

No Human Right to Adopt?

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Where does European human rights law stand on adoption? The European Court's approach has for a long time been that the European Convention of Human Rights (ECHR) does not guarantee the right to adopt. This position sounds clear enough until we ask ourselves what is meant by a right to adopt. Is it a right that the state provides interested parties with an adoptive child? A right that one be authorised to adopt, should an adoptive child become available? A right to adopt a child with whom one already has *de facto* parent-child bonds? Are we moreover referring to a putative right held by couples or single persons? And does it matter if the putative right-holder is married, co-habiting or heterosexual? Before we make sense of the claim that the ECHR does not guarantee the right to adopt, we must clarify the sense, out of the many possible ways in which such a right is understood. We must be able to distinguish between all these alleged rights on a principled basis, explaining why some, but not others, are human rights. Our account must be more fine-grained than the general statement that there is no right to adopt.

In two early cases, the first decided in the mid-seventies and the second in the late-nineties, the former European Commission on Human Rights declared inadmissible applications which complained that national adoption laws violate the ECHR, without examining the merits of the complaint. In the first case, *X. v. Belgium and the Netherlands*¹ the applicant - an unmarried man - complained that Dutch law did not allow him to adopt an abandoned child whom he had looked after for several years. In the second case, *Di Lazzarro v Italy*² the applicant - also unmarried - complained that Italian adoption law at the time did not permit unmarried persons to adopt save in limited circumstances;³ unlike Mr X, Ms Di Lazzarro had no established

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¹ *X v Belgium and the Netherlands* No 6482/74, Commission decision of 10 July 1975, DR 7, 75.

² *Di Lazzarro v Italy* No 31924/96, Commission decision of 10 July 1997, Decisions and Reports (DR) 90-B, 134.

³ Such as when an unmarried person wishes to adopt an orphan child to whom he or she is related or with whom he or she has a stable relationship which began before the parents' death.

relationship or bonds with a particular child, and was simply fighting for recognition of her eligibility, as a single person, to apply for adoption.

In both cases, the Commission held that the application was incompatible *ratione materiae* with the provisions of the ECHR on the ground that the right to adopt is not included among the rights guaranteed by the ECHR and cannot be 'read into' either the right to respect for private and family life (Article 8 ECHR) or the right to marry and found a family (Article 12 ECHR). The Commission reached this conclusion on the basis of two arguments; first, a textualist argument that the right to adopt is not enumerated in the Convention and second, an intentionalist argument that the provisions of the Convention cannot be given a scope which the contracting parties expressly intended to exclude. It noted, in passing, that the Convention 'does not oblige states to grant a person the status of adoptive parent or adopted child'⁴ but that interfering with an existing relationship between an adoptive parent and an adoptive child might engage the responsibility of a state under Article 8 ECHR.⁵

One might interpret *Di Lazaro* and *X v Belgium* as lending precedential⁶ support to the proposition that applications which challenge the compatibility of national adoption laws, are always inadmissible 'ratione materiae' under the ECHR. This would amount to the view that the ECHR gives no protection to the right to adopt, *no matter how that right is understood*, and that complaints about adoption-related laws and practices are inadmissible because they fall outside the ambit of Article 8 ECHR. Yet in recent years, the Court has shown great willingness to examine a number of adoption-related cases, which it has found admissible. These cases are divided into two categories; first, cases where an existing adoption, lawful under domestic law, has interfered with, or is part of, a person's private or family life under Article 8 ECHR, and second, cases in which no adoptive status has yet been granted and the applicant alleges discrimination on the basis of sexual orientation, in relation to her application for authorization to adopt.

In the cases of the second category the Court has directly confronted the question of whether the practice of applying for authorisation to adopt falls within the ambit of a convention right, which is a condition for the

⁴ *Di Lazaro v. Italy* (n 2) 139.

⁵ *X v Belgium and Netherlands* (n 1) 77.

⁶ The European Court is not formally bound to follow its previous judgments but it has remarked that 'in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents' (see *Mamatkulov v Turkey* [2005] 41 EHRR 25 [para] 121). Indeed, the Court routinely justifies its judgments by reference to settled precedent. For an insightful analysis of the moral foundations of the doctrine of precedent, which shows why – contrary to Strasbourg's dictum – certainty is not the value underlying it, see Scott Hershovitz, 'Integrity and Stare Decisis' in S. Hershovitz, *Exploring Law's Empire* (2006) Chapter 5. Note that decisions reached by the former European Commission may carry less precedential weight, due to the very different institutional setting under which it operated.

applicability of Article 14 ECHR (non-discrimination clause). In *Fretté v France* (2002),⁷ the Court answered the question in the affirmative, holding that the practice of applying for authorisation to adopt falls within the ambit of article 8 ECHR; it found however no violation of the non-discrimination clause. In *E.B. v France*⁸ – a judgment which some European Court judges described in their separate opinions as overturning *Fretté* – the Court held that the applicant had been discriminated against on the basis of her sexual orientation and in relation to her application for authorization to adopt.

In both *Fretté* and *E.B.* some judges expressed concerns about the applicability of the Convention in cases of alleged discrimination in relation to applications for authorization to adopt, given that the Convention does not guarantee the right to adopt.⁹ Another judge argued that the Court's current doctrine has a discriminatory effect in that a homosexual's application alleging discrimination in relation to his or her application to be authorised to adopt has been found admissible by the Court, whereas a heterosexual's application alleging violation of her private or family life in relation to his or her application to be authorised to adopt would be inadmissible.¹⁰

This article aims to shed light on the Court's somewhat muddled approach to issues of adoption, both in relation to admissibility and to merits. The article is divided into three parts. In the next section I shall argue that there should be no strict rule against the admissibility of applications that challenge the compatibility of adoption laws and practices with the ECHR.¹¹ Potentially, any adoption-related issue might give rise to an ECHR violation and hence all adoption-related applications may have to be examined at the merits stage, whether or not they allege discrimination (unless of course they are manifestly ill-founded or are inadmissible for some other reason). As I shall argue, there can be circumstances under which the state's failure (or refusal) to grant someone adoptive status may amount to a violation of the ECHR, in virtue of principles the Court has already given effect to. My argument turns on a broader claim that questions about the ambit of convention rights, usually examined at the admissibility stage, are in fact disguised and elliptical propositions about the substantive rights of the ECHR, which are normally examined at the merits stage.

⁷ *Frette v France* (2002) 38 EHRR 438.

⁸ *E.B. v France*, Grand Chamber judgment of 22 January 2008 App no 43546/02.

⁹ See the dissenting opinion of Judge Costa in *Fretté*.

¹⁰ See dissenting opinion of Judge Mularoni in *E.B v France*.

¹¹ I shall speak of adoption 'laws and practices' to account for the fact that the European Court refrains from ruling *in abstracto* on the compatibility of domestic legislation with the ECHR. I do believe however that all ECtHR judgments, properly understood, have general normative consequences on whether relevant domestic enactments (constitutions, legislation, decrees) should be formally repealed or disapplied and on how (in monist countries) these enactments should be interpreted and applied by the judiciary. In that sense, the European court *is* indirectly -and inevitably- judging the compatibility of domestic legislation with the ECHR.

I will then turn to an analysis of the two judgments on discrimination and adoption, *Fretté* and *E.B.* I shall argue that the way in which the Court collected judges' votes in *Fretté* constitutes a case of judicial paradox and that a different decision-making process would have resulted in a ruling of a violation. The paradox consists, in short, in the fact that only one judge (out of seven) endorsed the majority reasoning in its entirety, which most importantly contained the finding that rejecting an application for authorization to adopt on the grounds that the applicant is homosexual does not constitute discrimination. In my view, the paradox explains why the Court was so anxious in *E.B.* to overturn the reasoning in *Fretté* as it did not reflect the beliefs of the majority of judges.

Thirdly, I shall turn to the Court's substantive reasoning in *E.B.* which held that a rejection of an application for an authorisation to adopt, on the implicit ground of the applicant's sexual orientation, constitutes discrimination. I shall argue that the Court rightly reached this conclusion by employing a standard of review that correctly captures the moral principles underlying the test of proportionality.

The Ambit of the Convention

In a number of cases the European Court has indirectly reviewed the compatibility of adoption laws and practices with the ECHR, after finding the applications admissible. It cannot therefore be said, with any qualifications, that adoption issues are incompatible *ratione materiae* with the Convention. Consider the following three cases.

In *Keegan v Ireland*, the European Court held that a lawful order to place a child born out of wedlock for adoption (under Irish law), without the knowledge or consent of the natural father, amounted to a violation of the ECHR. Having established that the relationship between the applicant and his child constituted 'family life' for the purposes of Article 8 ECHR, the Court held:

[that the] fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life.¹²

The Court's, rather formal, approach was to construe the case as one about family life, not about adoption. But in effect what the Court did was to review Irish adoption law (or the way it was applied by Irish authorities in the applicant's case) in light of the human rights principles that underlie

¹² *Keegan v Ireland* (1994) 18 EHRR 342.

Article 8 ECHR. The Court's ruling was as much about adoption as it was about the family life. To see this consider the following point; the proposition that Irish adoption law had violated Mr Keegan's right to family life under the ECHR entailed the proposition that the ECHR rights of the adoptive parents of Mr Keegan's child would *not* have been violated if they had been denied custody upon the natural father's objection.¹³ For it could not have been the case that in order to respect Mr Keegan's human right to family life, Ireland would have to violate the human rights of the adoptive parents. In fact the ruling entails a more general proposition about adoption, namely that ECHR law requires contracting states to give due regard to the interests of the adoptive child's natural parents; that, other things being equal,¹⁴ the natural parents' consent is required in all cases of adoption.

In *Pini and others v Romania*, a case of inter-country adoption, two Italian couples had each lawfully concluded adoption proceedings and acquired parental rights according to the provisions of Romanian law. The couples had been sent photographs of the adoptive children who lived at a private educational centre in Romania, in the care of which they had been placed when they were abandoned at the age of three. The educational centre however refused to give custody of the children to the adoptive parents and to obey court orders to that effect, initiating a series of legal challenges against the enforcement of the orders which lasted for more than three years, eventually succeeding in blocking the transfer of custody. The applicants complained that the failure of the Romanian authorities to execute the domestic courts' final decision to give effect to the lawful adoption order amounted to an infringement of their right to family life under Article 8 ECHR. The European Court held, by five votes to two, that the Convention was in the present case applicable because there was a legal bond between the applicants and their adopted children which amounted to family life within the meaning of Article 8 ECHR.

The majority in *Pini* reached this conclusion on the ground that the relations between an adoptive parent and an adopted child are of the same nature as family relations. Under settled case-law of the Court, Article 8 ECHR may apply to relationships between a child born out of wedlock and its natural parents,¹⁵ relationships between persons who have *de facto* family bonds,¹⁶ as well as to relationships that arise from a lawful and genuine

¹³ Assuming this happened before they developed emotional bonds with the adoptive child.

¹⁴ We must add this qualification to account for cases where some other principle, of a greater weight, justifies conferring parental rights over a child whose biological father/mother has not consented. This might be true for example in the case of a child raised by someone other than its biological parent whom it came to regard as its only parent. Our culture is of course full of stories about the tragedy, for all the people involved, of disputes over custody between a biological mother and an adoptive mother. Consider Bertolt Brecht's classic play *The Caucasian Chalk Circle* and Stephen Gyllenhaal's film *Losing Isaiah*, to name just a few.

¹⁵ *Keegan v Ireland*; *Odievre v France*, judgment of 13 February 2003 App No 42326/98.

¹⁶ *Johnston and others v Ireland* (1986) 9 EHRR 203; *Berrehab v Netherlands*, A 138 (1988).

marriage, *even if no family bonds have yet been fully established*,¹⁷ in other words, according to the Court's case law *de facto* family ties are a sufficient but not a necessary condition for the applicability of the right to family life. *De jure* family bonds resulting from a lawful marriage may also fall within the ambit of Article 8 ECHR irrespective of *de facto* emotional ties. The Court concluded that by analogy, *de jure* family bonds resulting from a lawful adoption also fall within the ambit of Article 8 ECHR, irrespective of *de facto* emotional ties.

Just like *Keegan*, *Pini* was as much about adoption as it was about family law. The Court's ruling entailed the proposition that ECHR law imposes constraints on how states treat lawful adoptive parents; other things being equal, states are not allowed to withdraw, or to adversely affect the exercise of the right of an adoptive parent once they have lawfully conferred it.

Finally, in a more recent case, *Emonet and others v Switzerland*¹⁸ the applicants maintained that the legal effects of adoption under Swiss law violated the right to respect for family life. Mrs Mariannick Faucherre and Mr Roland Emonet, a non-married couple living together, wished to have the biological child of the first adopted by the second. When the adoption process was completed, they realized that under Swiss law the mother-daughter relationship between Mrs Faucherre and her adult daughter, Mrs Isabelle Chantal Emonet (the third applicant) had been severed. Their request to have the relationship restored was subsequently rejected by the Swiss authorities. The European Court found the application admissible, holding that the relationship between the three applicants amounted to a *de facto* family life, which had been interfered with by Swiss law. It went on to find that, unlike adoption of minors, in the case of co-habiting couples who adopt adult children it is not necessary for the state to sever parent-child relationships in order to promote the best interests of the adoptive child. Although the couple could have achieved the desired legal consequences under Swiss law by getting married, the Court held that co-habiting couples should have the choice of achieving the same result without getting married, through adoption.

Again, the Court's ruling in *Emonet* entails general constraints regarding the adoption laws (and practices) of contracting states. Assuming that *Emonet* was correctly decided, the ECHR now requires - other things being

¹⁷ The leading authority here is the case of *Abdulaziz, Cabales and Balkandali* (1985) 7 EHRR 471, in which the United Kingdom refused permission to three non-nationals, who had no rights of permanent residence, to join their lawful spouses who had the right to remain indefinitely in the United Kingdom. The Court held that "by guaranteeing the right to respect for family life, Article 8 (art. 8) 'presupposes' the existence of a family ... However, this does not mean that all intended family life falls entirely outside its ambit. Whatever else the word 'family' may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage" [para 62].

¹⁸ *Emonet and others v Switzerland*, Judgment of 13 December 2007, App No 39051/03.

equal - that a person, whose biological adult child is adopted by his co-habiting partner, maintain their legal rights of parenthood.

In sum, while not about the right to adopt per se, all three of the above judgments (*Keegan*, *Pini* and *Emonet*)¹⁹ entailed legal constraints, under the ECHR, on the way in which the adoption law of contracting states affects individual rights and duties. In that sense, all three judgments entail principles that govern what rights individuals have in relation to adoption; principles which the Court must normally apply in future cases (unless there is a strong reason to overturn precedent) and which bind all contracting states in their law-making and law-applying practices, irrespective of whether there has been a legal challenge before the European Court.

It is therefore somewhat misleading to claim that adoption issues are incompatible with the ECHR. For as we saw, the principles underlying the Court's case law certainly condition the way in which contracting states confer adoptive rights and duties under law. The principles tell us which aspects of adoption law and practice must conform to ECHR rights and how. These principles justify for instance why the Court found that the rights of the adoptive parents in *Pini* had been violated; the principles *protected* Ms Pini's adoptive family as much as they would have her biological family.

Now it might be argued, as the Commission observed in *Di Lazzaro*, that the ECHR 'does not oblige states to grant a person the status of adoptive parent or adopted child' and that that is the sense in which adoption issues are incompatible, *ratione materiae* with the ECHR. In other words, it might be said that it is only if contracting states choose to allow adoption, that the ECHR imposes some conditions on adoption law, conditions that stem from other individual interests that the Convention protects (like family life); and that it is only if someone *already* has the status of an adoptive parent or child that his or her application is admissible (i.e. compatible *ratione materiae* with the provisions of the ECHR).

To the extent that this argument is meant to justify a strict rule against the admissibility of applications that request the granting of adoptive status, it fails. Once we accept that adoption issues are justiciable under ECHR principle, we can imagine the Court hearing cases in which the applicant asks to be granted the status of adoptive parent. Take the case of Mr X as an example. Recall the principle found in the Court's case law, that the Convention protects not only *de jure* family relationships but also *de facto* family bonds. In the Court's own words, 'the question of the existence or non-existence of 'family life' is essentially a question of fact depending upon the existence of close personal ties.'²⁰ This principle would apply in the case

¹⁹ There are other adoption-related cases which could have been used to make the same point, like *Odievre v France*, Judgment of 13 February 2003 App No 42326/98, but I have chosen to concentrate on the three mentioned above.

²⁰ *Emonet* (n 18) [para] 33.

of Mr X, who had looked after a child for a long time and had established a parent-child relationship albeit in the absence of a biological connection. His complaint that he was not allowed to adopt that child should have been found admissible, just like other cases where there were *de facto* family bonds. In fact it seems to me that Mr X would have a pretty strong case that he and his child both had rights to have their relationship made legal, if the following principle is true; once one develops strong and long-standing parental bonds with a non-biological child, then their relationship should be vested with all the sub-rights and duties that married couples and/or natural parents have in relation to their children; these would include for instance the legal duty of Mr X not to abandon the child and the legal right of the child to inherit Mr X.²¹

But even if we set aside the merits of Mr X's case, it is clear that if *de facto* family bonds fall within the ambit of Article 8 ECHR, then his application (and any other application which is similar in a morally relevant sense) ought to be ruled admissible, *in spite of the fact that Mr X asked to be granted the status of an adoptive father*. The example of an adult and his non-biological child who have a *de facto* family bond and seek adoption status is meant to support the following more general thesis about the applicability of the Convention to adoption issues: we cannot always know *in advance of examining the merits* of a case that challenges adoption legislation (or the lack thereof) whether some human rights principle requires contracting states to grant, withhold or respect adoptive rights. The question of whether the application 'falls within the ambit' of the Convention, cannot always be divorced from the substantive question of whether the applicant's ECHR rights have been violated. For whether or not some facts or issues fall within the ambit of a convention article (usually examined at the stage of admissibility) is in fact *shorthand* for the statement that the applicant's ECHR rights have not been violated (i.e. a merits judgment). It is an elliptical proposition about some substantive right of the ECHR.

Take for example the case of Ms *Di Lazzaro* whose application was declared incompatible *ratione materiae* with the Convention. She was a single, unmarried person, who had no established bonds with a particular child, claiming that she had the right to be eligible to adopt. The rejection of her application entails the position that contracting states may, subject to conditions,²² grant authorisation to adopt only to married or co-habiting

²¹ I will not discuss here the issue of whether the recognition of these rights and duties must be phrased in law using the vocabulary of 'adoption,' 'adoptive father/mother,' 'adoptive child' etc. The issue is the same as the debate over whether same-sex unions recognized by law must not only have the same rights and responsibilities as marriages, but also be called 'marriages.' On this see the discussion by Ronald Dworkin in his, *Is Democracy Possible Here?* (2006) Chapter 3.

²² I cannot fully state all the conditions here but they would include things like: the existence of scientific evidence that it is in the best interests of the child to be raised by two parents rather than one; that there are enough couples willing to adopt orphans or abandoned children; that no other single person, similarly situated, has been granted adoptive status, and so on and so forth.

couples and that, other things being equal, single persons have no right to be eligible to adopt under the ECHR; that in other words, whether to allow single persons to be eligible to adopt is a matter of state *policy*. But this conclusion is warranted only if no other human rights principle is applicable to the applicant's case and we can only know that if (a) we know all the pertinent facts about the case and (b) we have established that these facts do not call for the application of a human rights principle. Both these conditions raise substantive issues of ECHR rights, usually examined at the merits stage. When the Court takes the subject matter of the applicant's request (for example, to be granted – or to be eligible to be granted – adoptive status) as determinative of admissibility, it bypasses the examination of substantive issues of principle, using the nature of the applicant's request as a *proxy* for the existence of a human rights violation. Doing so saves the Court time and other resources as it may well be the case that, more often than not, using the object of the applicant's request as a proxy gets the substantive question of a human rights violation *right*. But since this may not always be the case,²³ it is wrong to think of the ambit of the ECHR rights in terms of an all-or-nothing rule because there is a risk that some cases in which there has been a human rights violation, are arbitrarily excluded from substantive examination.

The Court therefore need not - indeed should not - decide, either that all adoption-related cases fall within the ambit of Article 8 ECHR, or that they are all inadmissible. In cases, like *Di Lazzaro v Italy*, where nothing indicates the applicability of a human rights principle (and hence the possibility of a human rights violation) the Court may dismiss the application at the admissibility stage by making a (covert and speedy) judgment about the merits. But in cases like *X v Belgium* (or, as we shall see, in *Fretté*) the Court should declare the case admissible and proceed to the merits given its distinguishing features. There would be no inconsistency in doing so, whereas there might be an inconsistency in declaring a case inadmissible without examining the merits, even though it shares the same properties with cases in which there has been a human rights violation.

Fretté v France: A Judicial Paradox

French law (Articles 343-1 of the Civil Code) permits any single person over the age of twenty-three to apply for authorisation to adopt. In its 2002 Chamber judgment in *Fretté* the European Court of Human Rights held, by

²³ Imagine for example someone who complains that her right to liberty under the ECHR is violated because her state refuses to allow her to participate in spaceship missions to the moon. The Convention does not guarantee the right to fly to the moon, the Court might say, in declaring the case inadmissible. But that conclusion would be wrong if the following facts obtain: there are regular flights to the moon open by law to all, at a reasonable price, except to those who have in the past been charged with a transport-related criminal offence even if, like the imagined applicant, they have been acquitted. In that scenario, the application should, I would think, be admissible.

the narrowest of margins (four votes to three), that the decision of the French authorities to deny a single person the authorisation to adopt a child, based primarily on his sexual orientation (homosexuality), did not violate the right not to be discriminated against under Article 14 ECHR, taken in conjunction with the right to private life under Article 8 ECHR. But the four judges in the majority reached this conclusion by different routes.

Three judges concurred that there was no breach of the ECHR but on different grounds than the majority; Judge Costa (joined by judges Jungwiert and Traja) argued that Article 14 ECHR was inapplicable in this case because the facts in question (refusal of an application for authorisation to adopt) do not fall within the ambit of Article 8 ECHR (right to family and private life). On Judge Costa's view, the decision of the French authorities did not interfere with applicant's family and private life under Article 8 ECHR, because that right encompasses neither a right to adopt²⁴ nor a general right that no state decision be based on one's sexual orientation, assuming the decision is well balanced and not hostile. Judge Costa concluded that Article 14 ECHR was inapplicable and that therefore there had been no violation of the Convention, while being hesitant to decide whether refusing homosexuals the authorisation to adopt, as single parents, is discriminatory. He found it difficult to examine whether the decision of the French authorities was discriminatory *in abstracto*, i.e. without reference to a particular right in the Convention as to the enjoyment of which there has been differential treatment. Such, he noted, would be the issue facing the court under the autonomous non-discrimination clause of the new Protocol 12 ECHR, which however was not in force.

The fourth judge, P Kuris, in the majority opinion found that Article 14 was engaged because the facts did fall within the ambit of Article 8 but that the difference in treatment between homosexual and other applicants for single parent adoption was in pursuit of a legitimate aim; that of the best interests of the perspective adopted child. In deciding whether there was an objective and reasonable justification to treat homosexuals differently on the issue of single-parent adoption, and in the result, writing as the majority, he relied heavily on the fact that there is no consensus among contracting states on homosexual adoption and no consensus within the scientific community about the possible negative effects on children adopted by homosexuals. Drawing on the settled doctrine of the margin of appreciation, the majority noted that the absence of common ground between the laws of the contracting states, entails a wide margin of appreciation in assessing whether differential treatment is justified. *Fretté* was a controversial judgment for many reasons. First, the majority allowed a wide margin of appreciation on

²⁴ Costa distinguished *Fretté* from cases like *Dudgeon v United Kingdom* 4 EHRR 149 (1981) (criminalisation of homosexuality) and *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 (dismissal of homosexuals from the army) in which, on his view, there had been a direct interference with the applicants' private life.

an issue involving differential treatment on grounds that belong to ‘suspect categories,’ i.e. grounds - such as race, gender and sexual orientation - that have widely and openly been used in the not-so-distant past for institutionalised discrimination. Such deferential stance goes against the widely shared intuition that differential treatment on the basis of grounds belonging to suspect categories should normally call for *more*, rather than less, judicial scrutiny.

Second, the case raised a difficult question about the applicability of Article 14 ECHR (non-discrimination), which is a non-autonomous right of the Convention that applies only when the facts at issue constitute interference with another right of the Convention. Thirdly, the case raises questions about judicial decision-making more generally.

The Court’s decision in *Fretté* constitutes a case of a judicial paradox in that only *one* out of the seven judges endorsed the reasoning which figures in - what was handed down as - the majority judgment, namely that the differential treatment in question was not discriminatory. Only judge P. Kuris opined that Article 14 ECHR was applicable in this case *and* that the differential treatment in question was not discriminatory. As mentioned above, three judges found that there was no violation on the sole grounds that Article 14 ECHR was inapplicable. Hence they joined judge Kuris in ruling, albeit on separate grounds, that there had been no violation of the Convention; but they did not decide whether, assuming Article 14 was applicable, the right not to be discriminated against had in the present case been violated. The remaining three judges, Sir Nicolas Bratza, Fuhrmann and Tulkens, dissented on the grounds that Article 14 ECHR was applicable *and* that the difference in treatment in question amounted to discrimination.

Here is the paradox: for the Court to rule a violation of Article 14 ECHR it must satisfy itself both that Article 14 ECHR is applicable and that the differential treatment in question was discriminatory. In *Fretté*, the majority of judges (4 out of 7) thought that the right not to be discriminated against under Article 14 ECHR was applicable and the majority of those (3 out of 4) thought that the way the applicant was treated was discriminatory. Yet since there was a vote only on whether article 14 was violated, the majority of judges (4 out of 7) voted against the finding of a violation. The following table illustrates the paradox:

Table: *Fretté v France*

Judge	Applicability of article 14 ECHR	Discrimination?	Violation of art. 14 ECHR
KURIS	yes	no	no
COSTA	no	did not decide	no
JUNGWIERT	no	did not decide	no

TRAJA	no	did not decide	no
BRATZA	yes	yes	yes
FUHRMANN	yes	yes	yes
TULKENS	yes	yes	yes
MAJORITY	YES	YES	NO

This is an instance of a general paradox in collective decision-making which results from the fact that for any multi-judge court, there are two ways of collecting votes and reaching results. Following Sager and Kornhauser²⁵ we can call the first one the *case-by-case* (or outcome-based) protocol and the second one the *issue-by-issue* (or reason-based) protocol. Under the case-by-case protocol, first each judge reaches a decision as to whether the applicant should prevail in this case, having decided individually on the legal issues raised, and then the Court renders judgment by aggregating these decisions. By contrast, under the issue-by-issue protocol, the Court aggregates what judges decide *on each issue* first, and then renders judgment as to whether the applicant should prevail in this case by taking into account the aggregated outcomes on each issue.²⁶ Which of the two protocols is used makes a material difference when the outcome of the case turns on more than one doctrinal issue and the judges are split on how they decide on each one. When the split is marginal, different outcomes as to whether the plaintiff prevails will be reached, depending on whether votes are collected on an issue-by-issue basis or on a case-by-case basis. In these cases, the choice of protocol - other things being equal - determines whether the applicant prevails or not.

Fretté was one such case. The Court followed a case-by-case (or outcome-based) protocol which resulted in the finding of no violation of Article 14 ECHR. Had the Court used the issue-by-issue (or reason-based) protocol, taking two separate votes (one on the applicability of Article 14 ECHR and

²⁵ Lewis Kornhauser and Lawrence Sager, 'The Many as One: Integrity and Group Choice in Paradoxical Cases' 32 *Philosophy and Public Affairs* (2004) 249–276; Lewis A. Kornhauser and Lawrence G. Sager, 'The One and the Many: Adjudication in Collegial Courts' *California Law Review* (1993) 1-59; Lewis Kornhauser and Lawrence Sager, 'The Many as One: Integrity and Group Choice in Paradoxical Cases' *U of Texas Public Law & Legal Theory, Research Paper No 55* (August 15, 2003), available at SSRN: <http://ssrn.com/abstract=441466>. For a critical response see Christian List and Philip Pettit, 'On the Many as One: A Reply to Kornhauser and Sager' 33 *Philosophy and Public Affairs* (2005) 377-390. One of the examples Kornhauser and Sager use is the case of *Palsgraf v Long Island Railroad Co* 162 NE 99 (NY 1928) which raised the following two issues: first whether the defendant's negligence caused the plaintiff's injury and second whether the defendant had a duty to take care.

²⁶ Looking at the table above, the difference between the two protocols can also be described as follows: under the case-by-case protocol, the final aggregation is vertical (bottom row) whereas under the issue-by-issue protocol, the final aggregation is horizontal (third column). The vertical aggregation results in the applicant losing because the majority of outcome decisions was negative whereas the horizontal aggregation results in the applicant prevailing because the majority decisions on the two issues were both affirmative.

one on whether differential treatment was discriminatory)²⁷ then a different outcome would have been possible. Assuming the concurring judges (Costa, Jungwiert and Traja) would still refuse - as they actually did - to vote on whether the differential treatment was discriminatory, then the issue-by-issue aggregate outcomes would both come out affirmative, resulting in the finding of a violation. If, on the other hand, the concurring judges decided to vote on the second issue (as we may well assume that they would, knowing that their vote could make a difference),²⁸ then it would simply take one vote to tip the balance in favour of the finding of discrimination (and hence of a violation of Article 14 ECHR). Since the three concurring judges suspended judgment on the issue of discrimination then this second possibility should remain open.

This is not the place to discuss which protocol provides the best solution to the paradoxes of multi-judge court decision-making process. Suffices to say that, assuming everything else about the facts of the case and the mental states of the judges remained the same, a violation of Article 14 ECHR could have been found in *Fretté*, if simply a different protocol had been used to collect votes. It is moreover puzzling that the majority judgment incorporated the reasoning of the minority (P Kuris) as opposed to the majority (Costa, Jungwiert and Traja) of those who voted against the ruling of a violation of Article 14 ECHR. If the Court had taken the case-by-case (outcome based) protocol to its logical end, it should have presented Costa's (joined by Jungwiert and Traja) concurring opinion as the majority judgment. The justification for not doing so cannot lie in the fact that these three judges were outvoted on the issue of the applicability of Article 14 ECHR, for this would only have been relevant under the issue-by-issue protocol which was not the one that the Court followed.

In sum, we might want to resist the claim that *Fretté* stood as a precedent that the refusal to grant the applicant an authorisation for adoption, on the basis of his sexual orientation, is non-discriminatory under the ECHR. First, the result could have been different had the Court followed an issue-by-issue protocol, taking two separate votes, one on the applicability of Article 14 and one on whether the differential treatment was discriminatory. Second, even if we grant that the Court rightly followed an outcome-based proposal, it is plausible to argue that the majority judgment was grounded on the finding that Article 14 was inapplicable (which is what the majority of

²⁷ Given what was said in the previous section about the nature of questions about the 'applicability' of convention rights (namely that they are cannot be divorced from the substantive question of whether there has been a violation), I am inclined to think that the first issue could not have been the mere 'applicability' of Article 14 ECHR but a more substantive one, to do with the normative conditions for the violation of the right not to be discriminated against.

²⁸ We may assume that one of the reasons why Costa, Jungwiert and Traja did not wish to decide, in their dissenting opinion, whether refusal of an authorisation to adopt was discriminatory, was that they knew that their decision would not affect the outcome given that there was no separate vote on the question of discrimination.

those who voted against the finding of a violation held) rather than on the finding that the differential treatment in question was not discriminatory. Finally, it is worth highlighting that the three judges who voted that there was no violation of Article 14 ECHR did so on the basis that the right to apply for authorisation to adopt does not fall within the ambit of Article 8 ECHR, refusing to examine the issue of discrimination. As we saw in the previous section, treating the question of ambit as precluding the examination of whether some human rights principle has been violated is a formal approach, given that the question of applicability of a convention article cannot always be divorced from the issue of whether a substantive ECHR right has been violated. Judges Costa, Jungwiert and Traja could have moved on to decide whether there had been a breach of the non-discrimination clause even though they thought that applications for authorization to adopt do not fall within the ambit of Article 8 ECHR.²⁹

E.B. v France: Over-inclusion and Suspect Grounds

In the case of *E.B. v France*, which was decided by the Grand Chamber in January 2008, the applicant, Ms E.B., a lesbian, was refused authorization to adopt by the French authorities. Unlike *Fretté*, the Court took a separate vote on whether the case falls within the ambit of Article 8 ECHR and held unanimously that the application was admissible. When it turned to the merits, the Court found that the applicant had been refused authorization to adopt on two grounds. First, because of the lack of a paternal referent in the household of the applicant and second, because of the attitude of the applicant's homosexual partner who expressed no commitment to the adoption plans. Although the European Court held that these two grounds are legitimate in principle, it found that the first ground was used, in the circumstances of the case, as a pretext and that it was the applicant's homosexuality that served, implicitly, as a decisive factor leading to the decision of the French authorities to refuse her authorization to adopt.³⁰ The Court concluded that the applicant suffered a difference in treatment on the basis of her sexual orientation and went on to examine whether the difference in treatment had an objective and reasonable justification.

²⁹ It may be suggested that, contrary to the actual beliefs of Judges Costa, Jungwiert and Traja, their vote against the ruling of the violation must be interpreted as a vote that excluding homosexuals from authorization to adopt does not constitute discrimination. This is because the *ratio decidendi* of any judgment consists in the principle that *in fact* justifies the judicial outcome, as opposed to the one that judges thought justifies the outcome (I am indebted to discussions with Nicos Stavropoulos on this point). In *Frette* however, it appears that the outcome is over-determined, if we assume that two different principles can equally justify it (one about whether adoption falls within the ambit of Article 8 ECHR and one about whether denying homosexuals authorization to adopt amounts to discrimination).

³⁰ The Court argued that it 'contaminated' the decision to reject the applicant, a decision which was otherwise based on reasonable and objective grounds. Some judges found the contamination theory objectionable. See the dissenting opinions of judge Zupancic and Loucaides.

Contrary to the majority's reasoning in *Fretté* which recognised a wide margin of appreciation, the Court noted that 'where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8.'³¹ Given that no such reasons were put forward by the French government and that the denial of the applicant's authorization to adopt was based on considerations regarding the applicant's sexual orientation, the Court held, by ten votes to seven, that there was a violation of Article 14 ECHR (non-discrimination) in conjunction with Article 8 ECHR.

E.B. v France is a landmark judgment for a variety of reasons; not least because the Court overturned (though not explicitly so) the much-criticized judgment of *Fretté*. First, it reaffirms a fundamental liberal-egalitarian principle that should govern human rights adjudication, namely that no one should suffer a disadvantage or be deprived of a liberty or opportunity because of one's choice of lifestyle, or because others think of him or her as less than an equal.³²

Moreover, the judgment indicates that the European Court may be retreating from its arguably over-heavy reliance on the use of the margin of appreciation and the idea of *consensus*. I have elsewhere criticised the margin of appreciation on the grounds that it is incompatible with liberal principles underlying the Convention.³³ Whether or not there is consensus among contracting states is an irrelevant consideration that, when taken into account, might well give effect to biased and prejudiced considerations for restricting liberty. Indeed, in a number of cases in the past the European Court has upheld moralistic measures that restrict liberty in order to promote public morals, on the grounds that there is no uniform conception of public morals in Europe. But in *E.B.* the European Court made no reference to the margin of appreciation and to the lack of consensus among contracting states on whether homosexuals should be given authorization to adopt, as it had done in *Fretté*.³⁴ The lack of reference to the margin of appreciation in *E.B.* is therefore a positive development that should be welcomed and that will hopefully be applied by the Court across the board in the future.

Second, it shows how the egalitarian principles underlying the Convention are to be given effect in differences of treatment based on 'suspect grounds' where the likelihood of discrimination is high, given long-standing societal prejudice; according to the Court's reasoning the burden should be on the state to provide particularly *weighty* reasons that call for differential treatment. The Court's position is wholly justified for it captures

³¹ *E.B v France* (n 8) [para] 91.

³² I have argued at length in favor of this principle in George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007) Chapters 5 and 6.

³³ *Ibid.* at 110-9.

³⁴ Or at least as the judge who wrote the majority judgment in *Frette* did.

a fundamental egalitarian principle that should govern the test of proportionality in human rights review; measures that secure *marginal* or *speculative* gains to the interests (well-being) of others cannot justify difference in treatment based on 'suspect' grounds (sex, sexual orientation, race, religion etc) in the allocation of fundamental liberties and opportunities. Such measures are disproportionate and we have a right against the government not to be subjected to them. For example, contrary to the Court's reasoning in *Fretté*, the lack of consensus among the scientific community about the possible negative effects on adopted children, means that the benefits to the well-being of children are speculative and that lack of evidence should therefore count in favor of, rather than against, allowing homosexuals to adopt.

What if, however, there was scientific evidence to the effect that children raised by homosexuals are more likely to suffer harm in their fundamental interests than children raised by heterosexuals?

It is first worth noting that the burden of responsibility the state carries when it positively assumes the role of providing a home and a family to a parentless child might be higher than when it monitors the well-being of a child who is being raised by his biological parents. In the former case, the state assumes the positive role of making a fundamental decision about the welfare of a child and his long-term interests; it is, we might say, the sole acting agent. In the latter case however, the state is monitoring the performance of other agents (the parents) who have the primary responsibility for the welfare of a child and (we may safely assume) have proper motivation to do so, and who have already established emotional bonds with the child that are worthy of respect.³⁵ This explains why there are many people, of the kind we are all familiar with, who would be ineligible as adoptive parents for lack of appropriate parental skills or commitment, yet who nonetheless are perfectly entitled to have children and retain legal responsibility of them. In other words, there is nothing inconsistent in the requirement that adoptive parents be better than the average biological parent and in recognizing that biological parents have a right not to be deprived of their parental responsibility save in order to prevent significant harm to children.³⁶

It may therefore be suggested that this point should weigh in favor of not taking any chances in authorizing adoptions with groups that, on average, will provide a poor home for adoptive children. But the suggestion

³⁵ I shall not discuss here the suggestion that the state could or should assume exclusively the responsibility for the welfare of all children upon birth, but it seems to me that it ignores various morally relevant biological facts about human psychology, as well as issues of distributive justice in the allocation of the cost of state child-raising. See the very interesting discussion by Veronique Munoz-Dardé, in 'John Rawls, Justice in and Justice of the Family' *The Philosophical Quarterly* Vol 48 No 192 (1998) 335-352; 'Is the family to be abolished then?' *Proceedings of the Aristotelian Society* Vol XCIX part 1 (1999).

³⁶ Section 31 (2) of the UK Children Act 1989.

must fail. We must be very careful when we construct a hypothetical in which there is scientific evidence to the effect that children raised by homosexuals are more likely to suffer harm in their fundamental interests than children raised by heterosexuals. For it matters crucially *why* there is a statistical correlation between the child-raiser's sexual orientation on one hand and harm to the fundamental interests of the child on the other. Consider three possible explanations of such a (hypothetical) correlation; first, that it is because the adoptive child suffers psychologically from societal bias and prejudice, being stigmatized; second that it is because homosexual relationships are more likely to be unstable (which in turn affects children), not by nature, but due to social prejudice and institutional inequalities and third (what seems to me the most unlikely of all) that due to biological factors, homosexuals are by nature less likely to feel motivated to show proper care and attention to their children.

Though we may assume that the first two 'scientific' explanations are plausible on the hypothetical under consideration (i.e. an alleged statistical correlation between sexual orientation and below-average protection of the child's well-being), they would fail to justify the practice of a blanket ban on all homosexuals from authorization to adopt (as in *Frette*). This would be so for two reasons. First, because such a ban would be *over-inclusive*; it would cover homosexuals who are very good parent material, whose adoptive children need suffer no stigma or prejudice (say because they live in a very liberal societal environment) and whose condition need not be subject to the institutional and social injustices that might adversely affect couple stability (say because the couple is particularly well-off and well-educated). The over-inclusiveness obtains as a result of the fact that sexual orientation is not the *cause* of possible harm to children but simply an epistemic tool for predicting such harm.³⁷

But over-inclusiveness, by itself, would not be a sufficient condition for a measure to be deemed discriminatory as we do not object to it in other contexts. We do not, for example, complain that the speed limit is over-inclusive because it prohibits very skilled drivers, like Lewis Hamilton, from driving at a speed at which they risk causing no harm to others. Nor would we find it objectionable if the state imposed a blanket ban on everyone over the age of eighty to adopt young children. The difference in gay and lesbian adoption, the reason why over-inclusiveness is an issue, lies in the knowledge of the fact that sexual orientation is very likely to be - and has

³⁷ One might think that this is not the case in the third possible explanation of the hypothetical above, namely that homosexuals might genetically lack the motivation and commitment to raise and care for children. If such a highly implausible explanation of the hypothetical correlation were true it would still fail to justify a blanket ban on homosexual adoption because we would also have to establish a further premise, namely that the social environment can have no positive effect on the alleged genetic trait. Given what we know about genes and the way they interact with the environment, such a premise would be extremely difficult to establish.

historically been - used, either directly or indirectly, as a basis for discrimination (a *suspect ground*).³⁸

In sum, when measures are over-inclusive on the basis of suspect grounds, States must find alternative means of ensuring that suitable applicants are not penalised for the mere existence of a statistical correlation between allowing people with a particular property (e.g. sex, sexual orientation, race, religion) to enjoy a liberty (e.g. authorised to adopt) on one hand and damage to the pursuit of a legitimate aim (security, welfare of children, economic stability etc) on the other. The Court did well to apply a kind of strict scrutiny test, placing the burden on the state to show why differential treatment on the basis of suspect grounds is necessary. This test should remain strict even when the state supplies, in good faith, weighty reasons in favor of differential treatment in the allocation of a benefit, which however has an over-inclusive effect. In the case of a state, like France, which has chosen³⁹ to confer upon single persons the benefit of being eligible to adopt, adoption authorities must be required to look at each individual application separately rather than use sexual orientation as a *proxy* for suitability which will inevitably result in the exclusion of suitable applicants. Other things being equal, homosexuals who have all the qualities that are necessary for single persons to become adoptive parents have a *right* under the ECHR to be authorised to adopt.

Conclusion

In this article, I presented a survey of the legal issues that adoption-related cases have raised in the case law of the ECHR. The position of the European Court has shifted gradually from a strict rule against the admissibility of adoption-related cases to a great willingness to scrutinise adoption laws and practice, particularly in relation to discrimination. It has been argued that this shift is justified on the basis of a general argument about the ambit of the ECHR rights. Propositions about the ambit of convention rights are elliptical statements about the merits of each

³⁸ Over-inclusiveness and suspect grounds of differential treatment are necessary but may not be sufficient to establish that the differential treatment was discriminatory. One suggestion might be to add a further condition, namely that the treatment in question affects a fundamental human interest. Consider the following example (put to me by Stuart Lakin): suppose the state refuses to accept blood donations from homosexuals because they are twice more likely to be HIV positive or have other blood transmitted diseases. We might think differently of this case because unlike creating a family, giving blood is not a fundamental interest. I am not convinced however that this suggestion is correct even though it seems to be in the right neighbourhood. A related issue, which I think does condition whether the difference is discriminatory, is whether the (financial) cost of avoiding over-inclusion is too high compared to the importance of the interest involved. It would not for example be discriminatory to refuse blood donations from homosexuals if the process of ensuring that their blood is not contaminated (or the process of decontaminating it) cost the NHS thousands of pounds more than if it only accepted donations from heterosexuals.

³⁹ I shall not discuss in this paper whether the refusal to allow single persons to adopt might be deemed to be a case of indirect discrimination against homosexuals.

application which the Court must not make too quickly as they may well raise substantive issues of human rights principles that have already been recognised by the Court. There are aspects of the adoption laws and practices of contracting states that raise important issues of principle regarding family life, which the Court has already decided in its case law. Principled consistency with established case law requires the Court to extend the application of those principles to adoption cases. One such principle is the requirement to give legal recognition to *de facto* family bonds, including bonds developed between non-biological parents and their children.

In relation to discrimination and adoption, the European Court's controversial judgment in *Fretté* in 2002, stood as authority for the claim that refusing a single person the authorisation to adopt a child, based primarily on his sexual orientation (homosexuality), does not violate the right not to be discriminated against under Article 14 ECHR. I have challenged whether this is in fact what the European Court decided in *Fretté*. The case constitutes an example of a judicial paradox, in that only one judge endorsed the majority reasoning in its entirety and that had the Court followed a different way of voting, it could have reached a different outcome. In my view, *Fretté* should be interpreted to have decided against the applicant on the ground that adoption issues fall outside the ambit of Article 8 ECHR, and not the ground that the treatment in question was not discriminatory. What was presented as the majority judgment in *Fretté*, not only failed to attract the support of the majority of the European Court judges, it also violated fundamental egalitarian principles of human rights. When the Court re-examined the issue six years later, in the recent *E.B.* it was anxious to assert the view that differential treatment of single-person applications for authorisation to adopt, on the basis of the applicant's sexual orientation, is discriminatory. But what it in fact affirmed, reversing *Fretté*, was that adoption issues fall within the ambit of Article 8 ECHR, for the purposes of examining whether there has been discrimination under Article 14 ECHR. This finding is particularly welcomed and the Court should extend this principle to other cases under Article 8 ECHR, not necessarily alleging discrimination.

Still, the ruling of a violation in *E.B.* is an important point of principle which the Court did very well to emphasise and which is defended admirably in the judgment, without any reference to states' moral consensus on the issue or to speculations about scientific data. The Court correctly placed the burden on the state to provide particularly *weighty* reasons that call for differential treatment and did not allow any margin of appreciation in the absence of concrete evidence. This approach is fully justified by the moral values of human rights which prohibit differential treatment based on suspect grounds (such as race, religion, gender, sexual orientation), for the sake of speculative or marginal gains to the interests of others. Unless states

show exactly how differential treatment leads to the protection of fundamental and weightier interests that cannot otherwise be served, then the applicant alleging discrimination should prevail.

Taking a step further, this paper discussed what kind of evidence *could* be produced to justify a *blanket* exclusion of homosexual and lesbian applicants from authorisation to adopt. I argued that the kind of evidence that could be produced would still fail to justify a blanket ban, because the ban would be *over-inclusive*; it would exclude applicants that are perfectly suitable to adopt, using their sexual orientation as an arbitrary criterion. The over-inclusion would offend the egalitarian principles that underpin the ECHR. The rationale of *E.B.* therefore supports the conclusion that contracting states which allow single persons to adopt and which practice a blanket exclusion of homosexual and lesbian applicants, are in breach of the ECHR, *no matter what evidence they can produce in defense of such practice.*

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