Case Commentary

E.B. v France: a missed opportunity?

*Ian Curry-Sumner**

In January 2008, the Grand chamber of the European Court of Human Rights delivered its judgment in the case of E.B. v France. The case revolved around a proposed single-parent homosexual adoption. The French authorities refused to grant permission to adopt based on two grounds. Having agreed that, of the two grounds utilised by the French authorities, one had been legitimate and one illegitimate, the court turned its attention to the interconnectedness of these two grounds. The majority held that the illegitimacy of one of the grounds has the effect of contaminating the entire decision, and accordingly held in favour of the applicant. This commentary focuses on the European Court's reasoning in reaching this remarkable decision.

INTRODUCTION

Adoption is a complex melting pot of, often conflicting, interests. In order to ensure that every adoption is in the best interests of the child concerned, rules have been developed with respect to *how* aspirant adoptive parents may adopt (eg different rules being applied in domestic and international adoptions), *which* consequences are attached to the adoption (eg weak *v* strong adoptions), *who* may adopt (eg grandparents, single parents, same-sex couples, etc) and *who* may be adopted (eg child *v* adult adoptions). These rules have often been debated both in national and supranational courts, and the European Court of Human Rights has dealt with issues surrounding adoption on many occasions.

In January 2008, the Grand Chamber of the European Court of Human Rights, in *E.B. v France*,[1] was asked to decide a case involving a proposed single-parent, homosexual adoption. The French authorities refused to grant authorisation to adopt on two main grounds, namely: (a) the absence of a paternal referent; and (b) the lack of commitment of the applicant's partner. After a brief outline of the facts and procedural history of the case, this commentary critically examines the European Court of Human Rights' treatment of those reasons, including its controversial argument that the French court's reasoning on one argument had contaminated the whole of its reasoning (a so-called 'contamination argument').

FACTS AND ISSUES

According to French law, both married couples[2] and individuals are permitted to adopt. In the case at hand, the applicant, Ms E.B., was a 45-year-old school teacher who had been in a stable relationship since 1990 with another woman, Ms R. On 26 February 1998, Ms E.B. applied to her local social services department for authorisation to adopt

* University of Utrecht.

1 *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR.

2 Article 343, *Code civil*. The couple may not be judicially separated and must either: (a) both be over the age of 28; or (b) have been married for at least 2 years.

a child. During the entire adoption application, Ms E.B. was open with regard to her sexual orientation and her relationship with Ms R. In the home study conducted by the local social services department, the socio-educational therapist and paediatric nurse noted the following points:

> 'Ms E.B. and Ms R. do not regard themselves as a couple, and Ms R. although concerned by her partner's application to adopt a child, does not feel committed by it . . . However, regard being had to her current lifestyle: unmarried and cohabiting with a female partner, we have not been able to assess her ability to provide a child with a family image revolving around a parental couple such as to afford safeguards for that child's stable and well-adjusted development.'[3–4]

This report was subsequently followed by six further reports, all recommending that Ms E.B. be denied authorisation to adopt.[5] Each of the reports provided the same two reasons for the recommendation to refuse authorisation, albeit in different terms. First, the absence of a male or 'paternal' referent among Ms E.B.'s circle of family or friends and, secondly, Ms R's ambivalence towards Ms E.B.'s adoption plans.[6]

On 26 November 1998, the President of the Council for the relevant *département* served the applicant with the official administrative refusal with regard to her request to adopt, and a subsequent request to reconsider the decision yielded the same result. This final administrative decision to refuse to grant authorisation was founded on the same two reasons.

NATIONAL ADMINISTRATIVE PROCEDURES

Subsequently, Ms E.B. applied to the Besançon Administrative Court seeking that both decisions be set aside.[7] On 24 February 2000, the Administrative Court set aside the decisions of the President of the *département* stating that the reasons provided were not sufficient to justify a refusal to grant authorisation to adopt.

The *département* appealed to the Nancy Administrative Court of Appeal. The Court of Appeal referred to the two grounds upon which the original decisions had been based, namely the lack of a paternal role model and the ambivalence of the partner to any future adoptive child.[8] In finding that these grounds had properly led to the decision that Ms E.B. did not provide the 'requisite safeguards' necessary of an aspirant-adoptive parent, the Court of Appeal overturned the Besançon Administrative Court's decision. Furthermore, the Court of Appeal found that the President's decision had not been based on the applicant's lifestyle.

Not satisfied with the decision of the Court of Appeal, Ms E.B. subsequently appealed to the *Conseil d'Etat*, which dismissed her appeal on the 5 June 2002. In upholding the decision of the Court of Appeal, the *Conseil d'Etat* referred to two main grounds:

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[3] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [10].

[4] Unless otherwise noted, there have been no corrections to grammatical errors found in the original source document(s). All quotations in this article appear exactly as they were found in the source material.

[5] On 28 August 1998 by a psychologist, on 21 September 1998 by a technical officer, on 12 October 1998 by a psychologist, on 28 October 1998 by the Adoption Board's representative, on 4 November 1998 by a representative from the Family Council, and on 24 November 1998 by the children's welfare service. *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at paras [1]–[10].

[6] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [37].

[7] The President's decision from 26 November 1998, as well as the decision of 17 March 1999.

[8] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [24].

(1) The fact that single-parent adoption is permitted by Article 343–1 *Code civil* does not prevent an investigation into whether the aspirant adoptive parent is able to offer a paternal role model for any future child. The *Conseil d'Etat*, therefore, held that the Nancy Court of Appeal had not erred in determining that the absence of a paternal role model and the ambivalence of the partner towards the adoption were relevant factors in denying the authorisation to adopt.
(2) The *Conseil d'Etat* also held that the Nancy Court of Appeal had not based its decision on the applicant's sexual orientation and thus did not infringe Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR).

Relying on Articles 8 and 14 of the ECHR, Ms E.B. further appealed to the European Court of Human Rights. She claimed that, in exercising her right under French law for a single person to adopt, she had suffered discriminatory treatment due to her sexual orientation. This, she alleged, amounted to an infringement of her right to respect for her private life.

DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS

The decision of the European Court of Human Rights centred on two main questions. First, whether the legal issues raised were admissible under the Convention and, secondly, whether the refusal to grant authorisation to adopt was discriminatory on the basis of Article 14 in conjunction with Article 8. The Grand Chamber of the Court held by a majority of 10 votes to 7 that the refusal was indeed a violation of Article 14, taken in conjunction with Article 8.

ADMISSIBILITY

With regard to Article 14, the Court reiterated that this Article acts only as a complement to the substantive provisions of the Convention.[9] Accordingly, it is necessary that the case falls within the ambit of one of the other provisions of the Convention. Turning its attention to whether the case fell within the ambit of Article 8, the court reiterated that Article 8 guarantees neither the right to found a family nor the right to adopt; the right to respect for 'family life' presupposes an extant family.[10] However, the court then went on to state that the notion of 'private life' is a broad concept that encompasses a variety of diverse issues, including the right to respect for both the decision to have and not to have a child.[11] The court noted that although the case did not directly involve an adoption itself, it did concern adoption since the acquisition of authorisation to adopt was a precondition to the grant of any future adoption order.[12] Furthermore, the court recognised that although the ECHR is silent with regard to the right of individuals to adopt, French legislation specifically grants this right. Accordingly, the court held that the case fell within the ambit of Article 8; a state

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[9] The Court was very clear in stating that Art 14 did not presuppose that a provision of the Convention had been violated: *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [47].

[10] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at paras [41]–[43].

[11] See *Evans v UK* (Application No 6339/05) [2006] 2 FLR 172, at para [57]. See further, C. Forder and J. Whittingham, 'Besluitvorming door (ex-)partners om wel of niet ouder te worden', (2006) *NJCM-Bulletin* 863–880.

[12] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [44]. This difference is recognised in many countries in the name given to this authorisation, for example in The Netherlands permission is called *beginseltoestemming* (permission in principle).

that has gone beyond its obligations under the Convention cannot do so on discriminatory grounds, since this is prohibited by Article 14.[13]

SUBSTANTIVE SCOPE

Having established that the case fell within the ambit of Article 8, the court went on to discuss the second question; namely, whether the refusal to grant authorisation to adopt was discriminatory on the basis of Article 14 in conjunction with Article 8.

In answering this question, the court referred to the previous case of *Fretté v France*,[14] in which Mr Fretté, a homosexual man applied to adopt a child through a single-parent adoption. The French authorities refused to grant Mr Fretté authorisation to adopt because they believed that his homosexuality could pose a substantial risk to the child's development. In a majority decision, the court held that this did not violate Article 14, taken in conjunction with Article 8.

In attempting to distinguish *E.B.* from *Fretté*, the Grand Chamber referred to three points of distinction.[15] First, in *E.B.* no reference was made to the applicant's 'choice of lifestyle', which had been explicitly referred to in *Fretté*. Secondly, the French authorities had acknowledged Ms E.B.'s positive qualities and child-raising capacities, unlike in *Fretté* where the applicant had been deemed to have difficulties envisaging the consequences of adopting a child. Thirdly, the domestic authorities referred to the attitude of Ms E.B.'s partner, a factor that was not present in the *Fretté* decision. Nonetheless, despite valiant attempts in *E.B.* to distinguish it from *Fretté,* there is some agreement among academics that *E.B.* has indeed overruled *Fretté*.[16]

Although it is somewhat difficult to decipher, the court in *E.B.* appears to have followed a standard Article 14 analysis. This involves first establishing a difference in the treatment of analogous situations (ie a single homosexual aspirant-adoptive parent and a single heterosexual aspirant-adoptive parent). Then the court must determine whether there is an objective and reasonable justification for the difference in treatment. The court applied this analysis to the two main grounds upon which the French administrative decisions were based, namely the lack of a paternal figure and the absence[17] of a committed attitude by Ms E.B.'s partner.

Lack of a paternal figure

The court regarded the reference to the lack of a paternal figure as irrelevant, since the ultimate effect of accepting such a reason would be to render the right of single persons to adopt ineffective.[18] Even Judges Costa, Türmen, Ugrekhelidze, Jočienė and

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[13] Ibid, at para [49].

[14] *Fretté v France* (Application No 36515/97) [2003] 2 FLR 9.

[15] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [71].

[16] See, for example, A. Bainham, 'Homosexual adoption' (2008) *Cambridge Law Journal* 479–481, J. Gerards, 'EB v France' (2008) *European Human Rights Cases* 408–431. This is also acknowledged by Judge Loucaides in his dissenting opinion.

[17] The court uses the phrases 'ambivalence of the applicant's partner's commitment' (para [37]) and 'the lack of commitment on the part of the applicant's partner' (para [39]) as though they are interchangeable. 'Ambivalence' is defined in the *Oxford English Dictionary* as 'uncertainty or fluctuation, especially when caused by inability to make a choice or by a simultaneous desire to say or do two opposite or conflicting things', whereas 'lack' is defined as 'deficiency or absence of something needed, desirable, or customary'. This lack of precision leads to a degree of uncertainty and confusion as to where the line that the court is trying to draw actually rests.

[18] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [73].

Loucaides, five of the dissenting judges, agreed with the majority on this point, stating that reference to a paternal role would be 'incompatible with the right of single persons to apply for authorisation to adopt'.[19]

As a result of the French authorities' references to the absence of a paternal figure, the majority concluded that the applicant had been discriminated against, either explicitly or implicitly, on the basis of her sexual orientation.[20] The court noted that although French law permits adoption by an individual, multiple references had been made by various authorities attesting to the detriment that would be suffered by a child adopted into a situation without a paternal figure. Based on this, the majority reached the 'inescapable conclusion' that Ms E.B.'s sexual orientation was consistently at the centre of the deliberations with regard to her adoption application.[21] This conclusion, however, was not 'inescapable' for Judges Costa, Türmen, Ugrekhelidze and Jočienė, who all dissented on this point. Although these four judges agreed with the majority that references to the absence of a paternal figure were indeed irrelevant, they did not consider this difference to amount to discrimination on the ground of sexual orientation. For example, they reasoned that a heterosexual woman living on her own could also be subject to the same criticism due to the lack of a paternal figure.

Nonetheless, having reached the conclusion that the applicant had suffered a difference in treatment on the basis of her sexual orientation, the majority continued the Article 14 analysis by examining the legitimacy and justification of the aim. Referring to the fact that French law permits single persons to adopt regardless of their sexual orientation, the majority found the government's reasoning for the discrimination E.B. suffered to be unconvincing.[22] As a result, the majority found the government's reference to the absence of a paternal figure to be an illegitimate justification.

Informal relationships and views of the partner

Turning to the other ground utilised by the French authorities, namely the absence of commitment of Ms E.B.'s partner, the entire court agreed that the attitude of the applicant's partner was 'not without interest or relevance in assessing her application'.[23] French adoption law obliges the authorities concerned to investigate all conditions which would be of relevance with respect to the home the applicant proposes to provide for the child's upbringing.[24] In analysing the facts, the majority came to the conclusion that this ground had been based on the de facto situation and had not been based upon the applicant's sexual orientation.[25] Once again, this would appear to be a point of general agreement between both majority and dissenting

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[19] Dissent of Judge Loucaides, *E.B. v France* (ibid).

[20] On the question of sexual orientation as a ground of discrimination, see the seminal case *Salgueiro da Silva Mouta v Portugal*, 21 March 2000, Application No 33290/96, [2001] 1 FCR 653, ECtHR.

[21] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [88]. In this sense, the Court's decision fits well in line with the increased recognition that sexual orientation deserves reference, in and of itself, in any future general discrimination provision. See, for example, *Possible action by the Committee of Ministers*, 28 January 2008, SG/Inf(2008)4. This information document refers expressly to Protocol 12 to the ECHR which would provide an independent ground for discrimination claims, including on the basis of sexual orientation (even if this ground is not specifically mentioned in the Protocol).

[22] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [94].

[23] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [76].

[24] Article 4, Décret No. 98–771 du 1er septembre 1998 relatif à l'agrément des personnes qui souhaitent adopter un pupille de l'Etat ou un enfant étranger.

[25] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [78].

judges.[26] Accordingly, the reference to the lack of commitment by the applicant's partner was regarded as a legitimate ground for the refusal to grant authorisation to adopt.

Contamination Argument

Having agreed that of the two grounds utilised by the French authorities, one had been legitimate (reference to the commitment of Ms E.B.'s partner) and one illegitimate (reference to the absence of a paternal figure), the court turned its attention to the interconnectedness of these two grounds. It is at this stage that the judges' opinions fundamentally diverge. The majority commented:

> '... these two main grounds form part of an overall assessment of the applicant's situation. For this reason, the Court considers that they should not be considered alternatively, but concurrently. Consequently, the illegitimacy of one of the grounds has the effect of contaminating the entire decision'.[27]

In using this interesting argument, the court basically argues that the illegitimacy of one factor is so serious that it results in the whole administrative decision being illegitimate, regardless of the legitimacy of the other factor. The illegitimacy of the reference to Ms E.B.'s sexual orientation was thus so serious that the whole decision had to be regarded as illegitimate. In their dissents, Judges Costa, Türmen, Ugrekhelidze, Jočienė and Mularoni all believed the assertion that one ground had contaminated the other to be gratuitous.

CRITICAL ANALYSIS

Before providing a critical note to this decision, it is important to stress that with only 10 of the 17 judges having reached the majority verdict, the precedential value of this decision is questionable.[28] This division of opinion, which was also present in the 2002 case of *Fretté v France*, is indicative of the European Court's inability to reach consensus on the question of single-parent adoptions by homosexuals.

Admissibility

In a decision marked by judicial disagreement as to the alleged violation of a substantive Convention right, it is interesting to note that the court was unanimous on the question of admissibility. However, the court's analysis leaves much to be desired. The court held that the facts of the case 'undoubtedly'[29] fell within the ambit of Article 8, without providing real arguments to support this claim. Instead, the court placed enormous weight on the fact that France has permitted individuals to adopt, therefore voluntarily bringing itself within the scope of the Convention.[30] However, this issue was not one that was put before the court. The question was not whether *adoption* by individuals should fall within the ambit of Article 8. Instead, the question was whether the *adoption procedure* for individuals should fall within the ambit of Article 8. In holding that the acquisition of an authorisation to adopt is a prerequisite to adoption, is the court not in fact arguing that the entire adoption procedure must fall within the

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[26] Dissents of Judges Costa, Türmen, Ugrekhelidze and Jočienė.

[27] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [80].

[28] J. Gerards, 'E.B. v France' (2008) *European Human Rights Cases* 427.

[29] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [49].

[30] Ibid.

ambit of Article 8? After all, every step along the road to an adoption order is evidently a necessary precondition for adopting a child.

It would appear that the court argued that if a state has granted individuals the right to adopt, then the adoption procedures will fall within the scope of Article 8. If a state has not granted this right then an individual may not petition the court by arguing an infringement of his or her rights. Consequently, an individual's right to adopt only enjoys the protection afforded by the Convention if a state has already granted that right. But is this justifiable? It is argued here that such a distinction is not justifiable for two reasons.

First, one must take account of the increasing recognition and acceptance across Europe of single-parent adoption. On 27 November 2008, the new European Convention on Adoption 2008 was opened for signatures.[31] The Convention seeks to replace the 1967 European Adoption Convention. The increase in international adoption, the increasing acceptance of single parent adoption and the emergence in some countries of same-sex adoption all coalesced, leading to a need for the revision of the 1967 Adoption Convention. This need was heightened by the denunciations of Sweden and Norway,[32] and the partial denunciation by the UK.[33] Although it was felt that flexibility should be retained with regard to the issue of same-sex adoption, the 2008 Adoption Convention explicitly provides for the right of single persons to adopt.[34]

Secondly, if one does not accept that the right to adopt should fall within the ambit of Article 8, an otherwise unjustifiable distinction will arise between couples wishing to adopt and those wishing to use artificial reproduction techniques. If the court now accepts that the decision to have or not to have a child falls within the scope of Article 8, which the court already acknowledged in *Evans v UK*,[35] why does this not also apply to those who have chosen to follow the route of adoption? Although *Evans v UK* involved issues relating to the creation and use of embryos, no reference was made to this fact in the court's analysis of the issues of admissibility. In fact, the court expressly stated that 'the right to respect for both the decisions to become and not to become a parent' falls within the ambit of Article 8.[36] Is this not also true of adoptions? Obviously, the 'decision to adopt' does not, and nor should it, lead to a 'right to adopt', in the same way that a 'decision to have a child using artificial insemination techniques' does not guarantee a 'right to a child'. However, in recognising that adoption is a method through which individuals and couples are able to realise their wish to raise a child and thus provide a child in need with a familial home, is not this decision equally deserving of the protection laid down by the Convention as the desire to raise one's own genetic child?

Substantive scope: lack of paternal figure

The majority reached the conclusion that the references by the French authorities to the absence of a paternal figure amounted to discrimination on the basis of sexual

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[31] See www.coe.int for more details. Is this enough of a reference? No – the site is vast, so it is not immediately apparent where to find the verification.

[32] Sweden denounced the Convention on 3 July 2002 (effective 4 January 2003) and Norway on 17 November 2008 (effective 18 May 2009).

[33] With respect to the UK, the 1967 Adoption Convention still applies to the Bailiwicks of Jersey and Guernsey.

[34] Article 7(1)(b), 2008 Adoption Convention. For a detailed analysis of the Convention see R. Horgan and F. Martin, 'The European Convention on Adoption 2008' (2008) IFL 155–162.

[35] *Evans v UK* (Application No 6339/05) [2006] 2 FLR 172.

[36] *Evans v UK* (Application No 6339/05) [2006] 2 FLR 172, at para [57].

orientation. Regardless of whether or not one agrees with this statement, the majority should have explained the steps it had taken in drawing this conclusion. Not only would this have improved the legal clarity of this decision, it also would have provided a template according to which future cases of sexual orientation discrimination could be tested.

Having determined different treatment in analogous situations, the court reached the conclusion that the French authorities had not provided convincing arguments to justify this difference in treatment. However, the court's arguments are, at best, tenuous. At no point did the court provide a well-argued analysis as to why it does not now believe the arguments put forward by the French authorities to be convincing. In 2002, albeit by a slim majority, the court had found in the case of *Fretté* that the reasons were convincing enough to justify a difference in treatment. In *Fretté*, the court acknowledged that the aim pursued by the French authorities, namely the protection of the 'health and rights of children who could be involved in an adoption procedure' was legitimate.[37] In determining whether the state had provided a justification for the difference of treatment, the court noted the absence of any common ground on the issue of homosexual adoption. Accordingly the majority found that with respect to this issue the state should be granted a wide margin of appreciation.[38] The majority in *E.B.*, however, appears not to have agreed and instead held that the difference in treatment can no longer be justified simply by virtue of the 'lack of consensus' across Europe.

Although the decision in *Fretté* has been widely criticised,[39] the court was under a duty in *E.B.* to explain why the 'lack of consensus' argument is either no longer valid or no longer relevant. Such a dramatic change of policy should ultimately be justified. A comparison can perhaps be drawn with the line of cases surrounding transsexualism. In *Rees v UK*,[40] *Cossey v UK*[41] *X, Y and Z v UK*[42] and *Sheffield and Horsham v UK*,[43] the court had consistently held that the UK should be granted a wide margin of appreciation in denying transsexuals the right to amend their birth certificate after gender reassignment surgery. However, in its 2002 decision in *Goodwin v UK*,[44] the court overturned this line of decisions stating that:

> 'While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to

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[37] *Fretté v France* (Application No 36515/97) [2003] 2 FLR 9, at para [38].

[38] Ibid, at para [41].

[39] See, for example, M. O'Flaherty and J. Fisher, 'Sexual orientation, gender identity and international human rights law: contextualising the Yogyakarta Principles' (2008) *Human Rights Law Review* 207–248, at 219, and T. Willoughby Stone, 'Margin of Appreciation Gone Awry' (2003) *Conn. Pub. Int. L.J.* 218–236.

[40] *Rees v UK* (Application No 9532/81) [1987] 2 FLR 111.

[41] *Cossey v UK* (Application No 10843/84) [1991] 2 FLR 492.

[42] *X, Y and Z v UK* (Application No 9369/81) *Reports of Judgments and Decisions* 1997-II, at p 630, [1997] 2 FLR 892.

[43] *Sheffield and Horsham v UK* (Application No 23390/94) *Reports of Judgments and Decisions* 1998-V, at p 2011, [1998] 2 FLR 928.

[44] *Goodwin v UK* (Application No 28957/95) [2002] 2 FLR 487, ECtHR.

> the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals'.[45]

If the court in *E.B.* wished to attach less importance to a common approach or idea of consensus, then it should have stated this and provided supporting arguments. If the court wished to follow the rationale laid down in *Goodwin*, then additional evidence (which is available) should have been adduced drawing attention to the continuing international trend in favour of homosexual adoption.

One could ask whether *Goodwin* and *E.B.* herald a change in the winds with respect to Article 8 and the use of the common approach. Could it be that the wide margin of appreciation has seen its heyday in the analysis of Article 8? Such a conclusion cannot be drawn solely on the basis of *E.B.*, and would obviously require further investigation and research. However, it would appear that mere reference to the diversity of approaches across Europe may no longer be sufficient in justifying difference in treatment. Whether this will only hold true for sexual orientation cases in which the discrimination must be justified by 'particularly convincing and weighty reasons', is yet to be seen.

Substantive scope: informal relationships and commitment of partner

The court was unanimous in its decision with regard to the legitimacy of the second ground upon which the authorisation to adopt was denied, namely reference to the lack of commitment of Ms E.B.'s partner. However, references to the stability or commitment of the relationship between Ms E.B. and Ms R at times appear contradictory. In the facts of the case, numerous references were made to the two women not regarding themselves as a couple. However, throughout the majority decision, as well as in many of the dissenting opinions, reference was made to the stability of the relationship and the fact that Ms R was Ms E.B.'s partner. For example, the court referred to the fact that Ms R was 'the long-standing and declared partner of the applicant'[46] and 'in a stable and lasting relationship'.[47]

The exact nature and stability of Ms E.B. and Ms R's relationship was, however, of paramount consideration. As pointed out by Bainham in a casenote on the decision: 'if there is one thing upon which all researchers are agreed it is that exposure to *family* conflict is bad for children'.[48] Earlier in his case-note he also refers to 'the presence in the household of a *partner* who clearly did not wish to take on a parental role'.[49] The legitimate aim is therefore clear – the avoidance of familial conflict. However, the question that must be asked is at what moment must one take the views of another into account in assessing an applicant's authorisation to adopt? At what moment does a relationship become stable enough to warrant an investigation into the partner's attitudes towards the adoption? With regard to marriages, these questions appear to have been answered already. The views of both spouses applying for authorisation to adopt jointly will be taken into account. Although with respect to the possibility for married couples to adopt individually European countries differ as to the means they

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[45] Ibid, at para [85].

[46] *E.B. v France* (Application No 43546/02) [2008] 1 FLR 850, ECtHR, at para [75].

[47] Ibid, at para [76].

[48] A. Bainham, 'Homosexual Adoption' (2008) *Cambridge Law Journal* 479–481.

[49] Ibid, at p 480 [emphasis added].

employ, the results are comparable. On the one hand, in France and the Netherlands, each spouse is permitted to adopt individually, but the views of his or her spouse must be taken into account.[50] On the other hand, in England and Wales, a spouse or civil partner is expressly denied the right to adopt individually, unless special circumstances exist.[51]

What happens, however, in the situation where someone is involved in an informal relationship? At what moment should the views of that person become relevant in assessing adoption applications? Should cohabitation need to be supplemented with an intimate relationship? What about the views of a partner with whom the applicant does not cohabit, but does indeed have an intimate relationship? It would, at any rate, appear that the sole testimony of the applicant and his or her partner as to the nature of the relationship is not conclusive. Ms E.B. and Ms R apparently did not intend and had not held themselves out to be a couple, and yet they were still regarded as being involved in a long-lasting, stable, intimate relationship.

Substantive scope: contamination argument

As Gerards indicates, the contamination argument is a defensible one. She uses the case of an Islamic employee.

> 'An employer who dismisses an Islamic employee after an argument in the workplace, may well have the primary aim to maintain a good work atmosphere, but his decision to dismiss the Islamic employee could be influenced by negative impressions or feelings about Muslims.'[52]

Although this example is illustrative of when the contamination argument could be used, the facts of *E.B.* should, and ultimately must, be distinguished from the abovementioned example. Reference to the lack of the commitment of the applicant's partner, as used by the French authority, was in this case an objectively determined and non-contentious issue. What would have happened if the French authorities had only referred to the lack of commitment? Would the refusal to grant authorisation to adopt have been valid? If this question is answered in the affirmative, it is necessary to return to the original aim of the legislation. Ultimately the authorisation to adopt provides the State with a mechanism to adjudicate on the suitability of persons to adopt a child. In this sense, the legislation is child-oriented, and thus, the best of the interests of the child are of the utmost importance. When assessing the relative importance of legitimate and illegitimate grounds, the court should have done so with express reference to the best interests of the child: is it in the best interests of a child to be adopted into a household in which one of the adults in the household is at best ambivalent towards the arrival of that child?

A more justifiable and perhaps logically convincing argument would have been to examine each ground individually. Having concluded that one of the grounds upon which the authorities had relied, namely that of sexual orientation, was illegitimate, the

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[50] France: Art 343–1, *Code civil.* The Netherlands: Art 227(1) Dutch Civil Code. See translation I. Sumner and H. Warendorf, *Family Law Legislation of the Netherlands* (Intersentia, 2003).

[51] An individual who is married or involved in a civil partnership is not permitted to adopt alone, unless: (a) the person's spouse cannot be found; (b) the spouses have separated and are living apart, and the separation is likely to be permanent; or (c) the person's spouse is by reason of ill-health, whether physical or mental, incapable of making an application for an adoption order: Adoption and Children Act 2002, s 51(3) and (3A).

[52] J. Gerards, 'E.B. v France' (2008) *European Human Rights Cases* 429. This is the author's own translation.

court should have turned its attention to the other ground, namely that of the lack of commitment of Ms E.B.'s partner. The question which then should have been posed is whether this other ground is *weighty and convincing enough* to justify that the whole decision be regarded as legitimate, despite reference to an illegitimate ground.

Imagine, for example, that instead of a reference to the lack of commitment of E.B.'s partner, the French authorities had referred to her inability to empathise with the consequences of having a child and that her emotional maturity was not ripe enough to raise a child. If this ground had been relied upon by the French authorities, would the Court in *E.B.* have come to a different conclusion? One would hope so. After all, the French authorities in granting or refusing authorisation to adopt are issuing their decision in the best interests of the child. It would not be in the best interest of the child to be adopted by an emotionally immature parent.

In reaching its decision and in an attempt to ensure that sexual orientation is not tolerated as a ground for refusal to adopt, the majority in *E.B.* have failed to adhere to the very essence of adoption legislation, namely that the 'best interests of the child' should always be taken into account. In this respect it is unfortunate that the court did not take this into account in the final step of its decision. The application of the contamination theory should *ultimately* be assessed hand-in-hand with the best interests of the child principle.

CONCLUSION AND THE FUTURE

Is this the case adoption lawyers have been waiting for? This commentator would argue that it is not. Although the end result is one that gay and lesbian activists will celebrate, the decision does not deserve any prizes for internal consistency, critical analysis, convincing argumentation or unanimity of decision. In fact, on all grounds, other than perhaps the outcome, the decision is disappointing. Many questions have been left unanswered and many more questions have, and will continue, to be spawned as a result of this decision. With respect to every aspect of this case, the court has failed to provide well-founded reasons for its decisions. In a decision with such an enormous potential for precedential value, it is disappointing that the majority decision does not address the issues raised in this article.

Why does the 'decision to adopt a child' not profit from the same protection under Article 8 as afforded to the 'decision to have or not to have a child'? Why is reference to an absence of a paternal referent equal to sexual orientation discrimination? Are homosexuals the only persons for whom the lack of paternal referent cannot be used? At what moment in time does a relationship become stable or serious enough to warrant the partner's views being of relevance for the authorisation?

With *Fretté* overturned, the future looks slightly brighter for same-sex adopters than before. One thing is clear since *E.B.*: sexual orientation is no longer a ground that can be used by authorities in adjudicating the suitability of a person to adopt. In this respect, the decision of *E.B.* should be welcomed. However, the coast is not clear. Enough warning signs have been sent from the dissenting opinions that should a similar case come before the court in the future, the decision may well be very different. It would appear that internal struggle, diversity and disagreement are rife. Perhaps the only thing that is clear is that this decision cannot be regarded as the 'well-argued and critical decision' that many must have been waiting for.