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Homosexual Single Individuals' Right to Adopt Before the European Court of Human Rights and in the French Legal Context

by Elena Falletti*

INTRODUCTION

This article illustrates how the European Court of Human Rights (ECtHR) reversed its jurisprudence on adoption by single homosexual individuals, and describes the consequences of this decision within the French legal system.¹ The decision in *E.B. v. France* concerns the case of Ms. E.B., a French lesbian woman against whom France discriminated in violation of Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR). After French family courts and administrative agencies denied her adoption application and successive appeals on the grounds of her sexual orientation, Ms. E.B. filed a petition before the ECtHR. Following her victory in the supranational court, a domestic administrative tribunal granted Ms. E.B. a new trial and allowed her to adopt a child – surprisingly, not based on human rights principles, but rather on a subjective assessment of the life of the future adoptive parent.

In French law it is possible for unmarried people to adopt children. Those children can assume the legal status of natural children of the adoptive parent.² Ms. E.B., a single woman, applied to adopt a child under the French Civil Code. When she signed the application, on February 26, 1998, she was 37 years old. She had been a kindergarten teacher for thirteen years, and had been in a homosexual relationship with her partner for eight years. All these circumstances were disclosed in her adoption application. After about six months, Ms. E.B. received a first denial of her adoption application from the administrative authorities. The reasoning for the refusal included both “the place [her] partner would

occupy in the child's life” and “the lack of a paternal referent” in her household.³

Although French law provides that an unmarried person is entitled to file an application for adoption, and despite her positive personal qualities and teaching experience, both the administrative institutions and the courts rejected Ms. E.B.'s application up to the *Conseil d'Etat*, the highest French administrative court.

After exhausting all domestic remedies, Ms. E.B. submitted a petition to the ECtHR claiming violations of Articles 8 and 14 of the ECHR on account of the discrimination by the French administrative authorities due to her declared homosexuality. In holding that France had violated these articles of the ECHR in its treatment of Ms. E.B., the ECtHR reversed its earlier precedent regarding adoption by homosexual individuals.

The court's decision in *Fretté* reached no consensus on homosexual individuals' right to adopt, thereby allowing states a wide margin of appreciation – a precedent that would be substantially changed in *E.B.*

THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN SAME-SEX ADOPTION PRIOR TO *E.B.*

Before the case of *E.B.*, the most relevant decision of the ECtHR in same-sex adoption pertaining was *Fretté v. France*,⁴ which concerned a man who requested to adopt a child after several unsuccessful attempts to have a child with a female friend. French Social Services described Mr. Fretté positively, but emphasized that he was not ready to organize his new life around a child and the related responsibilities. They also noted that he had no one to fill the maternal role in his family.⁵ After exhausting domestic remedies, Mr. Fretté petitioned the ECtHR alleging that France violated Articles 6 (right to a fair trial), 8, and 14 of the ECHR by interfering with his family and private life and for discriminating against him based on his homosexuality. By a four-to-three vote, the ECtHR found no violation of the ECHR.

The court's decision in *Fretté* reached no consensus on homosexual individuals' right to adopt, thereby allowing states a wide margin of appreciation – a precedent that would be substantially changed in *E.B.* In *Fretté*, the ECtHR stated that States Parties to the ECHR enjoy a certain margin of appreciation in deciding

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which differences justify different treatment. This margin of appreciation may vary depending on the presence, or absence, of a consensus view on a legal issue, such as adoption, in Member States. In *Fretté*, the ECtHR observed that the margin of appreciation for homosexual couples to adopt children was wide due to lack of such consensus. As a result, the ECtHR left Member States free to decide how to regulate this issue.⁶ To avoid abuse, the ECtHR reserves the right to evaluate conformity of domestic decisions to Article 14 of the ECHR.

The court in *Fretté* found that the French government's stated reasons for the conduct of domestic authorities was justified because of converging interests of the applicant to adopt a child, and the child's interest in being adopted. The ECtHR emphasized the importance of the affective and emotional relationship created through adoption, noting that the interest of the child⁷ must be the predominant factor. In *Fretté*, the French domestic court⁸ noted that the education provided by same-sex parents, and the absence of a maternal role model may have negative consequences.⁹ The ECtHR noted the lack of consensus within the scientific debate about these consequences, especially among psychiatrists and psychologists.¹⁰ The ECtHR also cited deep



Photo by Alfredovic.

The European Court of Human Rights.

Based on these domestic guidelines, on February 24, 2000, the Administrative Court of Besançon (Administrative Court) approved Ms. E.B.'s application.¹⁹ The Administrative Court held that the Children's Welfare Service and the Adoption Board's orders denying her application to adopt did not legally justify

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division in national and international public opinion. For these reasons, the ECtHR held that a wide margin of appreciation did not infringe on the principle of proportionality that the ECHR¹¹ accords to Member States.

A CONCISE OVERVIEW OF FRENCH ADOPTION LAW

In *E.B. v. France*, the ECtHR interpreted the application of French laws,¹² including Article 343 of the Civil Code,¹³ Articles 63 and 100-3 of the Family and Social Welfare Code, and Articles 1, 4 and 5 of Decree no. 98-771 of September 1, 1998, establishing the criteria for evaluating adoption applications for children in state care.¹⁴ These laws affirm that a couple married longer than two years and not legally separated, where both spouses are over twenty-eight years old, may apply to adopt a child.¹⁵ Article 343-1 of the Civil Code states that a single person over twenty-eight years of age may also apply for adoption.¹⁶ In addition, Article 63 of the Family and Social Welfare Code¹⁷ affirmed that a person who has custody and established emotional ties to a child is authorized to adopt the child.¹⁸ Articles 1, 4 and 5 of Decree no. 98-771 provide guidelines for adoption.

rejection of the application. Because Ms. E.B. was a teacher who enjoyed social relationships and showed good familial, educational, and psychological qualities, the Administrative Court determined that she was fit to adopt a child.

However, the public authorities reviewing the adoption appealed to the Nancy Administrative Court of Second Instance (Nancy Administrative Court), which, in its judgment on December 21, 2000, reversed the Administrative Court's decision granting custody. The Nancy Administrative Court held that Ms. E.B.'s personal situation presented two grounds for rejection: first, the absence of a male parental role model capable of fostering an adopted child's development,²⁰ and second, the lack of sufficient clarity about the place that the applicant's female partner would occupy in the child's life.²¹

Ms. E.B. appealed this decision to the highest French administrative authority, the *Conseil d'Etat*, which rejected her appeal on June 5, 2002, citing the same two justifications as the Nancy Administrative Court.²² According to the French administrative judges, the public authorities had to consider Ms. E.B.'s sexual orientation when evaluating the needs and interests of

In *E.B.*, the ECtHR affirms an important principle of law: because sexual behavior concerns very intimate and personal choices, ‘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 of the ECHR.’

the adopted child. The *Conseil d’Etat* further held that barring Ms. E.B.’s application to adopt did not violate Articles 8 and 14 of the ECHR or Article 225-1 of the Criminal Code forbidding sexual discrimination.²³

JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

The ECHR is a living instrument, and is adaptable to moral and social evolution in modern times. Neither the ECHR nor ECtHR jurisprudence provides mandatory rules for adoption. However, despite Member States’ domestic laws on adoption by single individuals, discrimination based on an applicant’s sexual orientation is not allowed.

In *E.B.*, the ECtHR affirms an important principle of law: because sexual behavior concerns very intimate and personal choices, “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 of the ECHR.”²⁴ The ECtHR highlights that this case did not concern

an application for authorisation to adopt by a – married or unmarried – couple, but by a single person. In the Court’s view, that ground might therefore have led to an arbitrary refusal and have served as a pretext for rejecting the applicant’s application on grounds of her homosexuality.²⁵

The ECtHR otherwise found the applicant to have “‘undoubted personal qualities and an aptitude for bringing up children,’ which were assuredly in the child’s best interests, a key notion in the relevant international instruments.”²⁶

Because of the complexity of the case, it is appropriate to explain the ECtHR’s concurring and dissenting opinions. The ECtHR found a violation of Articles 8 and 14 of the ECHR by a ten-to-seven vote. The compensation award of €10,000 against the French government was approved by an eleven-to-six vote. Judge Costa’s dissenting opinion states that there is no explicit right to adopt under the ECHR and finds that, while domestic authorities may not cite the lack of a “paternal” figure, the applicant’s partner’s attitude is a legitimate criterion for refusing adoption.²⁷ Judge Mularoni’s dissenting opinion argues that denial based on the absence of a “paternal referent” for the adopted child is not a violation of Article 14 of the ECHR.²⁸

In both domestic and international law, the best interest of the child is the paramount consideration for all adoption applicants: individuals, couples, homosexuals, and heterosexuals. Judge Zupančič’s dissenting opinion argued that the applicant should have submitted “statistical proof . . . that the French administrative authorities systematically discriminate against lesbian women wishing to adopt a child.”²⁹ Judge Loucaides’s dissenting opinion asserts that sexuality is not a protected status under Article 14 of the ECHR.³⁰

Fundamentally, the ECtHR’s decision in *E.B.* establishes that domestic authorities’ evaluation of a married or unmarried individual’s application to adopt may not be based on the applicant’s sexual orientation.³¹ The decision is a striking departure from the ECtHR’s earlier precedent from *Fretté*, where reaching a consensus opinion on homosexual adoption was inconceivable.

THE FINAL FRENCH COURT DECISION ON THE *E.B.* CASE

After the decision of the ECtHR in *E.B.*, on April 28, 2008, Ms. E.B. once again petitioned to adopt a child. Nevertheless, on January 26, 2009, French administrative authorities rejected her petition. Ms. E.B. then appealed to the French Equal Opportunities and Anti-Discrimination Commission³² (*Haute Autorité de Lutte contre les Discriminations et pour l’Égalité* (HALDE)) on the following grounds: first, that she suffered discrimination because of her sexual orientation, despite the fact that she clearly met the legal requirements to adopt a child; second, that she had informed the Social Services of her same-sex relationship with Ms. R.; third, that psychological and social reports had given a favorable opinion of Ms. E.B.’s adoption application.³³

The French administrative authority (*le Président du Conseil général du Jura*) argued that Ms. E.B. could not adopt a child, citing new reasons, including the significant age difference between her, her partner, and the child, as well as her partner’s limited involvement in the adoption proceedings.³⁴ The President of the *Conseil Général du Jura* (Jura General Council) found Ms. R.’s alleged lack of interest significant, stating: “As a matter of fact, Ms. R. shows low emotional involvement with the child and she had a third-party role in the ‘mother-child’ relationship.”³⁵

However, in reviewing the Jura General Council's decision, on October 5, 2009, HALDE noted that the Jura General Council's arguments were ill founded, but were not overtly discriminatory. HALDE found the presumption that Ms. R. was disinterested in the adoption proceeding was unfounded, because Ms. R. participated in all interviews during the proceedings.³⁶ Furthermore, the psychological reports issued by Social Services stated that Ms. E.B. and Ms. R. were "a really complementary couple," who "express that they both want a child."³⁷

Because Ms. R. was not the principal candidate for adoption, her marginal involvement in the adoption procedure was justified.³⁸ On these facts the Administrative Tribunal of Besançon erred by evaluating Ms. E.B. and Ms. R. as if they were a heterosexual couple involved in a civil union (PACS)³⁹ or a marriage, and not as a single woman who wanted to adopt a child with the support of her same-sex partner.

Based on this error, French authorities demanded the involvement of the applicant's lesbian partner because she lived with Ms. E.B. and could influence the adopted child. The HALDE decision compared Ms. E.B.'s application with similar adoptions made by single women involved in heterosexual relationships. HALDE made this comparison to illuminate the discriminatory nature of the Administrative Tribunal of Besançon's argument.⁴⁰ According to French authorities, the stability and strength of the adoptive couple are matters of the utmost importance.⁴¹

Recent social developments including divorce and France's PACS⁴² have fostered an epochal change in the traditional idea of family. In this context, HALDE held that if the French Civil Code recognizes the legal right of individuals to adopt children, Articles 8 and 14 of the ECHR protect this possibility for all individuals.⁴³ While there is no right to adopt a child under the ECHR, each application for adoption must be judged in keeping with Articles 8 and 14 of the ECHR. Even if discrimination based on sexuality is not explicitly prohibited by the ECHR, the ECtHR's case law specifies that the list of human rights recognized in the ECHR is not exhaustive.⁴⁴

Nevertheless, the decisions of the French courts at issue in the *E.B.* case seem to be founded only upon her sexual orientation,

despite psychological and social reports regarding the professional and personal qualifications of the claimant. For these reasons, HALDE stated that the Jura General Council's decision is contaminated by discrimination in violation of Articles 8 and 14 of the ECHR. These facts led HALDE to overturn the Jura General Council's decision that upheld the denial of Ms. E.B.'s adoption petition.⁴⁵ Ultimately, the Administrative Tribunal of

Besançon issued a new decision that approved Ms. E.B.'s application for adoption based on positive psychological reports.⁴⁶ Ms. E.B. can now adopt a child.

CONCLUSIONS

The *E.B.* case confirms that the margin of appreciation afforded to Member States in their evaluation of adoption applications is limited by the requirement of an "objective and reasonable justification" for refusal.⁴⁷ Indeed, a refusal may not be based on a prospective parent's sexual orientation. The ultimate domestic resolution of the *E.B.* case additionally reveals an interesting and controversial practice: the Administrative Tribunal of Besançon implemented the ECtHR's judgment based on recognition of specific personal

circumstances related to the applicant, not on the fundamental right of non-discrimination. The Administrative Tribunal of Besançon did not refer to the ECtHR's judgment in its legal reasoning, but instead relied on HALDE's decision. Still, HALDE specifically cited the ECtHR's judgment in its own decision. In this way, the ECtHR's decision influenced the final result of the French judges, even if it was not part of their legal reasoning.

The ECtHR's decision in *E.B.* is of fundamental importance. It requires Member States to move past prejudices against adoption applicants based on their sexual orientation, a characteristic that is wholly unrelated to an individual's parenting capabilities. Ms. E.B. was successful in her work as an educator of children and was recognized as a good teacher by French authorities, independent of her sexual orientation. The refusal of her request for adoption constituted discrimination based solely on abstract categories, directly contrary to Articles 8 and 14 of the ECHR.⁴⁸ The ECtHR's decision in *E.B.* makes clear that States Parties to the ECHR are free, within their margin of appreciation, to prohibit the adoption of children by unmarried people, but may not do so based on sexual orientation. **HRB**

ENDNOTES: Homosexual Single Individuals' Right to Adopt Before the European Court of Human Rights and in the French Legal Context

¹ See Anne Viel, *L'Homoparentalité*, (2002-2003) (Ph.D dissertation, Lille University, available at <http://195.220.153.189/Document.htm&numrec=031490302967210>, last visited Feb. 17,

2011); Machteld Vonk, *Children and Their Parents: A Comparative Study of the Legal Position of Children With Regard to Their*