CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FORMER THIRD SECTION

CASE OF FRETTÉ v. FRANCE

(Application no. 36515/97)

JUDGMENT

STRASBOURG

26 February 2002

FINAL

26/05/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

In the case of Fretté v. France,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr W. FUHRMANN, *President*,
Mr J.-P. COSTA,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 2 October 2001 and 30 January 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36515/97) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Philippe Fretté ("the applicant"), on 1 April 1997.

2. The applicant alleged, in particular, that the decision to dismiss his application for authorisation to adopt amounted to an arbitrary interference with his private and family life, within the meaning of Article 8 of the Convention, and that it was based exclusively on an unfavourable prejudice about his sexual orientation. He also complained that he had not been notified of the hearing held by the *Conseil d'Etat* and that he had not been given access to the Government Commissioner's submissions prior to the hearing, in breach of Articles 6 and 13 of the Convention.

3. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 12 June 2001 the Court declared the application partly admissible [The Court's decision is obtainable from the Registry].

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 October 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the French Government* ("the Government")
Mr R. ABRAHAM, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mrs L. DELAHAYE, *magistrat*, on secondment to the Human
Rights Section of the Legal Affairs Department,
Ministry of Foreign Affairs,
Mrs H. DAVO, *magistrat*, on secondment to the Human
Rights Office, European and International
Affairs Department, Ministry of Justice,
Mrs A. OUI, Principal Administrative Assistant,
Social Services Department,
Ministry of Employment and Solidarity, *Counsel*;

(b) *for the applicant*
Mr R. WINTEMUTE, Reader in Law, King's College,
University of London, *Approved Representative*,
Mr T. FORMOND, doctoral student in private law,
University of Paris X (Nanterre),
Mr S. GARNERI, doctoral student in public law,
University of Aix-en-Provence, *Advisers*.

7. The Court heard addresses by Mr Wintemute and Mr Abraham.

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Third Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. In October 1991 the applicant made an application for prior authorisation to adopt a child. A social inquiry was opened by the Paris Social Services, Child Welfare and Health Department. On 18 December 1991 the applicant had a first interview with a psychologist from the Department, during which he revealed that he was a homosexual. He submits that during the interview he was strongly urged not to continue with the adoption process.

10. In a decision of 3 May 1993 the Paris Social Services Department rejected the applicant's application for authorisation to adopt. The reasons given for the decision were that the applicant had "no stable maternal role

model" to offer and had "difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child". The decision was taken on the basis of various inquiries leading, among other things, to a social services report of 2 March 1993, which included the following statements:

> "... Mr Fretté seems to us to be a sensitive, thoughtful man who shows consideration for others. He discusses his emotional life and his homosexuality with a great deal of honesty and simplicity. He spoke to us of a number of relationships which have had a major impact on his life, particularly one with a male friend who has now died. It should be added that he is now the auxiliary guardian of this friend's child. ...
>
> His humanistic, altruistic cast of mind prompts him to take an interest in the problems of the Third World. He sponsors two Tibetan children, one of whom is a baby.
>
> He is able to talk sensibly and intelligently about the boy over whom he has guardianship. He is not personally responsible for the boy, who is in the care of his grandmother, but he plays a highly active part in his upbringing. His ideas about bringing up children are well thought out and imbued with a spirit of tolerance.
>
> Mr Fretté has been thinking about adopting since 1985. He is aware that his homosexuality may be an obstacle to being granted authorisation to adopt because of the prevailing views of society.
>
> In his opinion, his choice of emotional and sexual lifestyle has no bearing on his desire to bring up a child. His application is a personal undertaking not a militant gesture.
>
> Since 1985 he has met many homosexual men with children.
>
> He even once considered having a child with a female friend but the plan came to nothing because of a lack of maturity on both sides. This friend is nonetheless still very interested in Mr Fretté's plan to adopt and has even promised to act as a female role model for the child.
>
> Mr Fretté's application to adopt a child is motivated by a desire to provide a child with affection and a proper upbringing. In his view the essential thing is to love and care for a child, adoption, for him, being no more than a social and legal procedure.
>
> Mr Fretté has the support of the friends around him. It seems, however, that his family either do not know of his plans or have misgivings about them.
>
> His desire for a child is genuine but he has difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child. For example, it was only when we visited his home that he realised how unsuitable his flat is for a child to live in. As a result he began considering the possibility of moving.
>
> When questioned as to how he regarded his role in society as a single father he said he did not have an answer. He considers himself capable of managing the day-to-day life of a child and thinks that he will in due course find the answers to the questions about his homosexuality and the absence of an adoptive mother that will occur to the child as he or she grows up.
>
> Mr Fretté is perfectly aware of the importance of telling the child about his parentage. He shows understanding towards women who are impelled to abandon their children. He refuses to have any fixed ideas about the characteristics of the child he would like to adopt.

Nonetheless, he has been thinking that he would prefer as young a baby as possible and that he may begin searching in Korea or Vietnam.

Mr Fretté has undoubted personal qualities and an aptitude for bringing up children. A child would probably be happy with him. The question is whether his particular circumstances as a single homosexual man allow him to be entrusted with a child."

11. On 21 May 1993 the applicant asked the authorities to reconsider their decision but his application was dismissed by a decision of 15 October 1993 indicating, among other things, that the applicant's "choice of lifestyle" did not appear to be such as to provide sufficient guarantees that he would offer a child a suitable home from a family, child-rearing and psychological perspective.

12. On the same day the applicant lodged an application for judicial review of that decision with the administrative court, seeking to have the decisions dismissing his application for authorisation quashed.

13. In a judgment of 25 January 1995 the Paris Administrative Court set aside the decisions refusing the applicant authorisation, citing the following grounds, *inter alia*:

"In dismissing Mr Fretté's application for authorisation to adopt a child, the main reasons given by the authorities were that Mr Fretté had 'no stable maternal role model' to offer and found it difficult 'to envisage the practical consequences of the upheaval occasioned by the arrival of a child'. The first reason is a circumlocution, by which the authorities could only have meant to refer to Mr Fretté's unmarried status, which could be lawfully relied on in support of the impugned decision but, under the provisions of Article 9, paragraph 2, of the decree of 23 August 1985, could not lawfully constitute the sole reason for the decision. Neither is there any evidence in the case file to substantiate the second reason given, which seems in fact to be erroneous in view of the information provided in the reports drawn up by the social services.

The reason given for the decision of 15 October 1993, by which the Director of Social Services, Child Welfare and Health dismissed Mr Fretté's appeal and confirmed the initial decision examined above, was Mr Fretté's 'choice of lifestyle'. Through this euphemistically worded reason the authorities were alluding to Mr Fretté's homosexuality. As the authorities themselves acknowledge in their defence pleadings, this aspect of Mr Fretté's personality could only have constituted a reason to refuse authorisation if it had been combined with conduct that was prejudicial to the child's upbringing.

The social services report prepared by Mrs S. and Mrs D. credits Mr Fretté with 'undoubted personal qualities and an aptitude for bringing up children', finds that 'a child would probably be happy with him' and only raises a question as to the compatibility of Mr Fretté's adoption plans with the 'particular circumstances' of his being 'a single homosexual man'. The social inquiry conducted by the French Vice-Consul's deputy in London noted Mr Fretté's educational skills, which he shows as much in his private life as in his professional activities. The psychiatrist, Dr D., detected 'no psychological impediment' to Mr Fretté's plan and although the psychologist, Mrs O., recommended that authorisation be refused, she gave no reason for her opinion and drew attention elsewhere in her report to 'Mr Fretté's affective qualities and aptitude for bringing up children and his deep understanding of adoption-related issues'.

Whereas the social services reports produced included information, particularly with regard to Mr Fretté's family, which, since they could have no valid bearing on the authorities' decision, infringed his right to respect for his private life, none of the documents included in the case file made it possible to establish or even suggest that Mr Fretté's lifestyle reflected a lack of moral rigour or emotional stability, or a risk that he would abuse the adoption process, or any other conduct indicating that his plan to adopt presented a risk to any child he might adopt.

Thus, those who took the contested decisions in the instant case wrongly interpreted the provisions cited above. Mr Fretté's application to have the aforementioned decisions of 3 May and 15 October 1993 set aside is well-founded."

14. The Paris Social Services appealed against that judgment to the *Conseil d'Etat*.

15. The Government Commissioner, Mrs C. Maugüe, made her submissions at the hearing of 16 September 1996. She submitted that the Paris Social Services' application to have the contested judgment set aside was well-founded, addressing the court as follows:

"The case raises the following question: In spite of Mr F.'s undoubted personal and intellectual qualities, did the authorities have good reason to consider that he did not provide sufficient guarantees to offer a child a home because of his choice of lifestyle?

In the light of the information in the case file, this question is elevated to a matter of principle. This case does not turn on its own facts because the documents in the case file leave me in no doubt that in many respects Mr F. has a genuine aptitude for bringing up children. The only thing that prompted the authorities to refuse authorisation was the fact that Mr F. was a homosexual and therefore that he did not provide sufficient guarantees that he would offer a child a suitable home from a psychological, child-rearing and family point of view. However, nothing in the case file suggests in any way that Mr F. leads a dissolute life and neither is there any reference in it to any specific circumstance that might pose a threat to the child's interests. Accepting the lawfulness of the refusal of authorisation in the instant case would implicitly but necessarily doom to failure all applications for authorisation to adopt by homosexuals ...

It is certain that a number of factors would tend to indicate that the Paris Social Services made an error in assessing the evidence.

The first and undoubtedly the strongest argument is that since the major reform of the laws on adoption introduced by the Act of 11 July 1966, single persons, whether men or women, have been entitled to adopt. ...

Deciding ... by judicial interpretation that an unmarried homosexual man does not provide sufficient guarantees from a psychological and family perspective to adopt a child introduces discrimination between adoption candidates on grounds of their choice of private life which was not expressly intended by Parliament.

The second argument in favour of the Administrative Court's ruling is that a person's right to lead the sex life of his or her choice should not, of course, be contested. This is one of the key components of the right to respect for private life guaranteed, *inter alia*, by Article 8 of the European Convention on Human Rights and Article 9 of the Civil Code. There is no longer any discrimination against homosexuality at domestic level ...

Thirdly, an examination of the case-law of the ordinary courts with regard to granting custody of the children of divorced couples and the exercise of parental authority shows that the ordinary courts take a broadly pragmatic approach in this area and attempt to avoid the pitfalls of an overly categorical approach. Thus, they do not hesitate, where the specific circumstances of the case so require, to accord visiting rights to homosexual parents or even to grant them custody or the right to exercise parental authority. For example, in a case in which it was established that there were upheavals in the mother's household, that there was no evidence of any physical danger to the child in the father's household, that the father lived in a stable relationship with another man and that the child was thriving in his father's home, custody was granted to the father (Pau Court of Appeal, 25 April 1991, no. 91-40734). Conversely, another court found that a father who had 'immoral homosexual relations incompatible with the exercise of parental authority' could not exercise that authority (Rennes Court of Appeal, 27 September 1989, no. 89-48660). Similarly, in a judgment in which it was found that, because of the father's homosexual practices, it would be particularly dangerous for the moral and physical well-being of his children to spend their holidays with him, it was held that there were serious grounds to justify refusing the father that right (First Civil Division of the Court of Cassation (Cass. civ. I), 13 January 1988, no. 86-17784). More recently the Court of Cassation granted a homosexual donor parental authority over a child born by artificial insemination to a mother who was herself involved in a homosexual relationship (Cass. civ. I, 9 March 1994, *M^me^ L. c. M. L.*; D 1995.197 note E. Monteiro; D 1995 summary 131, observations by D. Bourgault-Coudeyville). The courts do not therefore presume that because someone is a homosexual, he or she is disqualified from exercising parental rights. The discussion focuses mainly on the child's interests and the dangers that such circumstances may pose to the child's mental health.

Lastly, authorisation is merely an administrative decision taken prior to the adoption process. ...

2.2. Nonetheless, I consider, for a number of reasons, that the Paris Social Services did not commit any error in assessing the evidence when it held that Mr F. did not provide the necessary guarantees. A number of factors led me to this conclusion.

Firstly, the right of everyone to the sex life of their choice should not be confused with a hypothetical right to have children. ...

Secondly, the pertinence of the comparison with the case-law on custody of children and parental authority is clearly limited. The examples cited above relate only to a previously established family tie or one which corresponds to an actual line of descent. It is one thing to preserve a filial tie between a child and parents who are separating or who wish to confirm their links with him or her but another to allow the establishment of a family tie between a child and an adult out of nothing ...

Thirdly, the question whether a child is in danger of being psychologically disturbed by his relationship with an adult who cannot offer him or her the reference point of a distinct father and mother, in other words a model of sexual difference, is a very difficult one which divides psychiatrists and psycho-analysts. 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. ...

There is no agreement on the answer to that question. If there is any consensus it lies instead in the growing awareness that the rights of the child set the limits of the right to have children and that the child's interests cannot always be reconciled with

current developments. This being so, I believe that when dealing with such a sensitive question, whose implications are more ethical and sociological than legal, it is up to Parliament to take a stance on what amounts to a choice for society. The courts, for their part, should not be anticipating shifts in public opinion, but responding to them.

This brings me to my fourth argument, which is that the question whether one or more homosexuals should be entitled to adopt is not one which Parliament can be said to have determined. ...

Fifthly, there should be no underestimating the part that authorisation plays in the adoption procedure. Admittedly, this is only one stage in the adoption process but it is a crucial one because the adoption cannot go ahead without it. ...

It should be added, as a concluding remark regarding authorisation, that I am aware that what I propose has the drawback that it appears to encourage candidates for adoption to conceal the truth if they feel that their choice of lifestyle amounts to an absolute impediment to their being granted authorisation. However, there are two reasons why I think that this problem can be overcome. Firstly, the question will not arise very often because, as was mentioned above, the scarcity of children eligible for adoption compared to the demand usually prompts the social services to reject requests from single candidates. Secondly, the aim of the inquiries conducted prior to the granting of authorisation is precisely to ensure that the candidate can offer a child a suitable home and this inevitably means that the experts investigate his or her private life. Although the inquisitorial nature of these inquiries has sometimes been condemned (see for example J. Rubellin-Devichi, *Revue française de droit administratif*, 1992, pp. 904 et seq.), they do have the merit of ensuring that authorisation is then granted in full knowledge of the facts.

My final argument is that if you have any remaining scruples about the fact that in considering the legality of a refusal of authorisation you are ruling on a matter which it is usually for the ordinary courts to decide in their capacity as the judges of matters of personal status, your scruples may be partly allayed by the fact that the position you will be taking will not entirely prevent the ordinary courts from authorising the adoption of a child by a homosexual in certain cases if they consider it compatible with the child's interests. When the new law on adoption was introduced recently, a new Article 353-1 was added to the Civil Code, the second paragraph of which provides that if authorisation is refused or not granted within the statutory time, the courts may approve the adoption if they consider that the applicants are capable of providing the child with a suitable home and that this is compatible with the child's interests. ...

It follows from the foregoing that the Paris Social Services are justified in maintaining that the Paris Administrative Court was wrong to rule in the judgment appealed against that the two impugned decisions should be set aside."

16. In a judgment of 9 October 1996 the *Conseil d'Etat* set aside the Administrative Court's judgment and, ruling on the merits, rejected the applicant's application for authorisation to adopt. It decided, *inter alia*, as follows:

"In a decision of 3 May 1993, upheld by a further decision of 15 October 1993 in response to an application for reconsideration, the chairman of the Paris Council ... rejected Mr Fretté's application for authorisation to adopt a child on the ground that although the applicant's choice of lifestyle was to be respected, the type of home that he was likely to offer a child could pose substantial risks to the child's development.

From the information in the case file, particularly the evidence gathered when Mr Fretté's application was being considered, it emerges that Mr Fretté, regard being had to his lifestyle and despite his undoubted personal qualities and aptitude for bringing up children, did not provide the requisite safeguards – from a child-rearing, psychological and family perspective – for adopting a child. The Paris Administrative Court was thus wrong, when setting aside the contested decisions, to rely on the argument that, in refusing the authorisation sought by Mr Fretté on the aforementioned ground, the chairman of the Paris Council had applied these provisions incorrectly.

However, since the appeal procedure has had the effect of transferring all the issues of fact and law to the *Conseil d'Etat*, it is for the latter to examine the other submissions made by Mr Fretté before the Paris Administrative Court. ... The grounds given for the contested decisions satisfy the requirements of the law. ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Regulations and information relating to the adoption procedure

17. The relevant provisions of the Civil Code provide as follows:

Article 343

"Adoption may be applied for by a married couple who have not been judicially separated and have been married for more than two years or are both over twenty-eight years of age."

Article 343-1

"Adoption may also be applied for by any person over twenty-eight years of age." (the age-limit was thirty at the material time, namely prior to the adoption of Law no. 96-604 of 5 July 1996)

18. The Family and Social Welfare Code lays down the rules on the taking of children into State care and the conditions for their adoption. It describes the authorisation procedure as follows:

Article 63

" ... Children in State care may be adopted by persons given custody of them by the social services wherever the emotional ties that have been established between them warrant such a measure or by persons granted authorisation to adopt by the head of the children's welfare service under the conditions laid down by decree ..."

Article 100-3

"Persons wishing to provide a home for a foreign child with a view to his or her adoption shall apply for the authorisation contemplated in Article 63 of this Code."

19. Decree no. 85-938 of 23 August 1985 established the arrangements for appraising applications for authorisation to adopt a child in State care as follows:

Article 1

"Any person wishing to obtain the authorisation contemplated in the second paragraph of Article 63 of the Family and Social Welfare Code must submit an application to that end to the head of the children's welfare service of the *département* in which he or she resides."

Article 4

"In order to assess the application, the head of the children's welfare service shall conduct all the investigations required to ascertain what kind of home the applicant is likely to offer the children from a psychological, child-rearing and family perspective ..."

Article 9

"Decisions to refuse authorisation must be supported by reasons as laid down in section 3 of the Law of 11 July 1979 cited above. The applicant's age or matrimonial status or the presence of children in his or her household may not constitute the sole reason for a refusal."

Article 11

"The decision by the head of the children's welfare service shall apply for three years. A further application for authorisation may be made when that period has expired. Further applications shall be assessed under the same procedure. ..."

20. According to data collected by the French authorities, some 11,500 applications for authorisation were made in 1999. About 8,000 applications were examined that year and the usual average of some 10% were rejected. At the time there were around 2,000 children in State care awaiting adoption. In 1999 the authorities issued some 4,000 visas to foreign children following their adoption by persons residing in France.

B. Notification of hearings before the *Conseil d'Etat*

21. At the material time, Article 55 of the Decree of 30 July 1963 on the organisation and functioning of the *Conseil d'Etat* required lawyers to be advised at least four days before the sitting if any cases in which they were due to appear were on the list of cases to be heard and to be notified of the issues raised in reports to the *Conseil d'Etat.* The obligation to notify therefore applied only in respect of lawyers.

22. As regards private individuals, a decision of the *Conseil d'Etat* of 16 March 1966 (Paisnel, Reports, p. 216) pointed out:

"There is no rule stating that appellants must receive [notice of the date on which their case is to be heard]. If they have not appointed a legal representative, it is for them to ask to be notified of the date on which their case is to be heard or to consult the notice boards installed for this purpose at the registry of the Judicial Division.

This rule, which provides that the parties are summoned to the hearing only if they have appointed a lawyer, should be seen in the light of the rule laid down in section 67 of the Ordinance of 31 July 1945, under which only members of the Court of Cassation and the *Conseil d'Etat* Bar (the *avocats aux conseils*) may plead during hearings before these courts."

23. Since 1 January 2001 all parties to proceedings before the *Conseil d'Etat* have been automatically informed of the date of the hearing. As in the past, the lists of cases for hearing are displayed at the Judicial Division secretariat and so are accessible to the public.

24. At the hearing the Government Commissioner speaks after counsel for the opposing parties have addressed the court and so the parties to the case cannot speak after him (see *Kress v. France* [GC], no. 39594/98, § 48, ECHR 2001-VI). Even if they are not represented by a lawyer, they do, however, have the possibility, hallowed by usage, of sending the trial bench a "memorandum for the deliberations" to supplement the observations they have made orally or to reply to the Government Commissioner's submissions. This memorandum for the deliberations is read out by the

reporting judge before he reads out the draft judgment and before the discussion begins.

25. By section 45 of the Ordinance of 1945, cases for which it is not compulsory to be represented by a lawyer include applications for judicial review of the decisions of the various administrative authorities.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 8 AND 14 OF THE CONVENTION

26. The applicant alleged that the rejection of his application for authorisation to adopt had implicitly been based on his sexual orientation alone. He argued that that decision, taken in a legal system which authorised the adoption of a child by a single, unmarried adoptive parent, effectively ruled out any possibility of adoption for a category of persons defined according to their sexual orientation, namely homosexuals and bisexuals, without taking any account of their individual personal qualities or aptitude for bringing up children.

Referring to the procedure adopted by the Court in *Salgueiro da Silva Mouta v. Portugal* (no. 33290/96, ECHR 1999-IX), the applicant considered it appropriate to place the issue in the context of Article 14 of the Convention. He alleged that he was the victim of discrimination on the ground of his sexual orientation, in breach of Article 14 taken in conjunction with Article 8. In view of the inevitability of the conclusion on that point, he did not deem it necessary for the Court to determine whether there had been a breach of Article 8 taken alone.

The relevant parts of the Articles in question provide:

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex ..."

Article 8

"1. Everyone has the right to respect for his private and family life, ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Applicability of Article 14 taken in conjunction with Article 8

27. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the provisions of the Convention (see, among many other authorities, *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 585, § 22, and *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, p. 184, § 33).

28. While he accepted that the right to respect for private and family life did not include the right of any unmarried person to adopt a child, the applicant submitted that the refusal of authorisation to adopt had infringed his right to respect for his private life without discrimination on the ground of his sexual orientation. He considered that an examination of the French authorities' decisions revealed that the decision to refuse authorisation had been based on his sexual orientation alone. The only way of avoiding that conclusion would be to show that the decision had been based on another ground which would have been applied in the same way to an unmarried single person, whether a heterosexual or a homosexual who had kept his homosexuality secret, with the same personal qualities and aptitude for bringing up children as had been recognised in himself. The fact was that there was no such ground. While the decision of 3 May 1993 had mentioned his difficulties in "envisaging the practical consequences of the upheaval occasioned by the arrival of a child" and the lack of a "stable maternal role model", it had to be said that those grounds had not been taken up again subsequently. Moreover, the Administrative Court had found that none of the evidence in the case file substantiated the first ground and had interpreted the second as "a circumlocution ... which ... could not legally constitute the sole reason for the decision". As for the ground of the child's interests on which the Government relied, it had to be said that no specific child had been identified during the authorisation procedure and therefore that it applied to all the children in the world who might be in need of an adoptive parent or parents. To exclude all unmarried homosexuals from adoption on the ground that that was in the interest of any child who might be in need of adoptive parents showed that the difference in treatment was based on sexual orientation.

Pointing out that sexual orientation is "a most intimate part of an individual's private life" (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI), the applicant maintained that practically any difference in treatment based on sexual orientation amounted to interference in a homosexual's private life because it required him to choose between denying his sexual orientation or being penalised, unlike

anybody else. The fact that the decisions taken by the French authorities with respect to the applicant's application for authorisation meant that anyone who revealed their homosexuality relinquished all possibility of adoption was particularly serious. An individual's private life was hardly respected if he was obliged to forgo a possibility available to any unmarried heterosexual in France, namely that of becoming a parent, if he wished to remain true to his sexual orientation. All the circumstances of which the applicant complained therefore fell within the ambit of Article 8 (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV). The applicant added, in the alternative, that adoption was a prospective family life which could fall within the ambit of Article 8 of the Convention for the purposes of Article 14.

29. The Government maintained, on the contrary, that the dispute did not fall within the scope of the Convention. Article 8 of the Convention did not safeguard aspirations, yet to be fulfilled, to found a family. Refusing to grant a person prior administrative approval for a possible adoption was not a decision that interfered with a person's private life and so it did not fall within the scope of Article 8. While respect for private life should also comprise "to a certain degree the right to establish and develop relationships with other human beings" (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 33-34, § 29), the right to adopt was not included as such among the rights guaranteed by the Convention (see *Di Lazzaro v. Italy*, no. 31924/96, Commission decision of 10 July 1997, Decisions and Reports (DR) 90-B, p. 134).

In the Government's opinion, the applicant was fostering confusion between the reasons for the refusal of authorisation, which he believed to have been based on his sexual orientation, and the actual object of the decision to dismiss his request which did not in itself amount to an interference in his private life. With regard to the latter point, the Government noted that the case did not concern a dispute over an existing situation, as had been true in the cases cited by the applicant, but a request relating to his future life, so that he could not allege that any right had been infringed. What the applicant sought was not recognition – and protection – of a right within the sphere of his private life but recognition of the mere potential or possibility for him to become an adoptive father.

As to the reasons for refusing authorisation, the Government noted that neither the decision of 3 May 1993, which referred only to the absence of a stable maternal role model and the applicant's difficulties in assessing the day-to-day consequences of an adoption, nor that of 15 October 1993, which alluded only to his "choice of lifestyle", contained the slightest indication that they were taken solely on the basis of his sexual orientation. The same was true of the Administrative Court's judgment and the *Conseil d'Etat*'s ruling, even though they differed in terms of the solution adopted. While there was no doubt that the expression "choice of lifestyle" did

include sexual orientation, it did not refer to that aspect alone but also covered other factors that tended to indicate that the applicant was not equipped to offer a child a suitable home from a psychological, child-rearing and family perspective.

The Government argued on that basis that Article 8 was not applicable in the instant case. Consequently, there had been no violation of Article 14, which had no independent existence.

30. In the case before it, the Court must therefore determine whether the facts of the case fall within the scope of Article 8 and hence of Article 14 of the Convention.

31. The Court has repeatedly held that Article 14 of the Convention is pertinent if "the subject-matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed ..." (see *National Union of Belgian Police v. Belgium*, judgment of 27 October 1975, Series A no. 19, p. 20, § 45), or the contested measures are "linked to the exercise of a right guaranteed ..." (see *Schmidt and Dahlström v. Sweden*, judgment of 6 February 1976, Series A no. 21, p. 17, § 39). For Article 14 to be applicable, it is enough for the facts of the case to fall within the ambit of one or more of the provisions of the Convention (see *Thlimmenos*, cited above, and *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, p. 17, § 36).

32. The Court notes that the Convention does not guarantee the right to adopt as such (see *Di Lazzaro*, cited above, and *X v. Belgium and the Netherlands*, no. 6482/74, Commission decision of 10 July 1975, DR 7, p. 75). 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 (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, pp. 14-15, § 31, and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 32, § 62). In the instant case, the decision to dismiss the applicant's application for authorisation could not be considered to infringe his right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life.

However, French domestic law (Article 343-1 of the Civil Code) authorises all single persons – whether men or women – to apply for adoption provided that they are granted the prior authorisation required to adopt children in State care or foreign children, and the applicant maintained that the French authorities' decision to reject his application had implicitly been based on his sexual orientation alone. If this is true, the inescapable conclusion is that there was a difference in treatment based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention (see *Salgueiro da Silva Mouta*, cited above, § 28). The Court also reiterates, in this connection, that the list set out in this provision is illustrative and not exhaustive, as is shown by the words "any

ground such as" (in French "*notamment*") (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72).

It is for the Court to determine therefore whether, as the applicant maintained, his avowed homosexuality had a decisive influence. The Court concedes that the reason given by the French administrative and judicial authorities for their decision was the applicant's "choice of lifestyle", and that they never made any express reference to his homosexuality. As the case file shows, however, that criterion implicitly yet undeniably made the applicant's homosexuality the decisive factor. That conclusion is borne out by the views expressed by the Paris Administrative Court in its judgment of 25 January 1995 and the Government Commissioner in her submissions to the *Conseil d'Etat*. The applicant's right under Article 343-1 of the Civil Code, which falls within the ambit of Article 8 of the Convention, was consequently infringed on the decisive ground of his sexual orientation.

33. Accordingly, Article 14 of the Convention, taken in conjunction with Article 8, is applicable.

B. Compliance with Article 14 taken in conjunction with Article 8

34. According to the Court's case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among other authorities, *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24, and *Van Raalte*, cited above, p. 186, § 39). In that connection, the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, among other authorities, *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, pp. 24-25, § 53).

35. According to the applicant, the difference in treatment in the present case could not be based on an objective and reasonable justification. Pointing out that where sexual orientation was at issue, there was a need for particularly convincing and weighty reasons (see *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999, and *Smith and Grady* and *Salgueiro da Silva Mouta*, cited above), he submitted that nothing could reasonably justify his being totally barred from adopting. Although the Government referred to the child's interests, what was at stake in the instant case was not a specific child's interests but those of all the children in the world who might be in need of adoptive parents. The irrebuttable presumption that no homosexual provided sufficient guarantees to offer a suitable home to an adopted child which was the logical corollary of the reference to such an interest reflected a social prejudice and the irrational fear that children brought up by homosexuals

would be "at greater risk of becoming homosexuals themselves or developing psychological problems" and the belief that they would also suffer at all events from other people's homophobic prejudices towards their adoptive parent. Through the assumption that homosexuals were less loving and attentive parents, social prejudice denied the common humanity of heterosexuals and homosexuals – although the latter had the same feelings and aptitudes. Numerous scientific studies had demonstrated the irrationality of that assumption and none had provided any evidence of the supposed "uncertainties that would affect the child's development" if he was adopted by a homosexual – uncertainties on which the Government's argument was based.

The applicant argued that although a child in that situation might be stigmatised in the short term, that did not create a higher risk of problems in the long term and children learnt to cope with the problem, if necessary with the help of a relative, a close friend or a teacher. To accept that the prejudices of third parties could justify exclusion from adoption procedures would be effectively giving a right of veto to parties who were motivated by such prejudices. That argument could not therefore be considered a sufficient justification, as the Court had already held in *Smith and Grady*, cited above, and the United States Supreme Court had decided in 1984 in *Palmore v. Sidoti*. The interests of children likely to be adopted demanded on the contrary that no category of adoptive parents should be excluded for reasons unconnected with their personal qualities or aptitude for bringing up children.

The applicant also questioned the notion that there were more potential adoptive parents than children. That was true of children for whom the French social services were trying to find an adoptive home, but in France thousands of children were excluded from adoption because of their age, ethnic background, disability or past, not to mention the possibility of international adoption. Around the world there were thousands of orphaned or abandoned children waiting in wretched orphanages for an adult to come and look after them.

The applicant further noted that there was no consensus in democratic societies on the need for single homosexuals to be barred totally from adopting. In Canada all the federal entities allowed single people to adopt and none of them prohibited homosexuals from doing so. Only one State in the United States had legislation that expressly prohibited persons who would otherwise be eligible to adopt from adopting a child if they were homosexuals, namely the State of Florida, which also prohibited certain forms of sexual behaviour in private between consenting adults, whether different sexes or the same sex. A large majority of the forty-three Council of Europe member States allowed adoption by unmarried individuals, if only under exceptional circumstances, and did not totally rule out in either their legislation or their case-law the possibility for homosexuals to adopt.

The applicant had found as a result of his research that there were only two countries, France and Sweden, in which case-law had established such a prohibition in respect of adoption by single persons. He had also found that in January 2001 a Swedish government committee had recommended that legislation should be introduced to overturn the prohibition on adoption by homosexuals which had been instituted by a judgment of the Supreme Administrative Court of 1993.

The applicant concluded from the foregoing that the *Conseil d'Etat* had violated Article 14 of the Convention taken in conjunction with Article 8 by making a distinction in which his sexual orientation was the decisive factor.

36. The Government submitted that the applicant's sexual orientation was not the reason for his being refused authorisation to adopt. They observed that the decision of 3 May 1993 had been based primarily on his status as a single man with no close ties to any female role model. They noted in that connection that the absence of a paternal role model had already constituted one of the reasons cited in a judgment of the *Conseil d'Etat* of 18 February 1994 for refusing an application for authorisation to adopt by a single woman. The second reason for the decision referred to the applicant's difficulties in gauging the day-to-day consequences of adoption, as noted in the report drawn up by the social workers on 2 March 1993 after visiting Mr Fretté's home to interview him. Moreover, while the reference to "choice of lifestyle" undoubtedly included Mr Fretté's sexual orientation, that was not its sole compass as it also covered his single status as such and, more generally speaking, his daily lifestyle which had led to the conclusion that he was not equipped to offer a child a suitable home from a psychological, child-rearing and family perspective. Moreover, neither the judgment of the Administrative Court nor that of the *Conseil d'Etat* contained any indication that the decision to refuse the applicant's authorisation was based solely on his sexual orientation even though the two judgments differed in terms of the solution adopted.

Even if the decision to refuse authorisation had been based exclusively or chiefly on the applicant's sexual orientation, there would be no discrimination against him in so far as the only factor taken into account was the interests of the child to be adopted. The justification for the decision lay in the paramountcy of the child's best interests, which formed the underlying basis for all the legislation that applied to adoption. In that respect in particular, "the rights of the child set the limits of the right to have children", as the Government Commissioner pointed out (see paragraph 15 above). The right to be able to adopt relied upon by the applicant was limited by the interests of the child to be adopted.

The criteria applied for that purpose had been both objective and reasonable. The difference in treatment stemmed from the doubts that prevailed, in view of what was currently known about the subject, about the development of a child brought up by a homosexual and deprived of a dual

maternal and paternal role model. There was no consensus about the potential impact of being adopted by an adult who openly affirmed his homosexuality on a child's psychological development and, more generally, his or her future life, and the question divided both experts on childhood and democratic societies as a whole.

Neither was there any consensus on the matter in the Council of Europe member States. To date, only the Netherlands, which had recently adopted legislation on the subject, allowed two persons of the same sex to marry, adopt and bring up children together. Many of the European Union States did not allow single persons to apply for adoption while others subjected the possibility to restrictive conditions because adoption by homosexuals, living alone or with a partner, gave rise to serious misgivings as to whether that was in the child's best interests.

The total lack of consensus as to the advisability of allowing a single homosexual to adopt a child means that States should be afforded a wide margin of appreciation and, according to the Court's case-law, it was not for the Court to take the place of the national authorities and take a categorical decision on such a delicate issue by ordaining a single solution. The Government concluded therefore that there had been no violation of Article 14 of the Convention taken in conjunction with Article 8.

37. The Court observes that it has found that the decision contested by the applicant was based decisively on the latter's avowed homosexuality. Although the relevant authorities also had regard to other circumstances, these appeared to be secondary grounds.

38. In the Court's opinion there is no doubt that the decisions to reject the applicant's application for authorisation pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure, for which the granting of authorisation was, in principle, a prerequisite. It remains to be ascertained whether the second condition, namely the existence of a justification for the difference of treatment, was also satisfied.

39. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (see *Thlimmenos*, cited above, § 44).

40. However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, among other authorities, *Petrovic*,

cited above, pp. 587-88, § 38, and *Rasmussen v. Denmark*, judgment of 28 November 1984, Series A no. 87, p. 15, § 40).

41. It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State (see, *mutatis mutandis*, *Manoussakis and Others v. Greece*, judgment of 26 September 1996, *Reports* 1996-IV, p. 1364, § 44, and *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 84, ECHR 2000-VII). This margin of appreciation should not, however, be interpreted as granting the State arbitrary power, and the authorities' decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention.

42. As the Government submitted, at issue here are the competing interests of the applicant and children who are eligible for adoption. The mere fact that no specific child is identified when the application for authorisation is made does not necessarily imply that there is no competing interest. Adoption means "providing a child with a family, not a family with a child", and the State must see to it that the persons chosen to adopt are those who can offer the child the most suitable home in every respect. The Court points out in that connection that it has already found that where a family tie is established between a parent and a child, "particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent" (see *E.P. v. Italy*, no. 31127/96, § 62, 16 November 1999, and *Johansen v. Norway*, judgment of 7 August 1996, *Reports* 1996-III, p. 1008, § 78). It must be observed that the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date. In addition, there are wide differences in national and international opinion, not to mention the fact that there are not enough children to adopt

to satisfy demand. This being so, the national authorities, and particularly the *Conseil d'Etat*, which based its decision, *inter alia*, on the Government Commissioner's measured and detailed submissions, were legitimately and reasonably entitled to consider that the right to be able to adopt on which the applicant relied under Article 343-1 of the Civil Code was limited by the interests of children eligible for adoption, notwithstanding the applicant's legitimate aspirations and without calling his personal choices into question. If account is taken of the broad margin of appreciation to be left to States in this area and the need to protect children's best interests to achieve the desired balance, the refusal to authorise adoption did not infringe the principle of proportionality.

43. In short, the justification given by the Government appears objective and reasonable and the difference in treatment complained of is not discriminatory within the meaning of Article 14 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

44. The applicant complained that he had not been able to attend the hearing before the *Conseil d'Etat* because he had not been notified of the date. He alleged a breach of the right to a fair trial guaranteed by Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

45. The applicant noted that, in the absence of any information from the judicial authorities, he had not been able to acquaint himself with and answer the Government Commissioner's submissions. Because of his professional activities, he had not been able to pay regular visits to the *Conseil d'Etat* to check whether his case was listed for hearing on the notice boards put up for that purpose. He had repeatedly telephoned the registry of the *Conseil d'Etat* to enquire about the date of the hearing but he had never been given a clear answer. Nor had he been told that he could ask to be notified of the date of the hearing in writing. He submitted that the fact that the parties were not automatically summoned to hearings was in itself contrary to Article 6 § 1 of the Convention. Penalising an individual who exercised his right not to appoint a member of the *Conseil d'Etat* and Court of Cassation Bar to represent him was incompatible with the principle of fairness, particularly as the failure to summon the applicant had deprived him of the opportunity to produce a memorandum for the deliberations, a possibility noted by the Court in *Kress*, cited above.

46. The Government pointed out that the rules governing contentious proceedings before the *Conseil d'Etat* provided that a list of cases for hearing had to be displayed at the registry in a place that was accessible to the public. Those rules stipulated, however, that the parties should be

notified automatically, four days at least before the hearing, only if they had appointed a lawyer. All parties were entitled to appoint a lawyer up to the date of the hearing, applying for legal aid where necessary. As for parties who had not appointed a lawyer, they had to accept a duty of diligence, that is to ask to be notified in writing of the date of the hearing. In the instant case, the Government submitted that the applicant could not rely on the complaint that he had not been notified because nothing appeared to indicate that he had carried out the formality of asking the registry of the *Conseil d'Etat* to inform him of the date of the hearing.

The Government also pointed out that in some fields of the law, in an effort to be more liberal and provide broad access to the courts, the *Conseil d'Etat*'s rules of procedure waived the obligation for the parties to the proceedings to appoint a lawyer to lodge their application or present their submissions in writing. The exclusive right of audience before the *Conseil d'Etat* was however retained by a category of specialised lawyers, the members of the *Conseil d'Etat* Bar. Such a system did not preclude respect for the principle that proceedings must be adversarial since proceedings before the *Conseil d'Etat* were mostly conducted in writing and all written evidence was sent to the parties. Consequently, the fact that the applicant was not notified of the hearing because he had not appointed a lawyer had not infringed his rights guaranteed by Article 6 because he could not have pleaded himself had he been informed that the hearing was about to take place. Moreover, the opposing party's lawyer had made no oral submissions at the hearing.

47. The principle of equality of arms – one of the elements of the broader concept of fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among many other authorities, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports* 1997-I, pp. 107-08, § 23). It also implies in principle the opportunity for the parties to a trial to have knowledge of and discuss all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see, *inter alia*, *Van Orshoven v. Belgium*, judgment of 25 June 1997, *Reports* 1997-III; *J.J. v. the Netherlands* and *K.D.B. v. the Netherlands*, judgments of 27 March 1998, *Reports* 1998-II; and *Nideröst-Huber*, cited above, p. 108, § 24).

48. The Court further observes that in *Kress* (cited above, §§ 72, 73 and 76) it noted that in most cases the Government Commissioner's submissions were not committed to writing, that the Government Commissioner made his submissions for the first time orally at the public hearing of the case, and that the parties to the proceedings, the judges and the public all learned of their content and the recommendation made in them on that occasion. Nonetheless, lawyers who so wished could ask the

Government Commissioner, before the hearing, to indicate the general tenor of his submissions. In addition, the parties were entitled to reply to the Government Commissioner's submissions by means of a memorandum for the deliberations. On the basis of the foregoing circumstances, the Court considered, in *Kress*, in which the applicant had been represented by a lawyer in the proceedings before the *Conseil d'Etat*, that the procedure described above had afforded the litigants sufficient safeguards and that no problem had arisen from the point of view of the right to a fair trial as regards compliance with the principle that proceedings should be adversarial.

49. The circumstances in the present case (that is those that obtained before 1 January 2001 because, since then, there has been a new rule whereby all parties must be informed of the date of the hearing) are somewhat different. The applicant, who had decided to exercise his right not to appoint a lawyer, for which express provision was made in domestic law, was, according to his submissions, not notified of the hearing and so did not attend it. He maintained in that connection that he had repeatedly telephoned the registry of the *Conseil d'Etat* to ask for the date of the hearing but had neither been given a clear answer nor been told of the possibility of asking to be notified thereof in writing, an assertion which the Government did not contest. In the Court's view the applicant could not legitimately be expected to pay regular visits to the registry of the *Conseil d'Etat* to check whether his case was listed on the notice boards on which it was legally required to be displayed four days at least before the sitting. Moreover, such a requirement would not have been compatible with the "diligence" which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *Vacher v. France*, judgment of 17 December 1996, *Reports* 1996-VI, pp. 2148-49, § 28, and *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 15, § 28).

50. Thus, the applicant was not able to acquaint himself with the Government Commissioner's submissions because he had not been notified of the hearing. Nor, since he was unrepresented, had he been able to establish the general tenor of those submissions before the hearing. As a result he was denied the opportunity to submit a memorandum for the deliberations in reply.

51. Thus, as the applicant was denied a fair trial before the *Conseil d'Etat* in the context of adversarial proceedings, there has been a breach of Article 6 § 1 in the instant case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

53. Before the Court the applicant sought payment of 100,000 French francs (FRF), or 15,244.90 euros (EUR) for non-pecuniary damage because of the discriminatory delay of nine years to which his dream of becoming an adoptive parent would have been subjected in the event of a finding of a violation of Article 14 of the Convention taken in conjunction with Article 8. His feelings of injustice, frustration and powerlessness as a result of his treatment by the French authorities and courts throughout the extremely long period during which he had been awaiting the outcome of the proceedings concerning his application for authorisation to adopt were compounded by the fact that the decision to adopt was easier at the age of 39, his age when he took the initial decision, than at 48 or 49, the age that he would be when a new decision could be taken if there was found to be a violation.

54. The Government submitted that a judgment of the Court would in itself constitute sufficient just satisfaction. If, however, the Court considered it necessary to award a sum under this head, it submitted in the alternative that a sum of FRF 30,000 (EUR 4,573.47) would make reparation for the non-pecuniary damage sustained by the applicant as a result both of the decision to reject his application and of the nature of the proceedings before the *Conseil d'Etat*.

55. The Court notes that in the instant case the only basis for awarding just satisfaction lies in the violation of Article 6 § 1 due to the nature of the proceedings before the *Conseil d'Etat.* The applicant did not seek compensation for any non-pecuniary damage he may have sustained in this respect, and the Court has consistently held that it does not have to consider such an issue of its own motion (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 155, ECHR 2000-VII, and, *mutatis mutandis*, *Scuderi v. Italy*, judgment of 24 August 1993, Series A no. 265-A, p. 8, § 20).

B. Costs and expenses

56. The applicant, who produced vouchers, sought payment of the sum of FRF 43,132 (EUR 6,575.43), made up of FRF 40,000 (EUR 6,097.96) in legal fees for his representation before the Court, FRF 1,000 (EUR 152.45) for his own correspondence and photocopying expenses in connection with the proceedings before the Court and the domestic courts, and FRF 2,132 (EUR 325.02) for the travel and subsistence expenses incurred in order to attend the hearing in Strasbourg.

57. The Government submitted that only the costs and expenses incurred in the proceedings before the Court could be reimbursed.

58. The Court reiterates that costs incurred before national courts may only be taken into account if they were incurred in seeking redress for the violations of the Convention found, which was not so in the instant case. As for the costs and expenses incurred before the Convention institutions, the Court also notes that it has found a breach only in respect of Article 6 § 1 of the Convention. Making its assessment on an equitable basis and according to the criteria laid down in its case-law (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II), the Court awards the applicant EUR 3,500 for costs and expenses.

C. Default interest

59. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8;

2. *Holds* unanimously that there has been a violation of Article 6 of the Convention;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 3,500 (three thousand five hundred euros) plus any value-added tax that may be chargeable in respect of costs and expenses;

(b) that simple interest at an annual rate of 4.26% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 26 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

W. FUHRMANN
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring opinion of Mr Costa joined by Mr Jungwiert and Mr Traja;

(b) joint partly dissenting opinion of Sir Nicolas Bratza, Mr Fuhrmann and Mrs Tulkens.

W.F.
S.D.

PARTLY CONCURRING OPINION OF JUDGE COSTA JOINED BY JUDGES JUNGWIERT AND TRAJA

(Translation)

The European Court of Human Rights is often faced with two particular problems although it rarely encounters both at the same time. The first relates to the determination of the substantive scope of the Convention and the second to the margin of appreciation afforded States in certain areas by the Court's case-law.

Fretté v. France was a case in which the Chamber had to deal with both problems simultaneously and so it is not surprising that it was divided on the subject. I myself found that there was no breach of Article 14 of the Convention taken in conjunction with Article 8, but for a quite different reason from that of the majority, relating to the applicability or rather, as far as I was concerned, the inapplicability of these provisions. I shall attempt to explain my reasoning.

1. Applicability of Article 14, taken in conjunction with Article 8

It is not disputed that the issue at the heart of this case is the ground for the dismissal of the applicant's application for authorisation to adopt, namely his homosexuality, which he courageously revealed during the inquiries carried out as part of the authorisation procedure, which is the responsibility of the social services in the relevant *département*, in this case Paris. The judgment of the administrative court, which quashed the decision to refuse the applicant authorisation, stated this expressly. Although the *Conseil d'Etat's* ruling, which set aside the administrative court's judgment and upheld the social services' decisions, referred more discreetly to the "applicant's choice of lifestyle [which] was to be respected", the masterly submissions by Mrs Christine Maugüe, Government Commissioner before the *Conseil d'Etat*, of which she is also a member, leave it in no doubt that it was because Mr Fretté claimed to be a homosexual that he was refused authorisation. Mrs Maugüe also emphasised that the *Conseil* had been called on to give a landmark ruling on this matter (see the extracts from her submissions cited in paragraph 15 of the present judgment).

I would also point out that the French adoption procedure requires an initial administrative authorisation, which is granted or refused *in abstracto* depending on the guarantees offered by the applicant (or applicants in the case of a couple) in terms of the kind of home that the child would be offered from a psychological, child-rearing and family perspective. This authorisation is not sufficient in itself for the adoption to proceed because the adoption is approved or rejected *in concreto* by the *tribunal de grande instance* and the parties and the public prosecutor may appeal against its decision. However, it is a practically indispensable prerequisite since the

adoption cannot proceed without prior authorisation save where the child is in State care and has already been placed in the custody of the persons applying for adoption or in the event provided for by Article 353-1 of the Civil Code ("If authorisation has been refused, the courts may approve the adoption if they consider that the applicants are capable of providing the child with a suitable home and that adoption is compatible with the child's interests"). There is no chance that the first exception will operate in Mr Fretté's favour and hardly any more likelihood that the second will either.

The facts of the case are therefore clear. In practice a homosexual such as the applicant is denied any possibility of adopting a child, and at any rate that is the position in the present case.

Paragraph 27 of the judgment wisely refers to the Court's case-law on the subject, according to which Article 14 is not applicable unless the facts at issue fall within the ambit of one or more of the provisions of the Convention. This interpretation of Article 14 is the logical consequence of what it actually states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination ..." It is supported still further by the converse implication of Protocol No. 12, which was signed on 4 November 2000 but is not yet in force and introduces a blanket ban on discrimination: "The enjoyment of any right set forth by law shall be secured without discrimination ..." Although the European legislature has decided to go further than it did in 1950, should the European Court be swayed by what it thinks the position in law ought to be and anticipate the entry into force of a Protocol which clearly expresses that intention but is subject to the ratification of the States? In my opinion the answer has to be no, if the Court's will is not to be given precedence over the States which founded it.

Given therefore that the current interpretation of Article 14 remains valid – and let it be said in passing that raising the question of a potential violation of Protocol No. 12 when it enters into force is both premature and debatable because it is not certain that the legal authorisation procedure actually establishes a right or a freedom to adopt – I believe that Article 14 does not apply in the instant case.

First of all, the Convention does not guarantee a right to adopt (see the decisions of the European Commission of Human Rights cited in the judgment, particularly that of 10 July 1997 on the application by Mrs Dallila Di Lazzaro), or even any protection of the desire – however respectable – to found a family (see the judgments cited in paragraph 32, particularly *Marckx*). Nor are any rights of this sort to be found in any of the other international instruments which, although not binding on our Court, may provide it with guidance, such as the United Nations Convention on the Rights of the Child.

Secondly, it is not enough to state, as the applicant did (see paragraph 28 of the judgment), that a person's sexual orientation is part of his or her private life. This is of course true and I had no doubt in finding for example that there was a breach of Article 8 in the case of homosexuals of both sexes who were dismissed from the armed forces for homosexuality (see *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999, and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI). However, that was because there had been an interference in the applicants' private lives, as in other famous cases such as *Dudgeon v. the United Kingdom* (judgment of 22 October 1981, Series A no. 45) or *Modinos v. Cyprus* (judgment of 22 April 1993, Series A no. 259), the circumstances of which are so well known that I will not go over them again (criminal punishment of homosexual relations). In this case, precisely given that there is no right to (adopt) children and the Convention does not safeguard the desire to found a family, there was in my view no interference by the State in Mr Fretté's private or family life. The rejection of Mr Fretté's application for authorisation was not in itself a violation of his private life or of his status as a single man without children. Might it legitimately be said that the very reasons for the negative response constituted an interference in his private life in that they stigmatised a certain choice of lifestyle? There may be some hesitation on this point but ultimately I do not believe it can be true because the *département's* attitude, which was reflected in reports that were, moreover, well balanced and not hostile towards the applicant on principle, mainly took account of the interests of the child likely to be adopted in the event that authorisation was granted. Whether the authorities were right or wrong is another question, but in any event their decision does not seem to me to affect the right to respect for private and/or family life within the meaning of Article 8.

Thirdly, I would like to submit, with all due respect for my colleagues, that paragraph 32 of our judgment, which finds Article 14 taken in conjunction with Article 8 applicable, is unconvincing. It expressly refers to a right guaranteed to the applicant by Article 343-1 of the Civil Code, but this Article merely states that adoption may be applied for and the possibility of applying for something does not establish a right to obtain such a thing otherwise the words would be meaningless. Implicitly, this paragraph is based on the idea that the rejection of Mr Fretté's application did indeed constitute a violation by the State of his right, but this seems to me to be a piece of circular reasoning.

My last point relates to the applicant's argument based on *Thlimmenos v. Greece* ([GC], no. 34369/97, ECHR 2000-IV) which the present judgment, moreover, does not follow in the section setting out the Court's reasoning. While recognising that *Thlimmenos* broadened the applicability of Article 14, I do not find the analogy convincing because in that case what

was at issue was an exclusion based on the fact of having committed a crime and the failure to take account of the fact that the crime of which the applicant was accused was *solely* the consequence of his exercising his freedom of religion. In the instant case the applicant was not, I am glad to say, subjected to a criminal penalty because of his private life. The rejection of his application could just as easily have been the answer given – as happens every day – to other single persons like him or couples applying for authorisation to adopt, whose applications are rejected not because of their sexual mores but because the *département* considers that they do not provide sufficient guarantees that they will offer a child a suitable home from a psychological, child-rearing and family perspective (incidentally, although in *Thlimmenos*, in which I sat, the Court reached a unanimous decision, I do wonder whether it may have gone a little far on that occasion, and I note that the judgment was delivered before the opening for signature of Protocol No. 12 – which I view as a key factor).

In short, I do not see how I could find Article 14 applicable in this case, even when taken in conjunction with Article 8.

2. Non-violation of the above provisions

Having arrived at this definite conclusion, I shall make only a few brief comments on this second matter, because my finding that the Articles in question were inapplicable inevitably leads me to find that there was no violation.

In reality, the judgment arrives at the latter conclusion through a combination of the concept of the margin of appreciation, whose scope is influenced by the nature of the subject at issue and the lack of any common ground in Europe in this area (see paragraphs 40 and 41 of the judgment), and the child's best interests (pre-eminence of the rights of the child over the right to a child) in the absence of any consensus in the scientific community on the impact of adoption by a single homosexual person or a homosexual couple (see paragraph 42 of the judgment). In reality, most of the majority have based their decision, without saying so, on the precautionary principle.

If I had had to decide one way or another, I would have been very hesitant. I recognise that the above arguments are strong and that they are not at variance with the Court's case-law. On the other hand it could be argued both that French law does not prohibit adoption by a single homosexual and that it appears from the file that the applicant seemed to offer many guarantees tending to confirm the belief that he could make a child happy even in the absence of a maternal or female role model. However the Court endeavours to rule on the actual circumstances and not take general, abstract decisions.

There are therefore arguments in both directions and the conclusion reached depends on the angle from which the matter is viewed, namely whether the emphasis is put on the subsidiarity of the European Court of

Human Rights' role or on the importance of the "European supervision" it is supposed to carry out.

Yet in the end everything holds together for how can European supervision be given preference to subsidiarity when the right asserted by the applicant – however understandable it might be on an emotional and personal level – is neither a right within the meaning of national law nor a freedom guaranteed by the Convention?

The fundamental paradox of this judgment seems to me that it would have been easier to justify the rejection of the complaint on the legal basis of the inapplicability of Article 14 than to declare Article 14 applicable and then find no breach of it.

JOINT PARTLY DISSENTING OPINION OF JUDGE Sir Nicolas BRATZA AND JUDGES FUHRMANN AND TULKENS

(Translation)

We are unable to share the view of the majority that there has been no violation of Article 14 of the Convention, read in conjunction with Article 8.

1. Before explaining why we disagree over Article 14 of the Convention, we would like to make some additional comments concerning the applicability of Article 8 of the Convention.

We have no difficulty in accepting the European Commission of Human Rights' consistently expressed opinion that Article 8 of the Convention does not guarantee a right to adoption as such. We also accept that Article 8, which guarantees the right to respect for family life, may not be interpreted to safeguard the mere desire to found a family, whether by adopting or by any other means. In this connection, there is a distinction between the instant case and *Salgueiro da Silva Mouta v. Portugal* (no. 33290/96, ECHR 1999-IX), in which there was already an established family life between the applicant and his daughter, and the decision of the Lisbon Court of Appeal to award parental authority over the child to the applicant's ex-wife constituted a clear infringement of his right to respect for his family life and consequently fell within the scope of Article 8. It follows in the instant case that the rejection by the *Conseil d'Etat* of the applicant's application for authorisation to adopt did not entail a direct interference with his rights guaranteed by Article 8 of the Convention. Neither did it entail the breach of any form of positive obligation on the State to guarantee the applicant the right to respect for his private or family life.

However, as the present judgment clearly states, the matter cannot rest there, because the application also relates to Article 14 of the Convention. The Court's case-law establishes two major principles regarding the interpretation of this provision, which are directly relevant in the instant case.

Firstly, in as much as Article 14 has no independent existence, its application does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention, just as it does not presuppose a direct interference by the national authorities with the rights guaranteed by such a provision. It is necessary but it is also sufficient for the facts of the case to fall “within the ambit” of one or more of the provisions in question (see, among many other authorities, the following judgments: *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, p. 35, § 71; *Karlheinz Schmidt v. Germany*, 18 July 1994,

Series A no. 291-B, p. 32, § 22; and *Petrovic v. Austria*, 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 585, § 22).

The second principle is closely linked to the first. Article 14 covers not only the enjoyment of the rights that States are obliged to safeguard under the Convention but also those rights and freedoms that fall within the ambit of a substantive provision of the Convention and that a State has chosen to guarantee, even if in so doing it goes beyond the requirements of the Convention. This principle was expressed for the first time by the Court in the case *"relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (judgment of 23 July 1968, Series A no. 6, pp. 33-34, § 9). The Court noted that the right to obtain from the public authorities the creation of a particular kind of educational establishment could not be inferred from Article 2 of Protocol No. 1 and it continued as follows:

> "... nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.
>
> To recall a further example, cited in the course of the proceedings, Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions.
>
> In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14. It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms. No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations, and for instance as to whether the respect due to the right concerned implies positive action or mere abstention."

Similarly, in *Abdulaziz, Cabales and Balkandali*, cited above, the State was not found to be under any obligation pursuant to Article 8 of the Convention to authorise foreign wives residing in the country to be joined by their husbands despite the fact that the latter did not have any independent right of entry to or residence in the territory. Nonetheless, the fact that such a right or privilege had been granted and that the situation fell "within the ambit" of the right to respect for family life guaranteed by Article 8, required that the difference in treatment of persons authorised to reside in the country, namely in this case non-national wives who did not enjoy the right to be joined by their husbands, should be justified under Article 14 (pp. 37-38, § 78).

Applying these principles to the instant case, we consider that although Article 8 of the Convention does not guarantee the right to adoption as such, nor the right for a single person to adopt, the situation which forms the basis of the present application undoubtedly falls within the "scope" or the

"ambit" of that provision. In the Court's case-law, the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which comprises, *inter alia*, the right to establish and develop relationships with other human beings and the outside world (*Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 33, § 29), the right to recognition of one's identity (*Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24) and the right to "personal development" (*Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I).

Thus, by legally entitling single persons to apply for adoption, France went beyond what was required by way of a positive obligation under Article 8 of the Convention. Nonetheless, having granted such a right and established a system of applications for authorisation to adopt, it has a duty to implement the system in such a way that no unwarranted discrimination is made between single persons on the grounds listed in Article 14 of the Convention.

This position cannot in any way be considered to anticipate the implementation of Protocol No. 12 to the Convention, which was signed in Rome on 4 November 2000 and extends the criteria for the application of Article 14 of the Convention, which are limited to "the rights and freedoms set forth in [the] Convention", to provide that "[t]he enjoyment of any right set forth by law shall be secured without discrimination ..." (Article 1). In the instant case, as the majority themselves acknowledge (see paragraph 32 of the judgment) and as we have just demonstrated, the situation of which the applicant complains does indeed fall within the ambit of Article 8 of the Convention and the right recognised under domestic law may not be granted in a discriminatory manner.

2. Having found that "Article 14 of the Convention, taken in conjunction with Article 8, is applicable" (see paragraph 33 of the judgment), the Court considers nonetheless that "the difference in treatment ... is not discriminatory within the meaning of Article 14 of the Convention" (see paragraph 43 of the judgment). This finding seems to us to be contrary in fact and in law to the requirements of Article 14 of the Convention as interpreted by the Court's case-law.

Wherever a legal system grants a right, in this case the right for everyone to apply for authorisation to adopt, it cannot grant it in a discriminatory manner without violating Article 14 of the Convention.

In the context of French law, which authorises all single persons, whether men or women, to submit an application for adoption (Article 343-1 of the Civil Code), we believe that the rejection of the application for authorisation, *based solely on the grounds of the applicant's sexual orientation*, amounts to a breach of Article 14 of the Convention. Of course it was not expressly stated that it was the applicant's homosexuality which was the reason for refusing the authorisation but, on the material presented,

it can be conceded nonetheless that it was his "choice of lifestyle" which was the real reason for the decision. This is moreover what the Government Commissioner pointed out, in the following terms:

> "In the light of the information in the case file, this question is elevated to a matter of principle. This case does not turn on its own facts because the documents in the case file leave me in no doubt that in many respects Mr F. has a genuine aptitude for bringing up children. The only thing that prompted the authorities to refuse authorisation was the fact that Mr F. was a homosexual and therefore that he did not provide sufficient guarantees that he would offer a child a suitable home from a psychological, child-rearing and family point of view. However, nothing in the case file suggests in any way that Mr F. leads a dissolute life and neither is there any reference in it to any specific circumstance that might pose a threat to the child's interests. Accepting the lawfulness of the refusal of authorisation in the instant case would implicitly but necessarily doom to failure all applications for authorisation to adopt by homosexuals ..."

As regards the scope of application of Article 14, there is no doubt that sexual orientation is covered by this provision, be it through discrimination on grounds of "sex" (which is the position of the United Nations' Human Rights Committee, particularly in its *Toonen v. Australia* decision of 4 April 1994) or on grounds of "other status" (European Commission of Human Rights, *Sutherland v. the United Kingdom*, no. 25186/94, report of the Commission of 1 July 1997, § 51, unreported). The Court itself acknowledges this in the present judgment (see paragraph 37). Furthermore, in Chapter III (on equality) of the EU's Charter of Fundamental Rights of 7 December 2000, Article 21 expressly prohibits "any discrimination based on any ground such as sex ... or sexual orientation". Recommendation 1474 (2000) of the Parliamentary Assembly of the Council of Europe recommends that the Committee of Ministers "add sexual orientation to the grounds for discrimination prohibited by the European Convention on Human Rights" and "call upon member States to include sexual orientation among the prohibited grounds for discrimination in their national legislation". In its reply of 21 September 2001, the Committee of Ministers assured the Assembly that it would continue "to follow the issue of discrimination based on sexual orientation with close attention". It may therefore be reasonably argued that a European consensus is now emerging in this area.

As far as the constituent elements of discrimination are concerned, we must therefore examine in turn whether there is a difference in treatment in the instant case and, if so, whether it pursues a legitimate aim and there is a proportionate relationship between the aim pursued and the methods used. Not every difference in treatment is prohibited by Article 14 of the Convention, only those which amount to discrimination. According to the Court's established case-law, the principle of equality of treatment is infringed if the difference ascertained has no "objective and reasonable justification".

(a) To determine whether there was a difference in treatment, it is necessary to place oneself in the domestic-law context once again. Prior authorisation to adopt is a procedure whose aim is to take a decision not in relation to a child but in relation to a potential parent and check that there is nothing to indicate that he or she would be unsuitable to adopt. Thereafter, it is for the civil courts to weigh up the interests of the parties when the adoption plans are formalised and in particular to assess whether the child's real interests are fully respected.

In the instant case, prior authorisation to adopt, which may be requested by any single person, was refused to the applicant solely because of his "choice of lifestyle" and not because this choice would pose any actual threat to a child's interests. Unless it is held that homosexuality – or race for example – is in itself an objection, the refusal of authorisation could only have been justified by Mr Fretté's homosexuality if it had been combined with conduct that was detrimental to a child's upbringing, and that was not the case here. In addition, in the applicant's case, as he moreover acknowledged himself, even if authorisation had been granted, it was not certain that a child would have been placed with him. Conversely however, if he had been a heterosexual or if he had concealed his homosexuality, he would certainly have obtained authorisation because his personal qualities were acknowledged throughout the proceedings.

Because the sole ground given for the refusal of authorisation was the applicant's lifestyle, which was an implicit yet undeniable reference to his homosexuality, the right guaranteed by Article 343-1 of the Civil Code was infringed on the basis of his sexual orientation alone (see, *mutatis mutandis*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI, and *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 71, 27 September 1999).

(b) Is this difference in treatment justified by a legitimate aim? As the Court has repeatedly pointed out "very weighty", "particularly serious" or "particularly convincing and weighty reasons" are needed for a difference in treatment on the ground of sex to be regarded as compatible with the Convention (see *Smith and Grady*, cited above, § 90, and *Lustig-Prean and Beckett*, cited above, § 82).

As the Government submitted, the decision to refuse the applicant authorisation stemmed from a desire to protect the rights and freedoms of the child who might have been adopted. In itself this aim may of course be legitimate, and in fact would even be the only legitimate aim. In the instant case, however, it has to be observed that the applicant's personal qualities and aptitude for bringing up children were emphasised on a number of occasions. The *Conseil d'Etat* even specified in its statement of reasons that there was no reference in the case file "to any specific circumstance that might pose a threat to the child's interests". The legitimate aim was not therefore effectively established in any way.

In their general and abstract wording, the reasons given by the judicial authorities for their decision to refuse the applicant authorisation are based solely on the applicant's homosexuality and therefore on the view that to be brought up by homosexual parents would be harmful to the child at all events and under any circumstances. The *Conseil d'Etat* failed to explain in any way, by referring for example to the increasing range of scientific studies of homosexual parenthood in recent years, why and how the child's interests militated in the instant case against the applicant's application for authorisation.

(c) Finally, on the question of proportionality, we might conceivably accept the Government's view that some margin of appreciation should be afforded to States in the sensitive area of adoption by homosexuals. It is not for the Court to take decisions (or pass moral judgment) instead of States in an area which is also a subject of controversy in many Council of Europe member States, especially as the views of the French administrative courts also seem to be divided. Neither is it for the Court to express preference for any type of family model. On the other hand, the reference in the present judgment to the lack of "common ground" in the contracting States or "uniform principles" on adoption by homosexuals (see paragraph 41 of the judgment), which paves the way for States to be given total discretion, seems to us to be irrelevant, at variance with the Court's case-law relating to Article 14 of the Convention and, when couched in such general terms, liable to take the protection of fundamental rights backwards.

It is the Court's task to secure the rights guaranteed by the Convention. It must supervise the conditions in which Article 14 of the Convention is applied and consider therefore whether there was a reasonable, proportionate relationship in the instant case between the methods used – the total prohibition of adoption by homosexual parents – and the aim pursued – to protect children. The *Conseil d'Etat*'s judgment was a landmark decision but it failed to carry out a detailed, substantive assessment of proportionality and took no account of the situation of the persons concerned. The refusal was *absolute* and it was issued without any other explanation than the applicant's choice of lifestyle, seen in general and abstract terms and thus in itself taking the form of an irrebuttable presumption of an impediment to any plan to adopt whatsoever. This position fundamentally precludes any real consideration of the interests at stake and the possibility of finding any practical way of reconciling them.

At a time when all the countries of the Council of Europe are engaged in a determined attempt to counter all forms of prejudice and discrimination, we regret that we cannot agree with the majority.