Application No. 40016/98
Siegmund KARNER v. Austria
European Court of Human Rights
First Section

JOINT WRITTEN COMMENTS OF ILGA-EUROPE (THE EUROPEAN REGION OF THE INTERNATIONAL LESBIAN AND GAY ASSOCIATION), LIBERTY, AND STONEWALL

Submitted on 12 March 2002

Dr. Robert Wintemute, School of Law, King's College London, respectfully submits, on behalf of ILGA-Europe, Liberty and Stonewall, three non-governmental organisations concerned with the protection of human rights in Europe (their interest in the application and their expertise are set out in Dr. Wintemute's letter to Judge Costa of 7 Nov. 2001), the following joint written comments, having been granted permission to do so by the President of the Chamber on 7 Dec. 2001.

Introduction

Legislatures and courts in Council of Europe member states, and in other democratic societies, are increasingly recognising that lesbian women and gay men have the same human capacity as heterosexual women and men to fall in love with another person, to establish a long-term emotional and sexual relationship with them, and to set up a joint home with them. There is therefore a sufficiently broad European consensus that unmarried same-sex partners must (at least) be treated in the same way as unmarried different-sex partners, and that unmarried same-sex partners (with or without children) enjoy "family life" in the same way as unmarried different-sex partners (with or without children). In particular, this European consensus requires that, where an unmarried different-sex partner qualifies to succeed to the tenancy of an apartment or house after the death of their partner (the legal tenant), an unmarried same-sex partner must receive the same protection against having the loss of their partner, and the trauma of bereavement, compounded by the hardship of suddenly losing their home.

I. Under Article 14 in conjunction with Article 8, does a difference in treatment between unmarried different-sex partners and unmarried same-sex partners, in the context of succession to the tenancy of an apartment or house, have an objective and reasonable justification?

A difference in treatment between unmarried different-sex partners and unmarried same-sex partners can be viewed as based either on sex (as the Government of Austria has conceded),[1] or on sexual orientation (as the Court characterised the difference of treatment in its admissibility decision of 11 Sept. 2001). Whether the ground for the distinction is sex or sexual orientation, a strong justification is required. The Court

[1] Observations of the Republic of Austria, received by the Court on 18 April 2001, p. 8: "The Agents of the Austrian Government do not dispute the fact that the applicant has been treated differently ... because of his sex since he would be entitled to succeed to the tenancy under s. 14 of the Landlord and Tenant Act, if he (or his partner) were female."

held in *Abdulaziz* v. *United Kingdom* (25 April 1985), para. 78, that "very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the Convention". Where the difference of treatment is based on sexual orientation, the Court has said, in *Smith & Grady* v. *United Kingdom* (27 Sept. 1999), paras. 89, 105 (in the context of Article 8), that "particularly serious reasons" or "convincing and weighty reasons" must be provided by the respondent government, and in *Salgueiro da Silva Mouta* v. *Portugal* (21 Dec. 1999), para. 36 (in the context of Article 14), that "a distinction based on considerations regarding the applicant's sexual orientation ... is not acceptable under the Convention".

If the Government of Austria fails to provide sufficiently serious, convincing or weighty reasons for the difference in treatment, it has breached its negative obligation, under Article 14 in conjunction with Article 8, not to discriminate against the applicant on the ground of his sex or sexual orientation in relation to his "private life" (his sexual orientation), his "family life" (his relationship with his partner), or his "home" (the apartment he shared with his partner). The Government of Austria has decided voluntarily to permit the unmarried different-sex partners of tenants to succeed to their tenancies when they die. Thus, the Court need not decide whether the Convention imposes a "positive obligation"[2] on Contracting States to grant this right to unmarried same-sex partners, or to all unmarried partners. Rather, the more limited question is whether there are sufficiently serious, convincing or weighty reasons for the Government of Austria to refuse to provide the same treatment to the unmarried same-sex partners of tenants who die. In *Abdulaziz*, *supra*, the Court rejected (at para. 82) the United Kingdom's argument that there was no violation of Article 14 because "it acted more generously ... than the Convention required". The Court observed that "[t]he notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention". (Emphasis added.)

A. A growing number of national courts in European and other democratic societies have required equal treatment of unmarried different-sex partners and unmarried same-sex partners.

Since the 1970s, it has become increasingly common in European and other democratic societies for two lesbian women or two gay men to live together as emotional, sexual and economic partners, in a relationship that is substantially similar to that of a heterosexual woman and a heterosexual man living together as partners without marrying. One same-sex partner will often move into the rented apartment or house of the other partner, who is the only tenant named in the lease. If the tenant dies, because of HIV infection (a frequent cause among gay men from the early 1980s to the mid 1990s), breast cancer, another illness or an accident, the landlord is contractually entitled to evict the surviving same-sex partner, unless that partner can claim that they are a "family member", or that they are sufficiently like an unmarried different-sex partner to qualify to succeed to the tenancy.

The highest courts of the State of New York and the United Kingdom have confronted this question and, unlike the Austrian Supreme Court in this case, have used techniques of statutory interpretation to avoid the serious injustice that would

[2] *Ibid*., p. 12.

result if the surviving same-sex partner suddenly lost their home, on top of losing their partner. In *Braschi* v. *Stahl Associates, Inc*., 543 N.E.2d 49 (1989), http://mason.gmu.edu/~weitzman/braschiv.htm, Miguel Braschi faced eviction from the apartment he had shared with his male partner, Leslie Blanchard, for 11 years. He relied on a New York City regulation that prohibited eviction of "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant". Although unmarried partners (different-sex or same-sex) did not qualify as legally married "spouses", the majority of the New York Court of Appeals held that they did qualify as "family members". The Court concluded that "the term family, as used in [the regulation] should not be rigidly restricted to those people who have formalized their relationship by obtaining ... a marriage certificate .... The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units .... This approach will draw[] a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates."

In the United Kingdom, the House of Lords reached a similar conclusion in *Fitzpatrick* v. *Sterling Housing Association Ltd.*, [1999] 4 All E.R. 705, http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd991028/fitz01.htm. Martin Fitzpatrick had lived with John Thompson in Mr. Thompson's apartment for around 18 years, as "partners in a longstanding, close, loving and faithful, monogamous, homosexual relationship". In 1986, Mr. Thompson fell down the stairs and suffered a blood clot in his brain. He required 24-hour care until his death in 1994. Mr. Fitzpatrick gave up his job and provided the care. After Mr. Thompson's death, the landlord sought to evict Mr. Fitzpatrick, who argued that he was protected by the Rent Act 1977, either as a "spouse", defined as including "a person who was living with the original tenant [outside marriage] as his or her wife or husband", or as "a person who was a member of the original tenant's family".

The majority held that he qualified as a "family member". Lord Nicholls found that "[a] man and woman living together in a stable and permanent sexual relationship are capable of being members of a family for this purpose. Once this is accepted, there can be no rational or other basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or between two women. Where a relationship of this character exists, it cannot make sense to say that, although a heterosexual partnership can give rise to membership of a family for Rent Act purposes, a homosexual partnership cannot. Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife. This love and affection and commitment can exist in same sex relationships as in heterosexual relationships. ... [T]he concept underlying membership of a family for present purposes is the sharing of lives together in a single family unit living in one house."

Lord Clyde observed that "[a] more open acceptance of differences in sexuality allows a greater recognition of the possibility of domestic groupings of partners of the same sex. The formal bond of marriage is now far from being a significant criterion for the existence of a family unit. While it remains as a particular

formalisation of the relationship between heterosexual couples, family units may now be recognised to exist both where the principal members are in a heterosexual relationship and where they are in a homosexual or lesbian relationship. ... [T]he concept of 'family' is now to be regarded as extending to a homosexual partnership."

Lord Slynn agreed that, "as a matter of law[,] a same-sex partner of a deceased tenant can establish the necessary familial link. ... Mere cohabitation by friends as a matter of convenience will not do. ... Far from being cataclysmic [this decision] is ... in accordance with contemporary notions of social justice. ... It seems also to be suggested that such a result in this statute undermines the traditional (whether religious or social) concept of marriage and the family. It does nothing of the sort. It merely recognises that, for the purposes of this Act, two people of the same sex can be regarded as having established membership of a family, one of the most significant of human relationships which both gives benefits and imposes obligations."

Primarily for linguistic and grammatical reasons, none of the Law Lords felt able to interpret "living ... as his or her wife or husband" as covering Mr. Fitzpatrick. But Lord Slynn noted that "[w]hether that result is discriminatory against same-sex couples in the light of the fact that non-married different sex couples living together are to be treated as spouses so as to allow one to succeed to the tenancy of the other may have to be considered when the Human Rights Act 1998 [incorporating Articles 8 and 14 of the Convention into U.K. law] is in force [on 2 Oct. 2000]".

In both *Braschi* and *Fitzpatrick*, it was not necessary to treat the surviving unmarried same-sex partner as in the same position as a married different-sex partner (*Braschi*) or an unmarried different-sex partner (*Fitzpatrick*), because the legislation included a second, open-ended category of "family member". And in *Fitzpatrick*, the House of Lords could only employ techniques of statutory interpretation, and did not in 1999 have at its disposal a principle of non-discrimination in relation to "private life", "family life" or "home", such as that found in Articles 14 and 8 of the Convention. However, in at least three cases involving issues other than housing succession, where a "family member" did not qualify but an unmarried different-sex partner did qualify,[3] national courts have used constitutional or statutory non-discrimination principles to hold that an unmarried same-sex partner must be treated in the same way as an unmarried different-sex partner.

In 1994, in *El-Al Israel Airlines* v. *Danilowitz*, High Court of Justice 721/94, 48(5) *Piskei-Din* (Supreme Court Reports) 749 (Hebrew); http://www.tau.ac.il/law/aeyalgross/legal_materials.htm (unofficial translation), the Supreme Court of Israel interpreted legislation prohibiting discrimination based on sexual orientation in employment as requiring an airline to provide the same free flight benefits to the unmarried same-sex partners of its employees as to the unmarried different-sex partners of its employees. Chief Justice Barak said, at para. 15: "The grant of the benefit to the employee for his [different-sex] spouse or [different-sex] common law spouse is based on the notion that a benefit - in the form of a flight ticket - should be given to the employee for the one with whom he shares his life, with whom he maintains a common household, with whom he parts when leaving for flights and to whom he returns when the work has ended. This is the common characteristic of the spouse and the common law spouse. The purpose of the benefit is not to strengthen the marriage institution. ... Thus, the grant of the benefit is based on the notion of shared life for a certain period ... which demonstrates a strong

[3] The Austrian legislation in this case includes a category of "unmarried partner" (*Lebensgefährte* or "life companion"), but does not have an open-ended category of "family member". Instead, only close blood relatives (e.g. children, parents, siblings) are covered.

social unit, based on cooperative life. ... [D]enial of this benefit [to] a same sex domestic partner constitutes discrimination and inequality. ... This difference is of no relevance whatsoever ... [and] constitutes an arbitrary and unfair distinction. Is leaving a same sex domestic partner easier than leaving a spouse of the opposite sex? Are shared life of two of the same sex different from those belonging to opposite sexes, concerning the cooperative relationship and the operation of the social unit?"

At para. 17, Chief Justice Barak added: "[O]ne cannot doubt the fact that the discrimination at hand is based on the 'sexual orientation' of the ... employee. ... [I]f a benefit is granted to a male employee who sustains a steady and continuous relationship with a woman, the same benefit must be given to a male employee who sustains a steady and continuous relationship with another man. That is how the employer will fulfil the principle of Equality. That is how he will avoid a violation of the employee's privacy ... The grant of a benefit to a permanent employee for his common law spouse, and the denial of the benefit [to] a permanent employee for his same sex domestic partner (who will fulfil all the requirements of a common law spouse, except for the sex requirement) constitutes discrimination in the work conditions on the basis of sexual orientation."

In 1995, in 14/1995 (III.13.) AB *határozat*,[4] the Constitutional Court of Hungary considered whether a draft law on domestic partnership (defined as "a woman and a man living together in a common household in an emotional and economic community outside a marriage")[5] could include unmarried different-sex partners but not unmarried same-sex partners. The Court held that "[a]n enduring union for life of two persons may constitute such values that it should be legally acknowledged on the basis of the equal personal dignity of the persons affected, irrespective of the sex of those living together. ... The cohabitation of persons of the same sex, which in all respects is very similar to the cohabitation of partners in a [different-sex] domestic partnership – involving a common household, as well as an emotional, economic and sexual relationship ... – gives rise today, albeit to a lesser extent, to the same necessity for legal recognition as it did in the 1950s for those in a [different-sex] domestic partnership. ... The sex of partners ... may be significant when the regulation concerns a common child or ... a marriage with another person. However, if these exceptional considerations do not apply, the exclusion from regulations covering ... [different-sex] domestic partnership ... is arbitrary and violates human dignity; therefore it is discrimination contrary to Article 70/A [of the Hungarian Constitution] ... The benefits (social and social security) that can be given only on the basis of a domestic partnership cannot depend only on the sex of the two people living together." To comply with the Constitutional Court's decision, the Parliament of Hungary passed Act No. 42 of 1996, which added to the Civil Code a new Article 685/A: "Partners ... are two people living in an emotional and economic community in the same household without being married." (Unofficial translation.)

In *M.* v. *H.*, [1999] 2 S.C.R. 3, http://www.lexum.umontreal.ca/csc-scc/en/index.html, the Supreme Court of Canada had to decide whether the Ontario Family Law Act (FLA) could define "spouse" as including, for the purpose of financial support obligations after a relationship ends, "either of a man and woman who are not married to each other and have cohabited [lived together in a conjugal relationship] ... continuously for a period of not less than three years". A lesbian woman, who was financially dependent on her former female partner, was precluded

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[4] See L. Sólyom & G. Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor, Univ. of Michigan Press, 2000), at 316-21 (unofficial translation).

[5] Article 578/G, Act No. 4 of 1959 on the Civil Code, as amended in 1977 (unofficial translation).

by this definition from seeking financial support after their relationship ended. She argued that this was discrimination based on sexual orientation, which was contrary to Section 15(1) of the Canadian Charter of Rights and Freedoms and could not be justified under Section 1, because an unmarried different-sex partner could seek financial support.

The Court agreed by 8 votes to 1: "57. The definition clearly indicates that the legislature decided to extend the obligation to provide spousal support beyond married persons ... to include those relationships which: (i) exist between a man and a woman; (ii) have a specific degree of permanence; (iii) are conjugal. ... 58. Same-sex relationships are capable of meeting the last two requirements. Certainly same-sex couples will often form long, lasting, loving and intimate relationships. The choices they make in the context of those relationships may give rise to the financial dependence of one partner on the other. ... 62. ... Members of same-sex couples are denied access to this system [of court-enforced financial support] entirely on the basis of their sexual orientation. ... 72. ... [T]he interest protected by ... the FLA is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. ... 73. The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from ... the FLA promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. As the intervener EGALE submitted, such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence."

B. Recommendations and legislation of European institutions support equal treatment of unmarried different-sex partners and unmarried same-sex partners.

Recommendations of the Parliamentary Assembly of the Council of Europe (PACE), and the European Community's European Parliament (EP), provide clear evidence of a European consensus that differences in treatment based on sexual orientation should be taken very seriously, especially differences in treatment between unmarried same-sex partners and unmarried different-sex partners (as well as differences in treatment between unmarried same-sex partners and married different-sex partners). In 2000, the PACE expressed its opinion "that the enumeration of grounds in Article 14 is, without being exhaustive, meant to list forms of discrimination which [the PACE] regards as being especially odious. Consequently the ground 'sexual orientation' should be added[6] [to Protocol No. 12 to the Convention]". The PACE also recommended: (a) in Recommendation 1470, that the forty-three Council of Europe member states "review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnership[s] and families are treated on the same basis as heterosexual partnerships and families";[7] and (b) in

[6] Opinion No. 216 (2000) on "Draft Protocol No. 12 to the European Convention on Human Rights", http://stars.coe.fr/ta/ta00/eopi216.htm (26 Jan. 2000), based on the Report of the Committee on Legal Affairs and Human Rights, Document (Doc.) 8614, http://stars.coe.fr/doc/doc00/edoc8614.htm.

[7] Recommendation 1470 (2000) on the "Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe",

Recommendation 1474, that these member states "adopt legislation which makes provision for registered [same-sex] partnerships".[8] The Committee of Ministers of the Council of Europe replied to Recommendation 1474 on 19 Sept. 2001:[9] "1. The Committee of Ministers agrees with the Parliamentary Assembly that, regrettably, discrimination and violence against homosexuals still occur. Differentiated treatment of homosexuals under the law and in practice still exists in member states as do contemptuous or intolerant attitudes towards them. ... 4. ... [T]he Committee of Ministers does not propose to re-open the debate concerning the need to include sexual orientation amongst the grounds for discrimination explicitly mentioned in Protocol No. 12 (or in Article 14 ...). ... It would, however, like to draw attention to several cases in which the Court has adopted a strict scrutiny vis-à-vis distinctions based on grounds not explicitly mentioned in Article 14 ... including distinctions based on sexual orientation (for example the judgment of 21 December 1999 in the case of *Salgueiro da Silva Mouta* v. *Portugal*)."

The EP addressed the rights of same-sex partners for the first time in 1994, when it called on the European Commission (Brussels) to draft a Recommendation seeking to end "the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, [and guarantee instead] the full rights and benefits of marriage, allowing the registration of [same-sex] partnerships".[10] In 2000, the EP urged the fifteen EU member states "to amend their legislation recognising registered partnerships of persons of the same sex and assigning them the same rights and obligations as exist for registered partnerships between men and women" and "to amend their legislation to grant legal recognition of extramarital cohabitation, irrespective of gender".[11]

On 27 Nov. 2000, the Council of the EU adopted Directive 2000/78/EC, OJ [2000] L 303/16, http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0078.html, which expressly prohibits direct and indirect discrimination based on sexual orientation in employment. This Directive applies to the 15 EU member states, and will eventually have to be implemented by each of the 13 other Council of Europe member states who are applying to join the EU. There is widespread agreement that a difference in treatment between the unmarried different-sex partners of employees and the unmarried same-sex partners of employees, with regard to employment benefits, constitutes direct discrimination based on sexual orientation in relation to "pay", and will not be compatible with the Directive once the deadline for implementation expires on 2 Dec. 2003. The Directive will thus effectively overrule the decision of the Court of Justice of the European Communities in Case C-249/96, *Grant* v. *South-West Trains*, [1998] ECR I-621. The United Kingdom Government agreed with this interpretation in its recent consultation document on implementing the Directive.[12] Whatever its legal effect may be, Recital 22 in the Directive's preamble ("This Directive is without prejudice to national laws on marital status and

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http://stars.coe.fr/ta/ta00/erec1470.htm (30 June 2000), based on the Report of the Committee on Migration, Refugees and Demography, Doc. 8654, http://stars.coe.fr/doc/doc00/edoc8654.htm.

[8] Recommendation 1474 (2000) on the "Situation of lesbians and gays in Council of Europe member states", http://stars.coe.fr/ta/ta00/erec1474.htm (26 Sept. 2000), based on the Report of the Committee on Legal Affairs and Human Rights, Doc. 8755, http://stars.coe.fr/doc/doc00/edoc8755.htm.

[9] 765th Meeting, Item 4.3, http://cm.coe.int/dec/2001/765/43.htm.

[10] "Resolution on equal rights for homosexuals and lesbians in the EC" (8 Feb. 1994), OJ [1994] C 61/40 at 42, para. 14.

[11] "Resolution on respect for human rights in the European Union (1998-1999)" (16 March 2000), A5-0050/00, para. 57, http://www.europarl.eu.int/plenary/default_en.htm (Texts adopted).

[12] *Towards Equality and Diversity* (Dec. 2001), http://www.dti.gov.uk/er/equality, paras. 12.7, 12.8.

the benefits dependent thereon.") does not apply where the difference in treatment is between two classes of unmarried partners, rather than between married and unmarried partners.

C. National or regional legislation in a rapidly rising number of Council of Europe member states requires equal treatment of unmarried same-sex partners and married or unmarried different-sex partners, especially with regard to succession to the tenancy of an apartment or house.

The European recommendations and legislation mentioned above have both reflected and inspired the rapid changes in national legislation since 1983, when the European Commission of Human Rights decided its first case on different treatment of same-sex partners, *X and Y* v. *United Kingdom* (No. 9369/81) (3 May 1983), 32 DR 220.[13] At that time, only the Netherlands had passed legislation providing rights in certain areas, including succession to a tenancy, both to unmarried different-sex partners and to unmarried same-sex partners. By April 1996, when the European Commission of Human Rights was about to deliver its final decision on this issue, *Röösli* v. *Germany*, (No. 28318/95) (15 May 1996), Denmark, Norway, Sweden and Spain had brought the total of Council of Europe member states with national or regional legislation recognising same-sex partnerships in at least one area to 5. As of February 2002, the total has tripled to 15 member states,[14] making the situation very different from that in 1996.[15] These states are: Austria (criminal law only), Belgium, Denmark, Finland, France, Germany, Hungary, Iceland, the Netherlands, Norway, Portugal, Spain,[16] Sweden, Switzerland,[17] and the United Kingdom.[18] To these 15 could be added Greece, Ireland,[19] Italy and Luxembourg,[20] which (along with Austria and other EU member states) must accept the principle of equal treatment of unmarried different-sex partners and unmarried same-sex partners in relation to employment benefits when they implement Directive 2000/78/EC.

What is striking about these developments is that, even though the range of rights granted in the 15 member states listed above varies greatly, the common

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[13] See Robert Wintemute, "Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention", in Wintemute (ed.) & Andenæs (hon. co-ed.), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford, Hart Publishing, 2001), pp. 713-29.

[14] For citations for these laws and those of democratic societies outside of Europe, see Appendix I, Wintemute & Andenæs, *ibid*., pp. 775-79. See also Finland, Registered Partnership Act (adopted by Parliament on 28 Sept. 2001); Balearic Islands (Spain), Law 18/2001 of 19 Dec., on Stable Couples (*de Parelles Estables*).

[15] See Robert Wintemute, "Conclusion", in Wintemute & Andenæs, *ibid*., pp. 759-73.

[16] Spain has national legislation on a few specific issues, especially tenancy succession, and more general regional laws in Aragón, the Balearic Islands, Catalonia, Navarra and Valencia.

[17] Switzerland has legislation in the Cantons of Geneva and Zürich. Legislation has been proposed at the federal level and in the Canton of Bern.

[18] Scotland has legislation in two areas. England and Wales have executive regulations in two areas.

[19] Ireland's 2000 budget introduced a broad exemption from capital acquisition tax where one person inherits the apartment or house that is their principal residence, including cases where they inherit it from their deceased unmarried partner, different-sex or same-sex. See Leo Flynn, "From Individual Protection to Recognition of Relationships? Same-Sex Couples and the Irish Experience of Sexual Orientation Law Reform", in Wintemute & Andenæs, *supra*, at p. 602.

[20] It is likely that most of the other 24 Contracting States do not confer rights on unmarried partners, whether different-sex or same-sex, with regard to housing or in other contexts, and therefore treat all unmarried partners equally, regardless of sex or sexual orientation.

minimum standard of the great majority (11 of 15) of these states permits a surviving same-sex partner to succeed to a tenancy,[21] either by recognising the fact of cohabitation in the same way as for a different-sex partner, or by providing a system of partnership registration (open to unmarried same-sex partners only or also to unmarried different-sex partners) which confers this right in the same way as for a married different-sex partner. In the Netherlands, a same-sex partner has this right whether they are the spouse, registered partner or unregistered partner of the deceased tenant. In Denmark, Finland, Germany, Iceland, Norway and Sweden, they have it if they are the registered partner of the deceased tenant. In Denmark and Sweden, as a matter of law or practice, unregistered same-sex partners are also protected. In France, a same-sex partner has a succession right if they have entered into a *pacte civil de solidarité* or were living in *concubinage* with the deceased tenant.[22] In Portugal,[23] Spain[24] or the United Kingdom (Scotland), they have it if they were living in unregistered cohabitation with the deceased tenant. In the United Kingdom (England and Wales), they have it in private sector housing governed by the Rent Act 1977 as a "family member" of the deceased tenant. Of the four states that do not provide this right in national or regional legislation, Belgium, Hungary and Switzerland all treat unmarried different-sex partners and unmarried same-sex partners in the same way, unlike Austria. Indeed, in Hungary it would be unconstitutional to introduce this right for unmarried different-sex partners and not extend it to unmarried same-sex partners. The Belgian Government's planned bill opening up civil marriage to same-sex couples,[25] and the Swiss Government's planned bill on registered same-sex partnerships would provide such a right to same-sex partners who marry or register.[26]

There is thus a strong and particularised consensus that an unmarried same-sex partner must be granted the same tenancy succession right as an unmarried (or married) different-sex partner. As the Court noted in *Smith & Grady* v. *United Kingdom* (27 Sept. 1999), para. 104, "... even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue".

II. Do unmarried same-sex partners enjoy "family life"?

In 1983, in *X & Y*, *supra*, the Commission said, in the context of Article 8: "Despite the modern evolution of attitudes towards homosexuality, the Commission finds that

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[21] Even if the protection is limited to the public sector, unmarried different-sex partners and unmarried same-sex partners are treated in the same way, whether the housing is public or private.

[22] The *Cour de cassation* held in *Vilela* v. *Weil*, *Chambre civile 3e*, 17 Dec. 1997, Bull. civ. 1997. III.151, No. 225, that the doctrine of *concubinage* applied only to unmarried different-sex partners and not to unmarried same-sex partners. France's 1999 law on the *pacte civil de solidarité* overruled this decision by adding the following definition to Article 515-8 of the *Code civil*: "*Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple*." (Emphasis added.)

[23] Tenancy Act (*Regime do Arrendamento Urbano*), s. 85(1)(c) (amended, Law 7/2001, 11 May 2001).

[24] The Law on Urban Leasing (*Ley de Arrendamientos Urbanos*) of 24 Nov. 1994, Articles 12, 16, 24, *disposición transitoria segunda* B(7), grants housing rights to a person cohabiting "in a permanent way in an emotional relationship analogous to that of spouses, without regard to its sexual orientation [*con independencia de su orientación sexual*]". (Unofficial translation.)

[25] *Communiqués de presse*, "Mariage de personnes du même sexe", 22 June 2001, 7 Dec. 2001, http://194.7.188.126/justice/index_fr.htm (Communiqués).

[26] See http://www.ofj.admin.ch/f/index.html (Individu et Société, Couples homosexuels).

the applicants' relationship does not fall within the scope of the right to respect for family life." In 1986, in *Simpson* v. *United Kingdom* (No. 11716/85) (14 May 1986), 47 DR 274, the Commission added, under Article 14 combined with Article 8: "the family (to which the relationship of heterosexual unmarried couples can be assimilated) merits special protection in society and [the Commission] sees no reason why a [government] should not afford particular assistance to families". The national case-law and legislation and European recommendations and legislation cited above demonstrate that the Commission's views from over 15 years ago can no longer be supported. Some of the most persuasive statements on this question have been made by the Constitutional Court of South Africa, a country that is painfully aware of the meaning of "discrimination", in *National Coalition for Gay and Lesbian Equality* v. *Minister of Home Affairs* (1999), 2000 (2) SA 1, http://www.concourt.gov.za/archive.html. The Court held, by 11 votes to 0, that Section 9(3) of the 1996 Constitution of the Republic of South Africa, which expressly prohibits discrimination based on "sexual orientation" and "marital status", does not permit the Government of South Africa to allow only married different-sex partners of permanent residents to immigrate, while threatening the unmarried same-sex partners of permanent residents with deportation. Although the legal issue was different in that case, because the difference in treatment was between unmarried same-sex partners and <u>married</u> different-sex partners, the Court's reasoning would have applied *a fortiori* if the difference in treatment had been between unmarried same-sex partners and <u>unmarried</u> different-sex partners.

Justice Ackermann said: "49. The impact of section 25(5) [of the Aliens Control Act] is to reinforce harmful and hurtful stereotypes of gays and lesbians. … '… The classification of lesbians and gays as 'exclusively sexual beings' stands in stark contrast to the perception of heterosexual [spouses or] parents as 'people who, along with many other activities in their lives, occasionally engage in sex.' …" ... 53. ... Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection, friendship, eros and charity ... They are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household ... Finally, ... they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses. ..."

There is now a sufficiently broad consensus in Council of Europe member states and other democratic societies that unmarried same-sex partners (with or without children) are "families" and enjoy "family life", in the same way as unmarried different-sex partners (with or without children), and that differences in treatment between unmarried same-sex partners and unmarried different-sex partners no longer have an objective and reasonable justification. This does not mean that Contracting States cannot, to use the language of the Commission, "afford particular assistance to families" <u>with children</u>. Rather, it means that Contracting States cannot grant a right to unmarried different-sex partners, regardless of whether or not they have children, and then withhold the right from unmarried same-sex partners (with or without children).