

Application No. 36515/97
Philippe FRETTÉ v. France
European Court of Human Rights
Third Section

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

Submitted on 15 June 2000

The International Lesbian and Gay Association, European Region (ILGA-Europe) is a non-governmental organisation that seeks to defend the human rights of lesbian, gay, bisexual and transgendered persons at European level. It was granted consultative status with the Council of Europe in 1998. Its membership consists of over 150 non-governmental organisations, whose members are mainly lesbian, gay, bisexual and transgendered individuals, in over 30 European countries. By a letter of 12 April 2000, ILGA-Europe applied for leave to submit written comments in the case of *Fretté v. France*, pursuant to Rule 61(3) of the Rules of Court. By a letter of 4 May 2000, the Section Registrar informed ILGA-Europe that the President of the Third Section had granted leave to submit written comments by 15 June 2000 on the admissibility and merits of the application, limited to the following two questions:

1. Les droits à la vie privée et familiale du requérant au sens de l'article 8 de la Convention ont-ils été respectés en l'espèce compte tenu des motifs du rejet de sa demande d'agrément en vue d'une adoption et de l'intérêt de l'enfant susceptible d'être adopté?

2. La jouissance des droits à la vie privée et familiale au sens de l'article 8, a-t-elle été assurée en l'espèce sans "distinction aucune" fondée sur le "sexe" ou "toute autre situation" au sens de l'article 14 de la Convention?

These written comments have been drafted in English, pursuant to Rule 61(5) of the Rules of Court, because that is the language best understood by the majority of the members of the Board of ILGA-Europe. The two questions posed by the Court have therefore been translated into English below.

I. Have the applicant's rights to private and family life within the meaning of Article 8 of the Convention been respected in this case, given the reasons for the rejection of his application for an "approval as eligible" to adopt and the interest of the child who would ultimately be adopted?

ILGA-Europe respectfully submits that this case is best examined under Article 14 of the Convention taken together with Article 8, rather than under Article 8 taken on its own. This is because the applicant is not claiming that he has an autonomous right under Article 8 to be granted an "approval as eligible" to adopt a child. Instead, he is claiming that he has a right, under Article 14 taken together with Article 8, to equal access to the possibility of being granted an "approval as eligible" to adopt a child, on the same basis as an unmarried heterosexual individual, and without discrimination on the ground of his sexual orientation.

It is important to understand at the outset that an *agrément* or "approval as eligible" is merely the first, administrative phase of an adoption under French law, and represents a preliminary determination that the prospective adoptive parent is eligible to be considered as a possible adoptive parent for a specific child. The second, judicial phase involves a civil court approving the placement of a specific child with the prospective adoptive parent. The grant of an "approval as eligible" therefore does not mean that any child will ever be placed with the individual awarded the "approval as eligible", and the decision to grant an "approval as eligible" is not based on the best interests of any specific child. However, the refusal to grant an "approval as eligible" to a particular class of persons makes it virtually impossible for individuals within that class to adopt a child.

II. Has the enjoyment of the rights to private and family life within the meaning of Article 8 been secured in this case without "discrimination" on the ground of "sex" or "other status" within the meaning of Article 14 of the Convention?

ILGA-Europe respectfully submits that, by denying Mr. Fretté an "approval as eligible" to adopt a child as an unmarried gay male individual, when the "approval as eligible" would have been granted had the authorities believed he was an unmarried heterosexual male individual, France discriminated against Mr. Fretté on the ground of his sexual orientation with regard to access to adoption, and therefore clearly

violated Article 14 of the Convention taken together with Article 8 ("family life" and "private life").

A. Applicability of Article 14 taken together with Article 8

It is clear from the case law of the Court that Article 14 only applies to differences in treatment that fall "within the ambit" of another Convention right. Where the difference in treatment involves the denial of an opportunity to one individual that is available to other individuals, there are two ways to establish that Article 14 applies. The first way is to show that the *opportunity* denied falls "within the ambit" of one of the Convention rights. The second way is to show that the *ground*, on which the decision to deny the opportunity was based, falls "within the ambit" of a Convention right. In Mr. Fretté's case, these two ways can both be used and provide two reasons why Article 14 applies taken together with Article 8: (1) because the *opportunity* he has been denied (an "approval as eligible" to adopt a child) falls "within the ambit" of a Convention right ("family life" in Article 8); and (2) because the *ground* on which the decision to deny him this opportunity was based (his sexual orientation) falls "within the ambit" of a Convention right ("private life" in Article 8)

1. An application by an unmarried individual for an "approval as eligible" to adopt a child falls "within the ambit" of "family life" in Article 8 for the purposes of Article 14.

This is the first case in which the Court has had to consider whether an application by an unmarried individual for an "approval as eligible" to adopt a child falls "within the ambit" of "family life" in Article 8 for the purposes of Article 14. The text of the Convention and the case law of the Court certainly permit the Court to hold that an application for an "approval as eligible" to adopt a child comes "within the ambit" of "family life" in Article 8 for the purposes of Article 14. An unmarried individual's application for an "approval as eligible" involves "intended family life", because it is a step in the process of creating a relationship between adoptive parent and adopted child that will generally amount to "family life". There would be no inconsistency if the Court were to hold that an application for an "approval as eligible" to adopt a child comes "within the ambit" of "family life" in Article 8 for the purposes of Article 14, even though a refusal to grant such an "approval as eligible" would generally not

interfere with, or breach any positive obligation inherent in, the right to respect for "family life" under Article 8, taken on its own.

The Court made exactly this kind of distinction in the context of immigration of spouses in *Abdulaziz v. United Kingdom* (25 April 1985), Series A, No. 94. Although the Court is understandably reluctant to hold that immigration laws interfering with "intended family life" violate Article 8 taken on its own, *Abdulaziz* shows that this reluctance does not apply where immigration laws are discriminatory in their treatment of "intended family life". The Court observed (at para. 62) that, even though Article 8 "presupposes the existence of a family", "this does not mean that all intended family life falls entirely outside its ambit". The Court therefore rejected the argument that the applicants fell outside Article 8 because they had yet to establish "family life" with their husbands in the United Kingdom. The Court found no violation of Article 8 on its own (at paras. 68-69), because the positive obligation to respect family life "cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country".

However, the Court found (at paras. 74-83) a violation of Article 14 taken together with Article 8 ("family life"), because British immigration laws discriminated on the ground of sex, by making it easier for men to sponsor their wives for immigration than for women to sponsor their husbands. A discriminatory law on immigration of spouses thus violated Article 14 taken together with Article 8 even though, in the absence of discrimination, there was no right under Article 8 to sponsor a spouse for immigration. 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.)

By following the reasoning in *Abdulaziz*, the Court can hold that national laws and decisions concerning access to adoption by unmarried individuals fall "within the ambit" of "family life" in Article 8 for the purposes of Article 14, and must therefore not involve any discrimination, without establishing any "right to adopt" for an

unmarried individual, or any positive obligation to grant an adoption application by an unmarried individual, under Article 8. And just as it was irrelevant in *Abdulaziz* that Article 8 of the Convention taken on its own did not require the United Kingdom to admit spouses of residents, it is irrelevant in Mr. Fretté's case that Article 8 of the Convention taken on its own does not require France to permit adoption by unmarried individuals. Once a Contracting State takes the voluntary decision to permit sponsorship of spouses for immigration, or to permit unmarried individuals to adopt children, it is affecting "intended family life" falling "within the ambit" of Article 8 and may not engage in discrimination that would violate Article 14.

Applying Article 14 taken together with Article 8 to Mr. Fretté's case would be entirely consistent, not only with *Abdulaziz*, but with four other judgments of the Court that have found violations of Article 14. In *Gaygusuz v. Austria* (16 Sept. 1996), [1996-IV] Reports of Judgments & Decisions, No. 14, p. 1129, and *Van Raalte v. Netherlands* (21 Feb. 1997), [1997-I] Reports of Judgments & Decisions, No. 29, p. 173, the Court held that discrimination based on nationality or sex, in relation to certain social security benefits or contributions, violated Article 14 taken together with Protocol No. 1, Article 1. Yet these judgments do not mean that an individual has a right to a particular level of social security benefits or contributions under Protocol No.1, Article 1 taken on its own. Similarly, in *Hoffmann v. Austria* (23 June 1993), Series A, No. 255-C, and *Salgueiro da Silva Mouta v. Portugal* (21 Dec. 1999), <http://www.echr.coe.int/hudoc>, the Court found that discrimination based on religion or sexual orientation, in judicial decisions about custody of children after a divorce, violated Article 14 taken together with Article 8 ("family life"). The Court was able to apply Article 14 to discrimination in child custody decisions without establishing any right of a parent to claim that every denial of custody itself violates Article 8 ("family life") taken on its own.

Applying Article 14 taken together with Article 8 ("family life") to Mr. Fretté's case would not impose any burdensome obligations on Contracting States in the area of adoption, just as the Court's judgments in *Gaygusuz*, *Van Raalte*, *Hoffmann* and *Salgueiro* did not impose any burdensome obligations on Contracting States in the areas of social security and child custody. These four judgments merely required Contracting States to justify differences in treatment in the areas of social security and child custody, especially when they are based on nationality, sex, religion or sexual orientation. Applying Article 14 taken together with Article 8 ("family

life") to Mr. Fretté's case would impose the same obligation to justify differences in treatment of unmarried individuals applying to adopt children. But, subject to their Article 14 obligation not to discriminate in relation to "family life", the Contracting States would retain a significant margin of appreciation in regulating and controlling adoption of children through their national legislatures and courts.

If the Court were to hold that decisions relating to adoption of children fall entirely outside of "family life" in Article 8 for the purposes of Article 14, the consequences would be grave. It would mean that the Convention would permit Contracting States to exclude whole categories of unmarried individuals from eligibility to adopt a child, on grounds such as sex, race, nationality, age or disability, if the excluded individuals could not claim that the ground of discrimination fell "within the ambit" of a Convention right. For example, such a conclusion would mean that France could, without having to provide any justification to the Court, absolutely exclude unmarried individuals who are male, of African or Arab origin, non-European Union nationals, aged 40 and over, or wheelchair users from the possibility of being granted an "approval as eligible" to adopt a child. Article 14 of the Convention would not apply and would therefore offer no protection against these forms of discrimination in this area. ILGA-Europe respectfully submits that such a conclusion is in no way compelled by the text of the Convention or the case law of the Court, and would be highly undesirable.

Three decisions of the European Commission of Human Rights (which of course do not bind the Court) provide no guidance on the question of discrimination with regard to access to adoption by unmarried individuals. In *X. v. Belgium and the Netherlands* (No. 6482/74) (10 July 1975), 7 Decisions & Reports 75, an unmarried man wished to adopt a child he had been caring for since 1970, but the Dutch Civil Code did not permit an unmarried individual to adopt. The Commission held (at p. 77) that "the right to adopt is not, as such, included among the rights guaranteed by the Convention", and that, even though the relationship between an adoptive parent and an adoptive child can come within "family life" in Article 8, "one should not deduce from this a positive obligation on the State [under Article 8] to grant a particular status - that of adoption - to the applicant and the person in his care". This decision is of little assistance because: (i) Mr. Fretté is not claiming that he has a "right to adopt" under the Convention, or that France has any positive obligation under Article 8, taken on its own, to grant him an "approval as eligible" to adopt; (ii)

the case concerned Dutch legislation which, at the time, did not permit unmarried individuals to adopt, unlike French legislation, which has done so since 1966; and (iii) the published parts of the decision do not refer to any discrimination argument made by the applicant under Article 14.

In *X. and Y. v. United Kingdom* (No. 7229/75) (15 Dec. 1977), 12 Decisions & Reports 32, British immigration authorities refused to allow an Indian national to enter the United Kingdom, even though he had been adopted (under Indian law) at the age of fourteen by his uncle, a British national. (The adoption was not recognised under English law.) The Commission held (at p. 34) that their relationship did not amount to "family life" under Article 8, because the nephew "throughout his life, both before and after the adoption, ha[d] lived with his natural parents in India", who "[were] fully capable of supporting him". This case, in which the adoption may have been perceived as an attempt to circumvent British immigration laws, bears no resemblance to that of Mr. Fretté. Nor do the published parts of the decision refer to any discrimination argument made under Article 14.

Finally, in *Di Lazzaro v. Italy* (No. 31924/96) (10 July 1997), 90-B Decisions & Reports 134, the application of an unmarried woman for an "approval as eligible" to adopt a child was rejected, because Italian legislation did not generally permit unmarried individuals to adopt children, except for children who are disabled, sick, or over a certain age. In rejecting her complaint under Article 8, the Commission merely repeated its statements in *X. v. Belgium and the Netherlands, supra*, regarding the absence of any "right to adopt" or any "positive obligation" to permit an adoption under Article 8. Again, this decision does not affect Mr. Fretté's case, because the Italian legislation (unlike French legislation) did not provide that an unmarried individual could in principle adopt any child, and because the published parts of the decision make no reference to any discrimination argument under Article 14.

The only Commission decision ILGA-Europe has found dealing with discrimination in relation to access to adoption by married couples is *X. v. Netherlands* (No. 8896/80) (10 March 1981), 24 Decisions & Reports 176. The applicant and her husband were refused permission to adopt a Polish child because of their ages, and because the child had reached school age. The Commission had no trouble applying Article 14 taken together with Article 12 ("right to found a family"). The Commission found no violation, holding that the requirement that the child not have reached school age was justifiable, and that this made it unnecessary to decide

whether the difference in treatment based on the ages of the applicant and her husband could be justified. Again, this case is very different from Mr. Fretté's, in which no specific child has been identified, and Mr. Fretté's sexual orientation is the sole reason for denying him an "approval as eligible" to adopt.

2. The absolute exclusion of an unmarried individual from the possibility of an "approval as eligible" to adopt a child, solely on the ground of sexual orientation, falls "within the ambit" of "private life" in Article 8 for the purposes of Article 14.

Whether or not the Court holds that Article 14 can apply to decisions regarding access to adoption by unmarried individuals, because they fall "within the ambit" of "family life" in Article 8, ILGA-Europe respectfully submits that the absolute exclusion of an unmarried individual from the possibility of an "approval as eligible" to adopt a child, solely on the ground of sexual orientation, *also* falls "within the ambit" of "private life" in Article 8 for the purposes of Article 14. The case law of the Court has established that an individual's sexual orientation is "a most intimate aspect" of their "private life". In *Laskey v. United Kingdom* (19 Feb. 1997), [1997-I] Reports of Judgments & Decisions, No. 29, p. 131, para. 36, the Court stated that "[t]here can be no doubt that sexual orientation and activity concern an intimate aspect of private life". And more recently, in *Lustig-Prean & Beckett v. United Kingdom* and *Smith & Grady v. United Kingdom* (27 Sept. 1999), <http://www.echr.coe.int/hudoc>, the Court held (*Lustig-Prean*, para. 64; *Smith*, para. 71) that "the investigations by the military police into the applicants' homosexuality" and "[t]heir consequent administrative discharge [from the armed forces] on the sole ground of their sexual orientation" constituted an interference with their right to respect for their private lives under Article 8. Because "the sole reason for the investigations ... and ... discharge was their sexual orientation[,] ... a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required". (*Lustig-Prean*, para. 83; *Smith*, para. 90.)

The Court recognised in *Lustig-Prean* and *Smith* that differences in treatment based on sexual orientation could interfere with the right to respect for "private life" in Article 8, not only where a criminal sanction is imposed, but also where an individual is dismissed from their employment. The Court had earlier held, in *Vogt v. Germany* (26 Sept. 1995), Series A, No. 323, that dismissing a state school teacher

because she was an active member of the German Communist Party interfered with her rights to freedom of expression and association under Articles 10 and 11. If the Court were faced with the dismissal of a government employee solely because they belonged to a particular religious minority, the Court would almost certainly hold that there had been an interference with their right to freedom of religion under Article 9.

It follows that a denial of an "approval as eligible" to adopt a child as an unmarried individual on the ground of the individual's sexual orientation, religion or political opinion could also be viewed as an "interference" with the individual's rights under Article 8, 9, 10 or 11. In these situations, there is an "interference" because the individual is forced to choose between their sexual orientation, religion or political opinion, and the opportunity of applying for an "approval as eligible" to adopt a child, just as the applicants in *Lustig-Prean* and *Smith*, the hypothetical religion case mentioned above, and *Vogt* were or would be forced to choose between their sexual orientation, religion or political opinion and their employment. And whether or not there is an "interference", and whether or not the "interference" could be justified under Article 8(2), 9(2), 10(2) or 11(2), a denial of an "approval as eligible" to adopt a child on the ground of sexual orientation, religion or political opinion at least falls "within the ambit" of Article 8 ("private life"), 9 ("religion"), 10 ("expression") or 11 ("association"). Thus, an unmarried individual who is denied an "approval as eligible" to adopt a child, because they are lesbian or gay (like Mr. Fretté), a Jehovah's Witness (as in *Hoffmann, supra*),¹ or a member of the Communist Party (as in *Vogt*), can invoke Article 14 of the Convention taken together with Article 8, 9, 10 or 11.

B. Violation of Article 14 taken together with Article 8

1. The decisions of the French authorities, upheld by the *Conseil d'État*, were a difference in treatment, between persons in similar situations, based on the applicant's sexual orientation.

ILGA-Europe respectfully submits that the decisions of the French authorities to deny Mr. Fretté an "approval as eligible" to adopt a child, which were upheld by the

¹ The *Conseil d'État* has upheld denials of "approvals" to adopt a child, not only to unmarried lesbian or gay individuals like Mr. Fretté, but also to a married couple who were Jehovah's Witnesses. See *Département du Doubs c. M. et Mme. Frisetti*, Cons. d'État, 24 avril 1992, Dalloz.1993.Jur.234 (note Isabelle Rouvière-Perrier, 238: "*cette position adoptée par le Conseil d'État nous paraît d'un avenir incertain*", in view of the European Commission of Human Rights' opinion in *Hoffmann*).

Conseil d'État, were a difference in treatment based on the applicant's sexual orientation, in that the application would have been granted had the French authorities believed Mr. Fretté was heterosexual.

The psychologists' report on Mr. Fretté of 23 December 1992 referred to "*le danger psychologique que peut représenter pour l'enfant son choix de vie sexuelle*". The social workers' report of 2 March 1993 concluded that: "*Mr. Fretté possède des qualités humaines et éducatives certaines. Un enfant serait probablement heureux avec lui. Ses particularités, **homme célibataire homosexuel**, permettent-elles de lui confier un enfant?*" The 3 March 1993 decision of the "*direction de l'action sociale, de l'enfance et de la santé du Département de Paris*" was based primarily on the prospective adoptive child's having to face "*une difficulté supplémentaire en étant en présence d'une représentation parentale dont on ne peut apprécier, en l'absence d'une référence maternelle constante, les conséquences qu'elle aurait sur son développement psychique*". On 15 October 1993, the Director of this agency rejected Mr. Fretté's appeal: "*Tout en respectant tout à fait vos choix de vie, [ces choix] ne me semblent pas de nature à présenter les garanties suffisantes quant aux conditions d'accueil que vous êtes susceptible d'offrir à un enfant sur les plans familial, éducatif et psychologique.*"

In the two administrative courts that heard Mr. Fretté's subsequent appeals, there was no doubt as to the real reason for the authorities' decision. In *Fretté c. Département de Paris*, Trib. admin. Paris, 25 janvier 1995, Dalloz.1995.Jur.647, the *Tribunal administratif de Paris* held (at p. 648) that the Director's decision had been "*motivée par 'les choix de vie' de M. [Fretté], ... par cette motivation euphémistique, l'Administration a entendu évoquer l'homosexualité de M. [Fretté]*". In her Conclusions of 16 September 1996, Madame Maugué, the *Commissaire du Gouvernement au Conseil d'État*, agreed unequivocally:

" ... cette interrogation revêt le rang d'une question de principe. En effet il n'est pas possible de régler cette affaire par une décision d'espèce car nous avons pas de doute, au vu des pièces qui figurent au dossier, sur le fait que M. F. possède à bien des égards de réelles aptitudes pour l'éducation d'un enfant. Le seul élément qui a conduit l'Administration à refuser l'agrément est le fait que M. F. est homosexuel ... Mais il ne ressort en aucune façon du dossier que M. F. ait une vie dissolue et aucun élément précis de nature à faire craindre pour l'intérêt de l'enfant n'est évoqué. Admettre la légalité du refus d'agrément dans le cas présent [celui de M. F.] revient à condamner implicitement mais nécessairement à l'échec toute

demande d'agrément émanant d'un homosexuel." (La Semaine Juridique (J.C.P.).1997.II.22766, at p. 35.)

Having heard these Conclusions, the *Conseil d'État* then upheld the French authorities' refusal to grant an "approval as eligible" to adopt:

*"[on] a rejeté la demande d'agrément ... au motif que si les **choix de vie de l'intéressé** devaient être respectés, les conditions d'accueil qu'il serait susceptible d'apporter à un enfant pouvaient présenter **des risques importants pour l'épanouissement de cet enfant**; ... eu égard à ses **conditions de vie** et malgré des qualités humaines et éducatives certaines [M. Fretté] ne présentait pas de garanties suffisantes sur les plans familial, éducatif et psychologique pour accueillir un enfant adopté."* (Département de Paris c. Fretté, Cons. d'État, 9 octobre 1996, Recueil des décisions du Cons. d'État.1996.391. All emphasis in bold *supra* has been added to the original text.)

It is abundantly clear from the language used by the French authorities and administrative courts that the determining factor in the various decisions to deny Mr. Fretté an "approval as eligible" to adopt a child was his sexual orientation. If he had been in all respects the same person but heterosexual, or if he had chosen to hide his being gay so that the authorities believed he was heterosexual, his application would have been granted. Although the French authorities and the *Conseil d'État* used much more respectful language than the Lisbon court of appeal in *Salgueiro, supra*, expressions such as "*choix de vie*", "*des risques importants pour l'épanouissement de cet enfant*" and "*conditions de vie*" nevertheless "*donnent à penser ... que l'homosexualité du requérant a pesé de manière déterminante dans la décision finale*", as the Court concluded in *Salgueiro* (at para. 35).

The French Government argues that the denial of an "approval as eligible" to adopt a child was based on "the best interests of the child". However, the grant of an *agrément* or "approval as eligible" to adopt a child is only a preliminary determination of eligibility to be considered as a possible adoptive parent for a specific child. In Mr. Fretté's case, because the "approval as eligible" to adopt was denied, he was unable to proceed to the second phase and attempt to adopt a specific child. Consequently, in his case, there was no specific child whose "best interests" could be taken into account. The decisions of the French authorities and the *Conseil d'État* amount to a determination that, because Mr. Fretté is gay, it is not in the "best interests" of any child in France or anywhere in the world to be adopted by him. The difference of

treatment is thus clearly based on Mr. Fretté's sexual orientation and not on the "best interests" of a specific child.

The French Government also argues that the denial of an "approval as eligible" was based on *"une appréciation in concreto des conditions de vie"* of Mr. Fretté rather than on his sexual orientation, and that he is free to reapply for an "approval as eligible" three years after a refusal. However, the Government has not pointed to any particular circumstance in Mr. Fretté's life that he could change, so as to become eligible for an "approval as eligible" to adopt after a second application, apart from his being gay. The Government cites *Département du Loiret c. Tissier*, Cons. d'État, 24 avril 1992, Recueil des décisions du Cons. d'État 1992.718; *Revue administrative* 1992.328, 331-32, as evidence that the case law of the *Conseil d'État* does not create a blanket ban or absolute exclusion of all prospective adoptive parents who are lesbian or gay. However, the circumstances of Mr. Fretté's case are not comparable to those of the 1992 case, in which an unmarried male individual was granted an "approval as eligible" to adopt even though he *"refus[ait] le principe même d'une vie de couple et se dis[ait] indifférent à l'aspect charnel de son épanouissement"*, and despite the authorities' considering that he had *"des 'tendances homosexuelles refoulées'"*. (See *La Semaine Juridique (J.C.P.)*.1997.II.22766, at p. 35.)

The *Conseil d'État's* 1992 decision may represent a narrow exception, requiring that an unmarried male individual with "repressed homosexual tendencies", who is not interested in sexual activity, be treated in the same way as an unmarried heterosexual male individual. However, Mr. Fretté's case demonstrates that the *Conseil d'État's* general rule is to treat unmarried gay male individuals (who do not repress their *"tendances homosexuelles"*, renounce the idea of a *"vie de couple"*, or display indifference to *"l'aspect charnel de [leur] épanouissement"*) differently from unmarried heterosexual male individuals, who would not be expected to satisfy these conditions to be granted an "approval as eligible" to adopt. Indeed, the *Conseil d'État* made it clear in 1997 that its case law *does* effectively create an absolute exclusion² of all prospective adoptive parents who are lesbian or gay (and do not repress their sexual orientations). In *Parodi c. Département du Gard*, Cons. d'État, 12 février

² The power of a civil judge to waive the need for an "approval as eligible" when granting the adoption of a specific child is rarely exercised, as the Commissaire du Gouvernement recognised in Mr. Fretté's case. See *La Semaine Juridique (J.C.P.)*.1997.II.22766, at pp. 37-38.

1997, *Revue Française de Droit administratif*.1997.441, a case involving an unmarried lesbian individual, the *Conseil d'État* upheld the denial of an "approval as eligible" to adopt a child, repeating almost *verbatim* its reasoning in Mr. Fretté's case:

"les décisions attaquées ont été prises au motif que les choix et conditions de vie de l'intéressée risqueraient d'entraîner des difficultés psychologiques pour l'enfant adopté; ... Mme. Parodi ..., eu égard à ses conditions de vie et malgré des qualités humaines et éducatives certaines, ne présentait pas des garanties suffisantes sur les plans familial, éducatif et psychologique pour accueillir un enfant adopté." (Emphasis in bold added.)

2. There is no objective and reasonable justification for the difference in treatment.

(a) Did the difference in treatment pursue a legitimate aim?

ILGA-Europe will assume for the sake of argument that the means employed by the French authorities and the *Conseil d'État* (an absolute exclusion of all unmarried individuals seeking to adopt who are lesbian or gay) pursued the legitimate aims of "protection of health" and "protection of the rights of others", rather than the illegitimate aim of "discriminating against an unpopular minority". ILGA-Europe will instead demonstrate the absence of any relationship, let alone a reasonably proportionate one, between the means employed and these legitimate aims, because prospective adoptive parents who are lesbian or gay do not, by virtue of their sexual orientation, represent a danger to the health or rights of any child.

(b) There is no reasonable relationship of proportionality between the absolute exclusion of lesbian and gay persons and any legitimate aims pursued by the exclusion.

(i) The Court should require "very weighty reasons" to justify a difference in treatment based solely on sexual orientation.

ILGA-Europe respectfully submits that the Court should hold that "very weighty reasons would have to be advanced before a difference in treatment on the ground of [sexual orientation] could be regarded as compatible with the Convention". (See, *mutatis mutandis*, *Abdulaziz*, *supra*, para. 78.)

In 1981 in *Dudgeon v. United Kingdom* (22 Oct. 1981), Series A, No. 45, para. 52, the Court held that Northern Ireland legislation prohibiting all private, consensual sexual activity between adult men "concern[ed] a most intimate aspect of

private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of [Article 8(2)]." In September 1999, the Court extended this strict justification test under Article 8 to the field of employment in *Lustig-Prean* and *Smith, supra*: "[because] the sole reason for the investigations ... and ... discharge was their sexual orientation[,] ... a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required". (*Lustig-Prean*, para. 83; *Smith*, para. 90.) The Court also rejected the hostility of heterosexual members of the armed forces as a justification for the blanket ban or absolute exclusion of lesbian and gay members: "To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights ..., any more than similar negative attitudes towards those of a different race, origin or colour." (*Lustig-Prean*, para. 90; *Smith*, para. 97.) In December 1999, having drawn an analogy between discrimination based on sexual orientation and discrimination based on race in *Lustig-Prean* and *Smith*, the Court drew an analogy between discrimination based on sexual orientation and discrimination based on religion in *Salgueiro, supra*, para. 36: "*Force est donc de constater ... que la cour d'appel a opéré une distinction dictée par des considérations tenant à l'orientation sexuelle du requérant, distinction qu'on ne saurait tolérer d'après la Convention (voir, mutatis mutandis, l'arrêt Hoffmann précité, p. 60, § 36).*" In *Hoffmann, supra*, para. 36, the Court had made a similar statement about differences in treatment based on religion: "Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable."

The Court has expressly adopted a "very weighty reasons" standard of justification for differences in treatment based on sex (*Abdulaziz*, 1985, *supra*, para. 78), birth out of wedlock (*Inze v. Austria*, 28 Oct. 1987, Series A, No. 126, para. 41), and nationality (*Gaygusuz*, 1996, *supra*, para. 42). The Court has strongly condemned discrimination based on religion (*Hoffmann*, 1993, *supra*, para. 36), race (*Jersild v. Denmark*, 23 Sept. 1994, Series A, No. 298, paras. 30, 35; *Sander v. United Kingdom*, 9 May 2000, <http://www.echr.coe.int/hudoc>, para. 23), and sexual orientation (*Lustig-Prean, Smith, Salgueiro*, 1999, see preceding paragraph). ILGA-Europe respectfully submits that the Court should expressly adopt a "very weighty

reasons" standard in Mr. Fretté's case (and in appropriate future cases involving discrimination based on religion or race). The fact that "sexual orientation" is not expressly mentioned in Article 14 should not be a barrier, in that, although "sex", "birth", "national origin" and "national minority" do appear in Article 14, "birth out of wedlock" and "nationality" do not.

By adopting a "very weighty reasons" standard for sexual orientation, the Court would be confirming that it considers discrimination based on sexual orientation as just as serious and harmful as discrimination based on sex, birth out of wedlock, and nationality, as well as religion and race. Such a standard would be consistent with legal developments in the Council of Europe and in other democratic societies. On 26 January 2000, the Parliamentary Assembly of the Council of Europe adopted its Opinion No. 216 (2000) on Draft Protocol No. 12 (<http://stars.coe.fr/ta00/eopi216.htm>). The Assembly "believes that the enumeration of grounds in Article 14 is, without being exhaustive, meant to list forms of discrimination which it regards as being especially odious. Consequently the ground 'sexual orientation' should be added [to the list of grounds in Draft Protocol No. 12]." The Opinion was based on the Report of the Committee on Legal Affairs and Human Rights (Doc. 8614, <http://stars.coe.fr/doc/doc00/edoc8614.htm>, paras. 22, 23, 35), which concluded: that "[c]learly the issue of discrimination because of sexual orientation has, since 1950, become accepted as being of the same magnitude as the grounds listed in the original text of Article 14"; that "lesbians and gay men are still victims of severe discrimination in some other European countries and only express recognition of 'sexual orientation' could protect them"; and that the grounds listed in Article 14 "have been selected because we have learnt to regard discrimination on these grounds to be the most insidious and obnoxious forms of discrimination."

The Opinion of the Parliamentary Assembly reflects a growing international consensus found in European Union law, national constitutions, and national legislation. Article 13 of the Treaty establishing the European Community (inserted on 2 Oct. 1997 and in force since 1 May 1999) expressly authorises the Council to adopt legislation prohibiting discrimination based on "racial or ethnic origin, religion or belief, disability, age or sexual orientation". Article 22(1) on "Equality and non-discrimination" of the Draft Charter of Fundamental Rights of the European Union (4 June 2000, Doc. No. CHARTE 4333/00, <http://db.consilium.eu.int/df/default.asp?>

lang=en, "Show All Documents") would combine the lists of grounds of discrimination expressly mentioned in Article 14 of the European Convention on Human Rights and in Article 13 of the EC Treaty, thus including sexual orientation.

In 1995, the Supreme Court of Canada held unanimously in *Egan v. Canada*, [1995] 2 Supreme Court Reports 513 (<http://www.lexum.umontreal.ca/csc-scc/en/index.html>), that sexual orientation is an "analogous ground" under the non-discrimination provision, Section 15, of the Canadian Charter of Rights and Freedoms, meaning that it is similar to such enumerated grounds as sex, race and religion. In 1996, the post-apartheid Republic of South Africa included sexual orientation as an enumerated ground in the non-discrimination provision, Section 9, of its final Constitution, alongside sex, race and religion, as did the Fiji Islands in 1997 and Ecuador in 1998. In 1999, Switzerland adopted a new Federal Constitution including a broader prohibited ground of discrimination intended to cover sexual orientation: "*Lebensform*", "*mode de vie*", "*modo de vita*" ("way of life"). And a growing number of democratic societies, including at least 11 Member States of the Council of Europe,³ as well as national, federal, state, provincial and local governments in Canada, the United States, Mexico, Brazil, Argentina, Namibia, South Africa, Israel, Australia and New Zealand, have adopted legislation prohibiting discrimination based on sexual orientation. **See Appendix I: International Treaties, National Constitutions, and National Legislation Prohibiting Discrimination Based on Sexual Orientation (or Authorising Such a Prohibition).**

(ii) The legislatures and highest courts of the great majority of democratic societies in Europe, Canada and the United States have not adopted a blanket ban or absolute exclusion of unmarried lesbian and gay individuals from any possibility of adopting any child.

It is essential to be aware that there are three very distinct situations in which lesbian and gay persons seek to adopt a child: (1) a lesbian or gay individual seeks to adopt as an unmarried individual, in a country where adoptions by unmarried individuals are permitted, and any partner the individual might have acquires no parental rights or obligations as a result of the adoption ("individual adoption"); (2) one member of a

³ In addition to the constitutional prohibition in Switzerland, there are legislative prohibitions at the national level in Denmark, Finland, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Slovenia, Spain, and Sweden. Like the Swiss Constitution, France's 1985 legislation (the second in the

same-sex couple, consisting of two men or two women living together as partners, seeks to adopt the biological child of the other member of the couple, so that both partners have parental rights and obligations vis-à-vis the child ("second-parent adoption"); and (3) both members of a same-sex couple seek to adopt an unrelated child jointly, so that both partners simultaneously acquire parental rights and obligations vis-à-vis the child ("joint adoption"). Mr. Fretté's case is an example of *individual adoption*.

ILGA-Europe respectfully submits that the case law of the *Conseil d'État*, which has created an absolute exclusion of all prospective adoptive parents who are lesbian or gay (and do not repress their sexual orientations), is unprecedented in the area of individual adoption in the Member States of the Council of Europe. The research that ILGA-Europe has conducted has revealed that 40 of the 41 Member States of the Council of Europe fall into either of two categories: either (a) no express provision of legislation, and no decision of a final appellate court, absolutely excludes lesbian and gay persons from the possibility of adopting a child as unmarried individuals, under the same conditions as unmarried heterosexual individuals, even if it is only a child who has a disability, is sick, or is above a certain age; or (b) no unmarried individual, regardless of sexual orientation, is ever permitted to adopt a child in any circumstances. ILGA-Europe is not aware of any Member State, other than France, that falls into category (c): unmarried individuals are permitted to adopt children, but an express provision of legislation, or a decision of a final appellate court, absolutely excludes lesbian and gay persons. The French Government has not cited another Member State with a similar rule. **See Appendix II: Council of Europe Member States: Access of Lesbian and Gay Persons to Adoption as Unmarried Individuals.**

In Canada and the United States, the legislatures and highest courts are also virtually unanimous in not finding it "necessary in a democratic society" to impose an absolute exclusion of unmarried lesbian and gay persons from any possibility of adopting any child as individuals. In Canada, as in France, all 13 provinces and territories permit unmarried individuals to apply to adopt a child as individuals. In no Canadian province or territory is there an express provision of legislation, or a decision of a final appellate court, absolutely excluding lesbian and gay persons from

world at the national level) uses a broader prohibited ground of discrimination intended to cover sexual

the possibility of adopting as an unmarried individual. In the United States, as in France, all 50 states and the District of Columbia permit unmarried individuals to apply to adopt a child as individuals. Only in one state, Florida, is there an express provision of legislation, or a decision of a final appellate court, absolutely excluding lesbian and gay persons from the possibility of adopting as an unmarried individual.⁴

"L'état de l'opinion publique", *"les débats nationaux"*, and the absence of a *"consensus européen"* to which the French Government refers relate primarily to second-parent adoption and joint adoption, which few Member States of the Council of Europe currently permit. Because they involve joint parental rights and obligations that have traditionally been restricted to married couples, second-parent adoption and joint adoption by same-sex couples raise issues relating to legal recognition of a same-sex couple's relationship. Mr. Fretté's case of individual adoption raises no such issues.

If there is any absence of *"consensus européen"* with regard to individual adoption by lesbian and gay persons, it relates to individual adoption by a lesbian or a gay person of a newborn baby with no apparent disabilities or special needs, the "demand" for which from prospective adoptive parents in Europe greatly exceeds the domestic "supply". It could well be true that, in most Council of Europe countries, the legislature or the highest court might currently be reluctant to establish a non-discrimination rule requiring equal treatment for unmarried lesbian and gay individuals in such circumstances, and prohibiting any preference for unmarried heterosexual individuals or married heterosexual couples. However, the *Conseil d'État's* case law applies not only to individual adoptions by lesbian and gay persons of children who are "in demand", but to any individual adoption by a lesbian or gay person of any child, no matter how unwanted by other prospective adoptive parents. The legislatures and highest courts of 40 of 41 Council of Europe countries, 13 of 13 Canadian provinces and territories, and 49 of the 50 United States (as well as the

orientation: *"moeurs"* ("morals, manners, customs, ways"). See Appendix I.

⁴ See Florida Statutes ch. 63.042, s. 3: "No person eligible to adopt under this statute may adopt if that person is a homosexual." Utah excludes unmarried lesbian and gay individuals only if they are cohabiting with a partner. See Utah Code Annotated ss. 78-30-1(3)(b), 78-30-9(3), as amended by 2000 Utah Laws ch. 208, ss. 5, 7: "A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. ... '[C]ohabiting' means residing with another person and being involved in a sexual relationship with that person." Mississippi Code Annotated s. 93-17-3(2), as amended by 2000 Mississippi Laws (Senate Bill 3074), provides that "[a]doption by couples of the same gender is prohibited". It is not clear

District of Columbia) have not found it "necessary in a democratic society" to impose an absolute exclusion of lesbian and gay persons from any possibility of adopting any child, no matter how unwanted.

(iii) There is no scientific evidence that lesbian and gay parents pose any "psychological danger" to children.

ILGA-Europe respectfully submits that the vast majority of studies of children raised by lesbian and gay parents have concluded that such children are as psychologically healthy as children raised by heterosexual parents. In 1995, the American Psychological Association issued a review of 43 empirical studies and numerous other articles which concluded that "[n]ot a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents". (See American Psychological Association, *Lesbian and Gay Parenting: A Resource for Psychologists* (Washington, DC, 1995) at p. 8.) The French Government has not cited a single scientific study to support its speculative claims of "*les incertitudes qui pèsent sur l'épanouissement d'un enfant*", or "*l'incertitude pesant sur l'équilibre de l'enfant*", adopted by an unmarried lesbian or gay individual.

Some of the leading scientific studies in this area have been conducted by two British psychologists, Susan Golombok and Fiona Tasker. For example, in "Adults Raised as Children in Lesbian Families" (1995) 65 *American Journal of Orthopsychiatry* 203, they studied 25 young adults from lesbian families and 21 young adults raised by heterosexual single mothers. They concluded (at p. 211) that "[a]ll the children in the sample had functioned well throughout childhood and adolescence. Those raised by lesbian mothers continued to do so in adulthood and experienced no long-term detrimental effects arising from their early upbringing." Children raised by lesbian mothers were "no more likely than those from heterosexual single-parent backgrounds to have sought professional help for mental health problems", and "23 out of 25 young adults from lesbian backgrounds identified as heterosexual in early adulthood" (pp.211-12).

whether this prohibition also applies to individual adoptions by one member of a same-sex couple, or only to second-parent or joint adoptions by same-sex couples.

After examining the scientific evidence in this area, one Canadian judge observed (in approving second-parent adoptions involving four lesbian couples and seven children):

"There is, in short, no evidence that families with heterosexual parents are better able to meet the physical, psychological, emotional or intellectual needs of children than families with homosexual parents. Nor is there any evidence that children of families in which the parents are homosexual would receive less than the 'adequate' level of care demanded of heterosexual parents ... When one reflects on the seemingly limitless parade of neglected, abandoned and abused children who appear before our courts in protection cases daily, all of whom have been in the care of heterosexual parents in a 'traditional' family structure, **the suggestion that it might not ever be in the best interests of these children to be raised by loving, caring and committed parents, who might happen to be lesbian or gay, is nothing short of ludicrous.**" (*Re K. and B.* (1995), 125 Dominion Law Reports (4th) 653 (Ontario Court, Provincial Division). Emphasis added.)

(iv) France's absolute exclusion of lesbian and gay persons is grossly disproportionate, and is not in the best interests of children needing adoptive parents.

ILGA-Europe respectfully submits that the Court should attach particular weight to the sweeping generalisation implicit in the case law of the *Conseil d'État*: no lesbian or gay person in France is, by virtue of their sexual orientation alone, capable of being a good adoptive parent to any child in France or anywhere in the world, no matter what the individual circumstances of the lesbian or gay person, or of the child in need of an adoptive parent. Even if the child is one of thousands in Europe who are living in a state institution,⁵ or constantly moving from foster parent to foster parent, and are not attractive to most prospective adoptive parents, because they have a disability, have special educational needs, have behavioural problems, have experienced abuse, are addicted to drugs, are HIV-positive, have siblings who must be adopted with them, or are considered too old (perhaps six or more years old), the child cannot be adopted by an unmarried lesbian or gay individual in France. The same is true of millions of children in developing countries abandoned by their parents. Without an "approval as eligible" under French law, a lesbian or gay person in France cannot

⁵ In the United Kingdom alone, there were over 50,000 children living in residential homes operated by local governments in 1999.

even think about trying to adopt such a child (putting aside any obstacles in international law or the policies of the child's country of origin).

The absolute exclusion of prospective lesbian and gay adoptive parents in Mr. Fretté's case resembles the United Kingdom's blanket ban on lesbian and gay members of the armed forces in *Lustig-Prean* and *Smith, supra*. There, the Court found the interferences with the applicants' private lives "especially grave", noting that "the *absolute and general character of the policy* which led to the interferences ... is striking ... The policy results in an immediate discharge from the armed forces once an individual's homosexuality is established and *irrespective of the individual's conduct* or service record." (*Lustig-Prean*, paras. 83, 86; *Smith*, paras. 90, 93; emphasis added.)

Here, Mr. Fretté's personal qualities were acknowledged by the social workers in their report of 2 March 1993 ("*[u]n enfant serait probablement heureux avec lui*"), and by the *Commissaire du Gouvernement* in her Conclusions: "*Les rapports qui ont été rédigés sont dans l'ensemble très élogieux sur les qualités intellectuelles et humaines de M. F. Celui-ci est décrit comme un homme cultivé, travailleur, sensible, réfléchi, attentif aux autres, constant dans ses amitiés, scrupuleux, altruiste.*" (La Semaine Juridique (J.C.P.).1997.II.22766, p. 35.) However, under the case law of the *Conseil d'État*, his individual attributes and conduct were irrelevant and his being gay automatically excluded him from the possibility of an "approval as eligible" to adopt. The *Conseil d'État*'s conclusion is in stark contrast to that in the judgment of the *Tribunal administratif de Paris* (which the *Conseil d'État* annulled):

"... cet aspect de la personnalité de M. [Fretté] [son homosexualité] ne pouvait justifier un refus d'agrément que s'il s'accompagnait d'un comportement préjudiciable à l'éducation d'un enfant; ... aucune pièce versée au dossier ne permet d'établir ni même n'autorise à alléguer que le mode de vie de M. [Fretté] traduirait un manque de rigueur morale, une instabilité affective, la possibilité de le voir détourner l'adoption de ses fins, ou tout autre comportement de nature à faire considérer son projet comme dangereux pour tout enfant adopté; ..." (Trib. admin. Paris, 25 janvier 1995, Dalloz.1995.Jur.647, 648. Emphasis added.)

A blanket ban on lesbian and gay persons receiving "approvals as eligible" to adopt children as unmarried individuals is not in the best interests of children needing adoptive parents. Because of an increase in access to contraception or abortion, and a reduction in the stigma attached to an unmarried mother's keeping her baby and

raising it on her own, there are fewer and fewer newborn babies available for adoption in many Council of Europe countries. An increasing percentage of children in need of adoptive parents in such countries consists of children who are older, or have disabilities or other special needs, or both. Because most prospective adoptive parents prefer not to take on the challenge of raising such a child, and would rather wait for a newborn baby without any apparent disabilities or special needs (possibly through an international adoption), social workers find it difficult to place older or special needs children for adoption. It is in the best interests of such children that the pool of potential adoptive parents should be as wide as possible. Where the pool in a particular country includes unmarried individuals, it is not in the best interests of children needing adoptive parents that any group of prospective adoptive parents should be absolutely excluded on grounds unrelated to their ability to be good parents. (The same is true of children in developing countries in need of adoptive parents.)

Courts in the United Kingdom have recognised that the best interests of children should prevail over any discriminatory criteria that would exclude whole classes of prospective adoptive parents. Applying the "best interests" standard, courts have interpreted United Kingdom adoption legislation (which, as in France, permits unmarried individuals to adopt but is silent on whether or not lesbian or gay persons are included) as permitting lesbian or gay persons to apply to adopt children as unmarried individuals. In *T, Petitioner*, [1997] Scots Law Times 724, Lord Hope, President of the Court of Session, Scotland's court of appeal, held (at p. 732) that:

"There can be no more fundamental principle in adoption cases than that it is the duty of the court to safeguard and promote the welfare of the child [Adoption (Scotland) Act 1978, s. 6]. **Issues relating to the sexual orientation, lifestyle, race, religion or other characteristics of the parties involved must of course be taken into account as part of the circumstances. But they cannot be allowed to prevail over what is in the best interests of the child.** The suggestion that it is a fundamental objection to an adoption that the proposed adopter is living with another in a homosexual relationship finds no expression in the language of the statute, and in my opinion conflicts with the [welfare of the child] rule which is set out in s. 6 of the Act." (Emphasis added.)

Having decided that an absolute exclusion of lesbian and gay persons from eligibility to adopt as unmarried individuals is not in the best interests of children generally, United Kingdom courts have gone on to issue adoption (or freeing for adoption) orders in cases where specific children had been placed with unmarried lesbian and

gay individuals. In each case, the court concluded that adoption by an unmarried lesbian or gay individual was in the best interests of the child, particularly if the alternative was to leave the child for years in the care of a local authority or a series of foster parents.

Thus, in *T, Petitioner*, the Scottish Court of Session issued an adoption order where a five-year-old boy, who was deaf, mute and unable to walk unaided, had been placed for adoption with an unmarried gay individual who had been living with his male partner for 10 years, and had worked as a nurse with disabled children and adults. In *Re E (Adoption: Freeing Order)*, [1995] 1 Family Law Reports 382, a 12-year-old girl with behavioural problems, including tantrums and eating problems, had been placed with or introduced to four married heterosexual couples. All four couples had rejected her, and she had spent three years in a children's residential home. She was later successfully placed with an unmarried lesbian individual living on her own, who was an experienced social worker who had worked with children displaying behavioural problems. The Court of Appeal (of England and Wales) held that adoption was in the best interests of the girl, and that the girl's mother had unreasonably withheld her consent to an eventual adoption by the unmarried lesbian individual. And in *Re W (a minor) (adoption: homosexual adopter)*, [1997] 3 All England Reports 620, a girl who had had "far too many placements" was placed with a "family ... compris[ing] two women living together in a lesbian relationship ... for ten years" (p. 621). One of the women planned to adopt her as an unmarried individual. The High Court, Family Division, concluded (at p. 627):

"that the [Adoption Act 1976 in England and Wales] permits an adoption application to be made by a single applicant, whether he or she at that time lives alone, or cohabits in a heterosexual, homosexual or even an asexual relationship with another person who it is proposed should fulfil a quasi-parental role towards the child. **Any other conclusion would be both illogical, arbitrary and inappropriately discriminatory** in a context where the court's duty is to give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood." (Emphasis added.)

It might be argued that these adoptions in the United Kingdom are exceptional, and that in most of the (at least 25, see Appendix II) Council of Europe countries where unmarried individuals are permitted to adopt children, placements of specific children with unmarried individuals known by the authorities to be lesbian or gay are currently rare in practice or even unprecedented. However, the absence in these

countries (to the knowledge of ILGA-Europe, and with the sole exception of France) of any express provision of legislation, or any decision of a final appellate court, absolutely excluding lesbian and gay persons from the possibility of adopting as unmarried individuals, permits each case to be considered on its merits. And it permits the practical (as opposed to theoretical) access of lesbian and gay persons to individual adoption to evolve with increasing understanding in Council of Europe countries of the need for more adoptive parents, and of the parenting skills that lesbian and gay persons have to offer. Such an evolution, rather than legislation or case law imposing absolute exclusions, would be in the best interests of children and would, at least partially, respect the human rights of lesbian and gay persons to be free from sexual orientation discrimination, under Article 14 taken with Article 8 of the Convention.

It might also be argued that, in the absence of an absolute exclusion imposed by legislation or case law, most children placed with unmarried lesbian or gay individuals are currently likely to be those who are "hard-to-place", because of their age or special needs, as the United Kingdom cases illustrate. However, it is not relevant that adoptions by lesbian and gay individuals in Council of Europe countries might usually be of "hard-to-place" children (or that obstacles in international law or the policies of the child's country of origin make an international adoption of a newborn baby difficult). It is not necessary in this case for Mr. Fretté to claim that he has a Convention right to an *equal chance* of being chosen, without regard to his sexual orientation or marital status, at the time that a specific child is placed for adoption, e.g., that he must have the same chance as a married heterosexual couple or an unmarried heterosexual individual to adopt a newborn baby without apparent disabilities or special needs, whether from France or a developing country. His claim is instead that he has at least a Convention right to *some chance*, even if it might in practice be limited to children who are not wanted by most prospective adoptive parents, or (if international law and the child's country of origin permit) to an international adoption. Instead, the case law of the *Conseil d'État*, by making it impossible for him to be granted an "approval as eligible" to adopt, regardless of his personal qualities, means that he has *no chance* ever in any circumstances of adopting any child.

Whether the Court adopts a standard of "very weighty reasons" (as in *Abdulaziz, supra*), or requires "particularly convincing and weighty reasons" (as in

Lustig-Prean, supra, para. 87, and *Smith, supra*, para. 94), or finds that the *Conseil d'État* "a opéré une distinction dictée par des considérations tenant à l'orientation sexuelle du requérant, distinction qu'on ne saurait tolérer d'après la Convention" (as in *Salgueiro*, para. 36), ILGA-Europe respectfully submits that the Court should, in view of the virtual absence of similar legislation or case law in the Council of Europe countries (as well as in Canada and the United States), and the absence of any scientific evidence of psychological harm, hold that France's absolute exclusion of lesbian and gay persons from the possibility of adopting a child as unmarried individuals is grossly disproportionate and cannot be justified under Article 14. Mr. Fretté's case is essentially the same as the case of *Salgueiro da Silva Mouta v. Portugal, supra*. Just as the Court held that the Convention does not permit Mr. Salgueiro da Silva Mouta's sexual orientation to be the determining factor in taking custody of his daughter away from him, the Court should hold that the Convention does not permit Mr. Fretté's sexual orientation to be the determining factor in denying him any possibility of adopting any child as an unmarried individual.

Conclusions

ILGA-Europe respectfully submits that the Court should:

- (1) declare the application admissible under Article 14 taken together with Article 8 ("family life" and "private life"); and
- (2) subsequently find that the applicant has suffered discrimination on the ground of his sexual orientation, and therefore that there has been a violation of Article 14 taken together with Article 8 ("family life" and "private life").

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APPENDIX I:

**INTERNATIONAL TREATIES,
NATIONAL CONSTITUTIONS, AND NATIONAL LEGISLATION
PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION⁶
(OR AUTHORISING SUCH A PROHIBITION)**

A. COUNCIL OF EUROPE MEMBER STATES

1. INTERNATIONAL TREATIES

European Union

Treaty establishing the European Community, Rome, 25 March 1957, Article 13 (inserted as Article 6a by Article 2(7) of the Treaty of Amsterdam, 2 October 1997, and renumbered as Article 13 by Article 12(1) and the Annex of the Treaty of Amsterdam) ("sexual orientation") (in force on 1 May 1999)

2. NATIONAL OR STATE CONSTITUTIONS

Germany

Berlin - Constitution, 1995, Article 10(2) ("*sexuelle Identität*")

Brandenburg - Constitution, 1992, Article 12(2) ("*sexuelle Identität*")

Thuringia - Constitution, 1993, Article 2(3) ("*sexuelle Orientierung*")

Switzerland - Federal Constitution, adopted on 18 April 1999, Article 8(2) ("*Lebensform*", "*mode de vie*", "*modo de vita*", or "way of life")

3. NATIONAL OR STATE LEGISLATION

Denmark - Law of 9 June 1971, nr. 289, as amended by Law of 3 June 1987, nr. 357; extended to private employment by Law of 12 June 1996, nr. 459 ("*seksuelle orientering*" added in 1987)

Finland - Penal Code (as amended by Law 21.4.1995/578), c. 11, para. 9, c. 47, para. 3 ("*sukupuolinen suuntautuminen*" or "sexual orientation")

France - Nouveau Code pénal, arts. 225-1, 225-2, 226-19, 432-7; Code du travail, arts. L. 122-35, L. 122-45 (originally added by Loi No. 85-772, 25 July 1985, Loi No. 86-76, 17 January 1986) ("*moeurs*" or "morals, manners, customs, ways")

Germany

⁶ Or a similar or broader ground which is intended to cover sexual orientation (or same-sex sexual orientation). This Appendix is an updated version of Appendix II in Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press, paperback edition, 1997), at x-xi, 265-267. Sexual orientation or a similar or broader ground was added by the later amending law, where more than one is listed, unless otherwise indicated.

Saxony-Anhalt - Gesetz zum Abbau von Benachteiligungen von Lesben und Schwulen (Law on Reducing Discrimination Against Lesbians and Gay Men), 22 Dec. 1997 (public sector only) ("*sexuelle Identität*")

Iceland - General Penal Code, No. 19/1940, s. 180, as amended by Act No. 135/1996, s. 1, and Act No. 82/1998, s. 91 ("sexual orientation" added in 1996)

Ireland - Unfair Dismissals Act, 1977, No. 10, s. 6(2)(e), as amended by Unfair Dismissals (Amendment) Act, 1993, No. 22, s. 5(a); extended to other aspects of employment by Employment Equality Act, 1998, No. 21, s. 6(2)(d) ("sexual orientation" added in 1993)

Luxembourg - Code pénal, arts. 454-457, added by Law of 19 July 1997 ("*orientation sexuelle*" and "*moeurs*")

Netherlands - Penal Code, arts. 137f, 429 *quater* (inserted by Law of 14 Nov. 1991, Staatsblad 1991, nr. 623); General Equal Treatment Act, arts. 1, 5-7 (Law of 2 March 1994, Staatsblad 1994, nr. 230) ("*hetero- of homoseksuele gerichtheid*" or "hetero- or homosexual orientation")

Norway - Penal Code, para. 349a, Law of 8 May 1981, nr. 14 ("*homofile legning, leveform eller orientering*" or "homosexual inclination, lifestyle or orientation")

Slovenia - Penal Code (1 Jan. 1995), art. 141; Law About Work Relations (in force 24 Oct. 1998), art. 6 ("*spolni usmerjenosti*" or "sexual orientation" added in 1995)

Spain - Penal Code, Organic Law of 23 Nov. 1995, No. 10/1995, arts. 314, 511-12 (see also arts. 22(4), 510, 515(5)) ("*orientación sexual*")

Sweden - Criminal Code, c. 16, para. 9, Law of 4 June 1987, SFS 1987:610 ("*homosexuell läggning*" or "homosexual inclination"); extended to employment by Law of 11 March 1999, SFS 1999:133 ("*sexuell läggning*" or "sexual inclination")

B. OTHER DEMOCRATIC SOCIETIES

1. NATIONAL OR STATE CONSTITUTIONS

Brazil

Mato Grosso - Constitution, 1989, Article 10.III ("*orientação sexual*")

Sergipe - Constitution, 1989, Article 3.II ("*orientação sexual*")

Ecuador - Constitution, 1998, Article 23(3) ("*orientación sexual*")

Fiji Islands - Constitution Amendment Act 1997, s. 38(2)(a) ("sexual orientation")

South Africa - Constitution of the Republic of South Africa Act, No. 200 of 1993, Section 8(2) (transitional Constitution) ("sexual orientation")
 - Constitution of the Republic of South Africa, 8 May 1996 (as amended on 11 Oct. 1996), Sections 9(3), 9(4) (final Constitution) ("sexual orientation")

2. NATIONAL, STATE, PROVINCIAL, TERRITORIAL OR LOCAL LEGISLATION

Australia

Australian Capital Territory - Discrimination Act 1991, No. 81, s. 7(1)(b) ("sexuality")
 New South Wales - Anti-Discrimination Act 1977, No. 48, as amended by Anti-Discrimination (Amendment) Act 1982, No. 142, s. 5, Schedule 2, Anti-Discrimination (Amendment) Act 1994, No. 28, s. 3, Schedule 4 ("homosexuality" added in 1982)
 Northern Territory - Anti-Discrimination Act 1992, No. 80, s. 19(1)(c) ("sexuality")
 Queensland - Anti-Discrimination Act 1991, No. 85, s. 7(1)(l) ("lawful sexual activity")
 South Australia - Equal Opportunity Act, 1984, No. 95, ss. 5(1), 29(3), as amended by Equal Opportunity Amendment Act, 1989, No. 68, Schedule ("sexuality" included in 1984)
 Tasmania - Anti-Discrimination Act 1998, No. 46, s. 16 ("sexual orientation" and "lawful sexual activity")
 Victoria - Equal Opportunity Act 1995, No. 42, s. 6(d) ("lawful sexual activity")

Canada

Federal Level - Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 2, 3(1), as amended by S.C. 1996, c. 14 ("sexual orientation")
 British Columbia - Human Rights Act, S.B.C. 1984, c. 22, ss. 3-6, 8-9, as amended by S.B.C. 1992, c. 43, ss. 2-7 ("sexual orientation")
 Manitoba - Human Rights Code, S.M. 1987-88, c. 45, s. 9(2)(h) ("sexual orientation")
 New Brunswick - Human Rights Act, R.S.N.B. 1973, c. H-11, as amended by S.N.B. 1992, c. 30, ss. 1-8 ("sexual orientation")
 Newfoundland - Human Rights Code, R.S.N. 1990, c. H-14, ss. 6-9, 12, as amended by S.N. 1997, c. 18, s. 2 ("sexual orientation")
 Nova Scotia - Human Rights Act, R.S.N.S. 1989, c. 214, s. 5(1)(n), as amended by S.N.S. 1991, c. 12, s. 1 ("sexual orientation")
 Ontario - Human Rights Code, R.S.O. 1990, c. H.19, ss. 1-3, 5-6 ("sexual orientation" originally added by S.O. 1986, c. 64, s. 18)
 Prince Edward Island - Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d), as amended by S.P.E.I. 1998, c. 92, s.1 ("sexual orientation")
 Québec - *Charte des droits et libertés de la personne*, R.S.Q. c. C-12, s. 10 ("*orientation sexuelle*" originally added by S.Q. 1977, c. 6, s. 1)
 Saskatchewan - Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, ss. 9-19, 25, 47(1), as amended by S.S. 1993, c. 61, ss. 4-15, 18 ("sexual orientation")
 Yukon Territory - Human Rights Act, S.Y.T. 1987, c. 3, ss. 6, 34 ("sexual orientation")

Israel - Equal Opportunities in Employment Act 1988, as amended by Book of Laws, No. 1377 of 2 Jan. 1992 ("*neti'ya minit*" or "sexual orientation")

Mexico

Mexico City - Penal Code, art. 281 (in force on 1 Oct. 1999) ("*orientación sexual*")

Namibia - Labour Act, 1992, No. 6, s. 107 ("sexual orientation")

New Zealand - Human Rights Act 1993, No. 82, s. 21(1)(m); New Zealand Bill of Rights Act 1990, No. 109, s. 19, as amended by Human Rights Act 1993, No. 82, ss. 21(1)(m), 145, Second Schedule ("sexual orientation")

South Africa - Labour Relations Act, 1995, No. 66, s. 187(1)(f) (dismissal); extended to other aspects of employment by Employment Equity Act, 1998, No. 55, s. 6 ("sexual orientation" added in 1995)

United States

California - Fair Employment and Housing Act, Government Code, ss. 12920-12921 ("sexual orientation" originally added to Labor Code in 1992)

Connecticut - Conn. Gen. Stat. ss. 4a-60a, 45a-726a, 46a-81b to 46a-81r ("sexual orientation" added in 1991)

District of Columbia - D.C. Code Ann. ss. 1-2501 to 1-2533 ("sexual orientation" originally added in 1973)

Hawaii - Haw. Rev. Stat. ss. 378-1, 378-2 ("sexual orientation" added in 1991)

Massachusetts - Mass. Gen. Laws Ann. ch. 151B, ss. 3, 4 ("sexual orientation" added in 1989)

Minnesota - Minn. Stat. Ann. ss. 363.01(45), 363.03 ("sexual orientation" added in 1993)

Nevada - Nev. Rev. Stat. (e.g.) s. 613.330 ("sexual orientation" added in 1999)

New Hampshire - N.H. Rev. Stat. Ann. (e.g.) ss. 21:49, 354-A:7, 354-A:10, 354-A:17 ("sexual orientation" added in 1997)

New Jersey - N.J. Rev. Stat. ss. 10:5-5.hh.-kk., 10:5-12 ("affectional or sexual orientation" added in 1991)

Rhode Island - R.I. Gen. Laws (e.g.) ss. 11-24-2 to 11-24-2.2, 28-5-2 to 28-5-7.3, 28-5-41, 34-37-1 to 34-37-5.4 ("sexual orientation" added in 1995)

Vermont - Vt. Stat. Ann. tit. 1, s. 143; tit. 21, s.495 ("sexual orientation" added in 1991)

Wisconsin - Wis. Stat. Ann. ss. 101.22, 111.31 to 111.36 ("sexual orientation" added in 1982)

Major United States cities with prohibitions of sexual orientation discrimination extending to private sector employment include Baltimore, Boston, Chicago, Cleveland, Denver, Detroit, Kansas City, Los Angeles, Minneapolis, New Orleans, New York, Philadelphia, Phoenix, Pittsburgh, Portland, Saint Louis, San Diego, San Francisco, Seattle, and Tampa. See Wayne van der Meide, *Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual and Transgendered People in the United States* (Policy Institute of the National Gay and Lesbian Task Force, Washington, DC, January 2000), <http://www.nglrf.org/library/index.cfm>.

APPENDIX II:
COUNCIL OF EUROPE MEMBER STATES:
ACCESS OF LESBIAN AND GAY PERSONS
TO ADOPTION AS UNMARRIED INDIVIDUALS

| <p>(a) Adoption by unmarried individuals and no absolute exclusion of lesbian and gay persons by legislation or a decision of a final appellate court</p> <p>(26 member states)</p> | <p>Either (a) or (b) but not (c) (insufficient information to determine whether (a) or (b))</p> <p>(12 member states)</p> | <p>(b) No adoption by unmarried individuals, whether heterosexual, lesbian or gay</p> <p>(2 member states)</p> | <p>(c) Adoption by unmarried individuals, but a decision of a final appellate court absolutely excludes lesbian and gay individuals</p> <p>(1 member state)</p> |
|---|--|---|--|
| <p>Andorra Austria Belgium Bulgaria Czech Republic Denmark Estonia Finland Germany Greece Hungary Iceland Italy Latvia Luxembourg Netherlands Norway Poland Portugal Romania Slovenia Spain Sweden Switzerland Ukraine United Kingdom</p> | <p>Albania Croatia Georgia Liechtenstein Lithuania Macedonia (FYR) Malta Moldova Russia San Marino Slovakia Turkey</p> | <p>Cyprus Ireland</p> | <p>France</p> |