European Court of Human Rights, First Section

WRITTEN COMMENTS OF FIDH, ICJ, AIRE CENTRE & ILGA-EUROPE
Submitted on 20 June 2011

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (Fédération Internationale des ligues des Droits de l'Homme), ICJ (International Commission of Jurists), AIRE Centre (Advice on Individual Rights in Europe), and ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association). For their interest and expertise, see "Application for leave to submit written comments" (3 May 2011), granted 11 May 2011 (Rule 44(2), Rules of Court).

Introduction

2. Since 1989, national legislatures and courts in Council of Europe member states and other democratic societies have been accepting, at an ever faster rate, that lesbian women and gay men have the same human capacity as heterosexual women and men to fall in love with another person, establish a long-term emotional and sexual relationship, set up a joint home and, if they wish, raise children with their partner. These national institutions have understood that same-sex couples therefore have the same emotional and practical needs as different-sex couples to have their relationships recognised by the law, and that same-sex couples can justly claim access to the same rights and obligations as different-sex couples.

3. The first judgment of the European Court of Human Rights to reflect these legal and social developments was Karner v. Austria (24 July 2003). The Court held that unmarried same-sex couples must generally be granted the same rights and obligations as unmarried different-sex couples. The Court has applied the principle of Karner in Kozak v. Poland (2 March 2010), P.B. & J.S. v. Austria (22 July 2010), and J.M. v. UK (28 Sept. 2010). In Karner (para. 33), the Court did not find it necessary to decide whether a same-sex couple enjoys “family life” under Article 8. The Court took this step in Schalk & Kopf v. Austria (24 June 2010). The First Section concluded unanimously (there was no dissent on this point) that:

“94. ... the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would.”

The two applications against Greece raise the question whether, under Karner, as reinforced by Schalk & Kopf, a Council of Europe member state may pass a law creating a new registration system that provides an alternative to marriage for unmarried couples, but is restricted to unmarried different-sex couples and therefore excludes unmarried same-sex couples.
I. The principle of Karner is strongly supported by comparative case law

4. In Karner, the Court found a violation of Article 14 combined with Article 8 (respect for home), because a law on succession to a tenancy had been interpreted as including a surviving unmarried different-sex partner, but not a surviving unmarried same-sex partner. The Court reasoned as follows (emphasis added):

"37. ... Just like differences [in treatment] based on sex, differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification ...

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to member States is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of Section 14 of the Rent Act in order to achieve that aim. The Court cannot see that the Government has advanced any arguments that would allow of such a conclusion."

5. The Court's conclusion in Karner, that there is direct discrimination based on sexual orientation when a right granted to unmarried different-sex couples is denied to unmarried same-sex couples, is consistent with the conclusions of several national courts: the Constitutional Court of Hungary in 1995,1 the Supreme Court of Canada in 1999,2 the United Kingdom's House of Lords3 and the Supreme Court of Montana in 2004,4 and the Constitutional Court of Colombia in 2007.5 Most recently, on 5 May 2011, Brazil's highest court for constitutional matters, the Supremo Tribunal Federal, decided that, to avoid discrimination based on "sexual preference" that would violate the federal Constitution, the federal Civil Code must be interpreted so as to permit "o reconhecimento da união entre pessoas do mesmo sexo como entidade familiar". See http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=178931. The decision appears to require that the widespread recognition in Brazilian law, of unmarried different-sex couples living in an "união estável" (stable union), must be extended to unmarried same-sex couples living in an "união estável".


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5 Constitutional Court of Colombia, Sentencias (Judgments), http://www.corteconstitucional.gov.co (Relatoría, Providencias): C-075/07, 7 February 2007. See also C-811/07, 3 October 2007; T-856/07, 12 October 2007; C-336/08, 16 April 2008; C-029/09, 28 January 2009.
II. Council of Europe member states and other democratic societies have always respected the principle of *Karner* when creating new registration systems

7. Since the Danish registered partnership law of 1989, every law creating an alternative registration system for unmarried couples, in the Council of Europe member states, or in other democratic societies (such as Canada, the United States, South Africa, Australia and New Zealand), has been either: (1) limited to unmarried same-sex couples, because unmarried different-sex couples are legally able to marry (the Danish model); or (2) open to all unmarried couples, different-sex and same-sex, regardless of sexual orientation (the French model). Prior to the 2008 law in Greece, there was (to the knowledge of the Third-Party Interveners) no precedent anywhere in the world for a new registration system that provides an alternative to marriage for unmarried couples, but is restricted to unmarried different-sex couples and therefore excludes unmarried same-sex couples. The consensus among Council of Europe member states and other democratic societies is clearly that, if a legislature decides voluntarily to create a new registration system, it must be open (at least) to unmarried same-sex couples, because they are legally unable to marry (unlike unmarried different-sex couples in most countries).

8. The following Appendix lists the legislation of 22 Council of Europe member states that allow same-sex couples to register their relationships (in 21 cases), or provide limited recognition of cohabiting same-sex couples (in Croatia). It also lists similar legislation in other democratic societies.
APPENDIX – NATIONAL (FEDERAL, REGIONAL, LOCAL) LEGISLATION RECOGNISING SAME-SEX COUPLES

Council of Europe Member States


Austria - Registered Partnership Act (Eingetragene Partnerschaft-Gesetz), Federal Law Gazette (Bundesgesetzblatt) vol. I, no. 135/2009


Croatia - Law on Same-Sex Civil Unions (Zakon o istospolnim zajednicama), passed by Parliament on 14 July 2003, signed by President on 16 July 2003 ("partneri" or "partnerice"); "partners")

Czech Republic - Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů (Act no. 115/2006 Coll. on Registered Partnership and on the Change of Certain Related Acts)

Denmark - Law on Registered Partnership (Lov om registreret partnerskab), 7 June 1989, nr. 372 ("registrerede partnere"); "registered partners")

Finland - Law 9.11.2001/950, Act on Registered Partnerships (Laki rekisteröidystä parisuhteista) ("parisuhteen osapuolet"); "registered partners")

France - Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité, ("partenaires"; "partners"); also inserting a new Art. 515-8 into the Code civil: "Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple."

Germany


Iceland – Law on Confirmed Cohabitation (Lög um staðfesta samvist), 12 June 1996, nr. 87 ("parties to a confirmed cohabitation"); Lög um breytingar á hjúskaparlögum og fleiri lögum og um brotchfall laga um staðfesta samvist (ein hjúskaparlög), 22 June 2010, nr. 65 ("spouses"), http://www.althingi.is/altext/138/s/1302.html

Ireland - Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, No. 24 of 2010 ("civil partners")

Liechtenstein - Law on the Registered Partnership of Same-Sex Couples (Gesetzes über die eingetragene Partnerschaft gleichgeschlechtlicher Paare) (approved by legislature on 17 March 2011; approved by 68% of voters in a referendum on 17 and 19 June 2011)

Luxembourg - Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats, Mémorial A, nr. 143, 6 August 2004 ("partenaires"; "partners")


Slovenia - Zakon o registraciji istospolne partnerske skupnosti (ZRIPS) Ur.l. RS, št. 65/2005 (Registered Partnership Law)
Spain

Spanish State – see, e.g., Law on Urban Leasing (Ley de Arrendamientos Urbanos) of 24 Nov. 1994, Arts. 12, 16, 24, disposición transitoria segunda B(7): housing rights granted to a person cohabiting "in a permanent way in an emotional relationship analogous to that of spouses, without regard to its sexual orientation [con independencia de su orientación sexual]; Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (Law 13/2005, of 1 July, providing for the amendment of the Civil Code with regard to the right to contract marriage), Boletín Oficial del Estado no. 157, 2 July 2005, pp. 23632-23634 (in force 3 July 2005)

Autonomous Communities (Comunidades Autónomas):

Andalucía - Ley de parejas de hecho, (5 Dec. 2002) 422 Boletín Oficial del Parlamento de Andalucía 23987 ("parejas de hecho"; "de facto couples")

Aragón - Ley relativa a parejas estables no casadas, (26 March 1999) 255 Boletín Oficial de las Cortes de Aragón ("parejas estables no casadas"; "unmarried stable couples")

Asturias - Ley 4/2002, de 23 de mayo, de Parejas Estables ("parejas estables"; "stable couples")

Balearic Islands - Llei 18/2001 de 19 de decembre, de parelles estables ("parelles estables"; "stable couples")

Basque Country - Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho, (9 May 2002) 92 Boletín Oficial del Parlamento Vasco 9760 ("parejas de hecho"; "de facto couples")

Canary Islands - Ley 5/2003, de 6 de marzo, para la regulación de las parejas de hecho, (13 March 2003, V Legislatura) 150 Boletín Oficial del Parlamento de Canarias 2 ("parejas de hecho"; "de facto couples")

Cantabria - Ley 1/2005, de 16 de mayo, de parejas de hecho, (24 May 2005) 98 Boletín Oficial de Cantabria ("parejas de hecho"; "de facto couples")


Extremadura - Ley de Parejas de Hecho, (26 March 2003) 377 Boletín Oficial de la Asamblea de Extremadura 13 ("parejas de hecho"; "de facto couples")

Madrid - Ley de Uniones de Hecho de la Comunidad de Madrid, (28 Dec. 2001) 134 Boletín Oficial de la Asamblea de Madrid (V Legislatura) 160003 ("uniones de hecho"; de facto unions)

Navarra - Ley Foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables, [7 July 2000] 82 Boletín Oficial de Navarra ("parejas estables"; "stable couples")

Valencia - Ley por la que se regulan las uniones de hecho, (9 April 2001) 93 Boletín Oficial de las Cortes Valencianas 12404 ("uniones de hecho"; "de facto unions")

Switzerland


United Kingdom - Civil Partnership Act 2004 ("civil partners")

Other Democratic Societies

Argentina


Buenos Aires (Autonomous City) - Ley No. 1.004, Reconózcanse las Uniones Civiles, 12 December 2002 ("members of the civil union")

Australia


States and Territories:


Northern Territory - Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003, Act. No. 1 of 2004 ("de facto partners")

Queensland - eg, Property Law Amendment Act 1999 ("de facto spouses")
South Australia - Statutes Amendment (Domestic Partners) Act 2006 ("domestic partners")
Tasmania - Relationships Act 2003, Relationships (Consequential Amendments) Act 2003 ("partners" include two persons in a "significant relationship", ie, "who have a relationship as a couple"; they may register a "deed of relationship")
Victoria – Statute Law Amendment (Relationships) Act 2001 ("domestic partners");
Relationships Act 2008 ("persons in a registered relationship")
Western Australia - Acts Amendment (Lesbian and Gay Law Reform) Act 2002 ("de facto partners")

Canada

Federal Statutes:
Federal Statutes include:
- Modernization of Benefits and Obligations Act, Statutes of Canada 2000, chapter (c.) 12 ("common-law partners", "conjoints de fait");
- Civil Marriage Act, Statutes of Canada 2005, c. 33 ("spouses", "époux")

Provinces and Territories:

Alberta - Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5 ("adult interdependent partners")
New Brunswick - eg, Family Services Act, N.B. Acts, c. F-2.2, section (s.) 112(3), as amended in 2000 (spousal support obligations of unmarried persons living in a family relationship)
Newfoundland - Same Sex Amendment Act, S.N. 2001, c. 22 ("cohabiting partners")
Northwest Territories - Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1), as amended by S.N.W.T. 2002, c. 6 ("spouses")
Nunavut - eg, An Act to amend the Labour Standards Act, S. Nunavut 2003, c. 18 ("common-law partners")
Ontario - Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, S.O. 1999, c. 6 ("same-sex partners"); An Act to amend various statutes in respect of spousal relationships, S.O. 2005, c. 5 ("spouses")
Prince Edward Island - Family Law Act, R.S.P.E.I. 1988, c. F-2.1, s. 29(1), as amended by S.P.E.I. 2002, c. 7 ("common-law partners")
Québec - An Act to amend various legislative provisions concerning de facto spouses, S.Q. 1999, c. 14, 1st session, 36th legislature, Bill 32 ("conjoints de fait", "de facto spouses"); An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c. 6, 2nd session, 36th legislature, Bill 84 ("conjoints en union civile" or "conjoints unis civilement" or "civil union spouses"; capacity to become "conjoints mariés" or "époux" or "married spouses" is governed by the 2005 federal law)
Saskatchewan - Miscellaneous Statutes (Domestic Relations) Amendment Acts, 2001, S.S. 2001, cc. 50-51 ("common-law partners", or persons "cohabiting as spouses" or "cohabiting in a spousal relationship")

Yukon Territory – eg, Family Property and Support Act, R.S.Y. 1986 (Vol. 2), c. 63, ss. 1, 30, 31, as amended by S.Y. 1998, c. 8, s. 10 ("spouses")

Mexico

Federal District (Mexico City) - Decreto de Ley de Sociedad de Convivencia para el Distrito Federal, Gaceta Oficial, 16 November 2006 ("convivientes"; "cohabitants"); Código Civil para el Distrito Federal, Article 146 ("spouses") (as amended by a law approved by the Asamblea Legislativa on 21 Dec. 2009 and published on 29 Dec. 2009)

Coahuila - Decreto No. 209, 11 Jan. 2007, adding the Pacto Civil de Solidaridad to the Civil Code ("compañeros civiles"; "civil companions")

New Zealand - Civil Union Act 2004, Relationships (Statutory References) Act 2004 ("parties to a civil union")

South Africa - Civil Union Act, No. 17 of 2006 (same-sex or different-sex "civil union partners", who include "spouses in a marriage" and "partners in a civil partnership")

United States (specific citations can be provided if the ECtHR would find them helpful)

- Colorado - "designated beneficiaries" - 2009
- Connecticut - "parties to a civil union" - 2005 ("spouses" from 2008)
- Delaware - "parties to a civil union" - 2011
- District of Columbia - "domestic partners" - 1992; "spouses" - 2010
- Hawaii - "reciprocal beneficiaries"- 1997; "partners in a civil union" - 2011
- Illinois - "parties to a civil union" - 2011
- Iowa - "spouses" - 2009
- Maine - "domestic partners" - 2004
- Massachusetts - "spouses" - 2004
- Nevada - "domestic partners" - 2009
- New Hampshire - "spouses in a civil union" - 2007 ("spouses" from 2010)
- New Jersey - "civil union partners" - 2006
- Oregon - "domestic partners" - 2007
- Vermont - "parties to a civil union" - 2000 ("spouses" from 2009)
- Washington - "domestic partners" - 2007, 2009
- Wisconsin - "domestic partners" - 2009

Uruguay - Ley No. 18.246 de Unión Concubinaria, published in Diario Oficial, 10 Jan. 2008, No. 27402 (same-sex or different-sex "concubinos")