father, the Supreme Court of Washington noted that State may not restrict a parent's reasonable visitation rights merely because that

⁴³ Corte di cassazione, sentenza n°601 - 2013.

⁴⁴ILGA-Europe Annual Review 2014, p. 96. Available online: https://ilga-europe.org/sites/default/files/Attachments/annual_review_2014_web_version.pdf

⁴⁵ CA Paris, 8 November 1984, *Jurisdata No. 027450*

⁴⁶ *Pablo-Gualberto v. Gualberto*, Supreme Court of the Philippines (28 June 2005); available online: <https://www.icj.org/wp-content/uploads/2012/07/Pablo-Gualberto-v.-Gualberto-Supreme-Court-of-the-Philippines.pdf>.

⁴⁷*S.N.E., Appellant, v. R.L.B., Appellee*. No. S-426. Supreme Court of Alaska: <https://www.courtlistener.com/opinion/1174888/sne-v-rlb/>

parent's lifestyle is not within the societal mainstream.⁴⁸

38. In *Di Stefano v Di Stefano*, which concerned visitation rights of a lesbian mother, the Appellate Division of the Supreme Court of New York found “that homosexuality, per se, did not render her unfit as a parent.”⁴⁹ It noted that “while the sexual life style of a parent may properly be considered in determining what is best for the children, its consideration must be limited to its present or reasonably predictable effect upon the children's welfare”.
39. In *Conkel v Conkel*, also concerning visitation rights of a bisexual father, Ohio Court of Appeals observed it could not take into consideration the unpopularity of homosexuals in society when its duty was to facilitate and guard a fundamental parent-child relationship. The Court of Appeals referred to the US Supreme Court’s judgment of *Palmore v. Sidoti* (1984), concerning removal of a white child from her natural mother because the white mother was cohabiting with a black man, whom she later married. The white father relied on the issue of social stigma. While the Supreme Court recognized that such a child might be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin, it stressed that “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.”⁵⁰
40. Adoption cases are of relevance as well, where adoptive parents’ sexual orientation is the primary consideration. Considering existing studies on the impact of sexual orientation on a child’s development the Supreme Court of Justice of Mexico has ruled that it was not possible to uphold the general hypothesis that living with homosexual parents has a negative effect on children’s development.⁵¹

VII. Conclusion

41. Despite a number of recent jurisprudential and legal advances gay and lesbian parents continue suffering discrimination and stigmatisation based on sexual orientation in many parts of Europe. This case provides the Court with the opportunity to reaffirm its findings made over 20 years ago and confirm rights of parents irrespective their sexual orientation or gender identity and expression to equal access to custody of their children.

⁴⁸ In the matter of the Marriage of Cabalquinto, Supreme Court of Washington, 100 Wn.2d 325 (1983), 669 P.2d 886, September 22, 1983.

⁴⁹ *Di Stefano v. Di Stefano*, 60 A.D.2d 976 (N.Y. App. Div. 1978): <https://casetext.com/case/di-stefano-v-di-stefano-2>

⁵⁰ *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987), Ohio Court of Appeals <https://www.courtlistener.com/opinion/3977558/conkel-v-conkel/>

⁵¹ Cf. Supreme Court of Justice of Mexico, Action of Unconstitutionality A.I. 2/2010, August 16, 2010, para. 336.