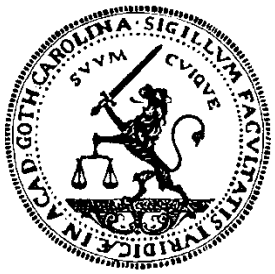

FACULTY OF LAW
Lund University

Valeri Lindholm

Is there a Right to a Multicultural Family under the European Convention on Human Rights?

A Critical Analysis of Ethnicity Matching in Adoption

Master thesis
30 credits

Professor Titti Mattsson

Master's Programme in
International Human Rights Law

Spring 2012

Contents

Summary

This thesis critically examines ethnicity matching between children awaiting adoption and prospective adopters and its discriminatory consequences for ethnic minority children under the European Convention on Human Rights. The examination is conducted against the background of the adoption controversy, and the differing views on what is in the best interests of the child. It highlights how the European Court of Human Rights has approached alleged discrimination in the matching between children and prospective adopters and finds that there is no right to adoption under the Convention, but there is a right not to be discriminated against in the access to adoption.

Moreover, the thesis addresses the European Convention on the Adoption of Children and Protocol No. 12, and their respective possible influence on the reasoning of the Court concerning ethnicity matching.

It also emphasises how one of the Council of Europe member States, the United Kingdom, is currently tackling the issue. The author is supportive of the United Kingdom Government initiated reform of the adoption system, and in particular its focus on regulating the discriminatory consequences for ethnic minority children awaiting adoption through legislative measures.

This thesis concludes that it is most likely that the Court would be willing to scrutinise the use of ethnicity matching in adoption. The main factors that are most likely to influence the reasoning of the European Court of Human Rights are highlighted and reflected upon. In light of these factors it is argued that ethnicity matching used as a determinative criterion in adoption, with the consequences of unjustified delay or denial of adoption for ethnic minority children, is a violation of Article 14 taken in conjunction with Article 8 European Convention on Human Rights. Moreover, the author argues that such a finding by the Court, and legal reforms such as the ones presented in the United Kingdom, will aid society to embrace the creation of multicultural families through adoption.

Preface

Likt solens strålar

Likt solens strålar värmer du mig
och får mig att växa
När vinden smeker min kind
eller när regnet hamrar på mitt tak är du där
Solen ger liv och du gav mig mitt[1]

I was brought to Sweden and to my parents from Seoul when I was six months old. I have always known that I am adopted and my parents have always given me the opportunity both to explore my country of birth and search for my biological family if I wanted to. It is a decision that very much differs from adoptee to adoptee, whether to search for one's biological "roots", but so far I have never felt inclined to do so. Instead I have taken great pleasure in exploring my Czech cultural heritage on my mother's side, and as I have grown older I have had the advantage of experiencing other cultures and living in different countries. Nowadays I increasingly think of myself as European, a *mélange*. I am grateful for my multicultural upbringing and proud of my mixed-cultural heritage, and for me the advantages vastly outnumber the disadvantages, which in my experience have only been minor.

My parents are a blessing in my life and I can only hope that one day I will be able to offer to a child waiting to be adopted what they have given me. Thank you for your love and support – without you I would never be where I am today, nor would my dreams for the future be what they are. Also, a big thank you to my brother for always being on my side and looking after me like only a brother can.

Adoption is thus a subject that I take great personal interest in and I found it very disconcerting to learn last year through *The Times* that ethnic minority children are left in the care system due to an overly strict emphasis on ethnicity matching between the child and prospective adopters. Combined with my strong interest in the European Convention on Human Rights and the Council of Europe as a whole, which has increased steadily over the

[1] The English version of the author's own poem:
Rays of the sun
Like the rays of the sun you keep me warm
and make me grow
When the wind is caressing my chin
or when the rain is hammering down over me
you are there
The sun nourishes life and you nourish me

years and especially since 2008 when I came to Strasbourg for the first time as a trainee, these two interests have formed the topic of my thesis.

It has been an enormous advantage to be able to research for and write my thesis here in Strasbourg. Researching in the European Court of Human Rights' Library has not only provided me with interesting material but also with the unique expertise and insight provided by lawyers working at the Court. I would here like to thank all the wonderful people within the European Court of Human Rights and the Council of Europe for their interest, inspiration and kind assistance. In particular I would like to express my gratitude to Ana Maria Duarte, and Julien Attuil – *je vous remercie au fond de mon cœur*.

Thank you also in particular to my supervisor, Professor Titti Mattsson, for her insightful comments and expertise during our regular phone conversations throughout this Spring, but even more for her enthusiastic support and encouragement. *Din vägledning har varit guld värd!*

Thanks also to my extended family and my darling friends, who constantly inspire me and make me sparkle – I am very lucky to have you in my life. Special thank you to Michelle Lafferty for introducing me to Bartholet's work, and to Stefano Colussa for his support and perceptive comments, *grazie mille!*

Finally, to all the children awaiting adoption and hoping for a loving home and to adopters everywhere who offer their love, this thesis is dedicated to you.

Valeri Lindholm
Strasbourg
May 2012

Abbreviations

ASFA	Adoption and Safe Families Act
BAAF	British Association for Adoption and Fostering
CoE	Council of Europe
Convention on Adoption	European Convention on the Adoption of Children
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
Hague Convention	Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption
IEP	Removal of Barriers to Interethnic Adoption Provisions of the Small Business Job Protection Act
MEPA	Multiethnic Placement Act
NABSW	National Association of Black Workers
Ofsted	Office for Standards in Education, Children's Services and Skills

1 Introduction

Compassion, kindness and love are universal values of humanity. They are also the core foundations for a nurturing family home for any child. In this day and age, especially within Europe, we travel more, we pursue careers outside our country of nationality and we meet people from a flora of ethnic and cultural backgrounds. Family relationships are formed across borders and as a result many children grow up in multicultural families.

Nevertheless, there is a persistent view within the adoption context to stress our differences based on ethnicity and the importance of safeguarding the cultural background of the child.[2] Far from being a problem isolated to international or intercountry adoptions within and outside Europe, the issue resurfaces on the national level in in-country adoptions.

The unacceptable result of stressing a strict ethnicity matching between children awaiting adoption and prospective adoptive parents is that ethnic minority children in Council of Europe (CoE) member States are denied the possibility to grow up in a loving family. Instead they are left in care under the pretext that a perfect ethnic match will be found in the future or denied adoptive placements altogether. Studies have undoubtedly shown that institutionalisation, which deprives children of emotional relationships, can severely damage their intellectual and emotional development.[3] The impact of delay in the adoption system causes profound harm to the children, and reduces their chances of being adopted.[4] The severe consequences for ethnic minority children placed for adoption stand in stark contrast to the best interests of the child in this regard, which is to grow up in a loving family home.[5]

---

[2] The issue of ethnicity matching in adoption has in particular been raised in the general media in the context of celebrities adopting children of another ethnicity. See eg, Lisa Respers France, "Bullock's adoption of black baby stirs debate" (*CNN*, 03/05/10) available at: <http://articles.cnn.com/2010-05-03/entertainment/sandra.bullock.black.blogs_1_black-voices-adopted-black-baby?_s=PM:SHOWBIZ> (accessed on 08/05/12); Britni Danielle, "Why Charlize Theron's Adoption of a Black Baby Is a Good Thing" *Clutch Magazine* (16/03/12) available at: <http://www.clutchmagonline.com/2012/03/why-charlize-therons-adoption-of-a-black-baby-is-a-good-thing/> (accessed on 08/05/12).

[3] Adam Pertman, *Adoption Nation* (2nd edition, The Harvard Common Press 2011) 77.

[4] An Action Plan for Adoption: Tackling Delay, Department for Education, 2012, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00205069/action-plan-for-adoption-tackling-delay> (accessed on 14/03/12), 7. Hereafter referred to as the Action Plan.

[5] See eg, Action Plan, 6; Elizabeth Bartholet, *Nobody's Children* (Beacon Press 1999) 6. See also Pertman, 85 regarding intercountry adoption.

1.1 Purpose and Research Questions

This thesis examines whether there is a *right to a multicultural family under the European Convention on Human Rights* (ECHR). It seeks to identify how the European Court of Human Rights (ECtHR) is likely to view multicultural families created through adoption by critically analysing ethnicity matching in adoption. The thesis explores whether the notion of adoption as "providing a child with a family, not a family with a child"[6] includes families where the adopter(s) is of an ethnicity other than the adoptee. It thus identifies how the Court has addressed alleged discriminatory factors in the matching between children awaiting adoption and potential adopters. In addition, the connection between the view on the best interests of the child and the matching criteria is highlighted. Thereby, the thesis aims to shed light on how the issue of ethnicity matching can be addressed under the Convention.

The research questions are the following:

- How does the ECHR reflect adoption under Article 8 alone and in conjunction with Article 14? Is there a right to adopt or to be adopted under the Convention?
- How has the ECtHR approached alleged discriminatory factors in the matching between children and prospective adopters?
- To what extent does the European Convention on the Adoption of Children address ethnicity matching? What will be the possible effect of Protocol No. 12 on the issue?
- How is the issue of ethnicity matching between children placed for adoption and prospective adopters being tackled in the UK? What are the implications for other CoE member States?

1.2 Delimitations

The focus of this thesis is the ECHR. Legal instruments from outside the CoE will therefore not be addressed in depth. The author initially intended to include how other relevant international instruments, and courts, where applicable have addressed the issue of ethnicity matching in adoption, but was prevented from doing so due to the limits provided by the thesis framework. The thesis does not seek to answer if there is a right to a family under international law and as such it will only present the two differing views on the matter where relevant. Identification of the best interests of the child for children in care in general is beyond the remit of this work. Moreover, the thesis does not aim to shed light on all the aspects related to adoption, and nor does it seek to address the judicial processes concerning adoption on the national level. In relation to the ECtHR's case law, the author does not intend to present all the case law associated with adoption,

[6] *Fretté v. France*, Judgment of 26/02/2002 ECtHR, Application no. 36515/97, para. 42.

but aims to highlight the most poignant cases linked to the topic of this thesis. The presentation of legislation, legal proposals in the case of the UK, and related state guidance and other policy measures concerning ethnicity matching in the U.S. and in particular in the UK is not intended as a comprehensive comparative law analysis, but rather as illustrative examples of how the State can address the issue.[7]

1.3 Methodology

The methodology used goes beyond the limits of the traditional legal method, which is often referred to as the dogmatic legal method, as the research for this thesis also includes sources other than legislation and its *travaux préparatoires*, case law, and legal doctrine. A number of hard and soft law instruments, both national and regional, as well as reports, documents, books, articles, websites and online databases were consulted. Scientific research studies emphasised in some of the consulted sources are referred to in parts of this work. In addition, information gained from informal correspondence with experts in the field is referred to when applicable, without the intention of categorising them as formal sources.

The author defines the analysis conducted throughout the thesis as critical since the author due to her own background and beliefs is unconvinced by the high importance of stressing the ethnic and cultural background of children awaiting adoption in the matching with prospective adopters, especially in the case of babies. Nevertheless, the author's aim has been to portray the different views on the subject in an objective manner.

An empirical study on the European Court of Human Rights' case law is conducted, which focuses on discriminating factors in the matching process between children and prospective adopters. When analysing the Court's case law the author was influenced by what has been described as the Court's casuistic role, and its overall evolutive approach founded on its interpretation of the object and purpose of the ECHR, and its role as an international human rights court limited by the principle of subsidiarity.[8]

The definition of the ethnicity concept used throughout the analysis in this thesis is derived from the Court's own definition in the case of *Timishev v. Russia*, where it stated that the concepts of ethnicity and race are overlapping. Race comes from the idea of biological classification of humans as a species and thus the categorising into sub-species in accordance with physical features such as skin colour or facial traits. The concept of ethnicity springs from the idea of societal groups that are characterised by features such as "common nationality, tribal affiliation, religious faith,

[7] The current preliminary stage of the UK legislation would also seem to prevent such a comparison.
[8] Robin C.A. White and Clare Ovey, *Jacobs, White and Ovey The European Convention on Human Rights* (5th edition, Oxford University Press 2010) 81.

shared language, or cultural and traditional origins and backgrounds."[9] In addition the concept used by the European Commission against Racism and Intolerance (ECRI) is ethnic origin.[10]

The definition of ethnic minority children used throughout this thesis includes black, Asian, mixed-ethnicity and other ethnic minority children such as Roma. It is thus different from the definition of black and minority ethnic children, used mostly as far as the author understands in the UK context.[11] The broader definition used is reflective of the European remit of this work.

1.4 Outline

The chapters in this thesis reflect the order of the research questions presented above, and each chapter is concluded with the author's remarks. The thesis is structured as follows. Chapter Two provides the reader with a brief presentation of the legal terminology and context of adoption under the ECHR. Thereafter it introduces the adoption controversy, namely the two main and differing views on adoption, to help the reader to understand the wider picture. The controversy seems to be inherent in discussions on adoption, and the debate is ongoing on both the national and international level, and has been particularly vivid in the U.S.

Chapter Three is dedicated to the empirical study, and the most relevant cases from the ECtHR's case law are thoroughly presented to emphasise the approach by the Court to alleged discrimination in the matching between children placed for adoption and prospective adopters. By comparing and contrasting the different cases, the author seeks to identify the factors that influence the Court's reasoning in order to evaluate how the Court would address ethnicity matching in adoption.

Chapter Four examines the likely influence of the European Convention on Adoption of Children and Protocol No. 12 on the reasoning of the Court. These two CoE instruments are the most relevant and legally binding ones in addition to the Convention. The relevant provisions in each instrument are thus presented.

---

[9] *Timishev v. Russia*, Judgment of 13/12/2005 ECtHR, Applications nos. 55762/00 and 55974/00, para. 55.

[10] See eg, ECRI in brief, 3, available at: <http://www.coe.int/t/dghl/monitoring/ecri/activities/mandate_en.asp> (accessed on 03/05/12) also emphasised in mail correspondence with ECRI representative on 06/02/12.

[11] See eg, The Narey Report, Martin Narey for *The Times*, 2011, available at: <http://www.thetimes.co.uk/tto/life/families/article3083832.ece> (accessed on 06/02/12, requires subscription), Chapter 7; Action Plan 21; BME adoption and fostering, BAAF, available at: <http://www.baaf.org.uk/info/bme> (accessed on 15/05/12).

Chapter Five addresses whether the issue of ethnicity matching in adoption should be tackled through government intervention. The current reform process of the adoption system in the UK is presented in its relevant parts for the purposes of this thesis as an illustrative example of how a CoE member State is addressing the issue. It also serves to show the high relevance of the topic. The chapter also reflects on similarities between the newly proposed legislation in the UK and the one in the U.S., as the latter serves as an indication for possible outcomes in the UK.

Chapter Six re-emphasises the overall question of this thesis by addressing the other side of it namely *is ethnicity matching a violation of the ECHR?* The chapter highlights the findings made throughout the thesis, and in particular it seeks to address the two interlinked questions by emphasising the identified factors that are most likely to influence the reasoning of the Court if it was to address the issue of ethnicity matching in adoption. The thesis thus concludes that using ethnicity matching in a way that results in unjustified delay or denial of adoptive homes for ethnic minority children would be a violation of the Convention.

2 Background

This chapter provides a brief presentation of the legal standing of adoption in relation to the ECHR. It also shortly introduces the adoption controversy, which consists of two contradictory views on the value of adoption that permeate both in-country and intercountry adoption.

2.1 Adoption under the ECHR: legal terminology and context

There is no right to adoption under the Convention.[12] Nor is there a right to be adopted.[13] Regarding Article 12, which explicitly enshrines the right to found a family, the Court has held that the right only applies to married couples. It does not safeguard the right to adopt or in other ways integrate a non-natural child into the family of a married couple.[14] In cases where the Member State provides for adoption, the system as such can be scrutinised by the Court in its supervisory function under the Convention. A violation of Article 12 in this context is only likely to be found if adoption has been refused in extreme cases of unfairness and/or where there is a link to discrimination and thus Article 14.[15]

Similarly, the Court has emphasised in relation to Article 8 in the case of *Fretté v. France* that adoption entails "providing a child with a family, not a family with a child".[16] In the same case the Court found that the refusal to grant an authorisation to adopt was based on the applicant's sexual orientation and as such the alleged discrimination fell within the ambit of Article 14 taken together with Article 8 and could thus be scrutinised by the Court.[17]

In the case of competing interests between the child and the prospective parents seeking to adopt, the best interests of the child, as enshrined in Article 3 of the United Nations Convention on the Rights of the Child 1989 (CRC) and referred to in the ECtHR's case law, will determine the outcome

[12] *Di Lazzaro v. Italy*, Admissibility decision of 10/07/1997 European Commission of Human Rights, Application no. 31924/96.
[13] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Dartmouth Publishing and Ashgate Publishing 1999) 296.
[14] *Di Lazzaro*.
[15] David J. Harris, Michael O'Boyle, Ed P. Bates and Carla M. Buckley, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd edition, Oxford University Press 2009) 555; *X and Y v. UK*, Admissibility decision of 15/12/1977 European Commission of Human Rights, Application no. 7229/75; *X v. The Netherlands*, Admissibility decision of 10/03/1981 European Commission of Human Rights, Application no. 8896/80; *Singh v. UK*, Admissibility decision of 03/09/2002 European Commission of Human Rights, Application no. 60148/00 (Friendly Settlement).
[16] *Fretté*, para. 42.
[17] Ibid paras. 31-33.

of the balancing exercise.[18] The Court emphasised in the case of *Pini and Others v. Romania* that the child's interests depending on the circumstances may trump those of the parents and even more so in cases of adoption.[19]

There are two types of adoption i.e. full adoption and simple adoption. The full version terminates all legal ties with the family of origin, where applicable, whereas in simple adoption the adoptee retains his or her legal relationship with the family of origin, and an additional legal tie is created with the adopter.[20] Full adoption is the most common version among the CoE member States but some States, such as Luxemburg, France and Italy, also have simple adoption,[21] and certain of these states use it to make a distinction between adoption by single persons and couples. In addition, single persons are eligible to adopt in most member States, even though the criteria for doing so differ.[22]

2.2 Remarks

In the case of identical ethnicity matching between children and prospective adopters the best interests of the children involved are not articulated by the children themselves,[23] but by social services whose policies completely disregard the possibility of creating multicultural families.

In addition, the legal distinction between the two forms of adoption is not of particular relevance within the context of this thesis. It should be mentioned, however, that within the framework of simple adoption, arguments for an identical ethnicity matching between adoptees and adopters seem even more irrelevant in cases where a link to the family of origin is retained. Similarly, in other cases where continued contact between the biological family and the adoptee is possible, the existence and nature of such contact would arguably further lessen the importance placed on ethnicity as a matching criteria.

[18] White and Ovey, 343.
[19] *Pini and Others v. Romania*, Judgment of 22/06/2004 ECtHR, Application nos. 78028/01 and 78030/01, para. 155 f.
[20] *Schwizgebel v. Switzerland*, Judgment of 10/06/2010 ECtHR, Application no. 25762/07, para. 24; *Gas and Dubois v. France*, Judgment of 15/03/2012 (only available in French) ECtHR, Application no. 25951/07, paras. 17-19.
[21] Simple adoption is not used in the UK but a special guardianship order exists, which is a legal hybrid between a residence order and an adoption order. See eg, Amy Neil Salter, *The Adopter's Handbook* (British Association for Adoption and Fostering 2012) 58.
[22] *Schwizgebel*, paras. 23-25.
[23] The author acknowledges that there might be cases were the children involved have expressed such opinions eg, in the case of *Pini and Others*, but holds that even in those cases however such opinions are most likely the result of ethnicity restrictive influences from adults in the child's environment.

2.3 The Adoption Controversy

There are two main polar views on adoption and the animosity between the two resurfaces on both the national and international level. The pro-adoption side, supported by adoption experts such as Bartholet, advocate for both in-country and intercountry adoption. Bartholet, in particular, argues that international law grants unparented children with the right to grow up in a nurturing family home and thus, if such families are to be found abroad, this is where these children should go regardless of whether the ethnicity of the child matches that of the adopters.[24] Such arguments are supported by research that shows that multicultural families joined through adoption do very well in general and that the adopted child and the family as a whole benefits from the multicultural dimension.[25]

Furthermore, Hayes criticises opposition to transracial adoption for promoting race separatism that prioritises the ambitions of homogeneous ethnic communities above the interests of children in care awaiting adoption. Hayes argues that the claim that the wellbeing of ethnic minority children is dependent on maintaining a strong sense of ethnic identity is unfounded, and stresses that liberal language emphasising the best interests of the child hides the true nature of the racist agenda.[26]

Pertman, another pro-adoption advocate, points out that multicultural adoptions are playing a minor but important role in lessening personal bias against other ethnicities and cultures.[27] Regarding intercountry adoption, Pertman stresses that it is vital to remember that "no child is better off institutionalized, or on the street, than living in a family, wherever that family may be."[28] Pertman further emphasises that transracial adoption in itself does not produce psychological or social adjustment issues in children but argues that the incorporation of the adoptee's heritage into the new family is invaluable, and the challenges faced by adoptees that do not share their parents ethnicity must be recognised. [29]

The other symbolic view is that adoption represents the worst form of exploitation, where the rich and influential take the children of the poor and powerless. Naturally, this view is particularly critical towards intercountry adoption as it regards it as another form of exploitation by Western industrialised countries of the least privileged classes in the poorest nations. White adoptive parents adopt children of a different colour and ethnicity and

[24] Elizabeth Bartholet, "International Adoption: The Human Rights Position", 1 Global Policy 91 (2010) 94 and 97 f.
[25] Ibid 97; Elizabeth Bartholet, "International Adoption: Current Status and Future Prospects", 3 The Future of Children 89 (1993) 98.
[26] Peter Hayes, "The Ideological Attack on Transracial Adoption in the USA and Britain", 9 International Journal of Law and the Family 1 (1995) 19 and 4-8.
[27] Pertman, 70.
[28] Ibid 85.
[29] Ibid 111 and 67.

thus remove these children from their birth families, and ethnic and cultural communities.[30]

The debate on ethnicity matching, or race matching as it is also referred to,[31] has been particularly strong in the U.S. The Multiethnic Placement Act (MEPA) was introduced in the U.S. in 1994 and subsequent amendments in 1996 were aimed at solving the controversy surrounding ethnicity matching by making it illegal to prevent transracial adoptions. The two following initiatives introduced by President Clinton in 1996 and 1997 respectively, Adoption 2002 and the Adoption and Safe Families Act (ASFA) further spurred the number of adoptions. The aim of Adoption 2002 was to double the number of adoptions for children with special needs and the latter provided states in the U.S. with financial incentives to increase the number of public adoptions.[32] "Special needs" is the umbrella term used for a range of concerns, such as ethnic minority or mixed heritage, older children, psychological and physical disabilities and problems, which children awaiting adoption might have.[33]

The position taken by the National Association of Black Workers (NABSW) is most poignant for the purpose of illustrating the critical view on mixed ethnicity matching between adoptees and adoptive parents. The Association's most recent position paper on Preserving Families is less radical in its phrasing than the official statement made in 1972 against transracial adoption, which labelled the placement of black children in white families as "internal colonialism" and a new form of "slave trade"[34], but its position is nevertheless the same.[35] Consequently, the Association opposes MEPA, the Removal of Barriers to Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996 (IEPA) and ASFA as they promote the creation of multicultural families through adoption; the Association in fact advocates for the repeal of the two latter acts.[36]

In another adoption critique, Smolin has concluded that the labelling of intercountry adoption as a form of child trafficking is correct under the present circumstances due to the fact that the law and the current system of intercountry adoption allows it to operate in such a manner. The entire system is corrupt, as it has no real means to prevent itself from diminishing into child trafficking; the problems with intercountry adoption and child

---

[30] Elizabeth Bartholet, *Family Bonds*, (Houghton Mifflin Company 1993) 142.
[31] The term race matching is especially used in the U.S.
[32] Pertman, 225 f.
[33] Ibid 120.
[34] Sissay Lemn, "On inter-racial adoption, Cameron is wrong. Colour blindness is a disability" *The Guardian* (13/03/12) available at: <http://www.guardian.co.uk/commentisfree/2012/mar/13/inter-racial-adoption-cameron-wrong?INTCMP=SRCH> (accessed on 04/04/12).
[35] NABSW, Position Paper on Preserving Families, available at: <http://www.nabsw.org/mserver/PreservingFamilies.aspx> (accessed on 04/04/12).
[36] Ibid.

trafficking are both systematically entrenched and recurrent.[37] Smolin argues that it is illusory to distinguish between buying children, and paying for adoption services if the law cannot prevent adoption intermediaries from profiting from their services. Smolin also finds that the ethics in both in-country and intercountry adoption systems is as deceptive and false as the law prohibiting the selling of children.[38] The prospect of reforming the systems as needed according to Smolin are bleak and his prediction is that the current form of intercountry adoption will eventually be abolished and history will label it as a "neo-colonialist mistake".[39]

Oreskovic and Maskew question Bartholet's position on international adoption and criticise her language for being overly simplistic and emotional. Instead they stress the problems that might face adoptees in their new families, and in particular they highlight the feelings of alienation from the culture of origin and adoptive culture, and feelings of resentment over loss of identity, family of origin and cultural heritage that face some adoptees.[40] Their arguments in this respect claim to be supported by research data[41] that show that such questions are highly relevant and that the failure to answer them causes deep and long-lasting damage to the adoptees.[42]

In this context the views of international children's organisations are also of interest. UNICEF's official position on international adoption mirrors the one presented in Article 21 CRC[43] on adoption i.e. if the family of origin is

---

[37] David M. Smolin, "Intercountry Adoption as Child Trafficking", 39 Valparaiso University Law Review 281 (2004) 323-324.
[38] Ibid 322 f.
[39] Ibid 325.
[40] Johanna Oreskovic and Trish Maskew, "Red Thread or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption", 14 Buffalo Human Rights Law Review 71 (2008) 121 f.
[41] Regrettably, the authors fail to provide a specific reference for these research findings.
[42] Oreskovic and Maskew, 124.
[43] Article 21 CRC reads as follows:
States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

unable to care for the child then appropriate care alternatives should be sought for the child. Intercountry adoption is viewed as one of the stable care options and it is recognised as a possible best permanent solution. UNICEF supports intercountry adoption that takes place within the principles established in the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993.[44] Similarly, Save the Children also emphasises its commitment to supporting the view established in the CRC on adoption and states in its Policy brief on International Adoption that much more effort should go into family preservation so as to allow the child to grow up in its family of origin. Regarding the child's identity and cultural heritage, the two main views on the subject are briefly presented, and the impact on the wellbeing of children adopted from other countries is emphasised. Furthermore, Save the Children states that it supports the hierarchy between domestic and international care options for children, which places intercountry adoption as a last possible resort, as established by Article 21 CRC. The need for this hierarchy is, according to the organisation, supported on the basis that international adoption diverts resources from in-country care options of quality.[45]

The controversy is highly relevant in the European context as well and has raised European voices. Notably, the previous CoE Commissioner for Human Rights, Thomas Hammarberg published an issue paper "Adoption and Children: A Human Rights Perspective" in 2011, in which a number of controversial issues connected to adoption are dealt with.[46] The position presented rejects Bartholet and others' stance, who argue that children have a right to a family *per se* under international law, and warns that it is misleading and dangerous to interpret statements in the CRC preamble related to the upbringing of children in a nurturing family environment as a right to a family.[47] This is even more so, if the supposed right is used to support adoption. Ethnicity matching and cultural heritage is not addressed in the issue paper but support for the subsidiarity principle, as expressed in Article 21 CRC, which subjects intercountry adoption to a possible measure of last resort, is supported.[48] Furthermore, the Commissioner, in his blog post, has also drawn attention to the adoption tragedy in the case of the American woman, who decided to abandon and send back her adoptive son,

---

[44] UNICEF, UNICEF's position on Inter-country adoption 2010, available at: <http://www.unicef.org/media/media_41918.html> (accessed on 03/04/12).

[45] Save the Children, Policy Brief on International Adoption 2010, available at: <http://www.savethechildren.org.uk/resources/online-library/policy-brief-international-adoption> (accessed on 03/04/12). These views were further specified by a Save the Children UK Advisor through e-mail correspondence on 26/04/12. The Advisor found the thesis topic interesting but could not advise the author further as Save the Children UK does not work on adoption issues in UK or in Europe.

[46] The issue paper was prepared by Nigel Cantwell. Cantwell has not looked into this particular issue but recognises its complexity through e-mail correspondence on 19/04/12.

[47] This position is also supported by Van Bueren. See Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995) 93.

[48] CoE Commissioner for Human Rights, Issue Paper on Adoption and Children: A Human Rights Perspective 2011, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1780157&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679> (accessed on 16/02/12).

Artyom Savelev, to Russia as she found his behaviour impossible to handle, in his blog post. In the blog post the Commissioner also highlighted that intercountry adoption should only be considered once it has become clear that a suitable form of care is not available in the child's community of origin.[49]

2.4 Remarks

The NABSW's very restrictive view on mixed ethnicity matching in adoption becomes even clearer when viewing the Association's position paper on Preserving Families together with the one on Kinship Care, which embraces this form of care as the preferred option for African American children in order to promote a strict family preservation of American families.[50]

In addition, the views presented above focus on international adoption to a large extent but it must be recognised that such views also have a significant impact on ethnicity matching between adoptees and prospective adopters on the domestic level. The view referred to as the "other symbolic view" above is consequently also critical towards domestic adoptions that cross ethnicity lines and result in the creation of multicultural families. Thus, without being as forthright as the NABSW, Smolin's labelling, for example, of intercountry adoption as child trafficking strongly indicates that multicultural families created through adoption are intrinsically bad at least under the current system as it is inherently exploitative of families that are not able to care for their own children. Thus, without explicitly rejecting multicultural ethnicity matching between adoptees and prospective adopters, such a view is closely aligned with Smolin's arguments.

Regarding the views presented where ethnicity matching is more explicitly emphasised, Oreskovic and Maskew's critique of Bartholet's position, notwithstanding the lack of a specific source of reference for the research findings as indicated above, seems to be too general in nature. It is misplaced to argue that Bartholet and other pro-adoption advocates are ignorant of the problems that might face adoptees that do not share the same ethnicity as their adoptive families. The authors criticise Bartholet for being over simplistic in her argumentation yet the same critique could be aimed at these two authors as their counter-argument seems to be based on the assumption that the majority of adoptees suffer from these negative consequences of adoption. In fact, there are research findings that clearly refute such a claim as these findings show clearly that a majority of adoptees, whose ethnicity of origin is different from the adoptive families that they grow up in, adapt well to their multicultural surroundings.

[49] Commissioner for Human Rights' blog post, posted on 05/12/2010, available at: <http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=37> (accessed on 16/02/12).

[50] NABSW, Position Paper on Kinship Care, available at: <http://www.nabsw.org/mserver/KimshipCare.aspx> (accessed on 04/04/12).

Research indicates that adoptees are faced with the same kind of formative questions and with the same level of self-esteem as children raised in their families of origin.[51] A four-year survey by the Search Institute in Minnesota from 1994 found no difference in grades, self-esteem and other outcomes between same-ethnicity and transcultural adoptees. Furthermore, transcultural adoptees might face challenges regarding their ethnicity but it must be emphasised that transcultural adoption does not create psychological nor social maladjustment problems in children by itself.[52]

Lastly, it is interesting to note that Bartholet criticises UNICEF and Save the Children for supporting a restrictive adoption view that has a very negative impact on intercountry adoption.[53]

[51] Pertman, 66.
[52] Ibid 111.
[53] Bartholet, ”International Adoption: The Human Rights Position” 92 f., 95 and 97.

3 ECtHR's Approach to Discriminatory Matching in Adoption

The case law presented in this chapter highlights discriminating factors in the matching between children placed for adoption and prospective adoptive parents or illustrate, how the Court has addressed alleged discrimination concerning adoption. The cases are presented in groups, where applicable, according to themes such as cases concerning homosexual persons wishing to adopt.

3.1 Main Articles in the ECHR

The case law presented below focus on Articles 8 and 14; they read as follows:

Article 8 – Right to respect for private and family life

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

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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

3.2 Protecting ethnic heritage: in the best interests of the child?

3.2.1 *E.D. v. Ireland* (1995)

The case concerned the non-consensual adoption by the applicant's child to a family from the settled community. The applicant was a member of the traveller community and alleged under Article 8 that the adoption by a non-traveller family had deprived his child of his name and the child had lost access to his traveller background and heritage. The applicant also complained under Article 10 that his right to impart information and ideas to his child about traveller culture, heritage, language and way of life, and under Article 11 that the adoption prevented the child from associating on an equal level with other members of the travelling community. A violation of Article 2 of Protocol No. 1 was alleged on the basis that the adoption deprived the applicant of his right to educate the child about his traveller background. The applicant also complained under Article 14 that the lack of effort to try to match his child with adoptive parents with the same cultural background was discriminatory as such a matching is prevalent in a consensual adoption.[54] The European Commission of Human Rights declared unanimously that the application was inadmissible due to the non-exhaustion of domestic remedies.[55]

The Commission found that the adoption order constituted an interference with the applicant's family life. The decision by the national Court was in accordance with law, based on the best interests of the child, and pursued the legitimate aims of protecting the health and rights of the child. Regarding the necessity criterion, the Commission noted that the Court had concluded that both the applicant and the mother were addicted to drugs or alcohol and were not capable of caring for the child within the foreseeable future. The foster parents wishing to adopt were most suitable as adoptive parents. The Commission found that the decision was reasonable and based on relevant and sufficient reasoning. In light of the margin of appreciation accorded to states within the area, the Commission did not consider that a long term fostering option was required as an alternative and recalled the benefit to the child of being permanently placed in the home of the foster parents. The Commission, even when assuming that the domestic remedies had been exhausted, found that the interference was necessary in a democratic society and, thus justified, and concluded that this part was manifestly ill-founded.[56] The Commission further recalled that Article 8 places an obligation on the State to act in a way that permits family ties to develop normally but it is not the State's obligation to positively re-establish family life conditions where the persons concerned have damaged such

[54] *E.D. v. Ireland*, Admissibility decision of 18/10/1995 European Commission of Human Rights, Application no. 25054/94, Complaints.
[55] Ibid The Law.
[56] Ibid The Law 1(a).

conditions themselves.[57] Regarding the placement of the child in foster care in a non-traveller family which consequently made the transfer to a traveller family not possible at the stage of adoption, due to the best interests of the child, the Commission satisfied itself with noting that the complaints were outside the time limit and that domestic remedies had not been exhausted.[58]

The alleged violations under Articles 10 and 11 were deemed to have been considered under Article 8, as the Commission did not find that the allegations gave rise to separate issues.[59] In relation to Article 14, it was noted that at the time of the adoption order the child had already formed bonds with the foster family so in practice it was not feasible to consider other adoptive parents. The question was thus whether the applicant had challenged his child's fostering placement before the bonding had occurred. Relying on its conclusion in relation to Article 8, the Commission found the complaint inadmissible as it was out of time and domestic remedies had not been exhausted.[60]

3.2.2 Remarks

Despite the dismissal of the case due mainly to the non-exhaustion of domestic remedies, it is most interesting that a complaint dealing with the issue of ethnicity matching was brought before the Commission. First of all it should be noted that the Commission did not use the concept of ethnicity as such but referred to the cultural identity, background or heritage of the child. Furthermore, it must be noted how the Commission argued around the facts of the case, especially its findings regarding Article 8. The positive and negative aspects of the child's adoption were weighed against each other and the Commission found that the adoption was in the best interests of the child. Thus, the importance of providing the child with a true family home with adoptive parents that were already in practice the parents of the child and with whom the child had formed family bonds was rightly seen as being of more weight than providing the child with direct access to his cultural background.

An aspect that was not discussed by the Commission but that seems to be reasonable to take into consideration is to what extent the child had in practice lost access to his cultural background and, moreover, to what extent the applicant had previously and was likely to in the foreseeable future provide the child with education about his culture and heritage. The applicant alleged violations of his rights under the Convention that he had as far as the facts of the case show made none, or minimal use of. The child was taken into care after barely three months after his birth and had only met with the applicant on one occasion, during which he was intoxicated, between the time when he was taken into care and up until the request for

[57] Ibid The Law 1(b).
[58] Ibid The Law 1(c).
[59] *E.D.*, The Law 2.
[60] Ibid The Law 3.

the adoption order i.e. a time period of almost seven years. The applicant and the child's mother had only asked for three visits during this time period and failed to attend two of them.[61] In the light of these facts, it seems unlikely that the applicant had previously provided any educational knowledge about his culture to his child. Nor does it seem likely that it would be the case in the future as the national Court's decision to grant the adoption order emphasised that both natural parents had acknowledged that neither of the two were capable of raising the child within the foreseeable future.[62]

In this connection it should be noted that conservative views on ethnicity and the placement of children with adopters of a different ethnicity also played a role in the more recent case of *Pini and Others*, which concerned the failure by the national authorities to enforce adoption orders regarding the applicants' adopted daughters. The applicants were Italians and their adopted daughters were Romanian. The private institution for orphaned and abandoned children in which the girls had been placed refused to comply with the adoption orders by retaining the children's birth certificates and by not granting their adoptive parents custody of them by literally hiding and denying the applicants, the court bailiffs, who were occasionally accompanied by police, access to the girls. The private institution also made numerous applications to the national courts to prevent the enforcement of the decisions granting the applicants the birth certificates and custody.[63]

Ethnicity was not invoked as a discriminatory ground, nor did the Court directly address it as an underlying factor for the actions taken by the private institution; however it seems clear that these actions were the consequences of such views. The facts in the case state that the institution's founder had expressed to the local newspaper that none of the children in the centre were to leave as they formed part of his family and "that it was time to stop *exporting* Romanian children."[64] The facts also reveal that the girls were not prepared for leaving the institute and living with their adopted families nor is it certain that the girls received all the letters that the adopters had written to them in Romanian for several years.[65] Indeed, the Court found it most regrettable that the girls had not received any psychological support and preparation for their departure from the centre.[66] The Court also noted that the failure to execute the decisions was a direct result of the opposition by the institute and its founder.[67]

It is clear from the facts of the case that the girls, who were older than ten years, ten being the age when the applicable Romanian law in the case required children to give their consent to adoption and adopted children

[61] Ibid The Facts.
[62] Ibid The Facts.
[63] *Pini and Others*, paras. 25-65.
[64] Ibid para. 96. The quote in the original text is indicated in italics.
[65] Ibid para. 99.
[66] Ibid para. 163.
[67] Ibid paras. 179 f.

could also apply to have the adoption order revoked from that age, when the case reached the Court had expressed that they wished to remain in the institute.[68] Without launching into pure speculation however it can at least be asserted that the girls' views on their adoptions must have been influenced by the negative views on their adoptions by the adults in the institute, who they regarded as their "*substitute parents*".[69]

3.3 Homosexual adoptive parents: in the best interests of the child?

3.3.1 *Fretté v. France* (2002)

The Court held by four votes to three that there had been no violation of Article 14 of the Convention taken together with Article 8. The case concerned the French authorities' refusal to grant the applicant's request for prior authorisation to adopt a child as a single person based mainly on his homosexuality.[70] The majority found that Article 14 in conjunction with Article 8 was applicable. The Court noted that the right to adoption is not guaranteed by the Convention and the right to respect for family life requires the existence of a family and does not protect the simple desire to found one.[71] "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."[72] French domestic law authorises all single persons, men and women, to apply for the prior authorisation to adopt and the Court found that the national authorities had based their refusal on the applicant's homosexuality, albeit without explicitly saying so in the decisions. Such a difference in treatment based on sexual orientation falls within the ambit of Article 14.[73]

The majority found that the justification provided by the national authorities appeared to be objective and reasonable and the difference in treatment was not discriminatory under Article 14.[74] The jurisprudence of the Court illustrates that "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*."[75] The Court found that the authorities' decisions to reject the application for prior authorisation served the legitimate aim of protecting the health and rights of children who were placed for adoption. There was

[68] Ibid paras. 74, 76, 82 and 99.
[69] Ibid para. 94. The quote in the original text is indicated in italics.
[70] *Fretté*, paras. 9-15.
[71] Ibid paras. 32 f.
[72] Ibid para. 31.
[73] Ibid para. 32.
[74] Ibid para. 43.
[75] Ibid para. 34. Quotations in the original text are indicated in italics.

no common ground among the member States on the question and the national authorities were better placed to evaluate the circumstances on the national level than the Court, and therefore the States enjoyed a wide margin of appreciation.[76] "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."[77] In particular, it was noted that the scientific community was divided over the consequences on a child who is adopted by a homosexual parent, national and international opinion differed widely and the number of children placed in adoption were scarce. The Court concluded that the applicant's right to adopt in national law was limited by the interests of the children awaiting adoption. The refusal by the authorities was proportionate when considering the wide margin of appreciation and the best interests of the child.[78]

Judge Costa in his partly concurring opinion, was joined by Judges Jungwiert and Traja, found that Article 14 was not applicable in the instant case. Costa stressed that the Convention does not include a right to adopt nor any protection of the desire to form a family, and did therefore not find that there had been an interference by the State with the applicant's private or family life. Unconvinced by the reasoning of the majority, Judge Costa noted that the applicable provision of the French Civil Code only gave the applicant the possibility to apply for the prior authorisation to adopt, which is different from granting a right. Regarding the margin of appreciation, Judge Costa held that the majority's decision was based on the precautionary principle and noted that the result derived at depended on whether the Court's subsidiarity was stressed or its supervisory role. Judge Costa concluded by stating that the judgment was a paradox and that it would have been better to reject the complaint on the basis of the non-applicability of Article 14.[79]

Judges Bratza, Fuhrmann and Tulkens expressed a joint partly dissenting opinion by finding a violation of Article 14 taken in conjunction with Article 8. Their partly dissenting opinion stressed that the majority's decision seemed to be contradictory in both fact and law as a discriminatory application of a legal right must be contrary to Article 14. Regarding the objective and reasonable justification for a difference in treatment it was noted that if homosexuality was not seen as an objection in itself the refusal to grant the authorisation would have to be based on facts pointing to the applicant's unsuitability as a parent, which was not the case. The legitimate aim of protecting the rights and freedoms of the child was not established. The national authorities based their decisions on the view that being brought up by homosexual parents is harmful to children. Some margin of appreciation should be given to member States, and the Court should not favour any type of family model. Total discretion by member States is

[76] Ibid paras. 38-41.
[77] Ibid para. 42.
[78] *Fretté*, para. 42.
[79] Ibid Partly Concurring Opinion of Judge Costa, Joined by Judges Jungwiert and Traja.

however dangerous for the protection of fundamental rights, and harmful to their previous development. In addition, the relationship between the interests at stake was not proportionate as the refusal was absolute and solely based on the applicant's sexual orientation. Thus, any real balancing of the interests and possibility to find a practical solution of reconciliation was inherently precluded.[80]

3.3.2 *E.B. v. France* (2008)

In the Grand Chamber judgment the Court found by ten votes to seven a violation of Article 14 in conjunction with Article 8 of the Convention. The Court unanimously declared that the application was admissible. The case concerned the refusal by the French authorities to grant the applicant authorisation to adopt as a single person based on her homosexuality.[81] The Court reiterated that the right to adopt and the right to found a family are not safeguarded by Article 8, nor by domestic law or international instruments such as the CRC, or the Hague Convention on the Protection of Children and Co-operation in Respect of International Adoption 1993.[82] The concept of private life under Article 8 is broad. The issue raised was whether the procedure for authorisation to adopt was discriminatory and not adoption as such. Therefore, the Court did not have to rule on if the right to adopt falls within the scope of Article 8 alone. It was reiterated that Article 14 is complementary to the substantive provisions and that its application only requires that the circumstances fall within the ambit of one or several Articles of the Convention. Article 14 also applies to additional rights provided by the States if such rights touch upon substantive rights of the Convention.[83] The Court noted that the State had gone beyond its obligations under Article 8 by granting single persons the right to apply for adoption authorisation and as such the circumstances of the case fell within the scope of Article 8. When granting such an additional right the State cannot apply the right in a discriminatory fashion in the light of Article 14. The Court also referred to its finding in *Fretté* where it had found that Article 14 taken in conjunction with Article 8, was applicable.[84]

The Court distinguished the case from *Fretté*. The two main grounds for the refusal to grant an authorisation to adopt were the lack of a paternal role model in the household, and the non-committal attitude of her longstanding partner to adopt. Regarding the former ground the Court accepted that the factor was a legitimate one to consider however it found the importance attached to it by the national authorities excessive under the circumstances as the applicant applied for the authorisation as a single person.[85] As to the latter ground, the Court did not find that the applicant had been

[80] Ibid Joint Partly Dissenting Opinion of Judges Bratza, Fuhrmann and Tulkens.
[81] *E.B. v. France*, Judgment of 22/01/2008 ECtHR, Application no. 43546/02, paras. 7-25.
[82] Ibid paras. 41 f.
[83] Ibid paras. 43-48.
[84] Ibid paras. 49-51.
[85] Ibid paras. 71-73 and 87.

discriminated against on that account. It noted that it was legitimate for the national authorities to take her partner's attitude into account in their assessment in order to secure the best interests of the child as her partner would be a part of the child's home environment. The essence of a prospective home for an adopted child to meet the required family, child-rearing and psychological needs of the child is highlighted in international instruments on the subject such as the European Convention on the Adoption of Children 2008.[86] The two main grounds were part of an overall assessment and they should therefore be considered concurrently thus if one ground is found to be illegitimate it affects the whole decision.[87]

The Court found it noteworthy that the applicant's sexual orientation was considered to a large extent in the reasoning of the domestic authorities.[88] The majority found that the applicant had suffered a difference in treatment due to her homosexuality as it had been considered a decisive factor in denying her the authorisation to adopt. Such a difference in treatment is discriminatory if there is no objective and reasonable justification for it. The Convention is a living instrument and must be interpreted accordingly. The domestic law granted a single homosexual to adopt a child and the Court did not find that the Government's arguments justified the refusal of the authorisation. The national provision in question did not make explicit reference to a referent of the other sex and the applicant's skills for bringing up children had been noted in a domestic judgment. The Court found that the national authorities distinction of the applicant based on her sexual orientation was not acceptable under the Convention.[89]

There were four dissenting opinions and one concurring opinion joined to the judgment. Judge Costa, joined by Türmen, Ugrekhelidze and Jočienė, was of the opinion that the Grand Chamber should have declared that a refusal based on the applicant's homosexuality would violate Article 14 taken in conjunction with Article 8 but in the instant case the application should have been dismissed as the refusal to grant authorisation was based on two factors, where at least one was a legitimate one.[90]

Judge Zupančič stated that in the public sphere privileges can become rights and if such a right is affected by arbitrariness and prejudice the rules governing discrimination should apply. Judge Zupančič did not adhere to the contamination theory supported by the majority, and stressed that the best interests of the child can trump the interests of biological parents and questioned if this was not even more so in the case of an adoptive parent.[91]

Judge Loucaides noted that the case overturned *Fretté*. The dissenting opinion does not accept the contamination theory and considers that the

[86] At the material time it was the draft European Convention on the Adoption of Children.
[87] *E.B.*, paras. 76-80.
[88] Ibid para. 85.
[89] Ibid paras. 90-96.
[90] Ibid Dissenting Opinion of Judge Costa, Joined by Judges Türmen, Ugrekhelidze and Jočienė, para. 8.
[91] Ibid Dissenting Opinion of Judge Zupančič.

applicant's homosexual relationship with her partner could distort the image of a family in the eyes of a child. Homosexuals should accept that there are certain roles that are incompatible with their peculiarity.[92]

Judge Mularoni expressed difficulty in understanding how the circumstances of the case could fall within the ambit of Article 8 without readily modifying previous case law. The attitude of the applicant's partner was alone sufficient to refuse the authorisation and Judge Mularoni did not share the majority's conclusion that the applicant's sexual orientation was a decisive factor in the decision of refusal.[93]

3.3.3 *Gas and Dubois v. France* (2012)

In this case, which is not final,[94] the Court found no violation of Article 14 in conjunction with Article 8 by six votes to one, as it did not find that the refusal to allow one of the applicants to adopt her same-sex partner's child through a simple adoption order discriminatory, as heterosexual couples that had entered into a civil partnership were faced with the same situation. Therefore, the Court did not see any evidence of a difference in treatment based on the applicant's sexual orientation.[95] The Court reiterated that a difference in treatment between persons in similar situations is discriminatory if it does not pursue a legitimate aim or if there is a disproportionate relation between the means used and the aim sought. The member States have a certain margin of appreciation to decide when a difference in treatment is justified. Differences based on sexual orientation require particularly serious reasons for justification.[96] The circumstances of the case differed from *E.B.* as it concerned simple adoption. The national judicial authorities rejected the application for simple adoption as they found it contrary to the best interests of the child to be deprived of the parental responsibility of the biological mother.[97] According to the national law the granting of simple adoption transferred parental responsibility to the adopter, the only exception was if the adoptive parent was the biological parent's husband or wife.[98] The applicants' situation was not comparable to that of a married couple regarding adoption by the second parent as marriage is given a particular status, and the Court had previously held that member States are not obliged to give homosexual couples access to

[92] Ibid Dissenting Opinion of Judge Loucaides.
[93] *E.B.*, Dissenting Opinion of Judge Mularoni.
[94] Under Articles 43 and 44 of the Convention the Chamber judgment is not final. During a three-month period following its delivery any party may request that the case be referred to the Court's Grand Chamber. If such a request is made a panel of five judges will decide if the case requires further examination. If the request is refused the Chamber judgment becomes final on that date and if not, the Grand Chamber will hear the case and deliver a final judgment.
[95] *Gas and* Dubois, para. 69.
[96] Ibid paras. 58-59.
[97] Ibid paras. 61 f.
[98] Ibid para. 18.

marriage under the Convention.[99] In addition, the Court had previously found that the logic behind the severing of parental ties between the child and the natural parent once an adoption had taken place was valid for minors. The applicable national provision did not lend itself to legitimising the granting of a shared parental responsibility between the two applicants.[100]

Judge Costa, joined by Judge Spielmann, in his concurring opinion expressed that the Court should restrain itself from becoming a fourth instance Court. Judge Costa noted that it is possible to deviate from the national law in favour of the Convention but did not consider it appropriate for the Court to censure the legislator in such a way in the present case. The legislator was however invited to reflect on the revision of the national provision.[101]

Judge Villiger, focused on the best interests of the child in his dissenting opinion and analysed if the difference in treatment was justified from the child's point of view. Children to homosexual parents that are married benefit from shared parental responsibility, while children to homosexual parents are treated differently since adoption is excluded for homosexual couples. Shared parental responsibility is in the best interests of the child and justifying such a discrimination based on that marriage confers a certain status on adults that are married was insufficient in the balancing of interests. A child born into a homosexual family formation should receive the best of the treatment offered to children born out of a heterosexual relationship i.e. shared parental responsibility.[102]

3.3.4 *X v. Austria* (Still pending)

The Court held a Chamber hearing on 1 December 2011.[103] The case concerns a same-sex couple and the domestic courts' refusal to grant one of the partners the right to adopt her partner's son, so-called stepchild adoption, without severing the child's legal relationship with his mother. The mother has sole custody of the child, who is cared for by her and her partner. The applicants' complain under Article 14 taken together with Article 8 that they are being discriminated against due to their sexual orientation, as the law does not hinder the adoption of a partner's child by the other partner in a heterosexual couple. The District Court and the Supreme Court referred to the broad margin of appreciation accorded to states in *Fretté*. The Regional Court drew attention to the importance of

[99] Ibid paras. 66-68.
[100] Ibid para. 72.
[101] *Gas and Dubois*, Concurring Opinion of Judge Costa, Joined by Judge Spielmann.
[102] Ibid Dissenting Opinion of Judge Villiger.
[103] *X and Others v. Austria*, Press Release of 01/12/2011 ECtHR, Application no. 19010/07.

maintaining contact with parents of both sexes. The father had not agreed to the adoption, and he had regular contact with his child.[104]

3.3.5 Remarks

The importance placed by the Court in its reasoning on the existence or non-existence of harmonisation among the CoE member States becomes particularly clear when contrasting the reasoning in *Fretté* with the one in *E.B.* In *Fretté* the Court's cautious approach is firmly entrenched in the lack of harmonisation on the issue, which in turn results in a wider margin of appreciation for the Contracting State. In *E.B.* however where a clear harmonisation has been established the Court is demonstratively more progressive in its findings.

In addition, *Fretté* has been criticised for being a judicial paradox and one commentator argues that a violation of Article 14 had been found if the Court had used a different decision-making method.[105] It has also been argued that the majority of the Court abused the margin of appreciation in this case by using it as some kind of precautionary principle in order to retract on human rights protection to meet political concerns. The margin of appreciation was used to quash the principle of proportionality and by doing so it was used as a form of precautionary principle. The principle's standard was not met, and moreover it's not appropriate to use it in the human rights context.[106]

Regarding *E.B.* it is of interest to note that certain view the inclusion of the additional right of access to adoption within the ambit of Article 14 as a mere step away from the right to adopt, due to the evolutionary interpretation by the Court of the Convention as a living instrument.[107] Judge Berro-Lefèvre does not consider the insertion of such a right as an easy one as there cannot be a right to a child, such a right would make the child the object of a right and thus contrary to the rights of the child.[108]

---

[104] *X and Others v. Austria*, Statement of Facts of 02/02/2009 ECtHR, Application no. 19010/07.

[105] George Letsas, "No Human Right to Adopt?", 1 UCL Human Rights Review 134 (2008) 137 and 143-146. See also the Partly Concurring Opinion of Judge Costa, Joined by Judges Jungwiert and Traja.

[106] Thomas Willoughby Stone, "Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in Fretté v. France to Backtrack on Protection From Discrimination on the Basis of Sexual Orientation", 3 Connecticut Public Interest Law Journal 271 (2003) 1, 5 f., 8 and 11. The use of the precautionary principle was also recognised in the Partly Concurring Opinion of Judge Costa, Joined by Judges Jungwiert and Traja.

[107] Adeline Gouttenoire and Frédéric Sudre, "Adoption: La France est condamnée pour discrimination fondée sur l'homosexualité de la requérante", 15 La Semaine Juridique 34 (2008) 36 f.

[108] Isabelle Berro-Lefèvre, "Adoption et Filiation Droit à l'Enfant, Droits de l'Enfant?" in *La conscience des droits: Mélanges en l'honneur de Jean-Paul Costa*, (Dalloz 2011) 29.

In *Gas and Dubois* the harmonisation aspect is only explicitly found in the concurring opinion of Judge Spielmann. The majority in the case made reference to the case of *Schalk and Kopf*,[109] in which the Court held that Article 12 does not oblige member States to provide homosexual couples with an access to marriage and that in cases where a State provides the option of civil partnerships for homosexual couples it retains a certain margin of appreciation in terms of the exact effects of that status. Nor can a right to marriage for homosexuals be derived from Article 14 taken together with Article 8. Furthermore, the Court also reiterated that the right to marriage is protected by Article 12 and it gives married couples a particular status.[110] It is possible to find that such reasoning at least inexplicitly refers to the non-existing harmonisation on issues of adoption related to the status afforded to homosexuals wishing to adopt, at least in the context of simple adoption where the parents seek shared parental responsibility. Notably, as mentioned above the poignant point in this context is that the ECtHR in *Gas and Dubois* found that the national provision could not be interpreted in a way that would legitimise shared parental responsibility for the child. The concurring opinion of Judge Costa implies judicial deference as it invited the French legislator to reconsider the wording of the provision. It also states that it would have been possible to disregard the national provision in favour of the Convention, as the Court had previously done in the case of *Mazurek v. France*[111], as emphasised by Judge Villiger in his dissenting opinion, but it concludes that such an approach would be to radical in the controversial context of the case.

In this connection Judge Villinger's approach in his dissenting opinion in *Gas and Dubois*, which highlights the best interests of the child and as such differs from the majority's point of departure must be emphasised. As mentioned previously the difference in treatment was found when comparing the situation of the child with children with heterosexual parents. Judge Villiger also emphasised that the Court had previously held in Article 8 cases[112] that legislation such as in the instant case, which imposed general prohibitions that bordered on being disproportionate, should in the best interests of the child be dealt with on a case-by-case basis.[113]

Regarding the possible outcome in the case of *X*, in light of *E.B.* the broad margin of appreciation accorded to States in *Fretté* and referred to in the case, appear to have been narrowed. There is of course the possibility to distinguish between the cases based on simple and full adoption. It is probably more likely that *Gas and Dubois* will influence the outcome of *X*. The case of *X* is certainly distinguishable from *Gas and Dubois* as Austrian law allows for stepchild adoption for both married and unmarried heterosexual couples in contrast to French law, which only made an

[109] *Schalk and Kopf v. Austria*, Judgment of 24/06/2010 ECtHR, Application no. 30141/04.
[110] *Gas and Dubois*, paras. 66-68.
[111] *Mazurek v. France*, Judgment of 01/02/2000 ECtHR, Application no. 34406/97.
[112] *Zaunegger v. Germany*, Judgment of 03/12/2009 ECtHR, Application no. 22028/04; *Anayo v. Germany*, Judgment of 21/12/2010 ECtHR, Application no. 20578/07.
[113] *Gas and Dubois*, Dissenting Opinion of Judge Villiger.

exception for married couples. Therefore the difference in treatment is solely based on the sexual orientation of the couple. The Court could thus find at least in principle that the difference in treatment provided by the law is discriminatory.

3.4 Non-recognition of a foreign adoption order, and a maximum age-limit on adoptive parents: in the best interests of the child?

3.4.1 *Wagner and J.M.W.L. v. Luxembourg* (2007)

The Court unanimously found a violation of Article 8, and a violation of Article 14 in conjunction with Article 8. The case concerned the refusal by the national courts to declare a Peruvian judgment, granting full adoption, enforceable in Luxembourg. The Court found that Article 8 was applicable since *de facto* family ties existed between the applicants as the first one had acted as the child's mother for several years, ever since the adoption in Peru. The Court reiterated that Article 8 requires that a fair balance is struck between the competing interests of the individual and society as a whole and that States enjoy a certain margin of appreciation. The existence of a family tie with a child requires States to act in a manner that enables the development of that tie and allows the child to be integrated into that family. The positive obligations of the States in this context must be interpreted against the CRC as a background. The relationship between an adoptee and an adopter is protected by Article 8.[114] The case was distinguished from *Fretté* as it concerned full adoption, and even though the national law at the time did not grant full adoption to single persons the refusal was classified as an interference. The refusal aimed to protect the health and morals and rights and freedoms of the child, which were legitimate considerations.[115] The State enjoyed a wide margin of appreciation in the instant case however an examination showed that the majority of the CoE member States allowed single persons to adopt thus indicating harmonisation. It had also, previously been practice to recognise Peruvian judgments on full adoption by operation of law. The Court found that the refusal failed to take account of the social reality of the case and observed that both applicants daily suffered the consequences of not recognising the adoption as the child was not granted legal protection and could thus not be properly integrated into the adoptive family.[116] It was not in the best interests of the child to refuse recognition of the Peruvian adoption and the Court noted that a division of

[114] *Wagner and J.M.W.L. v. Luxembourg*, Judgment of 28/06/2007 ECtHR, Application no. 76240/01, paras. 117-121.
[115] Ibid paras. 122-127.
[116] Ibid paras. 128-132.

the Court of Appeal, based on the principle of the best interests of the child had recognised another Peruvian adoption by operation of law, albeit under somewhat different circumstances. It was unreasonable for the national courts to not recognise the *de facto* family ties that already existed and they should have dispensed with an in-depth examination. The strict application of the national provision was not a sufficient reason under paragraph 2 of Article 8 and therefore not necessary in a democratic society.[117]

Regarding Article 14, the Court observed that it had found that Article 8 was applicable, and that it had been breached in the instant case and concluded that the facts fell within the ambit of the Article 14 in conjunction with Article 8. It was reiterated that Article 14 protects against a difference in treatment between persons in a similar situation if it has no objective and reasonable justification.[118] The aim as mentioned above was considered as legitimate. Again, the Court drew attention to the negative consequences that the refusal entailed for both applicants. The child was placed in a legal vacuum as the ties with the family of origin had been severed while there was no complete substitute tie with the adoptive mother. The burden of not being able to require Luxembourgish nationality was heavy and the mother suffered through the difficulties facing her child. The Court found that there was no ground to justify such discrimination, especially in the light of the previous practice to recognise Peruvian adoptions and the favourable judgment within the Court of Appeal, in the other similar case. The child was not to blame for the precarious situation she was being faced with. Therefore, the relationship between the means used and the aim pursued was disproportionate.[119]

3.4.2 *Schwizgebel v. Switzerland* (2010)

The Court unanimously found that there had been no violation of Article 14 taken together with Article 8, as it did not find that the refusal to grant authorisation to a single person to take in a second child with a view to adoption was discriminatory. The refusal was primarily based on the age difference, between 46 and 48 years, between the child to be adopted and the applicant.[120] The Court reiterated the applicable principles in cases alleging discrimination under Article 14, as can be seen in the cases summarised above. The existence or non-existence of harmonisation between the member States is of relevance when deciding the margin of appreciation. The evolving trends in the member State concerned, and the CoE member states overall must also be taken into account. The ECHR and its Protocols must be interpreted according to present conditions and the Convention must afford practical and effective protection of the rights safeguarded therein.[121]

[117] *Wagner and J.M.W.L.*, paras. 133-135.
[118] Ibid paras. 149 f.
[119] *Wagner and J.M.W.L.*, paras. 153-159.
[120] Schwizgebel, para. 88.
[121] Ibid paras. 79-81.

The Court found that the applicant could be viewed as having been treated differently from a younger single woman. The refusal by the authorities was based on securing the child's well-being and rights.[122] The Court noted that there was no common practice between the member States regarding the possibility for single persons to adopt, nor were there any identical age-limits, either lower or upper, for adopters. Neither the European Convention on the Adoption of Children 1967 nor the revised version of 2008[123] provided any set upper age-limit or a maximum age-limit between the adopter and the child. Thus the Swiss authorities had a wide margin of appreciation especially, due to the lack of harmonisation on the topic and the transitional stage of the law.[124] The national proceedings were of an adversarial nature, and the decisions taken were well reasoned and detailed. The age criterion had been applied flexibly by the Federal Court and it had taken the best interests of both the prospective adopted child and the child already adopted into account. The Court found that the justification given by the State was objective and reasonable.[125]

3.4.3 Remarks

It is most noteworthy that the Court in its applicability assessment of Article 8 in *Wagner and J.M.W.L.* found that the applicant had acted as the child's mother and thus family ties existed *de facto* between them. Assuming that ethnicity matching is less of a common feature when placing children in foster care, it can certainly be argued, based on this finding by the Court, that where a child has created *de facto* family ties with a person who has acted as a parent for the child then an interference with that family bond would fall under Article 8 of the Convention. Circumstances providing the basis for such a bond to be formed seem to be intrinsic in care arrangements for children that are placed in a family environment. Moreover, it is fairly common that foster parents choose to apply to adopt children that have been placed in their care. If adoption was to be refused in such an instant there would arguably be an interference with family life, and as such Article 8 would apply. In the event that the child placed in a foster family were to be of a different ethnicity than the foster carers, and that specific factor was to play a role in the decision to refuse adoption, the UK is a significant example of such practices,[126] then there would also be pertinent reason to find Article 14 taken together with Article 8 applicable. With regard to the current situation in the UK this scenario is even more likely to arise as the Action Plan highlights the Government's intention to swiftly place children that have been taken into care in a family home, and in appropriate cases with a view to adoption.[127]

---

[122] Ibid para. 86.
[123] The newer version of 2008 had yet to enter into force at the time.
[124] *Schwizgebel*, paras. 89-93.
[125] *Schwizgebel*, paras. 96-98.
[126] See chapter 5.
[127] Action Plan.

Furthermore, the harmonisation factor resurfaces again when comparing *Schwizgebel* with *Wagner and J.M.W.L*. It is particularly noteworthy that the Court in *Wagner and J.M.W.L.* finds that the national authorities should have forsaken the actual wording of the law and instead adopted a more pragmatic approach, albeit in the light of the fact that a division within the Court of Appeal had already adopted an operation by law approach.

4 The influence of other legal CoE instruments on the ECtHR

This chapter presents the relevant provisions in the European Convention on the Adoption of Children 2008 (Convention on Adoption) and the older 1967 version as applicable, and Protocol No. 12 to the reader. These two instruments are presented here, as they are the most relevant legally binding CoE instruments in addition to the ECHR that the Court would be likely to take into account if dealing with the question of ethnicity matching in adoption. The Court made explicit reference to both versions of the Convention on Adoption in *Schwizgebel*.[128]

4.1 European Convention on the Adoption of Children: supporting multiethnic matching?

The Convention on Adoption entered into force on 1 September 2011.[129] The 1967 version of the Convention was outdated and even contrary to the case law of the ECtHR. The preamble states that the adoption of children exist in all CoE member States, and recognises that the views regarding the guiding principles in adoption and the consequences thereof differ between the member States.[130] The revised version was also intended as a complement to The Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 (Hague Convention). Therefore it is asserted that it will have an influence on international adoption as well, even though its main focus is on in-country adoption.[131]

The Convention on Adoption applies to the adoption of children i.e. adoptees that are younger than 18 years old, and only covers legal institutions of adoption that create a permanent relationship between the adoptee and the adoptive parent.[132] Its main focus is full adoption but it does not prevent States from recognising simple adoption as well.[133] Adoptions may only be granted if they are in the best interests of the child and special

[128] *Schwizgebel*, paras. 89-91.
[129] CoE Treaty Office List of Treaties: Family Law-Rights of Children, available at: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=202&CM=7&DF=06/05/2012&CL=ENG> (accessed on 12/04/12).
[130] Preamble of the Convention on Adoption and its Explanatory Report, paras. 16-18.
[131] Ibid para. 19.
[132] Article 1 Convention on Adoption.
[133] Article 11 Convention on Adoption and its Explanatory Report, para. 63.

attention shall be taken to provide a stable and harmonious home for the child.[134]

The Convention on Adoption is rather silent on the topic of ethnicity matching between children awaiting adoption and prospective adopters. It touches on the subject in Article 10, preliminary enquires which are required to have been carried out by the competent authority prior to granting an adoption. "The ethnic, religious and cultural background of the adopter and of the child"[135], are listed in sub-paragraph f under matters that are to be considered during the enquiries to the appropriate extent and as far as possible. The enquiries should be adapted to the individual circumstances in each case, and the list is not exhaustive, nor obligatory, and the factors listed therein are all equally important.[136] No further guidance is given in respect of which importance the ethnic and cultural background of the child should play in the matching between children awaiting adoption and prospective adopters. The Explanatory Memorandum to the Convention on Adoption only states that the wording in sub-paragraph f is based on the wording used in the Hague Convention and that ethnic and cultural background was added to the 2008 version of the Convention as these factors are also of importance.[137] The equivalent sub-paragraph in the 1967 version only mentions religion, if applicable.[138]

4.2 Remarks

Listing ethnic, religious and cultural background of both the child and the prospective adopter among the factors that are to be taken into consideration in these enquiries, depending on the individual case combined with the lack of clear guidance on how much weight such considerations should be given, does not seem to bode well for a multicultural matching between ethnic minority children and adoptive parents. Nevertheless, it can always be hoped that these factors will not be excessively stressed to the ultimate detriment of the minority and multi-ethnic children awaiting adoption within the care system. Furthermore, it can hopefully be assumed that an increased openness towards multicultural families created through adoption, as well as an understanding and raised awareness of the discriminatory consequences of a strict ethnicity matching on the children of colour within the care system, and the likeliness that such a complaint would be scrutinised by the ECtHR should deter practitioners in the member States from using the criteria in a discriminatory manner. In fact, the possibility that such practices could result in a complaint to the ECtHR should not only deter practitioners in the member States that have ratified the Convention on Adoption but practitioners in all CoE member States.

[134] Article 4 Convention on Adoption.
[135] Article 10(2)(f) Convention on Adoption.
[136] Explanatory Report to the Convention on Adoption, paras. 54 and 56.
[137] Explanatory Report to the Convention on Adoption, para. 59.
[138] Article 9(2)(g) European Convention on the Adoption of Children 1967 and its Explanatory Report, para. 35.

4.3 Protocol No. 12: ethnicity matching emphasised as discriminatory?

Article 1 reads as follows:

Article 1 – General prohibition of discrimination

1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The Protocol envisages to strengthen equality and provide a general protection against discrimination in addition to Article 14 in the ECHR by covering all rights provided for in the law of the member States. The scope of Article 1 of the Protocol particularly covers discrimination in connection with rights granted under national law, rights that may be inferred from a clear obligation of a public authority, the exercise of discretionary power by a public authority and other acts and omissions by public authorities.[139] The two paragraphs of the Article are complementary and the obligation on the States Parties is mainly of a negative nature, even though certain positive obligations would be included as well.[140] This has caused certain member States such as the UK to express their hesitation to be bound by the Protocol as it is currently rather vague how broad its application will be in practice. Some member States have concerns that it will be applicable to rights in other international instruments that have not been incorporated into national law. [141]

It is structured according to Article 14 and the term "discrimination" should be understood in the same manner.[142] The list of grounds of discrimination is identical to the one in Article 14 and is also non-exhaustive in nature.[143] Similarly, to Article 8 paragraph 2, the term "public authority" covers administrative authorities, the courts and legislative bodies.[144]

---

[139] Explanatory Report to Protocol No. 12, para. 22.
[140] Ibid paras. 23-28.
[141] Harris, O'Boyle, Bates and Buckley, 612. Regarding the UK. See also Nicholas Grief, "Non discrimination under the European Convention on Human Rights : a critique of the United Kingdom Government's refusal to sign and ratify Protocol 12" 27 E.L. Rev 3 (Human Rights Survey 2002) 11. According to the Explanatory Report to Protocol No. 12 international law might also be covered but it does not give the ECtHR competence to examine compliance with rules of law in other international instruments, para. 29.
[142] Explanatory Report to Protocol No. 12, paras. 18 f.
[143] Ibid para. 20.
[144] Ibid para. 30.

4.4 Remarks

The Protocol entered into force in 2005, but to date only 18 out of the 47 member States have ratified it.[145] None of the respondent States in the cases that were explicitly discussed in chapter 3 have ratified the Protocol.

In the event of a complaint alleging that ethnicity matching is discriminatory under the ECHR, it would be possible to invoke both Article 14 taken together with Article 8 ECHR, and Article 1 Protocol No. 12, in cases where the respondent state is bound by the Protocol. The new legislation in the UK, that will be further discussed in chapter 5, recognise that a difference in ethnicity between the child to be adopted and the prospective adopters should not be a hinder for adoption, would be ideal for the purposes of invoking Article 1 of the Protocol. Currently, however this would not be a possibility as the UK is not a party to it.

[145] As of 27/03/12 the Protocol have entered into force for the following CoE member States: Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, the Netherlands, Romania, San Marino, Serbia, Slovenia, Spain, The former Yugoslav Republic of Macedonia and the Ukraine. Protocol No. 12 to the ECHR: Chart of signatures and ratifications <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=27/03/2012&CL=ENG> (accessed on 27/03/2012).

5 Reforming the UK adoption system: progress through government intervention?

The chapter addresses the sensitive issue of whether the solution to the problem of ethnicity matching is government intervention. It addresses how a specific CoE member State, the UK, is dealing with the issue following the identification of discriminatory consequences for ethnic minority children awaiting adoption as they were found to have to wait much longer than white children.[146]

5.1 Background: from news to Government pledge

In the beginning of 2011 the issue of delay within the adoption system and in particular the disadvantage faced by ethnic minority children started receiving increased attention in the news. The new statutory guidance relating to adoption was published in February 2011,[147] and the revised national minimum standards entered into force in April of the same year.[148] The statutory guidance clearly spells out that denying a child adoptive parents solely because of the lack of a shared racial or cultural background is unacceptable.[149] Both the statutory guidance and the national minimum standards highlight that children should be matched with prospective adopters that can meet most of the child's needs without over-emphasising ethnicity.[150] Furthermore, *The Times* launched its campaign on adoption to improve the system, and commissioned Martin Narey to draw up a report evaluating the system and to provide recommendations for improvement.[151] Narey was later appointed as ministerial adviser on adoption.[152]

---

[146] This thesis reflects the adoption reform in the UK up until 18/05/12.

[147] Adoption Statutory Guidance, Department for Education, 2011, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/g0072314/guidance> (accessed on 20/04/12).

[148] Adoption: National Minimum Standards, Department for Education, 2011, available at: <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00028-2011> (accessed on 20/04/12).

[149] Adoption Statutory Guidance, 3.16.

[150] Ibid 4.4-4.7; Adoption: National Minimum Standards, 13.

[151] David Bebber, "The Narey Report: A blueprint for the nation's lost children" *The Times* (05/07/2011) available at: <http://www.thetimes.co.uk/tto/life/families/article3083832.ece> (accessed on 06/02/12, requires subscription).

[152] Government's General Article 05/10/11: "Martin Narey appointed as ministerial adviser on adoption", Department for Education, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00192226/martin-narey-appointed-as-ministerial-advisor-on-adoption> (accessed on 20/04/12).

The Narey Report was published in July and has a specific chapter dedicated to the issue of ethnicity matching within adoption, in which Narey states that the obsession with ethnicity in adoption is unjustified. It is further highlighted that the approach taken stands in sharp contrast to the change in attitude towards homosexual adopters as it remains inflexible and conservative. Narey questions the importance placed on the ethnic and cultural heritage of the child, especially in the case of babies, in the light of the negative impact such an approach has had on ethnic minority children. Ethnicity and cultural heritage should be one factor of many in the matching process and not the determinative one. The consequences for black children awaiting adoption are highlighted in particular, as these children wait three times longer than white children. Adoption is only offered to 10 per cent of black children leaving care, and 15 per cent for Asian children, while 35 per cent of white children are adopted. Despite the new guidance, Narey emphasises that it is unlikely that the practices of local authorities will change.[153] Narey recommended the Children's Minister, Tim Loughton, to ensure that the new guidance on ethnicity matching changes the practices of local authorities and voluntary agencies, and that data on the number of ethnic minority children that are adopted from care, and the time taken between the entry into care and adoption, is published regularly.[154]

In March this year, the UK Government announced the proposal of legislative amendments to ensure speedier placements for children awaiting adoption.[155]

5.2 The Government's Action Plan for Adoption: Tackling Delay

The Action Plan was published in April 2012, and presents proposals to address the issue of delay in the adoption system. The UK Government's intention is to accelerate the adoption process so that more children awaiting adoption can benefit from it in a timely manner. The foreword by the Secretary of State for Education, Michael Gove, explicitly states that the Government will legislate to limit the number of adoptions that are delayed as a consequence of a rigorous application of the ethnicity criteria in the matching between children placed for adoption and prospective adopters.[156]

---

[153] The Narey Report, Chapter 7.
[154] Ibid Summary of Recommendations.
[155] Government's press notice 09/03/12: "Government sets out measures to speed up adoptions and give vulnerable children loving homes", Department for Education, available at:
<http://www.education.gov.uk/inthenews/inthenews/a00204964/governmentmeasurestospeedupadoptions> (accessed on 09/03/12).
[156] Action Plan, 3.

The Action Plan highlights the detrimental consequences of delay on the development of the children awaiting adoption, and recognises that adoption is the best option for many of the children placed in care. The average time between entering into care and being placed with the adoptive family in the UK is one year and nine months.[157] Overall the Action Plan sets out measures on how to improve professional development, the quality of the services offered to prospective adopters, and ensuring accountability of local authorities by a stronger regime.[158]

5.2.1 Ethnicity matching: a cause for delay

The Action Plan recognises that the matching between children and prospective adopters is one of the main factors that cause delay. The child's welfare is the primary consideration to be taken into account in the adoption process, and as delay can be harmful to the child's well-being it should be one of the most important considerations in the matching process. The delay faced by black children is particularly striking as it takes about a year longer for these children to be adopted after entering the care system than it does for white and Asian children. A reason for this is the idea that adoptive parents should share the child's ethnicity to the maximum extent possible and that it is so important to the best interests of the child that it outweighs other considerations, such as the essence of finding a long-term solution as quickly as possible. Ethnicity is defined as race, and cultural, religious and linguistic background. The study of Professor Elaine Farmer for the Adoption Research Initiative is highlighted, in which it was found that attempts to find similar ethnicity families caused delay for 70% of black, and minority ethnic children facing delay. Another study by Dr Julie Selwyn identified exact ethnicity matching between children awaiting adoption and prospective adopters as a common specific requirement in the matching process, and that pessimism by certain social workers resulted in meagre family finding efforts. As a result adoption became a non-feasible alternative for many ethnic minority children.[159]

The review of research on transracial adoption by the Evan B. Donaldson Institute,[160] which concluded that multicultural or transracial adoption does not inherently cause psychological and behavioural difficulties in children, is highlighted in support of such adoption if it serves to combat delay. The Government recognises that ethnicity can be a valid consideration such as in cases where an older child expresses such wishes. At the same time it is stressed that any delay caused by the search for a perfect or partial ethnic match that result in the disregard for otherwise suitable adoptive parents is not in the best interests of the child. In addition, the Action Plan also draws attention to the fact that other prospective adopters are often needlessly disregarded due to their civil status or age even though it is clear that delay

[157] Action Plan, 6 f.
[158] Ibid 11 f.
[159] Ibid 21 f.
[160] Also referred to by the author of this thesis in 2.3 of chapter 2.

and instability is more likely to cause harm to the child. The Government will address the matching issue through primary legislative measures as soon as possible. The best interests of the child will remain the primary consideration in the matching process.[161]

Annex A to the Action Plan indicates that the next step in the adoption reform is a strategy document on children in care and adoption, which is to be presented at the beginning of July of this year. Consultations on changes to secondary legislation are scheduled to start in September. The Government's response should follow between January and March 2013 followed by the making and laying of regulations in April to June, and the new regulations will enter into force at the end of June and beginning of July 2013.[162]

5.2.2 Improving the System: accountability focus

The aim is to secure a consistent implementation of the reform measures throughout the system by introducing a new accountability tool that will be focused on quality and timeliness within the system.[163] The Government was active within the shaping of the new inspection framework for local authorities and voluntary adoption agencies,[164] which was presented by the Office for Standards in Education, Children's Services and Skills (Ofsted)[165] in February and has been in use since April of this year. The aim of the new framework is to raise standards and promote positive child outcomes. The essence of finding a suitable family for the specific child awaiting adoption is emphasised while it is also guaranteed that matching factors like age, disability and ethnicity are not automatically a reason for delay.[166] Only local authorities that secure placement in adoptive families for children that have been placed for adoption within a 12-month timeframe, excluding exceptional circumstances, may potentially be assessed as "outstanding".[167]

---

[161] Action Plan, 22.
[162] Action Plan, Annex A – Actions and Milestones.
[163] Action Plan, 36.
[164] Inspection of local authority and voluntary adoption agencies, Ofsted, 2012, available at: <http://www.ofsted.gov.uk/resources/inspection-of-local-authority-and-voluntary-adoption-agencies-0> (accessed on 27/02/12).
[165] Ofsted regulates and inspects the care of children and young people, and the education and skills for learners of all ages. It regulates and inspects childcare and children's social care, and inspects the Children and Family Court Advisory Support Service among other establishments. Ofsted also assess council children's services, and inspects services for children in care, safeguarding and child protection. See e.g. Inspection of local authority and voluntary adoption agencies.
[166] Action Plan, 36 f.
[167] Right on time: Exploring delays in adoption, Ofsted, 2012, available at: <http://www.ofsted.gov.uk/resources/right-time-exploring-delays-adoption> (accessed on 19/04/12), 9.

In addition, the Action Plan introduces a new adoption scorecard for local authorities, which will be updated on an annual basis. These scorecards will highlight key factors for swift adoption placements, and swift handling off prospective adopters by local authorities and adoption agencies. The idea is to provide a tool that easily measures performance on a comparative basis.[168] The scorecards have three main indicators, and will notably include the number of adoptions of children from ethnic minority backgrounds.[169] The Government will introduce a tougher intervention policy to address underperformance within the system by setting performance thresholds for two of the main indicators, which will be raised during the next four years to meet the levels in the statutory guidance. It is stated that the Government will not hesitate to intervene further e.g. by its statutory power if deemed necessary.[170]

5.3 Primary Voices on the Action Plan

The views of the British Association for Adoption and Fostering (BAAF) and Adoption UK on the Action Plan, as expressed in their respective statements[171], have been chosen as both are well-known and respected actors in the field of adoption in the UK. BAAF states that it is the leading adoption and membership association in the UK, and Adoption UK is a national charity run by and for adopters. Additionally, both are members of the Government's Expert Working Group, which was formed to advise the Government on how to improve the quality of services offered to prospective adopters.[172] Both welcomed the publication of the Action Plan and its aim of improving the current adoption system. Adoption UK emphasised that a speedy assessment must be balanced against quality.[173] BAAF highlighted that the adoption system must match children with adopters that meet their needs, and that more effort must be put into recruiting adopters interested in adopting children with special needs, including older children.[174] [175]

---

[168] Action Plan, 38.
[169] Action Plan, Figure 1.
[170] Action Plan, 41 f.
[171] BAAF statement re: Government's Action Plan on Adoption, issued 14/03/12, available at: < http://www.baaf.org.uk/node/4066> (accessed on 18/04/12). Adoption UK statement on the publication of the Government's Adoption Action Plan, issued 14/03/12, available at: <http://www.adoptionuk.org/information/100172/273854/statement_on_publication_of_adoption_action_plan/> (accessed on 14/03/12).
[172] Action Plan, 12.
[173] Adoption UK statement on the publication of the Government's Adoption Action Plan.
[174] BAAF statement re: Government's Action Plan on Adoption.
[175] The latter would currently, most likely include a majority of ethnic minority children, as identified earlier these children have faced much longer waiting periods mainly due to the implementation of the ethnic matching criteria. There is no other directly relevant information for the purposes of this thesis in either of the two statements.

5.4 U.S. outcomes: success indicators?

Legislation addressing the same problem has already been enacted in the U.S. MEPA and IEP[176] were enacted to prohibit the delay or denial of a child's foster or adoptive placement on the basis of race, colour or national origin. Agencies receiving federal funding are prohibited from considering race in foster and adoption decisions, except in exceptional circumstances, according to IEP. Noncompliance is subjected to large fines under the Civil Rights Act and individual discrimination complaints can be filed in U.S. district courts.[177] Thus, a brief presentation of the outcomes of the U.S. legislation provides an indication of what the results in the UK might be. The report "Finding Families for African American Children: The Role of Race & Law In Adoption From Foster Care" from 2008 evaluated the impact of MEPA and IEP on the number of black children adopted from foster care.

The report found that the promotion of transracial adoptions by MEPA and IEP had not removed the barriers to permanency placements for African American children. African American children and Native American children had lower adoption rates than children of other ethnicities. According to data from the U.S. Department of Health and Human Services the percentage of black children adopted from foster care was consistently lower each year than the number of black children awaiting adoption. The data also indicated however, that there had been a small increase in the number of transracial adoptions concerning African American children from foster care.[178]

In addition, the report also found that the time African America children spend in foster care had decreased but this was mostly due to ASFA[179], and not MEPA and IEP. ASFA requires more timely efforts to terminate parental rights. The average time children awaiting adoption spent in continuous care decreased from 45 months to 42 months between the financial years of 1998 and 2005. According to statistics from 2004, black children generally stayed in foster care 9 months longer than white children.[180]

Upon publication of the report Banks commented that the issues of ethnicity in adoption mostly reflect concerns about multicultural families. [181]

---

[176] For background information see chapter 2.2.
[177] Susan Smith, Ruth McRoy, Madelyn Freundlich and Joe Kroll, Finding Families for African American Children: The Role of Race & Law In Adoption From Foster Care, Evan B. Donaldson Adoption Institute, 2008, 30, available at: <http://www.adoptioninstitute.org/policy/2008_05_mepa.php> (accessed on 29/04/12), 4.
[178] Ibid 33.
[179] For background information see chapter 2.2.
[180] Smith, McRoy, Freundlich and Kroll, 34.
[181] Jeninne Lee-St. John, "Should Race Be a Factor in Adoptions?", *Time* (27/05/2008) available at: <http://www.time.com/time/health/article/0,8599,1809722,00.html> (accessed on 11/04/12).

Furthermore, in his article on private racial preferences through discriminatory state action, Banks addresses facilitative accommodation and racial preferences in adoption policy to shed light on race politics in the U.S. and the resulting racial inequalities that it creates.[182] Banks suggests that the preferred solution to eliminate individual racial preferences from the state funded adoption process is what he terms strict "nonaccomodation". Such individual preferences representing to his mind the type of racial approach that racial inequality stems from.[183] Explicitly stated the proposal means the State should not fund agencies that accommodate adopters' racial preferences.[184] It would apply to public and private adoption agencies but not independent adoptions.[185] Other preferences such as sex and religion, however would still be catered for.[186]

Banks argues that nonaccomodation would successfully provide more black children with adoptive homes, and would address the racial inequalities between children awaiting adoption. Colour blindness is here used as a means rather than an end in itself. The proposal is described as "culturally pluralist but nonessentialist" i.e. not all individual racial preferences are banned, only the most harmful ones thus permitting preferences for racial minority groups. The aim of nonaccomodation would be substantial race equality and the creation of multicultural families would only be by-products.[187] Banks further states that his proposal is in line with the principle of the best interests of the child but he does not seek to justify it according to that line.[188]

In her correspondence Bartholet criticises Banks for going too far in his view on how far the state should go to intervene, and for disregarding individual autonomy altogether. Bartholet holds that the State should only intervene to limit individual choices within adoption if it is an absolute necessity.[189] Instead Bartholet argues for removing state-imposed hinderances to transracial adoptions, and advocates securing the proper implementation of MEPA, which has not fulfilled its full potential in practice. It is also argued that Banks' nonaccomodation could be harmful to the children awaiting adoption and she questions whether we should aim to pressure prospective adopters to adopt black children, if they do not want to.[190]

---

[182] Richard R. Banks, "The Color of Desire: Fulfilling Adoptive Parent's Racial Preferences Through Discriminatory State Action", 107 Yale Law Journal 875 (1998) 964.
[183] Banks, 940.
[184] Ibid 943.
[185] Ibid 950.
[186] Ibid 945 f.
[187] Ibid 941 f.
[188] Ibid 947.
[189] Elizabeth Bartholet, "Private Race Preferences in Family Formation", 107 Yale Law Journal, 2351 (1998) 2353.
[190] Ibid 2353-2355.

5.5 Remarks

Firstly, it must be recognised that the information provided through the adoption campaign launched by *The Times* has been invaluable to the shaping of the angle taken on the topic of this thesis. Furthermore, it is interesting to note that the Ofsted Report "Right on time: Exploring delays in adoption", which was published in April, identifies among its key findings that processes for matching children with adoptive parents were overall vigorous and there was little evidence indicating that delay was caused by an excessive emphasis of finding a perfect ethnic match.[191] The report evaluates the effectiveness of measures aimed to avoid delay in the adoption process based on findings of a survey of nine local authority areas and their partner agencies. The report includes case assessment; the views of adopters, children and professionals were also taken into account.[192] Careful considerations of the children's ethnic and cultural background were given without over-emphasising a perfect ethnic match thus seeming to be in conformity with policies on adoption recruitment and permanence. In the majority of the cases examined in the report ethnicity matching did not result in delay. Six adoptions out of 53 examined cases (11%) from four different local authorities were multicultural. In most cases where the children had been placed for adoption the placement with new families took place within the 12-month timeframe.[193]

In addition, the first local authority adoption scorecards, presented in the Action Plan, were published in May. The results are based on figures from 2009 to 2011 and reveal that 80 out of 152 local authorities met the interim thresholds of 21 months from entering care to adoption, and matching a child to a family within seven months of issuing the court order. The results are used to initiate detailed discussions and analyse the problems in the areas showing poor performance. High numbers of ethnic minority children is listed as a potential underlying reason for delay.[194] The average number of children adopted from ethnic minority backgrounds for England over the three-year period was 1590 (7%).[195]

The bleak improvement for black children awaiting adoption reflected in the U.S. report stands in contrast to the Ofsted evaluation, but it must be recalled that the U.S. outcome is not decisive for the UK one even when assuming that the proposed legislation will be very similar. Either way,

---

[191] Right on time: Exploring delays in adoption, 7.
[192] Right on time: Exploring delays in adoption, 10-12.
[193] Ibid 33.
[194] Government's press notice 11/05/12: "Adoption scorecards show the serious extent of delays across England", Department for Education, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00208881/adoption-scorecards-show-the-serious-extent-of-delays-across-england> (accessed on 11/05/12).
[195] Adoption scorecards (Excel file) see Government's General Article 11/05/12: "Adoption scorecards", available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00208817/adoption-scorecards> (accessed on 11/05/12).

when trying to remedy the deficiencies through legal means we should not let "The absence of a ready legal solution become[s] confused with the absence of a significant social problem".[196]

Regarding the reactions to the Action Plan, it should be mentioned that it has not only been greeted in a positive manner. Most notably, the effort to de-emphasise ethnicity as the ultimate matching criteria in order to ensure speedier adoption placements for ethnic minority children has been criticised in the news for being based on the misconception that colour blindness is a goal and not a disability.[197] The structure of the author's arguments in this regard can be questioned but nevertheless, the critique further highlights that the controversy, when it comes to multicultural or transracial adoption as presented earlier in chapter 2, is a current issue within the reform of the adoption system in the UK.

More specifically on the Government's role, Banks is advocating for increased government intervention in the issue of racial matching in adoption in contrast to Bartholet who values a certain degree of individual autonomy. Furthermore, it is interesting to note the pure racial focus of Banks' article. To an extent it can probably be explained by the fact that the term race seems to be both more utilised and focused upon in the U.S. than in Europe. The preferred term in the European context and especially within the CoE would be ethnic origin.[198] It is also noteworthy that Banks' makes such a distinction between racial preferences and religious preferences as pro-ethnicity matching arguments referring to the cultural background, in which religion would likely play a part, are used in the U.S. as well.

Lastly, the Government's commitment to improving the adoption system, to address the issue of delay, and in particular the de-emphasising of shared ethnicity between adoptees and prospective adopters as a specific requirement for a suitable matching, commends appraisal. It is here to be noted that the Children and Families Bill was announced in the Queen's Speech in May of this year, and it is expected to be introduced in early 2013. The purpose of the Bill is to support the most vulnerable children.[199] Regarding adoption, the Bill will reduce the waiting time for ethnic minority children by preventing local authorities from delaying adoption based on finding a perfect ethnic match if there are otherwise suitable adopters available. The ethnicity of the child will as a general rule be of secondary importance to placing a child in a permanent home as soon as possible.[200]

---

[196] Mark Kelman, *A Guide to Critical Legal* Studies, (Harvard University Press 1987) 276.
[197] Lemn.
[198] See chapter 1.4.
[199] Government's press notice 09/05/12: "Children and Families Bill to give families support when they need it most", Department for Education, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00208753/childrens-bill-family-support> (accessed on 09/05/12).
[200] The Queen's Speech 2012: Briefing Notes, 23-26, available at: <http://www.cabinetoffice.gov.uk/resource-library/queens-speech-2012-background-briefing-notes> (accessed on 09/05/12). The provisions on adoption will apply to England.

Thus, even though the majority of the proposals presented in the Action Plan are still to be implemented in practice, they seem to provide a viable way to tackle the discriminatory effects on ethnic minority children. The way that the issue has been handled in the UK also shows the significance and perhaps the need to have a high-profile commitment to it.

The Government will discuss with the Welsh ministers whether it will be extended to Wales.

6 Ethnicity matching: a violation of the ECHR?

The final chapter re-emphasises the question indicated on the title page of this thesis, namely *is there a right to an adopted multicultural family under the European Convention on Human Rights?* The chapter addresses the question from the other side of the coin and seeks to answer both sides of it in light of the findings identified in the previous chapters, by highlighting the factors that are likely to influence the reasoning of the Court if it was to tackle the issue.

6.1 Recalling the situation

Before addressing the factors, the situation at hand must be recalled. Taking the UK as the example, the majority of children in care awaiting adoption are ethnic minority children, very few are infants and some have physical disabilities, others psychological disabilities, and some have both.[201] The number of ethnic minority children placed for adoption greatly outnumbers the number of prospective adopters from ethnic minority backgrounds.[202] If ethnicity matching is used as the determinative criterion then this mismatch results in severely delayed placements or a complete denial of adoptive homes for ethnic minority children.

6.2 No Right to Adoption but a Right not to be Discriminated against

The Court has been insistent on emphasising that there is no right to adoption under the Convention, and rightly asserted that the essence of adoption is to provide a child with a family. There is however a right not to be discriminated against under the Convention's Article 14. CoE member States providing adoption are thus obliged under Article 14, taken in conjunction with Article 8, to provide access to adoption in a non-discriminatory manner as access to adoption falls within the ambit of Article 8, as found by the Court in *Fretté*. This finding is further supported by Article 1 of Protocol No. 12.

The jurisprudence presented in this thesis shows the Court's willingness to scrutinise how the member States grant adoption in order to prohibit that access to adoption is given in a discriminatory manner. Clear parallels can be drawn between a case where the prospective adoptive parents are denied

[201] The Narey Report, Chapter 7. See also Action Plan, 5-7 and 21.
[202] See eg. Action Plan, 9 and 21.

to adopt an ethnic minority child based on their non-matching ethnicity, and one in which the prospective adopters are homosexual and denied to adopt based on their sexual orientation. The Court has undoubtedly shown in *E.B.* that at least in the case of a single person wishing to adopt, the member States may not have regard to the person's sexual orientation when assessing the person's capability to parent an adopted child. It can certainly be argued that ethnicity is likely to be viewed in the same way by the Court.

6.3 The UK model: emerging trend or isolated event?

The current UK adoption reform and its potential to address effectively the issue is of particular relevance in relation to the harmonisation factor. The importance of harmonisation among the CoE member States for the reasoning of the Court was expressively emphasised in chapter 3. Naturally, the success of the measures taken by the UK Government will affect the influence on the other member States. In addition, it also provides the Court with a specific example of how to deal with it.

Furthermore, an underlying aspect affecting how the issue is perceived in different CoE member States is whether adoption is viewed as the preferred option for permanent placements for children in care. In contrast to the UK, the Swedish system as an example does not recognise adoption without consent from the biological parent(s).[203] In most European Union countries, except for the UK, permanent placements for children in care are mainly achieved through the transfer of parental rights and foster care placements, not adoption.[204]

Adoption policies among the CoE member States will also be affected as the adoption culture evolves, and society becomes more open to new family constellations by recognising that a flora of family structures can serve the best interests of the child. There is increased emphasis on providing the adoptee with the possibility to maintain contact with the family of origin.[205] Pertman highlights that the increased openness surrounding adoption shows that adoption as a social institution continues to "open our minds and alter our collective views about what constitutes a family".[206] In this connection as indicated earlier in chapter 2.2, the argument of safeguarding the

[203] Gunvor Andersson, *Adoption som barnavårdsinsats*, in Bilaga (Appendix) 6 to SOU 2009:68 Lag om stöd och skydd för barn och unga (LBU), 191.
[204] Ibid 194.
[205] Deborah H. Siegel and Susan Livingston Smith, Openness in Adoption: From Secrecy and Stigma to Knowledge and Connections, Evan B. Donaldson Adoption Institute, 2012, 7, available at: <http://www.adoptioninstitute.org/research/2012_03_openness.php> (accessed on 27/03/12).
[206] Adam Pertman, "New Realities in the Extended Family: Who Is the Woman Celebrating Thanksgiving with Your Next-Door Neighbors?", blog post (27/03/12) available at: <http://www.huffingtonpost.com/adam-pertman/new-realities-in-the-exte_b_1382513.html> (accessed on 27/03/12).

adoptee's ethnic and cultural background through ethnicity matching becomes even less valid.

6.4 The Best Interests of the Child

In light of *Gas and Dubois* in particular, the Court cannot be said to reason solely from the child's perspective but it is certain, as shown in the cases presented, that the best interests of the child will play a significant role in the Court's reasoning when dealing with cases concerning adoption. The Court's view on the best interests of the child is most likely to be affected by scientific research findings, relevant CoE instruments and relevant international law instruments.

The scientific research referred to in chapters 2 and 5 highlight that there is no ground for claiming that transracial or multicultural adoption placements are harmful to the children's development and well-being. In addition, there are research findings, as indicated in chapter 5, stressing the severe implications that delay in adoption has on children's development.

The Convention on Adoption, which is the most relevant legally binding CoE instrument in this context, does not proscribe that an ethnic, religious or cultural background should be the determinative factor in the matching between the child and prospective adopters.

Relevant international law instruments that the Court would be likely to take into account are EU regulations, the Hague Convention and the CRC. These instruments, as indicated in chapter 1.2 are not within the scope of this thesis. Nevertheless, at a glance the wording in Article 21 and Article 20(3)[207] CRC do not seem to be a hindrance to placing ethnic minority children with adoptive parents of another ethnicity.

6.5 Concluding Remarks

The findings presented in this thesis show that it is most likely that the Court would be willing to scrutinise the use of ethnicity matching in adoption. All the factors presented above that are likely to be taken into account by the Court indicate that utilising ethnicity matching as a determinative criterion if it results in unjustified delay or denial of adoptive placements for ethnic minority children would be a violation of Article 14, taken together with Article 8 ECHR.

[207] Article 20(3) CRC reads as follows:
Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

The *E.D.* application presented in chapter 3 illustrates that the issue of ethnicity matching in relation to the ECHR has already been brought to Strasbourg. The current UK adoption reform emphasises the urgency of addressing the issue. Even though it is too early to evaluate if the legal measures announced in the Action Plan will remedy the unjustified delay faced by ethnic minority children awaiting adoption, the reform can already be regarded as progress to the extent that it emphasises the issue in the European context. Furthermore, legal reforms will contribute to shaping a non-discriminative adoption culture and will reflect how it should be. On a larger scale it will possibly also aid society to accommodate multicultural families better.[208]

Moreover, the best interests of the child in adoption and what is considered as controversial adoptive placements will continuously be influenced by the kind of family that society is willing to recognise. Today's society, especially in Europe where a multitude of different family constellations have taken root, and where the multicultural family is likely to become the future norm, should embrace the creation of multicultural families through adoption.

[208] The concept of the idea was inspired by Banks, 960.

Bibliography

Books

Pertman Adam, *Adoption Nation* (2nd edition, The Harvard Common Press 2011)

Bartholet Elizabeth, *Family Bonds* (Houghton Mifflin Company 1993)

Bartholet Elizabeth, *Nobody's Children* (Beacon Press 1999)

Van Bueren Geraldine, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995)

Berro-Lefèvre Isabelle, *Adoption et Filiation Droit à l'Enfant, Droits de l'Enfant?* in *La conscience des droits: Mélanges en l'honneur de Jean-Paul Costa*, (Dalloz 2011)

White Robin C.A. and Ovey Clare, *Jacobs, White and Ovey The European Convention on Human Rights* (5th edition, Oxford University Press 2010)

Kilkelly Ursula, *The Child and the European Convention on Human Rights* (Dartmouth Publishing and Ashgate Publishing 1999)

Harris David J., O'Boyle Michael, Bates Ed P. and Buckley Carla M., *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd edition, Oxford University Press 2009)

Kelman Mark, *A Guide to Critical Legal* Studies, (Harvard University Press 1987)

Salter Amy Neil, *The Adopter's Handbook* (British Association for Adoption and Fostering 2012)

Articles

Banks Richard R., ”The Color of Desire: Fulfilling Adoptive Parent’s Racial Preferences Through Discriminatory State Action”, 107 Yale Law Journal 875 (1998)

Bartholet Elizabeth, “International Adoption: Current Status and Future Prospects”, 3 The Future of Children 89 (1993)

Bartholet Elizabeth, ”Private Race Preferences in Family Formation”, 107 Yale Law Journal 2351 (1998)

Bartholet Elizabeth, “International Adoption: The Human Rights Position”, 1 Global Policy 91 (2010)

Gouttenoire Adeline and Sudre Frédéric, ”Adoption: La France est condamnée pour discrimination fondée sur l’homosexualité de la requérante”, 15 La Semaine Juridique 34 (2008)

Grief Nicholas, ”Non discrimination under the European Convention on Human Rights: a critique of the United Kingdom Government’s refusal to sign and ratify Protocol 12” 27 E.L. Rev 3 (Human Rights Survey 2002)

Hayes Peter, ”The Ideological Attack on Transracial Adoption in the USA and Britain”, 9 International Journal of Law and the Family 1 (1995)

Letsas George, ”No Human Right to Adopt?”, 1 UCL Human Rights Review 134 (2008)

Oreskovic Johanna and Maskew Trish, ”Red Thread or Slender Reed: Deconstructing Prof. Bartholet’s Mythology of International Adoption”, 14 Buffalo Human Rights Law Review 71 (2008)

Smolin David M., ”Intercountry Adoption as Child Trafficking”, 39 Valparaiso University Law Review 281 (2004)

Willoughby Stone Thomas, ”Margin of Appreciation Gone Awry: The European Court of Human Rights’ Implicit Use of the Precautionary Principle in Fretté v. France to Backtrack on Protection From Discrimination on the Basis of Sexual Orientation”, 3 Connecticut Public Interest Law Journal 271 (2003)

Legislation

Adoption and Safe Families Act 1997

European Convention on Human Rights 1950

European Convention on the Adoption of Children 1967

European Convention on the Adoption of Children 2008

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993

Multiethnic Placement Act 1994

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2000

Removal of Barriers to Interethnic Adoption Provisions of the Small Business Job Protection Act 1996

United Nations Convention on the Rights of the Child 1989

Documents

Adoption: National Minimum Standards, Department for Education, 2011, available at: <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00028-2011> (accessed on 20/04/12)

Adoption Statutory Guidance, Department for Education, 2011, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/g0072314/guidance> (accessed on 20/04/12)

An Action Plan for Adoption: Tackling Delay, Department for Education, 2012, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00205069/action-plan-for-adoption-tackling-delay> (accessed on 14/03/12).

Andersson Gunvor, Adoption som barnavårdsinsats, in Bilaga (Appendix) 6 to SOU 2009:68 Lag om stöd och skydd för barn och unga (LBU)

CoE Commissioner for Human Rights, Issue Paper on Adoption and Children: A Human Rights Perspective 2011, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1780157&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679> (accessed on 16/02/12)

Explanatory Report to the European Convention on the Adoption of Children 1967

Explanatory Report to the European Convention on the Adoption of Children 2008

Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2000
Inspection of local authority and voluntary adoption agencies, Ofsted, 2012, available at: <http://www.ofsted.gov.uk/resources/inspection-of-local-authority-and-voluntary-adoption-agencies-0> (accessed on 27/02/12)

Right on time: Exploring delays in adoption, Ofsted, 2012, available at: <http://www.ofsted.gov.uk/resources/right-time-exploring-delays-adoption> (accessed on 19/04/12)

Smith Susan, McRoy Ruth, Freundlich Madelyn and Kroll Joe, Finding Families for African American Children: The Role of Race & Law In Adoption From Foster Care, Evan B. Donaldson Adoption Institute, 2008, 30, available at: <http://www.adoptioninstitute.org/policy/2008_05_mepa.php> (accessed on 29/04/12)

The Narey Report, Martin Narey for *The Times*, 2011, available at: <http://www.thetimes.co.uk/tto/life/families/article3083832.ece> (accessed on 06/02/12, requires subscription)

Newspaper articles

Bebber David, ”The Narey Report: A blueprint for the nation’s lost children” *The Times* (05/07/2011) available at: <http://www.thetimes.co.uk/tto/life/families/article3083832.ece> (accessed on 06/02/12, requires subscription)

Lee-St. John Jeninne, ”Should Race Be a Factor in Adoptions?”, *Time* (27/05/2008) available at: <http://www.time.com/time/health/article/0,8599,1809722,00.html> (accessed on 11/04/12)

Lemn Sissay, ”On inter-racial adoption, Cameron is wrong. Colour blindness is a disability” *The Guardian* (13/03/12) available at: <http://www.guardian.co.uk/commentisfree/2012/mar/13/inter-racial-adoption-cameron-wrong?INTCMP=SRCH> (accessed on 04/04/12)

Online articles and blogs

Danielle Britni, ”Why Charlize Theron’s Adoption of a Black Baby Is a Good Thing” *Clutch Magazine* (16/03/12) available at: <http://www.clutchmagonline.com/2012/03/why-charlize-therons-adoption-of-a-black-baby-is-a-good-thing/> (accessed on 08/05/12)

Pertman Adam, ”New Realities in the Extended Family: Who Is the Woman Celebrating Thanksgiving with Your Next-Door Neighbors?”, blog post (27/03/12) available at: <http://www.huffingtonpost.com/adam-pertman/new-realities-in-the-exte_b_1382513.html> (accessed on 27/03/12)

Respers France Lisa, ”Bullock’s adoption of black baby stirs debate” (*CNN*, 03/05/10) available at: <http://articles.cnn.com/2010-05-03/entertainment/sandra.bullock.black.blogs_1_black-voices-adopted-black-baby?_s=PM:SHOWBIZ> (accessed on 08/05/12)

Other Internet sources

Adoption scorecards (Excel file) see Government’s General Article 11/05/12: ”Adoption scorecards”, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00208817/adoption-scorecards> (accessed on 11/05/12)

Adoption UK statement on the publication of the Government’s Adoption Action Plan, issued 14/03/12, available at: <http://www.adoptionuk.org/information/100172/273854/statement_on_publication_of_adoption_action_plan/> (accessed on 14/03/12)

BAAF statement re: Government’s Action Plan on Adoption, issued 14/03/12, available at: < http://www.baaf.org.uk/node/4066> (accessed on 18/04/12)

BME adoption and fostering, BAAF, available at: <http://www.baaf.org.uk/info/bme> (accessed on 15/05/12)

CoE Treaty Office List of Treaties: Family Law-Rights of Children, available at: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=202&CM=7&DF=06/05/2012&CL=ENG> (accessed on 12/04/12)

Commissioner for Human Rights’ blog post, posted on 05/12/2010, available at: <http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=37> (accessed on 16/02/12)

Government’s General Article 05/10/11: ”Martin Narey appointed as ministerial adviser on adoption”, Department for Education, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00192226/martin-narey-appointed-as-ministerial-advisor-on-adoption> (accessed on 20/04/12).

Government’s press notice 09/03/12: ”Government sets out measures to speed up adoptions and give vulnerable children loving homes”, Department for Education, available at: <http://www.education.gov.uk/inthenews/inthenews/a00204964/governmentmeasurestospeedupadoptions> (accessed on 09/03/12)

Government's press notice 09/05/12: "Children and Families Bill to give families support when they need it most", Department for Education, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00208753/childrens-bill-family-support> (accessed on 09/05/12)

Government's press notice 11/05/12: "Adoption scorecards show the serious extent of delays across England", Department for Education, available at: <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00208881/adoption-scorecards-show-the-serious-extent-of-delays-across-england> (accessed on 11/05/12)

NABSW, Position Paper on Kinship Care, available at: <http://www.nabsw.org/mserver/KimshipCare.aspx> (accessed on 04/04/12)

NABSW, Position Paper on Preserving Families, available at: <http://www.nabsw.org/mserver/PreservingFamilies.aspx> (accessed on 04/04/12)

Save the Children, Policy Brief on International Adoption 2010, available at: <http://www.savethechildren.org.uk/resources/online-library/policy-brief-international-adoption> (accessed on 03/04/12)

The Queen's Speech 2012: Briefing Notes, 23-26, available at: <http://www.cabinetoffice.gov.uk/resource-library/queens-speech-2012-background-briefing-notes> (accessed on 09/05/12)

UNICEF, UNICEF's position on Inter-country adoption 2010, available at: <http://www.unicef.org/media/media_41918.html> (accessed on 03/04/12)

Table of Cases

European Court of Human Rights

Anayo v. Germany, Judgment of 21/12/2010 ECtHR, Application no. 20578/07.

E.B. v. France, Judgment of 22/01/2008 ECtHR, Application no. 43546/02.

Fretté v. France, Judgment of 26/02/2002 ECtHR, Application no. 36515/97.

Gas and Dubois v. France, Judgment of 15/03/2012 (only available in French) ECtHR, Application no. 25951/07.

Mazurek v. France, Judgment of 01/02/2000 ECtHR, Application no. 34406/97.

Pini and Others v. Romania, Judgment of 22/06/2004 ECtHR, Application nos. 78028/01 and 78030/01.

Schalk and Kopf v. Austria, Judgment of 24/06/2010 ECtHR, Application no. 30141/04.

Schwizgebel v. Switzerland, Judgment of 10/06/2010 ECtHR, Application no. 25762/07.

Timishev v. Russia, Judgment of 13/12/2005 ECtHR, Applications nos. 55762/00 and 55974/00.

Wagner and J.M.W.L. v. Luxembourg, Judgment of 28/06/2007 ECtHR, Application no. 76240/01.

X and Others v. Austria, Press Release of 01/12/2011; Statement of Facts of 02/02/2009 ECtHR, Application no. 19010/07.

Zaunegger v. Germany, Judgment of 03/12/2009 ECtHR, Application no. 22028/04.

European Commission of Human Rights

Di Lazzaro v. Italy, Admissibility decision of 10/07/1997 European Commission of Human Rights, Application no. 31924/96.

E.D. v. Ireland, Admissibility decision of 18/10/1995 European Commission of Human Rights, Application no. 25054/94.

Singh v. UK, Admissibility decision of 03/09/2002 European Commission of Human Rights, Application no. 60148/00 (Friendly Settlement).

X v. The Netherlands, Admissibility decision of 10/03/1981 European Commission of Human Rights, Application no. 8896/80.

X and Y v. UK, Admissibility decision of 15/12/1977 European Commission of Human Rights, Application no. 7229/75.