EUROPEAN COURT OF HUMAN RIGHTS
Fifth Section

Application No. 25951/07
Valérie GAS & Nathalie DUBOIS v. France

Hearing of 12 April 2011, Strasbourg, France

Oral submissions on behalf of the third-party interveners, FIDH, ICJ, ILGA-Europe, BAAF and NELFA[1]

[AS DELIVERED = 1608 words = 10 minutes at 160 words per minute]

Mister President of the Chamber, Judges and Registrars of the Court,

The strongest and most persistent prejudice against the lesbian and gay minority in Europe, is that they represent a threat to the welfare of children. This prejudice, held by many members of the heterosexual majority, has been reflected in decisions of national courts denying lesbian women and gay men custody of their own children, or the possibility of adopting a child as an unmarried individual. It has also been reflected in national legislation that fails to provide for the reality that, despite the legal obstacles and social prejudice they face, same-sex couples are raising children. Families composed of a same-sex couple and their children exist across Europe, but often face unnecessary problems in their daily lives, and unnecessary anxieties about their futures, because each of their children has only one legal parent rather than two. The question before the Court is whether the European Convention on Human Rights permits rules that discriminate against children, directly or indirectly on the ground of their parents' sexual orientations, regarding who is automatically a legal parent of

[1] The footnotes provide sources for comparative law materials that have not been cited in the third-party interveners' Written Comments and Supplementary Written Comments, or the exact paragraph in which a quoted statement of the Court can be found.

children born after donor insemination, or who may adopt their partner's child and become the child's second legal parent.

This Court has twice confronted the social prejudice against lesbian women and gay men raising children, and responded with clear legal principles rejecting this prejudice. In 1999, in *Mouta* v. *Portugal*, the Court considered a national court's decision to transfer custody of an 8-year-old girl from her gay father to her heterosexual mother. The national court found it unnecessary "to determine whether homosexuality is ... an illness" because, in any case, "it is an abnormality".[2] This Court unanimously found a violation of Article 14 combined with Article 8, because the national court "made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention".[3]

In 2008, in *E.B.* v. *France*, the Court also found a violation of Article 14 combined with Article 8. The Grand Chamber rejected, by 14 votes to 3 on the principle (10 to 7 on the facts), the blanket exclusion of lesbian women and gay men from the possibility of adopting a child as an unmarried individual. The judgment's principle was stated concisely by Judge Costa in his dissenting opinion: "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 ... [A] person can no more be refused authorisation to adopt on grounds of their homosexuality than have their parental responsibility withdrawn on those grounds (... *Mouta*). I agree."[4]

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[2] Paragraph 34.
[3] Paragraph 36.
[4] Paragraph 3.

Today, the question before the Court is whether to extend its judgments in *Mouta* and *E.B.* to national rules that allow the children of different-sex couples (in which one partner is not a genetic parent) to have two legal parents, but do not allow the children of same-sex couples to have two legal parents. In examining this question, the Court should be aware of an emerging consensus in Council of Europe member states and other democratic societies: where a child is being raised by two women or two men who form a stable couple, and the child has only one legal parent, it is in the child's best interests to grant full legal parenthood to both members of the couple who are raising the child.

There are already 10 Council of Europe member states where legislation permits the registered or cohabiting same-sex partner of a parent to adopt the parent's child and become the child's second legal parent: Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden, and the United Kingdom. The same will be true in Luxembourg, if a pending government bill becomes law, and in Hungary, if the new Civil Code is brought into force. In France[5] and Slovenia,[6] the supreme civil court has recognised adoptions outside of Europe that gave a child two legal parents of the same sex. In Andorra[7] and Portugal, where unmarried different-sex couples may adopt each other's children, compliance with *Karner* v. *Austria*[8] arguably requires this possibility for same-sex couples.

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[5] *Cour de cassation, Première chambre civile, Arrêt no. 791 du 8 juillet 2010.*

[6] Supreme Court of the Republic of Slovenia, Decision No. II Ips 462/2009-9 of 28 January 2010 (copy sent by e-mail).

[7] Andorra, *Llei qualificada de l'adopció i de les altres formes de protecció del menor desemparat*, *Butlletí Oficial del Principat d'Andorra* Núm. 29 - *any* 8 - 24.4.1996, p. 712, Article 2: "*L'adopció pot ésser demanada després de cinc anys de matrimoni o de convivència, per parelles estables heterosexuals ...*"

[8] (24 July 2003).

In other democratic societies, the same trend can be seen. Second-parent adoption is available, through legislation or appellate case-law, to registered or cohabiting same-sex couples in all 13 parts of Canada, in at least 16 of the 50 United States (plus the District of Columbia),[9] in the Federal District of Mexico, and in Brazil, Uruguay, Argentina and South Africa. In 7 of 8 parts of Australia,[10] and in New Zealand,[11] the child of a lesbian couple may have two legal parents, either through automatic parenthood for the mother's female partner, or through second-parent adoption.

It is true that there is not yet a majority of Council of Europe member states in which second-parent adoption is available to same-sex couples. But in a case in which the welfare of a child is at stake, the third-party interveners would respectfully urge the Court to stress the overwhelming consensus among member states that legal rules and judicial decisions must promote the best interests of the child. All 47 member states are parties to the United Nations Convention on the Rights of the Child. Under its Article 2, "States Parties shall ... ensure the [Convention's] rights ... to each child ... without discrimination of any kind, irrespective of the child's ... parent's ... sex ... or other status", and "shall ... ensure that the child is protected against all forms of discrimination or punishment on the basis of the status [or] activities ... of the child's parents". Under its Article 3, "[i]n all actions concerning children, whether undertaken by ... courts of law ... , or legislative bodies, the best interests of the child shall be a primary consideration".

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[9] Nevada Revised Statutes, sections 122A.200 (1)(a) and (d), 127.030, 127.160; Washington Revised Code, sections 26.33.260, 26.33.902

[10] Queensland, Status of Children Act 1978, s. 19B (inserted by Act No. 2 of 2010, s. 107); Northern Territory, Status of Children Act 1978, s. 5DA (inserted by Act No. 1 of 2004, s. 41). The exception among the 8 parts is South Australia.

[11] Status of Children Act 1969, s. 18 (inserted by Act No. 91 of 2004, s. 14).

This approach is implicit in the Court's judgment in *Mouta*, which concerned the welfare of a specific child, and overrides the Court's general reluctance to require legal recognition of unmarried couples, if the welfare of an unmarried couple's child is at stake. In *Emonet* v. *Switzerland*,[12] the Court rejected the argument that the applicants, an unmarried different-sex couple and one partner's adult child, could have qualified for adoption through marriage, stating "that it is not for the national authorities to take the place of those concerned in reaching a decision as to the form of communal life they wish to adopt".[13] The Court saw the Revised European Convention on the Adoption of Children "as a sign of growing recognition in the Council of Europe's member States for adoptions such as that [in *Emonet*]".[14]

In 2008, in *P & Others*,[15] the United Kingdom's House of Lords decided, by 4 votes to 1, that Northern Ireland's blanket exclusion of unmarried couples from joint adoption of children was discrimination contrary to Articles 14 and 8 of the Convention. The case involved an unmarried different-sex couple, raising the 10-year-old daughter of the female partner. Because they did not wish to marry, the male partner was ineligible to adopt the girl. Baroness Hale noted the effect of a similar rule in England and Wales, before its amendment in 2002: "Unmarried couples were already in practice allowed to adopt; but only one of them could do so legally, thus reducing the other to second class status ..."[16] She concluded: "... [I]f one looks at this from the point of view of a child, whose best interests would be served by being adopted by this couple even if they remain unmarried, then the difference in treatment

[12] (13 Dec. 2007).
[13] Paragraph 82.
[14] Paragraph 84.
[15] (18 June 2008), [2008] UKHL 38, http://www.bailii.org/uk/cases/UKHL/2008/38.html.
[16] Paragraph 97.

does indeed become disproportionate. At bottom the issue is whether the child should be deprived of the opportunity of having two legal parents."[17]

A final example of a court protecting a child's best interests comes from Germany, where a mother's female registered partner may adopt the mother's child, but only after a trial period of one year. In 2010, a lesbian couple, whose child was born after donor insemination in Denmark, were exempted from this trial period by the District Court of Elmshorn, because denying legal recognition of the child's second parent, even for a year, can conflict with its well-being, especially if the biological parent dies.[18]

To conclude, the question of allowing the children of same-sex couples to have two legal parents, when the children of different-sex couples born in exactly the same way have two legal parents, requires the Court to decide whether its strong presumption against direct or indirect differences in treatment based on sexual orientation, and its concern for the best interests of children, can be outweighed by a government's desire to maintain a rigid "one mother and one father" model of family life, regardless of the consequences for the children of same-sex couples. In *Wagner* v. *Luxembourg*,[19] the Court noted Luxembourg's rigidity in "making [its] conflict rules take precedence over the social reality and the situation of the persons concerned",[20] which caused the unrecognised adopted child to be "penalised in her daily existence".[21] As Professor Nigel Lowe wrote: "[I]t is as discriminating to the child to limit legal parenthood ...

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[17] Paragraph 112.
[18] *Amstgericht Elmshorn, Beschl. v. 20.12.2010 - 46 F 9/10* (copy sent by e-mail).
[19] (28 June 2007).
[20] Paragraph 133.
[21] Paragraph 158.

as to accord the child a different status and legal rights according to the circumstance of their birth or upbringing."[22]

The question of whether it is better for a child to have two legal parents, or only one, was considered by the New York Court of Appeals in 1995, the Constitutional Court of South Africa in 2002, the United Kingdom's House of Lords in 2008, and Brazil's Superior Tribunal of Justice in 2010. All of these courts concluded that the answer is clear: two legal parents are better for a child than one.

Thank you.

[22] "A Study into the Rights and Legal Status of Children being brought up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation", CF-JA (2008) 5, 10 March 2009, at p. 3, http://www.coe.int/t/DGHL/STANDARDSETTING/FAMILY/CJ-FA%20_2008_%205%20E%2025%2009%2009.pdf.