

GRAND CHAMBER OF THE  
EUROPEAN COURT OF HUMAN RIGHTS  
APPLICATION NO. 19010/07

**X and OTHERS**

Applicants

v.

**AUSTRIA**

Respondent

**JOINT WRITTEN OBSERVATIONS  
OF THIRD PARTY INTERVENERS**

- **Alliance Defending Freedom**
- **Fédération Pro Europa Christiana**
- **Österreichische Gesellschaft zum Schutz von Tradition,  
Familie und Privateigentum**
- **Freunde kinderreicher Familien in Österreich**

**filed on**

**24 August 2012**

## Introduction

1. Established in 1994, Alliance Defending Freedom (ADF) has a full time litigation team of over 40 lawyers and 2100 allied attorneys, all devoted to litigation surrounding the issue of the family. ADF has argued, co-counseled or intervened in over 20 cases before this Court. ADF has Special Consultative Status with the Economic and Social Council of the United Nations and full accreditation with the Fundamental Rights Agency of the European Union, European Parliament and Organization for Security and Co-Operation in Europe. Alliance Defending Freedom's American offices have been centrally involved in virtually all of the significant litigation dealing with the issues involved in the instant application in the United States at all levels of judicial review.
2. Fédération Pro Europa Christiana is a federated organization based in Brussels with membership organizations throughout Europe including Austria, France, Germany, Italy and Portugal. Organizationally, Fédération Pro Europa Christiana seeks: (a) to promote, within the specific framework of the laity, the message of the Gospel and its morals, both individual and social, as well as the teachings of the Magisterium of the Catholic Church; (b) to promote and develop the information and formation of European citizens about the moral and social values of Christianity; and (c) to contribute to the formation of the youth and to close ties among young people from different cultures by passing on to them the Christian heritage and the European cultural patrimony. The issues present in the instant application are of central organizational importance to the Fédération Pro Europa Christiana.
3. Österreichische Gesellschaft zum Schutz von Tradition, Familie und Privateigentum (TFP) is a civic organization with the aim of protecting the basis of Christian civilization. It belongs to a consortium of 15 like-minded organizations in Australia, Europe, North and South America. Among its central organizational goals, TFP seeks to defend the natural and traditional family on the basis of cultural, historic, religious and moral values. TFP publishes, holds seminars, takes part in radio and television broadcasts, petitions government and holds exchange programmes with similarly minded organizations.
4. Established in 2004, Freunde kinderreicher Familien in Österreich (KinderReich) supports large Families in Austria. KinderReich wants to encourage families to have more children. KinderReich's goal is to strengthen the understanding of the value of large families for the society and politics. Organizationally, KinderReich seeks to promote more joy and optimism through investment in the future with a large family.

5. The brief addresses two basic issues in turn: (1) this Court's governing jurisprudence as it applies to the adoption of minor children, and (2) an established body of social evidence which demonstrates that children do best when they are raised by their married, biological mother and father.

### **Jurisprudence of the Court**

6. It is a settled jurisprudence of the Court that Article 8 of the European Convention on Human Rights (the Convention) does not guarantee the right to adopt as such.<sup>1</sup> Moreover, the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family.<sup>2</sup>
7. Nevertheless, the Court has found Article 14 taken in conjunction with Article 8 applicable in cases of alleged discrimination in the adoption procedure. The Court came to a conclusion that adoption, although not being a substantive right under Article 8, falls within the ambit of the Article's protection of private life and thus can trigger a challenge based on Article 14 taken in conjunction with Article 8 of the Convention.<sup>3</sup>
8. On several occasions was the Court confronted with cases of alleged Article 14 in conjunction with Article 8 violation in connection to adoption procedure sought by individuals who practice homosexual behavior. These cases can be divided into two distinct categories: (1) individual adoptions – a single person wishing to adopt a child in a member state where such adoptions are authorized, and (2) adoptions by a second parent – one of the partners in the same-sex couple wishing to adopt the biological child of his/hers partner.
9. The first situation arose in the cases of *Fretté v. France* and in the case of *E.B. v. France*.<sup>4</sup> In the *Fretté* case the Court accepted with no hesitation that the denial to grant adoption authorization to a man who self identifies as being homosexual has pursued a legitimate aim – namely the protection of the health and right of children who could be

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<sup>1</sup> *Di Lazaro v. Italy*, Commission decision of 10 July 1997, no. 31924/96.

<sup>2</sup> ECHR, *Marckx v. Belgium*, judgment of 13 June 1979, § 31.

<sup>3</sup> ECHR, *Fretté v. France*, judgment of 26 February 2002, §§ 27-33.

<sup>4</sup> ECHR, judgment of 22 January 2008.

involved in an adoption procedure.<sup>5</sup> In evaluating the second condition – the existence of justification for the difference of treatment – the Court put a major emphasis on the margin of appreciation that member states have in this area of legal regulation. The Court reiterated its notion that one of the relevant factors in assessing the scope of the margin of appreciation is the existence or non-existence of common ground between the laws of the member states. Here, the Court found it indisputable that there are no uniform principles among the member states on the issue of allowing an adoption by a single individual who self-identifies as being homosexual. Opinions on these controversial social issues reasonably differ in a democratic society. Therefore the Court concluded that member states enjoy a wide margin of appreciation on these matters “[b]y reason of their direct and continuous contact with the vital forces of their countries”.<sup>6</sup> The Court rightly recognized that “[s]ince the delicate issues raised in the case ... touch on areas where there is little common ground amongst the member states of the Council of Europe ... the wide margin of appreciation must be left to the authorities of each State.”<sup>7</sup>

10. The other major factor in the Court’s decision – beyond a wide margin of appreciation – has been the need to protect children’s best interests. Adoption means “providing a child with a family, not a family with a child” and thus the interests of the child have to be paramount. The Court also took a precautionary principle into consideration – citing a divided scientific community on the subject of possible consequences of a child being adopted by one or more homosexual parents.<sup>8</sup>

11. A similar set of facts came before the Grand Chamber of the Court in *E.B. v. France*. Here, the applicant – a woman who practices homosexual behavior– was denied adoption authorization on two grounds: (1) lack of paternal referent, and (2) partner of the applicant being uncommitted to the adoption. The Court found the first reason for denial of adoption authorization as illegitimate, because “it was her status as a single person that was relied on as a ground for refusing the applicant authorization to adopt, whereas the law makes express provision for the right of single persons to apply for authorization to

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<sup>5</sup> ECHR, *Fretté v. France*, *op. cit.*, § 38.

<sup>6</sup> *Id.*, § 41.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, § 42.

adopt.”<sup>9</sup> The *ratio decidendi* of the case rested on a presumption “that French law allows single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual.”<sup>10</sup> The domestic legal provisions and their application in the case were thus the deciding factors for the Grand Chamber’s decision.

12. The second category of cases – adoption by a second parent – came before the Court in a recent case of *Gas and Dubois v. France*.<sup>11</sup> This category of cases is very distinct – both in facts and in law – from the single parent scenario. The most important legal distinction is the wide margin of appreciation that member states have when regulating marriage and partnership issues.<sup>12</sup> In France, the Civil Code provides for sharing of parental responsibility in the adoption context only in the case of the adoption of the spouse’s child; spouses being persons united by the bonds of marriage. Because regulation of marital/partnership issues is in the domain of the member states, the Court had little difficulties to found “that it cannot be considered, in the matter of the adoption by the second parent, that the applicants are in a situation of legal status comparable to that of married couples.”<sup>13</sup>
13. The difference between the two types of cases has a solid base in the jurisprudence of the Court and in pure logic. It is one thing to say, that there is violation of Article 14 in conjunction with Article 8, if domestic law allows for adoption by single parents, but the practice of national authorities forecloses an adoption by a single parent who identifies as homosexual. It is quite different to attempt to rewrite domestic laws that provide for second parent adoption for heterosexual couples only. Member states of the Council of Europe are far from reaching a consensus on the definition of marriage/partnership. Only six out of forty-seven member states have redefined “marriage” to include same-sex couples. Thirteen other member states permit same-sex couples to register their relationship. In sum, there are nineteen member states in which same-sex couples either have the possibility to “marry” or to enter into a registered partnership. Although it is a

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<sup>9</sup> ECHR, *E.B. v. France*, *op. cit.*, § 86.

<sup>10</sup> *Id.*, § 94.

<sup>11</sup> ECHR, judgment of 15 March 2012.

<sup>12</sup> It is a settled jurisprudence of the Court that Article 12 of the Convention does not impose upon the member states the obligation to extend the right of marriage to same-sex couples. The last case to consider the matter was the case of *Schalk and Kopf v. Austria*, ECHR, judgment of 24 June 2010, §§ 49-64.

<sup>13</sup> ECHR, *Gas and Dubois v. France*, *op. cit.*, § 68.

large group of member states, it's not even a majority of member states, and very far from a European consensus on the matter. As the Court remarked in *Schalk and Kopf v. Austria* “[w]hen it comes to parental consequences, however, the possibilities for registered partners to undergo medically assisted insemination or to foster or adopt children vary greatly from one country to another.”<sup>14</sup>

14. As the Court has noted on several occasions, the member states follow a legitimate aim in regulating adoption procedures – namely the need to protect children’s best interests. It is therefore an absolutely prudent decision for the Government to prefer, as far as adoption is concerned, an environment which most closely resembles the biological family, that being a heterosexual union of one man and one woman.
15. The legitimacy of the Court is at its highest when the decision of the Court has a clear textual basis in the Convention. The member states respect the Court’s judgments because they are viewed as a result of genuine adjudication process, not as ideological decisions coming out from a dominantly political process. And although the evolutive interpretation seems to be the modern orthodoxy in constitutional adjudication, the Court has long recognized that it has its limits. As the Court held on numerous occasions, while the Convention must be interpreted in the light of present-day conditions, the Court cannot, by means of an evolutive interpretation, “derive from [it] a right that was not included therein at the outset”<sup>15</sup>. No reasonable argument can be made that the right for second parent adoption outside of a heterosexual union has been granted by the Convention when it was signed by the member states in 1950.

## **Social science**

16. Several submissions to this Court try to emphasize that there is no scientific evidence that children of parents who practice homosexual behavior are disadvantaged in any significant respect relative to children of heterosexual parents.<sup>16</sup> Yet some of the most recent sociological studies suggest caution in coming to definite conclusions.

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<sup>14</sup> ECHR, *Schalk and Kopf v. Austria*, *op. cit.*, § 33.

<sup>15</sup> ECHR, *Johnston and Others v. Ireland*, judgment of 18 December, § 53.

<sup>16</sup> See e.g. ECHR, *Fretté v. France*, *op. cit.*, § 35.

17. The widely circulated claim that parents engaged in same-sex relationships do just as well as other parents at raising children – a claim widely known as the “no differences” thesis – is not a settled science. Recent social research has shown that previous studies claiming the “no differences” thesis didn’t compare “a large, random, representative sample of lesbian or gay parents and their children with a large, random, representative sample of married parents and their children. The available data, which are drawn primarily from small convenience samples, are insufficient to support a strong generalized claim either way.”<sup>17</sup>

18. What seems to be well documented by social science research on the other hand is the assertion that:

*“Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents ... regardless of whether their resident parent remarries.”*<sup>18</sup>

19. This assertion has been confirmed by numerous analyses including a one conducted in the United States on a data set of 35,938 children and their parents, which found that *“regardless of economic and parental resources, the outcomes of adolescents (12-17 years old) in cohabitating families ... are worse ... than those ... in two-biological-parent families”*.<sup>19</sup>

20. Another study based on teacher-rating scale of performance concluded that *“children of married couples are more likely to do well at school in academic and social terms, than children of cohabitating and homosexual couples”*.<sup>20</sup>

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<sup>17</sup> L. Marks, Same-sex parenting and children’s outcomes: A closer examination of the American psychological association’s brief on lesbian and gay parenting, *Social Science Research*, Volume 41, Issue 4, July 2012, p. 748. In reviewing the studies claiming the “no differences” thesis Marks noted that 77% of them were based on small, non-representative, convenience samples of fewer than 100 participants. In another study Patterson reported that “[s]amples for which demographic information was reported have been described as predominantly Caucasian, well-educated, and middle to upper class.” See C.J. Patterson, Children of lesbian and gay parents. *Child Development* 63, p. 1029.

<sup>18</sup> S. McLanahan, G. Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps*. Harvard University Press, Cambridge, MA, p. 1.

<sup>19</sup> S.L. Brown, Family structure and child well-being: the significance of parental cohabitation. *Journal of Marriage and Family* 66, p. 364.

<sup>20</sup> S. Sarantakos, Children in three contexts: family, education, and social development. *Children Australia* 21, p. 24.

21. A unique empirical study concluded just a decade ago focused on long-term (post-18 years old) outcomes of children raised with parents who practices homosexual behavior. The study examined several outcomes of societal concern and used two heterosexual comparison samples (married parent sample and cohabitating parent sample). This study's conclusion regarding outcomes of parents who self-identified as homosexual reads, in part:

*“If we perceive deviance in a general sense, to include excessive drinking, drug use, truancy, sexual deviance, and criminal offenses, and if we rely on the statements made by adult children (over 18 years of age) ... [then] children of homosexual parents report deviance in higher proportions than children of (married or cohabitating) heterosexual couples.”*<sup>21</sup>

22. The importance of focusing not only on young children, but also on adolescents and young adults is strengthened by the findings of social science when comparing two-biological-parent families with cohabitating families. Although *“the outcomes of children (6-11 years old) in cohabitating families ... are worse ... than those of children in two-biological-parent-married families, much of this difference ... is economic ... In contrast, regardless of economic and parental resources, the outcomes of adolescents (12-17 years old) in cohabitating families ... are worse ... than those ... in two-biological-parent married families.”*<sup>22</sup> The conclusion of the social science being that in the case of cohabitating families and two-biological-parent families the differences in children's outcomes increase in significance as the children grow older. The likelihood of significant differences arising between children from same-sex and two-biological-parent families may also increase across time – not just into adolescence but into early and middle adulthood.<sup>23</sup>

23. Just a year ago, in 2011, a major study – New Family Structures Study (NFSS) – has been conducted by the University of Texas, which surveyed 2,988 young adults for the specific purpose of collecting more reliable data on children from various family

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<sup>21</sup> S. Sarantakos, *Same-Sex Couples*. Harvard Press, Sydney, p. 131. The study also notes areas of no significant heterosexual-homosexual differences, i.e. “physical and emotional well-being”, p. 130.

<sup>22</sup> S. Brown, *op. cit.*, p. 364.

<sup>23</sup> L. Marks, *op. cit.*, p. 745.

origins.<sup>24</sup> The NFSS has been acknowledged by critics to be “*better situated than virtually all previous studies to detect differences between these groups in the population.*”<sup>25</sup> The NFSS interviewed the children raised in same-sex couples after they have grown up and matured into young adults. This allowed the children to speak for themselves about their past experiences and to report on how they are doing at present.. Although the study does not claim to establish causality (more longitudinal studies would need to be conducted), the results of the research are robust. The study controlled for variables like age, gender, race, level of mother’s education, perceived household income while growing up, to help eliminate alternative explanations for a given outcome, making the causal link between parenting structure and children’s outcomes more likely when the results are statistically significant after controls.

24. The NFSS found that on the economic outcomes, the grown children raised by a female same-sex couple were almost four times more likely to be currently on public assistance than the grown children from two-biological-parent families. As young adults, they were also 3.5 times more likely to be unemployed than their counterparts from two-biological-parent families.<sup>26</sup>
25. As far as sexual victimization is concerned the children raised in female same-sex partnerships were forced to have sex against their will four times more than the children of two-biological-parent families. In percentages, 31% of children raised in a female same-sex relationships said they had been forced to have sex, compared with 25% of children raised in relationships with male same-sex partners and 8% of children raised in two-biological-parent families.<sup>27</sup> Comparable results were yielded in questions concerning sexually transmitted infections.<sup>28</sup>
26. On emotional and mental health level outcomes the children raised in a female same-sex relationship reported the lowest levels of perceived safety in their childhood home, followed by children raised in male same-sex relationships, with the children from two-

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<sup>24</sup> The study is described in the article of M. Regnerus, the lead investigator of the NFSS. See M. Regnerus, How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structure Study, *Social Science Research*, Volume 41, Issue 4, July 2012, p. 752-770.

<sup>25</sup> P. Amato, The well-being of children with gay and lesbian parents, *Social Science Research*, Volume 41, Issue 4, July 2012, p. 772.

<sup>26</sup> M. Regnerus, *op.cit.*, p. 761.

<sup>27</sup> *Id.*, p. 763.

<sup>28</sup> *Id.*, p. 761.

biological-parent families reporting the highest levels of perceived safety. The children raised by same-sex couples also reported significantly higher levels of depression on the CES-D scale (Center for Epidemiologic Studies Depression Scale).<sup>29</sup>

27. The findings of the NFSS disprove the claim that there are no differences between children raised in same-sex relationships and children raised in two-biological-parent families. On 14 continuous outcomes, eight of the estimates for children raised in female same-sex relationships are statistically different from children raised in two-biological-parent families – they include educational attainment, family of origin safety/security, negative impact of family of origin, report worse physical health, smaller household incomes than do respondents from two-biological-parent married families.<sup>30</sup>
28. Another important aspect on the NFSS should not go unnoticed and that is the category of respondents adopted by heterosexual couples. On only four of 14 outcomes do adopted respondents appear distinctive as compared to respondents from two-biological-parent families.<sup>31</sup> If adopted children raised by heterosexual couples far significantly better in the measured outcomes than children raised in same-sex couples, it is rational and legitimate for a national authority to weigh this factor into the final equation. In other words, taking into consideration the fact that in most member states the “demand” for adoption is higher than the number of children ready for adoption, the national authority can legitimately state a preference for adoptive parents – namely for a partnership that is stable and most similar to the two-biological-parent family. Therefore a preference for marriage/heterosexual partnership cannot be labeled as illegitimate or arbitrary.
29. In some Council of Europe member states studies have been conducted on the stability of same-sex partnerships. A recent 2012 study of same-sex couples in the United Kingdom found that same-sex couples of both sexes are more likely to separate than heterosexual couples.<sup>32</sup> A 2006 study of same-sex marriages in Norway and Sweden found that “*divorce risk levels are considerably higher in same-sex marriages*” such that Swedish female same-sex couples are more than three times as likely to divorce as heterosexual

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<sup>29</sup> *Id.*, p. 762.

<sup>30</sup> *Id.*, p. 763.

<sup>31</sup> *Id.*, p. 764.

<sup>32</sup> C.Q. Strohm, *The Stability of Same-Sex Cohabitation, Different Sex Cohabitation and Marriage*, California Center for Population and Research, UCLA, 1 February 2012 <<http://papers.ccpr.ucla.edu/papers/PWP-CCPR-2010-013/PWC-CCPR-2010-013.pdf>>

couples.<sup>33</sup> In deciding on legal regulation of adoption by a second parent, and taking due regard to the interests of the adopted child, the stability of the relationship into which the adopted child is entering is of vital importance for member states to make policy choices. Taking into consideration the wide margin of appreciation that member states enjoy in this area of family law, the difference in treatment cannot be evaluated as illegitimate, if based on the prospected stability of the relationship.

## Conclusion

30. The right of everyone to the private life of their choice should not be confused with a hypothetical right to have children – a substantive right not protected by Article 8 of the Convention. Adopted children are all the more in need of a stable and fulfilling family environment because they have been deprived of their original family and have already suffered in the past. This makes it all the more important that they do not encounter any further problems within their adopted family.
31. Dealing with such a sensitive question, whose implications are more ethical and sociological rather than legal, it is up to the national authorities to take a stance on what amounts to a choice for society. The Court, for its part, is ill equipped to anticipate shifts in the public opinion. With scientific evidence being in large part inconclusive on whether child rearing by parents who practice homosexual behavior has negative effects on children, the Court should employ a strong precautionary principle. If the interests of a child in an adoption procedure should remain paramount, it is unacceptable to make an adopted child an object of a social experiment.

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<sup>33</sup> M. Andersson, F. Noack, T. Seierstad, H. Weedon-Fekjaer, The Demographics of Same-Sex Marriages in Norway and Sweden. *Demography*, Volume 43, February 2006, pp. 76-98. The same conclusion was reached by NFSS, which found that 58% of those children whose biological mother had a same-sex relationship also reported that their biological mother exited the respondent's household at some point during their youth, and around 14% of them reported spending time in foster care system, indicating greater than average household instability. See M. Regnerus, *op. cit.*, p. 757.