CASE OF E.B. v. FRANCE

(Application no. 43546/02)

JUDGMENT

STRASBOURG

22 January 2008

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

In the case of E.B. v. France,

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

Christos Rozakis, *President,*
Jean-Paul Costa,
Nicolas Bratza,
Boštjan Zupančič,
Peer Lorenzen,
Françoise Tulkens,
Loukis Loucaides,
Ireneu Cabral Barreto,
Riza Türmen,
Mindia Ugrekhelidze,
Antonella Mularoni,
Elisabeth Steiner,
Elisabet Fura-Sandström,
Egbert Myjer,
Danutė Jočienė,
Dragoljub Popović,
Sverre Erik Jebens, *judges,*
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 14 March 2007 and on 28 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 43546/02) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms

("the Convention") by a French national, Ms **E.B**. ("the applicant"), on 2 December 2002. The President of the Grand Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant alleged that at every stage of her application for authorisation to adopt she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules). On 19 September 2006 a Chamber of that Section, composed of the following judges: Ireneu Cabral Barreto, *President*, Jean-Paul Costa, Rıza Türmen, Mindia Ugrekhelidze, Antonella Mularoni, Elisabet Fura-Sandström, Dragoljub Popović, *judges*, and Sally Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72). Prior to relinquishment the Chamber had received written comments submitted by Prof. R. Wintemute on behalf of four NGOs – *Fédération internationale des Ligues des Droits de l'Homme* (FIDH); European Region of the International Lesbian and Gay Association (ILGA–Europe); British Association for Adoption and Fostering (BAAF); and *Association des Parents et futurs parents Gays et Lesbiens* (APGL) – as third-party interveners (Rule 44 § 2). Those observations were included in the case file transmitted to the Grand Chamber.

4. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

5. The applicant, but not the Government, filed written observations on the merits.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 March 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms E. BELLIARD, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Ms A.-F. TISSIER, Head of the Human Rights Section,
Ms M.-G. MERLOZ, Drafting Secretary,
Human Rights Section,
Ms L. NELIAZ, Administrative Assistant, Child and
Family Bureau, Ministry of Employment,
Social Cohesion and Housing,
Ms F. TURPIN, Drafting Secretary, Legal and Contentious
Issues Office, Ministry of Justice, *Advisers*;

(b) *for the applicant*
Ms C. MÉCARY, of the Paris Bar, *Counsel*,
Mr R. WINTEMUTE, Professor of Human Rights Law,
King's College, University of London,
Mr H. YTTERBERG, Ombudsman against Discrimination
on grounds of Sexual Orientation in Sweden,
Mr A. WEISS, *Advisers*.

The Court heard addresses by Ms C. Mécary and Ms E. Belliard.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1961 and lives in Lons-le-Saunier.

8. She has been a nursery school teacher since 1985 and, since 1990, has been in a stable relationship with a woman, Ms R., who is a psychologist.

9. On 26 February 1998 the applicant made an application to the Jura Social Services Department for authorisation to adopt a child. She wanted to investigate the possibility of international adoption, in particular in Asia, South America and Madagascar. She mentioned her sexual orientation and her relationship with her partner, Ms R.

10. In a report dated 11 August 1998 the socio-educational assistant and paediatric nurse noted the following points among others:

> "Ms B. and Ms R. do not regard themselves as a couple, and Ms R., although concerned by her partner's application to adopt a child, does not feel committed by it.
>
> Ms B. considers that she will have to play the role of mother and father, and her partner does not lay claim to any right *vis-à-vis* the child but will be at hand if necessary.
>
> ...
>
> Ms B. is seeking to adopt following her decision not to have a child herself.
>
> She would prefer to explain to a child that he or she has had a father and mother and that what she wants is the child's happiness than to tell the child that she does not want to live with a man.
>
> ...
>
> Ms B. thinks of a father as a stable, reassuring and reliable figure. She proposes to provide a future adopted child with this father figure in the persons of her own father and her brother-in-law. But she also says that the child will be able to choose a surrogate father in his or her environment (a friend's relatives, a teacher, or a male friend ...).
>
> ...
>
> CONCLUSION
>
> "On account of her personality and her occupation, Ms B. is a good listener, is broad-minded and cultured, and is emotionally receptive. We also appreciated her clear-sighted approach to analysing problems and her child-raising and emotional capacities.
>
> However, regard being had to her current lifestyle: unmarried and cohabiting with a female partner, we have not been able to assess her ability to provide a child with a family image revolving around a parental couple such as to afford safeguards for that child's stable and well-adjusted development.
>
> Opinion reserved regarding authorisation to adopt a child."

11. On 28 August 1998, in her report on the interviews she had had with the applicant, the psychologist examining her application recommended in the following terms that authorisation be refused:

> " ...
>
> Ms [B.] has many personal qualities. She is enthusiastic and warm-hearted and comes across as very protective of others.
>
> Her ideas about child-rearing appear very positive. Several question marks remain, however, regarding a number of factors pertaining to her background, the context in which the child will be cared for and her desire for a child.
>
> Is she not seeking to avoid the "violence" of giving birth and genetic anxiety regarding a biological child?
>
> Idealisation of a child and under-estimation of the difficulties inherent in providing one with a home: is she not fantasising about being able to fully mend a child's past?
>
> How certain can we be that the child will find a stable and reliable paternal referent?
>
> The possibilities of identification with a paternal role model are somewhat unclear. Let us not forget that children forge their identity with an image of both parents. Children need adults who will assume their parental function: if the parent is alone, what effects will that have on the child's development?
>
> ...

We do not wish to diminish Ms [B.]'s confidence in herself in any way, still less insinuate that she would be harmful to a child; what we are saying is that all the studies on parenthood show that a child needs both its parents.

Moreover, when asked whether she would have wanted to be brought up by only one of her parents, Ms B. answered no.

...

A number of grey areas remain, relating to the illusion of having a direct perception of her desire for a child: would it not be wiser to defer this request pending a more thorough analysis of the various – complex – aspects of the situation?...”

12. On 21 September 1998 a technical officer from the children's welfare service recommended that authorisation be refused, observing that the applicant had not given enough thought to the question of a paternal and male role model, and assumed that she could easily take on the role of father and mother herself, while mentioning a possible role for her father and/or brother-in-law, who lived a long way away, however, meaning that meetings with the child would be difficult. The officer also wondered about the presence of Ms R. in the applicant's life, noting that they refused to regard themselves as a couple and that Ms R. had not at any time been involved in the plan to adopt. The reasoning of the opinion ended as follows:

“I find myself faced with a lot of uncertainties about important matters concerning the psychological development of a child who has already experienced abandonment and a complete change of culture and language...”.

13. On 12 October 1998 the psychologist from the children's welfare service, who was a member of the adoption board, recommended that authorisation be refused on the ground that placing a child with the applicant would expose the child to a certain number of risks relating to the construction of his or her personality. He referred among other things to the fact that the applicant lived with a girlfriend but did not consider herself to be in a couple, which gave rise to an unclear or even an unspoken situation involving ambiguity and a risk that the child would have only a maternal role model. The psychologist went on to make the following comments:-

“...

It is as though the reasons for wanting a child derived from a complicated personal background that has not been resolved with regard to the role as child-parent that [the applicant] appears to have had to play (*vis-à-vis* one of her sisters, protection of her parents), and were based on emotional difficulties. Has this given rise to a feeling of worthlessness or uselessness that she is trying to overcome by becoming a mother?

Unusual attitude towards men in that men are rejected.

In the extreme, how can rejection of the male figure not amount to rejection of the child's own image? (A child eligible for adoption has a biological father whose symbolic existence must be preserved, but will this be within [the applicant's] capabilities?) ...”

14. On 28 October 1998 the Adoption Board's representative from the Family Council for the association of children currently or formerly in State care recommended refusing authorisation to adopt in the following terms:-

“...From my personal experience of life with a foster family I am now, with the benefit of hindsight, in a position to assess the importance of a mixed couple (man and woman) in providing a child with a home.

The role of the “adoptive mother” and the “adoptive father” in the child's day-to-day upbringing are complementary, but different.

It is a balance that will be shaken by the child to a degree that may sometimes vary in intensity according to how he or she experiences the realisation and acceptance of the truth about his or her origins and history.

I therefore think it necessary, in the interests of the child, for there to be a solid balance between an “adoptive mother” and an “adoptive father” where adoption is being envisaged. ...”

15. On 4 November 1998 the Board's representative from the Family Council, present on behalf of the union of family associations for the *département* (UDAF), referring to the Convention on the Rights of the Child of 20 November 1989, recommended that authorisation be refused on the ground of the lack of a paternal referent and added:

" ... It appears impossible to build a family and bring up a child without the full support of this partner [R.] for the plan. The psychologists' and welfare reports show her clear lack of interest in Ms [B.]'s plan ...

In the further alternative, the material conditions for providing a child with a suitable home are not met. It will be necessary to move house, solve the issue of how to divide expenses between both partners, whose plans differ at least in this respect."

16. On 24 November 1998 the head of the children's welfare service also recommended that authorisation be refused, noting expressly that

"Ms [B.] lives with a female partner who does not appear to be a party to the plan. The role this partner would play in the adopted child's life is not clearly defined.

There does not appear to be room for a male referent who would actually be present in the child's life.

In these circumstances, there is a risk that the child would not find within this household the various family markers necessary to the development of his or her personality and well-being."

17. In a letter of 26 November 1998 the decision of the president of the council for the *département* refusing authorisation to adopt was served on the applicant. The following reasons, among others, were given:

"... in examining any application for authorisation to adopt I have to consider the child's interests alone and ensure that all the relevant safeguards are in place.

Your plan to adopt reveals the lack of a paternal role model or referent capable of fostering the well-adjusted development of an adopted child.

Moreover, the place that your partner would occupy in the child's life is not sufficiently clear: although she does not appear to oppose your plan, neither does she seem to be involved, which would make it difficult for the child to find its bearings.

Accordingly, all the foregoing factors do not appear to ensure that an adopted child will have a sufficiently structured family framework in which to flourish. ..."

18. On 20 January 1999 the applicant asked the president of the council for the *département* to reconsider the decision refusing her authorisation to adopt.

19. The children's welfare service asked a clinical psychologist to prepare a psychological assessment. In her report of 7 March 1999, drawn up after an interview with the applicant, the psychologist concluded that "Ms B. ha[d] plenty to offer in providing a home for a child (patience-values-creativity-time)", but considered that adoption was premature having regard to a number of problematic points (confusion between a non-directive and *laissez-faire* attitude, and ignorance of the effects of the introduction of a third person into the home set-up).

20. On 17 March 1999 the president of the council for the *département* of the Jura confirmed the refusal to grant the request for authorisation.

21. On 13 May 1999 the applicant applied to the Besançon Administrative Court seeking to have the administrative decisions of 26 November 1998 and 17 March 1999 set aside. She also contested the manner in which the screening process in respect of her request for authorisation had been conducted. She pointed out that many people involved in the process had not met her, including the psychologist from the adoption board.

22. In a judgment of 24 February 2000 the Administrative Court set aside the decisions of 26 November 1998 and 19 March 1999, ruling as follows:

"... the president of the council for the *département* of the Jura based his decision both on "the lack of a paternal role model or referent capable of fostering the well-adjusted development of an adopted child" and on "the place [her] partner would occupy in the child's life". The reasons cited are not in themselves capable of justifying a refusal to grant authorisation to adopt. The documents in the case file show that Ms B., who has undisputed personal qualities and an aptitude for bringing up children, and who is a nursery school teacher by profession and well integrated into her social environment, does offer sufficient guarantees – from a family, child-rearing and psychological perspective – that she would provide an adopted child with a suitable home. ... Ms B. is justified, in the circumstances of this case, in seeking to have the decisions refusing her authorisation set aside ..."

23. The *département* of the Jura appealed. The Nancy Administrative Court of Appeal, in a judgment of

21 December 2000, set aside the lower court's judgment. It found, first, that "B. maintain[ed] that she ha[d] not been sent a personality test, but [did] not allege that she [had] asked for the document and that her request [had been] refused" and that the 4th paragraph of Article 63 of the Family and Social Welfare Code "[did] not have the effect of precluding a report from being drawn up on the basis of a summary of the main points of other documents. Hence, the fact that a psychologist [had drawn] up a report just on the basis of information obtained by other people working on the case and without hearing submissions from the applicant [did] not invalidate the screening process carried out in respect of Ms B.'s application for authorisation to adopt ...".

24. The court went on to find that

> "... the reasons for the decisions of 26 November 1998 and 17 March 1999, which were taken following an application for reconsideration of the decision of the president of the council for the *département* of the Jura rejecting the application for authorisation to adopt submitted by Ms B., are the absence of "identificational markers" due to the lack of a paternal role model or referent and the ambivalence of the commitment of each member of the household to the adoptive child. It can be seen from the documents in the file, and particularly the evidence gathered during the examination of Ms B.'s application, that having regard to the latter's lifestyle and despite her undoubted personal qualities and aptitude for bringing up children, she did not provide the requisite safeguards – from a family, child-rearing and psychological perspective – for adopting a child...;
>
> ... contrary to Ms B.'s contentions, the president of the council for the *département* did not refuse her authorisation on the basis of a position of principle regarding her choice of lifestyle. Accordingly, and in any event, the applicant is not justified in alleging a breach ... of the requirements of Articles 8 and 14 of the Convention...".

25. The applicant appealed on points of law. On 5 June 2002 the *Conseil d'Etat* dismissed her appeal in a judgment giving the following reasons:

> "... Regarding the grounds for refusing Ms B. authorisation:
>
> ...
>
> Firstly, the fact that a request for authorisation to adopt a child is submitted by a single person, as is permitted by Article 343-1 of the Civil Code, does not prevent the administrative authority from ascertaining, in terms of child-rearing and psychological factors that foster the development of the child's personality, whether the prospective adoptive parent can offer – in her circle of family and friends – a paternal "role model or referent" where the application is submitted by a woman ...; nor, where a single person seeking to adopt is in a stable relationship with another person, who will inevitably be required to contribute to providing the child with a suitable home for the purposes of the above-mentioned provisions, does this fact prevent the authority from determining – even if the relationship in question is not a legally binding one – whether the conduct or personality of the third person, considered on the basis of objective considerations, is conducive to providing a suitable home. Accordingly, the Administrative Court of Appeal did not err in law in considering that the two grounds on which the application by Ms [B.] for authorisation as a single person was refused – namely, the "absence of identificational markers due to the lack of a paternal role model or referent" and "the ambivalence of the commitment of each member of the household to the adoptive child" – were capable of justifying, under the above-mentioned provisions of the decree of 1 September 1998, the refusal to grant authorisation;
>
> Secondly, with regard to Ms [B.]'s assertion that, in referring to her "lifestyle" to justify the refusal to grant her authorisation to adopt, the Administrative Court of Appeal had implicitly referred to her sexual orientation, it can be seen from the documents submitted to the tribunals of fact that Ms [B.] was, at the time of the examination of her application, in a stable homosexual relationship. As that relationship had to be taken into consideration in the needs and interests of an adopted child, the court neither based its decision on a position of principle in view of the applicant's sexual orientation nor breached the combined requirements of Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; nor did it breach the provisions of Article L. 225-2 of the Criminal Code prohibiting sexual discrimination;
>
> Thirdly, in considering that Ms [B.], "having regard to her lifestyle and despite her undoubted personal qualities and aptitude for bringing up children, did not provide the requisite safeguards – from a family, child-rearing and psychological perspective – for adopting a child", the Administrative Court of Appeal, which did not disregard the elements favourable to the applicant in the file submitted to it, did not distort the contents of the file;
>
> It follows from the foregoing that Ms [B.] is not justified in seeking to have set aside the above-mentioned judgment, which contains adequate reasons ...".

II. RELEVANT LAW AND PRACTICE

A. Domestic law

1. The Civil Code

26. The relevant provisions at the material time read as follows:

Article 343

"Adoption may be applied for by a married couple who have not been judicially separated and have been married for more than two years or are both over twenty-eight years of age."

Article 343-1

"Adoption may also be applied for by any person over twenty-eight years of age. ..."

2. Family and Social Welfare Code

27. The relevant provisions at the material time read as follows:

Article 63

"Children in State care may be adopted either by persons given custody of them by the children's welfare service wherever the emotional ties that have been established between them warrant such a measure or by persons granted authorisation to adopt ...

Authorisation shall be granted for five years, within nine months of the date of the application, by the president of the council for the relevant *département* after obtaining the opinion of a[n] [adoption] board. ..."

Article 100-3

"Persons wishing to provide a home for a foreign child with a view to his or her adoption shall apply for the authorisation contemplated in Article 63 of this Code."

3. Decree no. 98-771 of 1 September 1998 establishing the arrangements for appraising applications for authorisation to adopt a child in State care

28. The relevant provisions of the decree read as follows:

Article 1

"Any person wishing to obtain the authorisation contemplated in the first paragraph of Article 63 and Article 100-3 of the Family and Social Welfare Code must submit an application to that end to the president of the council for the *département* in which he or she resides. ..."

Article 4

"Before issuing authorisation, the president of the council for the relevant *département* must satisfy himself that the conditions in which the applicant is proposing to provide a child with a home meet the needs and interests of an adopted child from a family, child-rearing and psychological perspective.

To that end, he shall order inquiries into the applicant's circumstances ..."

Article 5

"The decision shall be taken by the president of the council for the relevant *département* after consulting the adoption board ..."

B. International Conventions

1. Draft European Convention on the Adoption of Children

29. The relevant provisions of this draft Convention, currently being examined by the Committee of Ministers of the Council of Europe, provide *inter alia*:

Article 7 – Conditions for adoption

"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. where such an institution exists, have entered into a registered partnership together;

b. by one person.

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."

2. International Convention on the Rights of the Child

30. The relevant provisions of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 and which came into force on 2 September 1990 read as follows:

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

Article 4

"States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

Article 5

"States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

Article 20

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

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

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

Article 21

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

shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs. ...”

3. Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of International Adoption

31. The relevant provisions of the Hague Convention of 29 May 1993 provide:

Article 5

“An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State:

a) have determined that the prospective adoptive parents are eligible and suited to adopt;

b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) have determined that the child is or will be authorized to enter and reside permanently in that State.”

Article 15

“1. If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

2. It shall transmit the report to the Central Authority of the State of origin.”

THE LAW

32. The applicant alleged that she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life. She relied on Article 14 of the Convention taken in conjunction with Article 8, which provide:

Article 8

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

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

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

I. ADMISSIBILITY

A. Submissions of the parties

1. The applicant

33. The applicant stated that adoption by homosexuals fell into three quite distinct categories: first, it might be a single person seeking to adopt, in a member State where adoptions by single persons were permitted (even if only in exceptional cases), in which case any partner the individual might have acquired no parental rights as a result of the adoption (individual adoption); second, one member of a same-sex couple might seek to adopt the child of the other partner, so that both partners had parental rights *vis-à-vis* the child (second-parent adoption); and lastly, both members of a same-sex couple might seek to jointly adopt a child with no prior connection with either partner, so that both partners simultaneously acquired parental rights *vis-à-vis* the child (joint adoption). The applicant specified that she had applied for individual adoption, which was the simpler legal option.

34. She emphasised the importance of obtaining authorisation, which, in practice, was a precondition to adopting a child in **France** or abroad.

35. The applicant did not claim a right to adopt, which – irrespective of the sexual orientation of the prospective adoptive parent – did not exist. Nevertheless, she submitted that Article 14 of the Convention, taken in conjunction with Article 8, was applicable to the present case. Firstly, the opportunity or chance of applying for authorisation to adopt fell within the scope of Article 8 both with regard to "private life", since it concerned the creation of a new relationship with another individual, and "family life", since it was an attempt to create a family life with the child being adopted. Secondly, a person's sexual orientation, which was an aspect of their private life, accordingly fell within the scope of Article 8.

2. The Government

36. The Government contended that the application was inadmissible, since the complaint fell outside the scope of Article 8 of the Convention and, consequently, Article 14. In any event, unlike in *Fretté* (*Fretté **v**. **France***, no. 36515/97, § 32, ECHR 2002-I), the refusal to grant the applicant authorisation had not been based, explicitly or implicitly, on the applicant's sexual orientation and could not therefore amount to direct or indirect discrimination based on her homosexuality.

37. The reason for refusing her authorisation had been dictated by the child's interests alone and had been based on two grounds: lack of a paternal referent and the ambivalence of the applicant's partner's commitment to her adoption plans.

38. With regard to the ground relating to the lack of a paternal referent, the Government pointed out that many professionals considered that a model of sexual difference was an important factor in a child's identity and that it was perfectly understandable that the social services of the *département* should take into consideration the lack of markers enabling a child to construct its identity with reference to a father figure. The Government cited decisions of the domestic courts in support of their submission that any other heterosexual applicant whose immediate circle of family and friends did not include a member of the opposite sex would have had their application refused on the same ground.

39. With regard to the second ground, the Government submitted at the outset that the lack of commitment on the part of the applicant's partner was an established fact. They observed that the applicant continued to deny the relevance of that fact, whereas it was legitimate to have regard to the conduct of a prospective adoptive parent's immediate circle of family and friends where there were plans to bring a child

into the home. Irrespective of the lack of legal consequences for the partner, the arrival of a child would change the balance of the receiving couple and the family unit, and an adopted child's previous history made it all the more important to assess the solidity of a couple's approach to any plan to adopt. Accordingly, apart from the fact that R. would necessarily be involved in the child's day-to-day life, her lack of involvement could be seen as a source of insecurity for the child with the risk that the child would find him or herself in competition with the applicant's partner for the applicant's time and affection. In the Government's submission, that ground could not be said to be related to the applicant's sexual orientation, as had been borne out by the decisions of the domestic courts.

40. In the Government's view, the circumstances of the present case were therefore very different from those in *Fretté* (cited above) and it should be stressed that the French administrative and judicial authorities had given paramount consideration to what lay in the best interests of the child. Those best interests were central to many international instruments binding on **France**. There was no right to a child or right to authorisation to adopt one. Adoption was a measure taken for the child's protection and was designed to provide him or her with a family. The sole purpose of the authorisation procedure was to identify from among the many candidates the person who could provide a child with the most suitable home in every respect. Accordingly, the desire for a child must not prevail over the child's interests.

B. The Court's assessment

41. The Court, noting that the applicant based her application on Article 14 of the Convention, taken in conjunction with Article 8, reiterates at the outset that the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt (see *Fretté*, cited above, § 32). Neither party contests this. The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family (see *Marckx* ***v.*** *Belgium*, judgment of 13 June 1979, Series A no. 31, § 31), or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father (see *Nylund* ***v.*** *Finland* (dec.), no. 27110/95, ECHR 1999-VI), or the relationship that arises from a genuine marriage, even if family life has not yet been fully established (see *Abdulaziz, Cabales and Balkandali* ***v.*** *the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 62), or the relationship that arises from a lawful and genuine adoption (see *Pini and Others* ***v.*** *Romania*, nos. 78028/01 and 78030/01, § 148 , ECHR 2004-V).

42. Nor is a right to adopt provided for by domestic law or by other international instruments, such as the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, or the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of International Adoption (see paragraphs 30-31 above).

43. The Court has, however, previously held that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings (see *Niemietz* ***v.*** *Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 33, § 29), the right to "personal development" (see *Bensaid* ***v.*** *the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I) or the right to self-determination as such (see *Pretty* ***v.*** *the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). It encompasses elements such as names (see *Burghartz* ***v.*** *Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24), gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 (see, for example, *Dudgeon* ***v.*** *the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and *Laskey, Jaggard and Brown* ***v.*** *the United Kingdom,* judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 131, § 36), and the right to respect for both the decisions to have and not to have a child (see *Evans* ***v.*** *the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-...).

44. Admittedly, in the instant case the proceedings in question do not concern the adoption of a child as such, but an application for authorisation to adopt one subsequently. The case therefore raises the issue of the procedure for obtaining authorisation to adopt rather than adoption itself. However, the parties do not contest

procedure for obtaining authorisation to adopt rather than adoption itself. However, the parties do not contest that in practice authorisation is a precondition for adopting a child.

45. It should also be noted that the applicant claimed to have been discriminated against on the ground of her avowed homosexuality, resulting in a violation of the provisions of Article 14 of the Convention taken in conjunction with Article 8.

46. The Court is not therefore called upon to rule whether the right to adopt, having regard, *inter alia*, to developments in the legislation in Europe and the fact that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, in particular, *Johnston and Others* ***v.*** *Ireland*, judgment of 18 December 1986, Series A no. 112, pp. 24-25, § 53), should or should not fall within the ambit of Article 8 of the Convention taken alone.

47. With regard to Article 14, which was relied on in the present case, the Court reiterates that it only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among many other authorities, *Sahin* ***v.*** *Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Articles of the Convention (see *Abdulaziz, Cabales and Balkandali*, cited above, § 71; *Karlheinz Schmidt* ***v.*** *Germany*, judgment of 18 July 1994, Series A no. 291-B, § 22; and *Petrovic* ***v.*** *Austria*, judgment of 27 March 1998, *Reports* 1998-II, § 22).

48. The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see *Case* "*relating to certain aspects of the laws on the use of languages in education in Belgium*" ***v.*** *Belgium (Merits)*, judgment of 23 July 1968, Series A no. 6, § 9; *Abdulaziz, Cabales and Balkandali*, cited above, § 78; and *Stec and Others* ***v.*** *the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 40, ECHR 2005-X).

49. The present case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person. Whilst Article 8 of the Convention is silent as to this question, the Court notes that French legislation expressly grants single persons the right to apply for authorisation to adopt and establishes a procedure to that end. Accordingly, the Court considers that the facts of this case undoubtedly fall within the ambit of Article 8 of the Convention. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14 (see, *mutatis mutandis*, *Case* "*relating to certain aspects of the laws on the use of languages in education in Belgium*", cited above).

50. The applicant alleged in the present case that, in the exercise of her right under the domestic law, she had been discriminated against on the ground of her sexual orientation. The latter is a concept covered by Article 14 of the Convention (see *Salgueiro da Silva Mouta* ***v.*** *Portugal*, no. 33290/96, § 28, ECHR 1999-IX). The Court also points out that in *Fretté* ***v.*** ***France*** (cited above), to which the parties expressly referred, the applicant complained that the rejection of his application for authorisation to adopt had implicitly been based on his sexual orientation alone. The Chamber found that Article 14 of the Convention, taken in conjunction with Article 8, was applicable (§ 33).

51. Accordingly, Article 14 of the Convention, taken in conjunction with Article 8, is applicable in the present case.

52. In these circumstances the Court dismisses the preliminary objection raised by the Government. It also considers, in the light of the parties' submissions, that this complaint raises complex issues of fact and law which cannot be resolved at this stage in the examination of the application, but require examination on the merits. It follows that this complaint cannot be declared manifestly ill-founded within the meaning of Article 35

merits. It follows that this complaint cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

A. Submissions of the parties

1. The applicant

53. The applicant maintained that the refusal to grant her authorisation to adopt had been based on her "lifestyle", in other words her homosexuality. In her view, this was borne out by the screening of her application and the opinion of the adoption board. She also considered that part of the judgment delivered by the *Conseil d'Etat* was worded in the same terms as the judgment it had rendered in the case of *Fretté* (cited above), which showed that the *Conseil d'Etat* adopted a discriminatory approach.

54. With regard to the ground based on the lack of a paternal referent, she argued that while the majority of French psychoanalysts believed that a child needed a dual maternal and paternal referent, there was no empirical evidence for that belief and it had been disputed by many other psychotherapists. Moreover, in the present case the Government had not shown that there was a practice of excluding single heterosexual women who did not have a male partner.

55. With regard to the argument based on her partner's place in and attitude to her plan to adopt, she submitted that this was an illegal ground. Articles 343 and 343-1 of the Civil Code provided that adoption was open to married couples and single persons: partners were not concerned and therefore were not a party to the adoption procedure and did not enjoy any legal status once the child was adopted. Having regard to her right to be subject to foreseeable legal rules, the applicant contested a ground for rejection of her application that had no basis in the law itself.

56. The applicant went on to stress that she and her partner had had a meeting with the social worker and that subsequently the various officials involved in screening her application for authorisation had never asked to meet her partner. Either steps should have been taken to interview her partner or this ground had in reality served as a pretext for rejecting her application purely on the basis of her sexual orientation.

57. The applicant submitted that the difference in treatment in her regard had no objective and reasonable justification. Particularly serious reasons were required to justify a difference in treatment based on sexual orientation. There were no such reasons in this case.

58. With regard to the division in the scientific community (*Fretté*, § 42), particularly serious reasons were required to justify a difference in treatment of homosexuals. The burden of proving the existence of any scientific reasons was on the Government and if they had failed to prove in *Fretté* and in the instant case that there was a consensus in the scientific community, this was because there was no known study on the subject.

59. The applicant disputed the existence of a "legitimate aim", since children's health was not really in issue here and the *Conseil d'Etat* had not explained how the child's health might be endangered. She submitted that three risks were generally cited: first, the alleged risk of the child becoming homosexual, which, quite apart from the fact that there was nothing reprehensible about such an eventuality and that the majority of homosexuals had heterosexual parents, was a prejudiced notion; second, the child would be exposed to the risk of developing psychological problems: that risk had never been proved and recent studies showed that being raised in a homoparental family did not incline a child to any particular disorder; besides that, the right to adopt that existed in some democratic countries showed that there was no risk for the child. Lastly, there was no long-term risk that the child would suffer on account of homophobic prejudices towards the parents and, in any event, the prejudices of a sexual majority did not constitute sufficient justification.

60. She pointed out that the practice of the administrative authorities was inconsistent in France, where

some *départements* no longer refused authorisation to single homosexual applicants. She also stated that the civil courts allowed adoption by the same-sex partner of the original parent.

61. In Europe there had been a steady development in the law in favour of adoption by same-sex couples since the *Fretté* judgment (cited above, § 41), with some ten European States now allowing it. The applicant also referred to a European consensus in favour of making adoption available to single homosexuals in the member States of the Council of Europe which allowed adoption by single persons, other than **France** where decisions were made on a discretionary basis. The same was true outside Europe, where case-law developments were in favour of adoption by homosexuals in the interests of children needing a home.

62. Lastly, she disputed the argument that there were insufficient numbers of children eligible for adoption, to which the Court had adhered in its *Fretté* judgment (cited above, § 42), arguing that the number of children eligible for adoption in the world exceeded the number of prospective adoptive parents and that making a legal possibility available should not depend on the effective possibility of exercising the right in question.

2. The Government

63. The Government pointed out that authorisation to adopt was issued at local, and not national, level by the president of the council for the *département* after obtaining the opinion of an adoption board at *département* level. In 2005, 13,563 new applications had been submitted, of which barely 8 % had not been satisfied (with less than 6 % being refused authorisation and about 2 % being withdrawn). In 2006, 4,000 visas had been granted by the relevant authorities to foreign children being adopted. The Government stated that they could not provide statistics relating to the applicants' sexual orientation, as the collecting or processing of personal data about a person's sexual life were prohibited under French law.

64. The Government submitted, in the alternative, that the present case did not lend itself to a review of the Court's finding in the *Fretté* judgment (cited above), since present-day conditions had not sufficiently changed to justify a departure from precedent.

65. With regard to national laws, there was no European consensus on the subject, with only nine out of forty-six member States of the Council of Europe moving towards adoption by same-sex couples and some countries not making adoption available to single persons or allowing it under more restrictive conditions than in **France**. Moreover, that observation should be qualified by the nature of those laws and the conditions that had to be met.

66. The conclusion reached by the Court in *Fretté* regarding the division in the scientific community was still valid today. The Government justified the failure to produce studies identifying problems or differences in development in children raised by homosexual couples by the fact that the number of children raised by a homosexual couple was unknown and the estimated numbers highly variable. Besides the complexity of the various situations that might be encountered, the existing studies were insufficiently thorough because they were based on insufficiently large samples, failed to take a detached approach and did not indicate the profile of the single-parent families in question. Child psychiatrists or psychoanalysts defended different theories, with a majority arguing that a dual maternal and paternal referent in the home was necessary.

67. There were also still wide differences in public opinion since *Fretté* (cited above, § 42).

68. The Government confirmed that the reality was that applications to adopt outnumbered children eligible for adoption. Their international obligations, particularly Articles 5 and 15 of the Hague Convention, compelled them to select candidates on the basis of those best able to provide the child with a suitable home.

69. Lastly, they pointed out that none of the sixty or so countries from which French people adopted children authorised adoption by same-sex couples. International adoption might therefore remain a purely theoretical possibility for homosexuals despite the fact that their domestic law allowed it.

B. The Court's assessment

70. The Court observes that in *Fretté v. France* (cited above) the Chamber held that the decisions to reject the application for authorisation had pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure (§ 38). With regard to whether a difference in treatment was justified, and after observing that there was no common ground between the legal systems of the Contracting States, the Chamber found it quite natural that the national authorities should enjoy a wide margin of appreciation when they were asked to make rulings on such matters, subject to review by the Court (§ 41). Having regard to the competing interests of the applicant and children who were eligible for adoption, and to the paramountcy of the latter's best interests, it noted that the scientific community was divided over the possible consequences of a child being adopted by one or more homosexual parents, that there were wide differences in national and international opinion and that there were not enough children to adopt to satisfy demand (§ 42). Taking account of the broad margin of appreciation to be left to States in this area and to the need to protect children's best interests to achieve the desired balance, the Chamber considered that the refusal to authorise adoption had not infringed the principle of proportionality and that, accordingly, the justification given by the Government appeared objective and reasonable and the difference in treatment complained of was not discriminatory within the meaning of Article 14 of the Convention (§§ 42 and 43).

71. The Court notes that the present case also concerns the question of how an application for authorisation to adopt submitted by a homosexual single person is dealt with; it nonetheless differs in a number of respects from the above-cited case of *Fretté*. The Court notes in particular that whilst the ground relating to the lack of a referent of the other sex features in both cases, the domestic administrative authorities did not – expressly at least – refer to **E.B.**'s "choice of lifestyle" (see *Fretté*, cited above, § 32). Furthermore, they also mentioned the applicant's qualities and her child-raising and emotional capacities, unlike in *Fretté* where the applicant was deemed to have had difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child (§§ 28 and 29). Moreover, in the instant case the domestic authorities had regard to the attitude of **E.B.**'s partner, with whom she had stated that she was in a stable and permanent relationship, which was a factor that had not featured in the application lodged by Mr Fretté.

72. In the instant case the Court notes that the domestic administrative authorities, and then the courts that heard the applicant's appeal, based their decision to reject her application for authorisation to adopt on two main grounds.

73. With regard to the ground relied on by the domestic authorities relating to the lack of a paternal or maternal referent in the household of a person seeking authorisation to adopt, the Court considers that this does not necessarily raise a problem in itself. However, in the circumstances of the present case it is permissible to question the merits of such a ground, the ultimate effect of which is to require the applicant to establish the presence of a referent of the other sex among her immediate circle of family and friends, thereby running the risk of rendering ineffective the right of single persons to apply for authorisation. The point is germane here because the case does not concern an application for authorisation to adopt by a – married or unmarried – couple, but by a single person. In the Court's view, that ground might therefore have led to an arbitrary refusal and have served as a pretext for rejecting the applicant's application on grounds of her homosexuality.

74. The Court observes, moreover, that the Government, on whom the burden of proof lay (see, *mutatis mutandis*, *Karner v. Austria*, no. 40016/98, §§ 41-42, ECHR 2003-IX), were unable to produce statistical information on the frequency of reliance on that ground according to the – declared or known – sexual orientation of the persons applying for adoption, which alone could provide an accurate picture of administrative practice and establish the absence of discrimination when relying on that ground.

75. In the Court's view, the second ground relied on by the domestic authorities, based on the attitude of the applicant's partner, calls for a different approach. Although she was the long-standing and declared partner of the applicant, Ms R. did not feel committed by her partner's application to adopt. The authorities,

which constantly remarked on this point – expressly and giving reasons – concluded that the applicant did not provide the requisite safeguards for adopting a child.

76. It should first be noted that, contrary to the applicant's submissions, the question of the attitude of her partner, with whom she stated that she was in a stable and lasting relationship, is not without interest or relevance in assessing her application. It is legitimate for the authorities to ensure that all safeguards are in place before a child is taken into a family. Accordingly, where a male or female applicant, although unmarried, has already set up home with a partner, that partner's attitude and the role he or she will necessarily play on a daily basis in the life of the child joining the home set-up require a full examination in the child's best interests. It would moreover be surprising, to say the least, if the relevant authorities, having been informed of the existence of a *de facto* couple, pretended to be unaware of that fact when assessing the conditions in which the child would be given a home and his future life in that new home. The legal status of a person seeking to adopt is not incompatible with an examination of his or her actual situation and the subsequent finding of not one but two adults in the household.

77. The Court notes, moreover, that Article 4 of the Decree of 1 September 1998 (see paragraph 28 above) requires the president of the council for the relevant *département* to satisfy himself that the conditions in which the applicant is proposing to provide the child with a home meet the needs of an adopted child from a family, child-rearing and psychological perspective. The importance of these safeguards – of which the authorities must be satisfied before authorising a person to adopt a child – can also be seen in the relevant international instruments, be it the United Nations Convention on the Rights of the Child of 20 November 1989, the Hague Convention of 29 May 1993 or the draft European Convention on the Adoption of Children (see paragraphs 29-31 above).

78. In the Court's view, there is no evidence to establish that the ground in question was based on the applicant's sexual orientation. On the contrary, the Court considers that this ground, which has nothing to do with any consideration relating to the applicant's sexual orientation, is based on a simple analysis of the known, *de facto* situation and its consequences for the adoption of a child.

79. The applicant cannot therefore be deemed to have been discriminated against on the ground of her sexual orientation in that regard.

80. Nonetheless, these two main grounds form part of an overall assessment of the applicant's situation. For this reason, the Court considers that they should not be considered alternatively, but concurrently. Consequently, the illegitimacy of one of the grounds has the effect of contaminating the entire decision.

81. With regard to the administrative phase, the Court observes that the president of the council for the *département* did not base his decision exclusively or principally on the second ground, but on "all" the factors involved – that is, both grounds – without it being possible to consider that one of them was predominant or that one of them alone was sufficient to make him decide to refuse authorisation (see paragraph 17 above).

82. With regard to the judicial phase, the Nancy Administrative Court of Appeal noted that the decision was based on two grounds: the lack of a paternal referent and the ambivalence of the commitment of each member of the household. It added that the documents in the file and the conclusions reached after examining the application showed that the applicant's lifestyle did not provide the requisite safeguards for adopting a child, but disputed that the president of the council for the *département* had refused authorisation on the basis of a position of principle regarding her choice of lifestyle, namely, her homosexuality (see paragraph 24 above).

83. Subsequently, the *Conseil d'Etat* held that the two grounds on which the applicant had been refused authorisation to adopt were in keeping with the statutory provisions. It also held that the reference to the applicant's "lifestyle" could be explained by the documents in the file submitted to the tribunals of fact, which showed that the applicant was, at the time of her application, in a stable homosexual relationship, but that this could not be construed as a decision based on a position of principle regarding her sexual orientation or as any form of discrimination (see paragraph 25 above).

84. The Court therefore notes that the administrative courts went to some lengths to rule that although

regard had been had to the applicant's sexual orientation, it had not been the basis for the decision in question and had not been considered from a hostile position of principle.

85. However, in the Court's opinion the fact that the applicant's homosexuality featured to such an extent in the reasoning of the domestic authorities is significant. Besides their considerations regarding the applicant's "lifestyle", they above all confirmed the decision of the president of the council for the *département*. The Court points out that the latter reached his decision in the light of the opinion given by the adoption board whose various members had expressed themselves individually in writing, mainly recommending, with reasons in support of that recommendation, that the application be refused on the basis of the two grounds in question. 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 notes that in his opinion of 12 October 1998 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" (see paragraph 13 above).

86. The Court observes that at times it was her status as a single person that was relied on as a ground for refusing the applicant authorisation to adopt, whereas the law makes express provision for the right of single persons to apply for authorisation to adopt. This emerges particularly clearly from the conclusions of the psychologist who, in her report on her interviews with the applicant of 28 August 1998, stated, with express reference to the applicant's case and not as a general comment – since she prefaces her remark with the statement that she is not seeking to diminish the applicant's confidence in herself or to insinuate that she would be harmful to a child – that "all the studies on parenthood show that a child needs both its parents" (see paragraph 11 above). On 28 October 1998 the adoption board's representative from the Family Council for the association of children currently or formerly in State care recommended refusing authorisation on the ground that an adoptive family had to be composed "of a mixed couple (man and woman)" (see paragraph 14 above).

87. Regarding the systematic reference to the lack of a "paternal referent", the Court disputes not the desirability of addressing the issue, but the importance attached to it by the domestic authorities in the context of adoption by a single person. The fact that it is legitimate for this factor to be taken into account should not lead the Court to overlook the excessive reference to it in the circumstances of the present case.

88. Thus, notwithstanding the precautions taken by the Nancy Administrative Court of Appeal, and subsequently by the *Conseil d'Etat*, to justify taking account of the applicant's "lifestyle", 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 proceedings.

89. The Court considers that the reference to the applicant's homosexuality was, if not explicit, at least implicit. The influence of the applicant's avowed homosexuality on the assessment of her application has been established and, having regard to the foregoing, was a decisive factor leading to the decision to refuse her authorisation to adopt (see, *mutatis mutandis*, *Salgueiro da Silva Mouta*, cited above, § 35).

90. The applicant therefore suffered a difference in treatment. Regard must be had to the aim behind that difference in treatment and, if the aim was legitimate, to whether the different treatment was justified.

91. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a "legitimate aim" or that there is no "reasonable proportionality between the means employed and the aim sought to be realised" (see, *inter alia*, *Karlheinz Schmidt*, cited above, § 24; *Petrovic*, cited above, § 30; and *Salgueiro da Silva Mouta*, cited above, § 29). Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8 (see, *mutatis mutandis*, *Smith and Grady* ***v.*** *the United Kingdom*, nos. 33985/96 and 33986/96, § 89, ECHR 1999-VI; *Lustig-Prean and Beckett* ***v.*** *the United Kingdom,* nos. 31417/96 and 32377/96, § 82, 27 September 1999; and *S.L. v. Austria*, no. 45330/99, § 37, ECHR 2003-I).

92. In that connection the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, *inter alia*, *Johnston and Others*, cited above, § 53).

93. In the Court's opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention (see *Salgueiro da Silva Mouta,* cited above, § 36).

94. The Court points out that French law allows single persons to adopt a child (see paragraph 49 above), thereby opening up the possibility of adoption by a single homosexual, which is not disputed. Against the background of the domestic legal provisions, it considers that the reasons put forward by the Government cannot be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorisation.

95. The Court notes, lastly, that the relevant provisions of the Civil Code are silent as to the necessity of a referent of the other sex, which would not, in any event, be dependent on the sexual orientation of the adoptive single parent. In this case, moreover, the applicant presented, in the terms of the judgment of the *Conseil d'Etat*, "undoubted personal qualities and an aptitude for bringing up children", which were assuredly in the child's best interests, a key notion in the relevant international instruments (see paragraphs 29-31 above).

96. Having regard to the foregoing, the Court cannot but observe 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 (see *Salgueiro da Silva Mouta,* cited above, § 36).

97. Consequently, having regard to its finding under paragraph 80 above, the Court considers that the decision in question is incompatible with the provisions of Article 14 taken in conjunction with Article 8.

98. There has accordingly been a breach of Article 14 of the Convention taken in conjunction with Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

100. The applicant pointed out that without the authorisation that had been refused her it was legally impossible for her to adopt a foreign child and impossible in practice to adopt a French child. Even if the French Government were to act quickly to grant her the authorisation, the discriminatory delay would be between nine and ten years. That delay was not only a psychological strain and unfair, but also reduced her chances of being able to adopt a child one day on account of her age; she had been thirty-seven when she had applied to adopt and so would be forty-six at the youngest if authorisation were finally to be granted. Accordingly, she sought an award of 50,000 euros (EUR) for non-pecuniary damage.

101. The Government did not express a view.

102. The Court considers that the applicant must have suffered non-pecuniary damage that is not sufficiently compensated by a mere finding of a violation of Article 14 of the Convention taken together with Article 8. Accordingly, ruling on an equitable basis, the Court awards her EUR 10,000 in just satisfaction.

B. Costs and expenses

103. The applicant claimed EUR 14,352 in lawyer's fees from the introduction of the application until the outcome of the proceedings (sixty hours' work at the rate of EUR 200 per hour exclusive of VAT), plus EUR 176 for the travel and accommodation expenses incurred in attending the hearing before the Grand Chamber, that is a total of EUR 14,528

Chamber, that is, a total of EUR 14,528.

104. The Government did not express a view.

105. The Court observes that, according to the criteria laid down in its case-law, it must ascertain whether the costs and expenses claimed were actually and necessarily incurred and were reasonable as to quantum (see, among other authorities, *Öztürk v. Turkey* [GC], no. 22479/93, § 83, ECHR 1999-VI). Applying the said criteria to the present case, the Court considers reasonable the amount of EUR 14,528 claimed by the applicant and awards her that sum.

C. Default interest

106. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by ten votes to seven that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

3. *Holds* by eleven votes to six
   (a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage and EUR 14,528 (fourteen thousand five hundred and twenty-eight euros) for costs and expenses, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 January 2008.

Michael O'Boyle Christos Rozakis
Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) dissenting opinion of Judge Costa, joined by Judges Türmen, Ugrekhelidze and Jočienė;
(b) dissenting opinion of Judge Zupančič;
(c) concurring opinion of Judges Lorenzen and Jebens;
(d) dissenting opinion of Judge Loucaides;
(e) dissenting opinion of Judge Mularoni.

C.L.R.
M.O'B.

DISSENTING OPINION OF JUDGE COSTA JOINED BY JUDGES TÜRMEN, UGREKHELIDZE AND JOČIENĖ

(Translation)

1. In a case such as this the Grand Chamber (to which jurisdiction was relinquished by a Chamber under Article 30 of the Convention) can be expected to give a leading judgment on a "serious question" affecting the interpretation of the Convention, in this case of Article 14 taken in conjunction with Article 8.

2. In so far as the Court has adopted a position of principle I can, I think, accept it, but I am not at all sure that in this specific case the interference attributed to the respondent State has proved to be contrary to that position or incompatible with the Convention provisions. I shall attempt to explain what I mean.

3. With regard to the question of principle, the main thrust of the majority's reasoning – making particular reference to the Court's earlier decision in *Salgueiro da Silva Mouta v. Portugal* (*Reports* 1999-IX) – is based on alleged discrimination against the applicant because her application for authorisation to adopt a child was allegedly refused on the ground of her homosexual orientation, and she considers such discrimination to be unjustified.

In *Fretté v. France* (*Reports* 2002-I), which the present judgment overturns (as of course the Grand Chamber can), the majority of the Chamber had considered that such a ground was not contrary to Article 14 and 8, or – to be more precise – that the reasons for which the French authorities had rejected the application for authorisation to adopt made by the applicant, who was a homosexual, were justified (in the best interests of the child likely to be adopted).

I did not subscribe to that reasoning, and whilst I did vote with the majority in favour of finding that there had not been a violation that was because, in my view, the Articles of the Convention relied on were not applicable because the Convention does not guarantee a right to adopt (but the Chamber did not agree with my reasoning on that point, and I will not go into it again here – *perseverare diabolicum*).

In my concurring opinion, in which I was joined by my colleagues Judge Jungwiert and Judge Traja, I pointed out that the French Civil Code (since 1966) allowed adoption by a single person and did not in any way prohibit adoption by a homosexual (or, which comes down to the same thing, did not require that the applicant be heterosexual). I therefore thought – and see no reason to change my view now – that a refusal to grant authorisation based exclusively on the avowed or established homosexuality of the applicant in question would be contrary to both the Civil Code and the Convention.

I am equally convinced that 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. This point of view might not be shared by all, for good or not so good reasons, but – rightly or wrongly – our Court, whose duty under the Convention is to interpret and ultimately apply it, 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 (*Salgueiro da Silva Mouta*). I agree.

4. If we leave the theoretical domain, however, and address the specific case of the applicant – which even in a judgment that sets out be a leading judgment it is the Court's primary duty to do – I do not agree. The domestic administrative and judicial case files show, unequivocally in my view, that authorisation was refused (and that that refusal was deemed legal) for two reasons, which can be summarised as follows. Firstly, there would be no male or "paternal" referent among Ms **E.B**.'s circle of family and friends. Secondly, the woman with whom she was in a stable relationship at the time of her application did not feel concerned by her partner's plan to adopt; although she might not have been actually opposed or hostile to it, she was certainly indifferent.

5. To my mind, the first of these grounds is illegal under French law because if the law allows a single person to adopt it is against the law to require that person, be they a man or a woman, to have a member of

the opposite sex among their circle of family and friends who could serve as a "referent" (to use bureaucratico-psychological jargon). A single person cannot be required to artificially rebuild a "home" for the purpose of being able to exercise a statutory subjective right; would a single person have to be single only in name in order to be able to adopt?

I note, though, that however illegal it may be the first ground should not be confused with homophobic discrimination. Whether or not Ms **E.B**. had been homosexual, the council for the *département* would still have refused her – or could still have refused her – authorisation on the ground of the lack of a "referent" of the other sex. It is not therefore clear that even this bizarre reasoning was based on the applicant's sexual orientation or that it alone suffices to justify the conclusion reached by the majority, at least by their reasoning.

6. The second ground, in any case, does not appear to me to be unreasonable or disproportionate. It is a fact that Ms **E.B**. was living with another person. Regardless of the latter's sex or sexual orientation, it is established and moreover not seriously disputed that this person did not support the adoption plan. In these conditions, if approval had been granted and the civil courts had subsequently allowed Ms **E.B**. to adopt it is very unlikely that the guarantees required under French law (from a "family, child-rearing and psychological" perspective – see paragraph 28 of the judgment), in the child's best interests, would have been met and it is assuredly not for the Court, if it is not to set itself up as a fourth instance, to decide otherwise.

7. A delicate problem of law therefore arises. Was the first ground (which moreover I have just said is not discriminatory, at least as far as the applicant's sexual orientation is concerned) decisive? Did it suffice to "contaminate" the administrative decision in question? Is it not more realistic to consider that, regarding a specific application by a person in a specific situation, the authorities were entitled to undertake an assessment of all the factors pertaining to that situation? Just as our court is not a court of fourth instance, nor is it a court of cassation that considers a particular ground to be founded, holds that it is not necessary to examine the other grounds and contents itself with the well-foundedness of the first ground to quash the decision and remit the case. This is what the judgment actually does however.

In that connection my position is close to that of my colleague Judge Mularoni, who, in her own dissenting opinion, criticises the majority for finding that Ms **E.B**.'s homosexual orientation was the *decisive* ground for refusing her authorisation. I, like her, consider this assertion to be somewhat gratuitous.

8. In my opinion, the Grand Chamber could have solemnly declared that a refusal of this kind could not be based on homosexuality without violating Articles 14 and 8, and thus given an important leading judgment, while dismissing Ms **E.B**.'s application because in this case it was not her homosexuality that had prevented her from obtaining authorisation. In my view, this would have corresponded more closely to the reality of the case, at least as regards my own interpretation of it.

9. This is why – in the present case – I cannot follow the majority's reasoning, and I consider that France has not violated the Convention.

DISSENTING OPINION OF JUDGE ZUPANČIČ

The issue is in some respects disguised, but the crucial question in this case is discrimination – on the basis of the applicant's sexual orientation – concerning the privilege of adopting a child. That this is a privilege is decisive for the examination of the case; it implies – and the majority recognises this – that we are not dealing with the applicant's right in terms of Article 8.

The difference between a privilege and a right is decisive. Discrimination in terms of unequal treatment is applicable to situations that involve rights; it is not applicable to situations that essentially concern privileges. These are situations in which the granting *vel non* of the privilege make it legitimate for the decision-making body, in this case an administrative body, to exercise discretion without fear that the right of the aggrieved person will be violated.

Put in the simplest terms, the theoretical principle according to which a right is subject to litigation and according to which a violation of that right requires a remedy does not apply to situations in which a privilege

is being granted. An exaggerated example of such a situation would be the privilege of being granted a decoration or a prize, or other situations of special treatment reserved for those who are exceptionally deserving.

In other words, it would be "bizarre" for anybody to claim that he ought to have received a particular award, a particular decoration or a particular privilege.

There are, of course, middle-ground situations such as applications for a particular post for which the aggrieved person is a candidate. One may for example conceive of a situation in which an applicant wished to become a judge or a notary public or was a candidate for a similar position but, for whatever reason, was denied that position. Even in that case it would be unusual for the Court to entertain a refusal to grant a privilege as something that is subject to the discrimination criteria.

In this particular case, the preliminary question of essential importance is to determine whether the privilege of adopting a child is subject to the discrimination criteria under Article 14. As pointed out above, the majority is not inclined to consider the privilege of adopting a child as a right.

It is therefore inconsistent to consider that there has been any kind of violation as long as the Court persists in its (justifiable!) position according to which the possibility of adopting a child is clearly not a right and is in any event at best a privilege. The question is then what kind of discretion the administrative body is entitled to exercise when making a decision concerning the privilege of adopting a child.

On the other hand, is it possible to imagine the Nobel Prize Committee being accused of discrimination because it never awards any Nobel Prizes to scientists of a particular race or nationality? Such an assertion would, of
course, require statistical proof. Statistical evidence is, indeed, very prevalent in employment discrimination and similar cases. In other words, if in this particular situation the European Court of Human Rights were to establish that the French administrative authorities systematically discriminate against lesbian women wishing to adopt a child, the issue would be much clearer.

But we are dealing here with an individual case in which discrimination is alleged purely on the basis of a single occurrence. This, as I have pointed out, does not permit the Court to reach the conclusion that there is in France a general discriminatory attitude against homosexuals wishing to adopt a child. The issue of systematic discrimination has not been explored in this specific case and it would probably not be possible to even admit such statistical proof in support of the allegation. If it were possible, however, the treatment of the case would be completely different from what we now face.

It is therefore incumbent on the Court to extrapolate a consistent line of reasoning from its preliminary position, according to which the privilege of adopting a child is in any event not a right.

A separate issue under the same head is whether the procedures leading to the negative answer to the lesbian woman were such as to evince discrimination. This question seems to be the distinction upon which the majority's reasoning is based.

The question distilled from this kind of reasoning is whether the procedures – even when granting, not a right, but a privilege – ought to be free of discrimination. In terms of administrative law, perhaps, the distinction is between a decision which lies legitimately within the competence of the administrative bodies and their legitimate discretion on the one hand and one which moves into the field of arbitrary decision.

A decision is arbitrary when it is not based on reasonable grounds (substantive aspect) and reasonable decision-making (procedural aspect) but rather derives from prejudice, in this case prejudice against homosexuals. It is well established in the legal theory that the discrimination logic does not apply to privileges, but it may well apply to the procedures in which the granting or not of the privilege is the issue.

It is alleged that the procedures in French administrative law were discriminatory against this particular female homosexual, but the question then arises as to whether this kind of discriminatory procedure is nevertheless compatible with the legitimate discretion exercised by the administrative body.

I am afraid that in most cases precisely this kind of "contamination" of substance by procedure is at the centre of the controversy. I cannot dwell on it here[1] but the question could be posed as follows. If the granting of privileges is not a matter of rights, is it not then true that the bestower of privilege is entitled –

argumento a majori ad minus – not only to discretion but also to discrimination in terms of substance as well as in terms of procedure? The short answer to this is that in the public sphere – as opposed to the purely private sphere of awards, prizes and so forth – there are some privileges which are apt to become rights, such as adopting a child, being considered for a public function, and so on. Decidedly, in so far as this process of the privilege potentially "becoming a right" is affected by arbitrariness, prejudice and frivolity the discrimination logic should apply.

The rest is a question of fact. Like Judge Loucaides, I do not subscribe to the osmotic contamination theory advanced by the majority.

There is one final consideration. The non-represented party, whose interest should prevail absolutely in such litigation, is the child whose future best interests are to be protected. When set against the absolute right of this child, all other rights and privileges pale. If in custody matters we maintain that it is the best interests of the child that should be paramount – rather than the rights of the biological parents – how much more force will that assertion carry in cases such as this one where the privileges of a potential adoptive parent are at issue?

CONCURRING OPINION OF JUDGES LORENZEN AND JEBENS

We have voted with the majority for finding a violation of Article 14 of the Convention in conjunction with Article 8 and we can also broadly agree with the reasons in the judgment leading to this conclusion. However, we would like to clarify our vote as follows.

In the present case the domestic authorities, when rejecting the application for authorisation to adopt, relied on two grounds that were both accepted as legitimate by the French courts in the appeal proceedings: firstly, the lack of a paternal referent in the household of the applicant and secondly, the indifferent attitude of the applicant's partner. We fully agree with the judgment's reasoning (paragraphs 75-78) that the latter ground was a relevant factor to be taken into account when deciding the application. As to the first ground, we do not find it to be irrelevant or discriminatory as such in cases where the application for adoption is made by a single person. However, it may be so if it is used in combination with a direct or indirect reference to the applicant's sexual orientation. In this respect we again agree with the majority that, despite the national courts' attempts to explain what was meant or not meant by the reference to the applicant's "lifestyle", it is not possible to conclude that her sexual orientation had no real importance for that ground. The refusal to grant the authorisation was accordingly based on one ground that was legitimate and another ground that was not legitimate in the circumstances of the case, and was thus discriminatory in terms of the Convention.

Consequently, a violation was found in the present case because the refusal to adopt was partly based on illegitimate reasons. This does not of course imply that the applicant could not have been refused authorisation based on grounds that were in conformity with the Convention, for example the indifferent attitude of her partner in itself. It is the opinion of the minority that the refusal was justified on that ground alone, and we do not exclude that this might be so. However, in our opinion – and this is in fact the point on which we most disagree with the minority – it is not for this Court to rule on that question, but exclusively for the French courts to decide.

In view of the more procedural character of the violation, we would have considered the finding of a violation or a minor pecuniary award sufficient just satisfaction in respect of any non-pecuniary damage sustained by the applicant, but we did not find it necessary to dissent on that point.

DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the majority in this case. I find that the decision of the domestic authorities to refuse the applicant authorisation to adopt a child was legitimate and well within their margin of appreciation.

The decision of the domestic authorities was based on two main grounds.

First, the "absence of 'identificational markers' due to the lack of a paternal role model or referent" and second, "the ambivalence of the commitment of each member of the household to the adoptive child". As regards the first ground, I agree with the majority that it is incompatible with the effective right of single persons to apply for authorisation to adopt, a right which is recognised by French law, and that it should therefore be rejected as inapplicable to the present case.

The second ground was the attitude of the applicant's partner, Ms R., who, despite the fact that she was the long-standing and declared partner of the applicant, did not feel committed by the latter's application to adopt. This ground by itself could legitimately justify the decision of the domestic authorities. That is not really disputed by the majority. But what the majority finds to be wrong is the fact that, as they put it, the "illegitimacy of one of the grounds ha[d] the effect of contaminating the entire decision".

Personally I do not accept this contamination theory – a theory more appropriate to medical science – for the simple reason that each of the grounds that led to the decision was separate and autonomous and its effectiveness was in no way dependent on or linked to the other one. Firstly, if the domestic authorities felt that the two reasons should operate jointly, they would have said so. Secondly, if – as the majority finds – the sexual orientation of the applicant, supposedly referred to implicitly in the reasoning of one of the grounds, was the real reason for refusing authorisation, I do not see why the authorities had to mention the other ground.

Given that we are dealing with decisions of the French administrative authorities, I might also add that it is a basic principle of French administrative law that if an administrative decision is based on several grounds, it is sufficient for one of the grounds to be legally acceptable in order for the decision to be valid.

In any event, I find that the reasoning of the domestic authorities in its entirety was in line with the Convention.

The authorities in question did not refer to the sexual orientation of the applicant as the reason for their refusal. However, contrary to my view, the majority finds that "the reference to the applicant's homosexuality was, if not explicit, at least implicit", and that the "influence of the applicant's avowed homosexuality on the assessment of her application has been established and ... was a decisive factor leading to the decision to refuse her authorisation to adopt". Reading the judgment of the majority I have the feeling that there is a constant effort to interpret the decision of the domestic authorities as being based on the sexual orientation of the applicant, although nothing was said to that effect and the authorities repeatedly made it clear that their refusal of authorisation was not made on the basis of a "position of principle regarding her choice of lifestyle" or "in view of the applicant's sexual orientation".

Be that as it may, I am of the opinion that, even if the applicant's sexual orientation had been a factor in refusing authorisation to adopt, the refusal in question could not be said to be incompatible with Article 8 taken in conjunction with Article 14, account being taken of all the relevant circumstances and the meaning and effect of such a factor in relation to the question that had to be decided.

It is true that Article 14 of the Convention prohibits discrimination in the enjoyment of the rights set forth in the Convention 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. Of course, sexual orientation is a different matter from sex, but even on the assumption that it is encompassed by the concept of "status" (which I do not think is correct), I must make this clarification which, to my mind, is necessary for the purposes of this case. There may be situations where different treatment is necessary on grounds of sex, religion, etc. or other status, if the consequences of the relevant status have a bearing on the particular question under examination. For instance, a person's religion may give rise to manifestations or practices which produce effects contrary to the interests of that person's children, a fact that can legitimately be taken into account when the welfare of the children is at issue. A typical example of this is the recent case of *Ismailova v. Russia,* judgment in which was delivered by the First Section on 29 November 2007. There, the applicant complained that the decisions of the domestic courts granting custody of her two children to their father had been in breach of Article 8 of the Convention taken in conjunction with Article 14, as they

amounted to discrimination on the ground of her religion. The Court, in rejecting the applicant's complaint, referred to some incidents which had arisen out of the religious practices of the applicant on account of her membership of a certain religious organisation, and which had had negative effects on her children. The Court stated the following:

> "The reasoning presented by the domestic courts shows that they focused solely on the interests of the children. The courts did not rely on their mother being a member of the Jehovah's Witnesses, but on the applicant's religious practices, in which she had included her children and failed to protect them. In the view of the domestic courts, this had led to social and psychological repercussions for the children. The courts considered that this would have negative effects on the children's upbringing. ...
>
> In such circumstances, the Court cannot but conclude that there existed a reasonable relationship of proportionality between the means employed and the legitimate aim pursued..."

Likewise, in the present case, I find that in deciding what was in the best interests of the child to be adopted, the domestic authorities could legitimately take into account the sexual orientation and lifestyle of the applicant as practised in the particular circumstances of the case, namely the fact that the applicant cohabitated with her same-sex partner. I might add – on the basis of the majority's approach, which treats the two reasons given by the authorities as one – that the partner in question was not even interested in being a party to the adoption plan.

I believe that the erotic relationship with its inevitable manifestations and the couple's conduct towards each other in the home could legitimately be taken into account as a negative factor in the environment in which the adopted child was expected to live. Indeed there was, in these circumstances, a real risk that the model and image of a family in the context of which the child would have to live and develop his/her personality would be distorted. This situation differs substantially from one in which a homosexual applicant does not cohabit with his or her partner. And, personally, I would most probably have approached the matter differently in the latter case.

It is my firm belief that nobody can invoke his religion, sex or any other status in order to rely on the prohibition of discrimination as a ground for exemption from disqualification in respect of a particular activity on account of the negative consequences that such status may have in relation to a specific issue.

Homosexuals, like anybody else, have a right to be themselves and should not be the target of discrimination or any other adverse treatment because of their sexual orientation. However, they must, like any other persons with some peculiarity, accept that they may not qualify for certain activities which, by their nature and under certain circumstances, are incompatible with their lifestyle or peculiarity.

Therefore – proceeding on the assumption accepted by the majority that one of the reasons which influenced the entire decision to refuse authorisation to adopt was the sexual orientation of the applicant – I find that in the light of the particular facts and circumstances of the case the legitimacy of the refusal in issue was in any event not open to question. I believe that there existed a reasonable relationship of proportionality between the means employed and the legitimate aim pursued.

Finally and incidentally, I must put on record that the judgment in this case overturns the *Fretté v. France* judgment (no. 36515/97). The efforts to distinguish the present case from *Fretté* are, in my opinion, unsuccessful and unnecessary so long as the central question in both cases, according to the approach of the majority, is substantially the same

Accordingly I take the view that there has been no violation in this case.

DISSENTING OPINION OF JUDGE MULARONI

(Translation)

I do not share the opinion of the majority in this case.

AS REGARDS ADMISSIBILITY

With regard to the admissibility of the application, I feel it important to specify straight away that I consider

the application admissible but for reasons that differ from those given by my colleagues.

The Court reiterates in paragraph 43 of the judgment that the notion of private life is a very broad one that encompasses many rights and possibilities. The Convention institutions' interpretation of Article 8 has greatly evolved. Very recently, in two applications concerning techniques of artificial insemination, the Court explicitly stated that this provision protected the right to respect for both the "decisions" to have and not to have a child (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-..., and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 66, ECHR 2007...).

Admittedly, both cases concerned the decision to have a "biological" child. However, I cannot forget that for centuries adoption, an age-old procedure that is known throughout most countries in the world, was the only means whereby couples unable to conceive could found a family with children. While it is undisputed that Article 8 does not guarantee a right to found a family, such a right is, however, guaranteed by Article 12 of the Convention. And whilst a "right" to adopt does not exist, I consider, in the light of our case-law, which over the years has brought more and more rights and possibilities within the ambit of Article 8, that the time has come for the Court to assert that the possibility of applying to adopt a child under the domestic law falls within the ambit of Article 8. Consequently, Article 14 would be applicable.

My approach would therefore be to stop declaring incompatible *ratione materiae* with the provisions of the Convention applications lodged by persons entitled under domestic law to apply to adopt a child. In my opinion, all applicants who are in the same personal situation of either being unable or finding it extremely difficult to conceive should be protected in the same way by the Convention regarding their legitimate desire to become parents, whether they choose to have recourse to techniques of artificial insemination or seek to adopt a child in accordance with the provisions of domestic law. I do not see any strong arguments in favour of a difference of treatment.

With all due respect to my colleagues, for the reasons explained below I find the legal reasoning in favour of declaring the application admissible

rather weak; it reiterates the arguments already used to this end in the case of *Fretté* (judgment of 26 February 2002, no. 36515/97, §§ 30-33).

As is rightly stressed in paragraph 47 of the judgment, the facts of the case must at least fall within the ambit of one of the Articles of the Convention – in this case Article 8 – for Article 14 to be applicable. If the Court is not prepared to modify old case-law that is still applied to this day, according to which all stages prior to the issue of an adoption order by the domestic courts fall outside the Court's scrutiny (see on this point, among other authorities, *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 140-42, ECHR-2004, and *Wagner and J.M.W.L. v. Luxembourg*, judgment of 28 June 2007, no. 76240/01, §§ 121-22), I have difficulty in understanding how it can come to the contrary conclusion that the right to seek authorisation to adopt "undoubtedly" falls within the scope of Article 8 of the Convention (see paragraph 49 of the judgment).

In my view, we should not be asking – and leaving unanswered – the wrong question, namely, whether the "right" to adopt should or should not fall within the ambit of Article 8 of the Convention taken alone (see paragraph 46 of the judgment). No right to adoption is recognised by domestic legislation or by the relevant international instruments, and the parties do not dispute this. On the other hand, we should establish – and this absolutely must be done and done clearly – whether the possibility of adopting a child afforded by domestic legislation does or does not fall within the ambit of Article 8. If the answer remains that it does not, I find it incomprehensible, as I have said above, to conclude that the right to seek authorisation "undoubtedly" falls within the ambit of Article 8 and that, accordingly, Article 14 taken together with Article 8 is applicable. Frankly, I find this conclusion illogical.

I would add that the approach followed in *Fretté* has had the practical effect of allowing applications relating to the preliminary phases in the process of adopting a child brought by homosexuals under Article 14 taken in conjunction with Article 8 to be declared admissible, whereas those brought by heterosexuals relying on Article 8 alone have to be dismissed as incompatible *ratione materiae* with the provisions of the

Convention.

Admittedly, in recent years the Court's interpretation of Article 14 has greatly evolved. However, I consider that an interpretation which leads to declarations of applicability that generate discrimination *a contrario* in the treatment of applications does not correspond to the spirit and letter of Article 14.

AS REGARDS THE VIOLATION

With regard to the merits, I share neither the reasoning nor the conclusion of the majority.

The Court observed that the domestic administrative authorities and then the courts which dealt with the applicant's case had based their decisions to reject her application on two main grounds: the lack of a paternal referent and the ambivalence of the commitment of each member of the household.

Regarding the first ground, which was based on the lack of a paternal referent in the applicant's household, I admit that I have serious doubts as to its compatibility with Article 14 of the Convention. The present case concerns an application for authorisation to adopt lodged not by a couple, but by a single person. To my mind, the decision whether or not to grant single persons the possibility of adopting a child is within the State's margin of appreciation; once such a possibility has been granted, however, requiring a single person to establish the presence of a referent of the other sex among his or her immediate circle of family and friends runs the risk of rendering ineffective the right of single persons to apply for authorisation.

However, I consider that the second ground on which the domestic authorities based their decision, which was based on the attitude of the applicant's partner, calls for a different approach. Although she was the long-standing and declared partner of the applicant, Ms R., who lived with the applicant, clearly distanced herself from the application for authorisation to adopt. The authorities, which constantly remarked on this point – expressly and giving reasons – concluded that the applicant did not provide the requisite safeguards for adopting a child.

Article 4 of Decree No. 98-771 of 1 September 1998 requires the president of the council for the relevant *département* to satisfy himself that the conditions in which an applicant is proposing to provide a child with a home meet the child's needs from a family, child-rearing and psychological perspective. The importance of these safeguards – of which the authorities must be satisfied before authorising a person to adopt a child – can also be seen in the relevant international instruments, be it the United Nations Convention on the Rights of the Child of 20 November 1989, the Hague Convention of 29 May 1993 or the draft European Convention on the Adoption of Children (see paragraphs 28-31 of the judgment).

Moreover, in the domestic legislation and in all the relevant international instruments it is the child's best interests that are paramount (*ibid.*), as has always been accepted and stressed by our Court in all cases concerning minors. Like the *Conseil d'Etat*, I consider that where a single person seeking to adopt is in a stable relationship with another person, who will inevitably be required to contribute to providing the child with a suitable home, the administrative authority has the right and the duty to ensure – even if the relationship in question is not a legally binding one – that the conduct or personality of the third person, considered on the basis of objective considerations, is conducive to providing a suitable home. It is incumbent on the State to ensure that the conditions in which a child – who very often has experienced great suffering and difficulty in the past – is provided with a home are the most favourable possible.

I therefore consider that the second ground is sufficient and relevant reason alone for refusing to grant the applicant authorisation. I therefore do not subscribe to the “contamination” theory propounded by the majority in paragraphs 80 et seq. of the judgment. On this point I share the considerations expressed by Judge Loucaides. I prefer to confine myself to the law of the legal systems I know best, according to which, where a decision is based on a number of grounds, it is sufficient for one of those grounds to be valid for the decision as a whole to be regarded as valid.

I would add that I find the majority's interpretation of the conclusions reached by the domestic courts to be unjustified: although the latter constantly asserted that it was not the applicant's homosexuality that was the basis of the refusal to grant authorisation, the majority consider that the reference to the applicant's homosexuality was, if not explicit, at least implicit, and that the influence of this consideration on the

homosexuality was, if not explicit, at least implicit, and that the influence of this consideration on the assessment of her application has been established and was a decisive factor (see paragraph 89 of the judgment).

However, it was actually the applicant herself who had declared her homosexuality given that at the time at which her application was being processed she was in a stable homosexual relationship. I do not find anything discriminatory about the national authorities' reference, in their decisions, to the applicant's avowed homosexuality and her relationship. Would it not also be relevant to refer to the personality of a heterosexual partner cohabiting with a prospective adoptive parent in a stable relationship and to his or her attitude to the partner's plans to adopt? I do not see any valid reasons for arguing that the authorities should not have made the slightest reference to these factors. The child was to arrive in a household composed of two people; the personality and attitude of those two people therefore had to be taken into account by the authorities.

Nor do I understand on what basis it can be concluded that the influence of the applicant's homosexuality was a decisive factor whereas, unlike in the case of *Salgueiro da Silva Mouta v. Portugal*, the domestic authorities always specified that it was not the applicant's sexual orientation that had founded the decision to refuse to grant her authorisation.

For all the foregoing reasons, I find that there has not been a violation of Article 14 taken together with Article 8.

[1] I have dealt with the issue at length in *The Owl of Minerva, Essays on Human Rights,* Eleven International Publishing, Utrecht, 2008, Chapter 14, pp. 413-28.

E.B. v. FRANCE JUDGMENT

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DISSENTING OPINON OF JUDGE MULARONI

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