CASE OF E.B. v. FRANCE

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.

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?