



FACULTY OF LAW
Lund University

Thérèse Bennshagen

Providing a Child with a Family, Not a Family with a Child

A Study in the ECtHR Case Law Regarding the Right to Adopt
for Homosexual Persons from a Child's Rights Perspective

LAGF03 Essay in Legal Science

Bachelor Thesis, Master of Laws programme
15 higher education credits

Supervisor: Marja-Liisa Öberg

Term: Spring 2020

Table of Contents

ABSTRACT	1
SAMMANFATTNING	2
ABBREVIATIONS	3
1. INTRODUCTION	4
1.1 PURPOSE AND RESEARCH QUESTIONS	4
1.2 DELIMITATIONS	5
1.3 METHOD AND PERSPECTIVE	5
1.4 MATERIAL	6
1.5 PREVIOUS RESEARCH	6
1.6 OUTLINE	7
2. A RIGHT TO RESPECT FOR FAMILY LIFE IN THE ECHR	8
2.1 WHAT CONSTITUTES "A FAMILY"?	8
2.2 WHAT DOES THE RIGHT TO RESPECT FOR FAMILY LIFE ENTAIL?	8
2.3 THE STATE'S OBLIGATIONS	9
2.4 INFRINGEMENT	9
2.5 DISCRIMINATION	10
2.6 THE RIGHT TO RESPECT FOR FAMILY LIFE IN RELATION TO SEXUAL ORIENTATION – THE RIGHT TO MARRIAGE	10
3. A GENERAL RIGHT TO ADOPT?	12
3.1 THE ECtHR CASE LAW	12
3.1.1 AN ABSOLUTE RIGHT?	12
3.1.2 THE ROLE OF THE CHILD'S INTERESTS	12
4. A RIGHT TO ADOPT FOR HOMOSEXUAL PERSONS?	14
4.1 SINGLE ADOPTION	14
4.2 SECOND-PARENT ADOPTION	15
5. THE CHILD'S INTERESTS IN CASES CONCERNING ADOPTION FOR HOMOSEXUAL PERSONS	17
5.1 A CHILD-CENTERED APPROACH	17
5.2 A LACK OF AN CHILD-CENTERED APPROACH	18
6. ANALYSIS	20
7. CONCLUSIONS	22
8. BIBLIOGRAPHY	23
9. TABLE OF CASES	25

Abstract

The traditional family as a heterosexual married couple with children is a norm that is increasingly being questioned and other family constellations are getting more common. In this context the relations and families of homosexual persons are being highlighted and prejudices against them are less tolerated. This change of attitude is occurring at different rates around Europe, which renders the task of the European Court of Human Rights (ECtHR) harder since there does not exist a European consensus on the issue. According to Article 8 of the European Convention on Human Rights (ECHR) there is a right to respect for family life. The ECtHR has in many cases taken a stand on the issue of the ambit of Article 8 in regard to homosexual persons, e.g. on the issue of adoption. Parallel to this, the ECtHR in 2008 issued a revised version of their Convention on the Adoption of Children, in which the child's legal position has been reinforced. Furthermore the ECtHR has in many of their cases regarding adoption emphasized that the child's interests in these cases are paramount.

In this essay I examine the right to adoption, according to the ECHR, for homosexual persons from a child's interests perspective. Initially I examine what the right to respect for family life, according the ECHR, entails. Then I investigate if there is a general right to adopt and what role the ECtHR gives the child's interests in those cases. After that I examine whether there is a right to adopt for homosexual persons followed by an account on what role the ECtHR gives the child's interests in those cases.

A conclusion from this examination is that there neither exists a general right to adopt nor such a right for homosexual persons. Nonetheless a Contracting State to the ECHR can incur obligations when they have exceeded the scope of the articles in the convention. The Contracting State has then a duty not to enforce these in a discriminatory manner. The essay further illustrates that even though the ECtHR has emphasized that the child's interests are paramount in cases concerning the right to adopt these interests are often given little consideration.

Sammanfattning

Bilden av den traditionella kärnfamiljen som enbart ett heterosexuellt gift par med barn ifrågasätts allt mer och andra familjekonstellationer blir allt vanligare. I detta kan vi se att homosexuella personers relationer och familjer har lyfts fram mer och mer och tidigare fördomar om dessa tolereras i mindre grad. Denna förändring i attityd sker dock i olika takt runtom i Europa, vilket gör Europadomstolen om de mänskliga rättigheternas uppgift (Europadomstolen) svårare då det saknas en europeisk konsensus i frågan. Enligt artikel 8 i Europarådets konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (EKMR) har man en rätt till respekt för familjeliv.

Europadomstolen har i flera fall fått ta ställning till frågan om omfattningen av artikel 8 i relation till homosexuella personer, bland annat när det gäller rätten till adoption.

Parallellt med detta gav Europarådet även ut 2008 en omarbetad version av deras konvention om adoption av barn, i vilken man kan se att barnets ställning har skärpts.

Dessutom har Europadomstolen i flera fall om adoption framhävt att barnets bästa är av största vikt.

I denna uppsats undersöker jag rätten till adoption, enligt EKMR, för homosexuella personer ur ett barnrättsperspektiv. Jag går först igenom vad rätten till respekt för familjeliv innebär enligt EKMR. Sedan undersöker jag om det finns en allmän rätt till adoption samt vad Europadomstolen säger om barnets bästa i de fallen. Därefter undersöker jag om det finns en rätt för homosexuella personer att adoptera följt av en redogörelse av vad Europadomstolen säger om barnets bästa i de rättsfallen.

Jag kommer i denna uppsats fram till att det varken finns en allmän rätt att adoptera eller en sådan rätt för homosexuella personer. Däremot kan en medlemsstat till EKMR ändå ådra sig skyldigheter i de fall som de valt att ge fler rättigheter än vad konventionen kräver. Medlemsstaten har rätt att ge fler rättigheter men får inte göra detta på ett diskriminerande sätt. Uppsatsen belyser sedan att trots att Europadomstolen har uttryckt att barnets bästa är av största vikt så ges barnet i praktiken ofta en mer undanskymd roll.

Abbreviations

Contracting States

The European member States to the Convention

ECHR

European Convention on Human Rights (the
Convention for the Protection of Human Rights
and Fundamental Freedoms)

ECtHR

The European Court of Human Rights

1. Introduction

In 2008 the European Convention on the Adoption of Children opened for signatures. This convention was a revised version of the original European Convention on the Adoption of Children from 1967. This revised version seeks to put the child's interests in focus and a new feature in this convention is that the consent of the child is now necessary if the child has sufficient understanding. This has been done by the European Court of Human Rights¹ in light of the strengthening of the legal status of the child by various conventions (see e.g. the Convention on the Rights of the Child).² Parallel to the advancements of the child's rights in Europe, the rights and legal status of homosexual persons have also progressed, e.g. in relation to the right to family life. According to Article 8 of the European Convention on Human Rights³ there exists a right to respect for family life. However, the traditional view of how a "family" is supposed to look like has for some time been challenged. These changes in the perception of how a family should be constructed has been advanced at different rates around Europe and there still is no European consensus on the scope of the right to family life for homosexual persons.

The advancement of various rights in the world, something that has expanded since the Second World War, has introduced new challenges for the courts around the world, not least in regard to when different interests may oppose one another. It may be argued that the right to family for homosexual persons is a *competing* interest to the rights of a child. In my opinion though, the measurement of a good parent has more to do with the character of a person and not their sexual orientation. However, this does not mean that the courts may not be faced at times with these two interests in the same case and it is therefore important to examine how the court handles these issues.

1.1 Purpose and Research Questions

The purpose of this essay is to examine the right to adopt for homosexual persons from a child's rights perspective. The main research question is to examine how the ECtHR weighs the interests of homosexual persons to adopt, within the right to respect for

¹ From henceforth referred to as ECtHR

² See the Explanatory Report to the European Convention on the Adoption of Children (Revised), under art. 5, p. 4.

³ From henceforth referred to as ECHR.

family life, against the child's interests. The overall purpose of this essay is thus to broaden the understanding of how the ECtHR weighs these two interests in the cases where they both factor in. To answer this I have chosen the following sub-questions:

- What does a right to respect for family life in the ECHR entail?
- To what extent does this right to respect for family life apply to homosexual persons?
- Is there a general right to adopt in the ECHR?
- Does the ECHR provide a right for homosexual persons to adopt?
- What role do the child's interests play in the cases concerning a right to adopt for homosexual persons?

1.2 Delimitations

I have chosen to focus only on the right to adopt on the basis of sexual orientation and I have also chosen to examine this in regard to the ECHR. The legal position of homosexual persons has been debated and advanced in several other fields within the ECHR. Important cases have additionally been brought before the ECtHR in regard to the right to private life (also found under Article 8), e.g. concerning discharges from the military.⁴ I will briefly write about the right to family life for homosexual persons and only do this in respect to the right to marry, due to the length of this essay. This essay will not give a comprehensive overview of the issue of adoption, which is an extensive research field ranging over several disciplines, or discuss other regulations concerning adoption. The ECtHR has expressed that in regard to adoption the right to family life in Article 8 of the ECHR should be interpreted in light of three other conventions: the United Nations Convention on the Rights of the Child, the Hague Adoption Convention and the European Convention on the Adoption of Children.⁵ Due to the size of this essay I will not discuss these three conventions further. I will only focus on the issue of adoption in relation to the ECHR.

1.3 Method and Perspective

To answer my research questions I have adopted a legal dogmatic method. This method allows me to seek my answers in different sources of law and analyse these in order to

⁴ See e.g. in *Lustig-Prean and Beckett, Smith and Grady, Perkins and R, and Beck, Copp and Bazeley*, all against The United Kingdom.

⁵ See e.g. *Pini and others v. Romania*, § 139.

illustrate the content of *de lege lata*. Simply put, it is about understanding how a specific legal provision is to be interpreted in practice.⁶ The legal provision in this essay is Article 8 in the ECHR. Throughout the essay I have applied a child's rights perspective in order to examine what role the ECtHR gives the child's interests in the cases concerning a right to adopt for homosexual persons. As mentioned in the introduction, the child's legal position has been advanced and this essay seeks to understand how this has worked out in practice, in relation to the case law from the ECtHR. A child's rights perspective is a term that is often used without specifying what it means and there does not exist a consensus on the meaning of the taking the child's interests in consideration. However, in this essay I have chosen to interpret having a child's rights perspective as ensuring the child's best interests in decisions that will impact the child.

1.4 Material

The primary sources applied in this essay are case law from the ECtHR regarding both the right to respect for family life (in general and in relation to the right to marriage for homosexual persons) and in regard to adoption (both in general and in regard to sexual orientation). My secondary sources have been chosen in order to deepen this knowledge and consists of relevant doctrine. A great aid for this understanding was provided by *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* by Hans Danelius,⁷ *The European Convention on Human Rights* by Robin C.A. White and Clare Ovey⁸ and *An Introduction to the European Convention on Human Rights* by Ian Cameron.⁹

1.5 Previous Research

Within the academic community the ECtHR approach towards the issue on the right to respect for family life for homosexual persons has been criticized. In an article by Paul Johnson he points out that even though the ECtHR has expressed in their case law that differential treatment on the sole basis of sexual orientation amounts to discrimination under Article 14, they continuously adopt a heteronormative approach to marriage which

⁶ Korling, Fredric & Zamboni, Mauro (red.) (2013). *Juridisk metodlära*. 1 uppl. Lund: Studentlitteratur. p. 26.

⁷ Danelius, Hans (2015). *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*. 5., [uppdaterade] uppl. Stockholm: Norstedts juridik.

⁸ White, Robin C. A., Ovey, Clare & Jacobs, Francis Geoffrey (2010). *Jacobs, White and Ovey: the European convention on human rights*. 5. Ed. Oxford: Oxford Univ. Press.

⁹ Cameron, Iain (2018). *An introduction to the European Convention on Human Rights*. 8th edition Uppsala: Iustus.

gives the States a wide margin of appreciation to differentiate between opposite and same-sex couples in respect of a wide range of legal rights.¹⁰ Research has also been conducted in relation to the case law of the ECtHR regarding adoption for homosexual persons and the role of 'European Consensus' in this matter. Junko Nozawa criticizes the ECtHR for applying the 'European Consensus' standard variously as it risks further fragmenting the Contracting States obligations under the ECHR.¹¹

In *Strasbourg's Response to Gay and Lesbian Parenting: Progress; then Plateau* Lydia Bracken reviews how the advancement of parenting rights for homosexual persons have ground to a halt and she argues in particular that if the ECtHR had a child-centered approach in the *Gas and Dubois* case the outcome would have been different.¹² My research follows the line of enquiry that Bracken has started by further investigating how the ECtHR balances the child's interests against a possible right to adopt for homosexual persons.

1.6 Outline

In chapter two I examine the right to respect for family life in general and in respect for homosexual persons. In chapter three and four I research the right to adopt, first in general, then in regard to homosexual persons. Thereafter in chapter five I write about what role is given to the child's interests in the case law regarding the right to adopt for homosexual persons. Lastly I analyse the material I have presented in order to see how the ECtHR handles the interests of homosexual persons to adopt against the child's interests.

¹⁰ Johnson, Paul. (2012) 'Adoption, Homosexuality and the European Convention on Human Rights: "Gas and Dubois v France"', *The Modern Law Review*, 75(6), p. 1136.

¹¹ Nozawa, Junko. (2013) 'Drawing the Line: Same-sex adoption and the jurisprudence of the ECtHR on the application of the "European consensus" standard under Article 14', *Utrecht Journal of International and European Law*, 29(77), pp. 66–75

¹² Bracken, L. (2016) 'Strasbourg's Response to Gay and Lesbian Parenting: Progress, then Plateau', *International Journal of Children's Rights*, 24(2), pp. 358–377.

2. A Right to Respect for Family Life in the ECHR

2.1 What Constitutes "a Family"?

Principally family life covers married couples and their underage children. Adoptive parents are here to be equated with biological parents.¹³ Though the ECtHR has stated that the existence of family life is essentially a question of fact "depending upon the real existence in practice of close personal ties".¹⁴ This means that de facto family ties can emerge even when a couple is not married. In regards to children the ECtHR has stated that family life will occur as soon as the child is born and even though the parents do not live together family ties will still exist.¹⁵ This bond between the parent and the child will only be broken under exceptional circumstances.¹⁶

Homosexual couples cohabitating was for a long time considered not to constitute "family" according to the ECtHR case law, although they enjoyed protection according to Article 8 as a part of their private life.¹⁷ The ECtHR however changed this view in *Schalk and Kopf v Austria* where they concluded that this kind of cohabitation should be considered as part of the right to respect for family life that Article 8 guarantees.

2.2 What Does the Right to Respect for Family Life Entail?

At its core the right to a respect for family life invokes a right for family members to live together and in different ways sustain and develop their mutual relationships without interference from the state.¹⁸ Although there is a right to respect for family in Article 8, the protection of the family as the unit of society can also be found in Article 12. Article 12 guarantees the right to marry and to found a family, while Article 8 prohibits interference with an existing family unit. The ECtHR does not impose on the Contracting States specific and detailed terms on how to formulate their family law in order to comply with their obligations.¹⁹ The ECtHR has however stressed that the rights should be effective in practice and enjoyed by the affected persons.²⁰

¹³ Danelius (2015), s. 394

¹⁴ See *K. and T. v Finland*, §150

¹⁵ See *Berrehab v Netherlands*, §21; *Keegan v Ireland*, §44.

¹⁶ See *Gül v Switzerland*, §32.

¹⁷ Danelius (2015), s. 397.

¹⁸ Danelius (2015), s. 396.

¹⁹ Danelius (2015), s. 366.

²⁰ *Airey v Ireland* is a good example of this.

2.3 The State's Obligations

Article 8 initially includes an obligation upon the Contracting States to abstain from interference, but the article also includes an obligation upon the Contracting State to adopt positive obligations in order to protect the individual.²¹ The positive obligations inherent in Article 8 can arise in two different situations. The first situation is when a Contracting State must take some action in order to secure respect for the right, and not only refrain from interfering. The second situation is when the Contracting State needs to protect an individual from interference by other individuals.²²

2.4 Infringement

Due to its nature, the second paragraph of Article 8 allows for interference given certain conditions are met. In general the ECtHR adopts a three-part enquiry when a Contracting State wants to limit the rights in an article.²³ The first step is to examine whether the restriction imposed on the right is "*in accordance with law*". This means that the restriction has to have some basis in international law, and that the law must be accessible and formulated in such a way that a person can foresee, to a certain degree, the consequences which a given action will bring.²⁴ The second step is that the limitation must meet one of the *specified legitimate aims* that the second paragraph lists. The list of justifications in this clause is exhaustive but also broadly formulated which makes it quite easy for the Contracting State to bring its action within one of the exceptions.²⁵ With regards to respect for family life, one of the exceptions that often comes to play is the protection of morals. The last step of the enquiry is that *the limitation must be necessary in a democratic society*. In *Handyside v The United Kingdom* the ECtHR declared that "necessary" implies a "pressing social need".²⁶ Every Contracting State has a certain margin of appreciation in assessing whether the limitation was necessary, although it must be proportionate.²⁷ This test of proportionality is the ECtHR prerogative and it requires the ECtHR to balance the severity of the restriction placed on the individual against the importance of the public interest.²⁸

²¹ Danelius (2015), s. 365.

²² White, Ovey & Jacobs (2010), s. 388.

²³ White, Ovey & Jacobs (2010), s. 311-312.

²⁴ White, Ovey & Jacobs (2010), s. 312.

²⁵ White, Ovey & Jacobs (2010), s. 316-317.

²⁶ *Handyside v UK*, § 48.

²⁷ Danelius (2015), s. 370.

²⁸ White, Ovey & Jacobs (2010), s. 325.

2.5 Discrimination

Since this essay is partly about discrimination based on sexual orientation, this section will provide a brief overview of Article 14, an article that prohibits discrimination in regard to the rights and freedoms covered in the ECHR. There are two elements that render Article 14 different than the other articles in the ECHR. The first is that it is subsidiary in the sense that it cannot be breached in itself but must be read in conjunction with another article in the ECHR.²⁹ The second element is that it is an autonomous provision, which means that even though a certain act is not a breach per se of a specific article, there can still be a breach in conjunction with a substantive right.³⁰ This applies in situations where the Contracting State has granted more rights than is required within the article, and the state has an obligation in these circumstances to not enforce this in a discriminatory manner.³¹ When examining whether there has been a breach of Article 14 there are some questions that must first be answered. The first question is whether the alleged discrimination is one of the grounds listed in the article, a list that is not exhaustive (see the wording 'such as').³² The ECtHR has held that a characteristic such as sexual orientation falls within its ambit.³³ The second question is to establish whether there has been a differential treatment when comparing to a relevantly similar situation. The last question is whether the differential treatment had an objective and reasonable justification and whether the state adhered to the principle of proportionality.³⁴

2.6 The Right to Respect for Family Life in Relation to Sexual Orientation – the Right to Marriage

One pivotal case concerning the right to marry for homosexual persons was *Schalk and Kopf v Austria*. This case is vital since the ECtHR declares in it that there is no obligation upon the Contracting State to grant the possibility to same-sex marriage. The ECtHR has yet to deviate from this course. Although the ECtHR is unwilling to equate same-sex couples with different-sex couples in regard to marriage they do however recognize that the relationships of homosexual persons should not only fall within the sphere of private

²⁹ Cameron (2018), s. 168.

³⁰ Cameron (2018), s. 168.

³¹ See e.g. *E.B. v. France*, § 49.

³² White, Ovey & Jacobs, s. 556.

³³ See e.g. *X and others v. Austria*, § 99.

³⁴ See e.g. *X and others v. Austria*, § 98.

life but also constitute family life if it concerns a cohabitating couple living in a stable *de facto* partnership.³⁵ Four years after *Schalk and Kopf v Austria* the issue of same-sex marriage arose again.³⁶ The circumstances in this case were out of the ordinary. In this case the applicant was born male, got married and had kids and then decided to undergo gender-affirming surgery.³⁷ In order to change to a female identity number the applicant had to transform her marriage into a registered partnership, which she claimed constituted a violation to her right to private and family life according to Article 8. The ECtHR, reiterating the *Schalk and Kopf* case, ruled that no violation had occurred and held that since there is a lack of European consensus and since it raises sensitive moral or ethical issues the margin of appreciation afforded to the Contracting States should be wide.³⁸

In two more recent cases the ECtHR extends the rights of homosexual couples, although still not recognizing a right to marry according to the ECHR.³⁹ In *Oliari and others v Italy* the ECtHR states that same-sex couples are just as capable of entering into stable, committed relationships as different-sex couples and that they are in a similar situation concerning the need for legal recognition and protection of the relationship.⁴⁰ Thus the failure of the Italian state in the particular case to provide some sort of legal recognition and protection of same-sex relationships was considered a violation of the right to private and family life under Article 8. The ECtHR also addresses in both cases that the legal recognition of same-sex couples has developed rapidly in Europe since the *Schalk and Kopf* case.⁴¹

³⁵ *Schalk and Kopf v. Austria*, §94-95.

³⁶ *Hämäläinen v. Finland*.

³⁷ Alternative terms are sex reassignment surgery, gender reassignment surgery and sex change surgery.

³⁸ *Hämäläinen v. Finland*, §71 och 75.

³⁹ *Oliari and others v. Italy* and *Orlandi and others v. Italy*

⁴⁰ *Oliari and others v. Italy*, § 165.

⁴¹ *Oliari and others v. Italy* § 178; *Orlandi and others v. Italy* §204.

3. A General Right to Adopt?

3.1 The ECtHR Case Law

3.1.1 An Absolute Right?

Is there a right to adopt in the ECHR? No, Article 8 does not guarantee an absolute right to adopt. The ECtHR has made this clear e.g. in the second paragraph, but also in its case law. This is especially true when the right to family collide with the child's wish to not be adopted by a foreign family.⁴² However, this fact does not exclude that the State can have certain positive obligations in this regard. When the existence of family ties have been established, the State has an obligation to act in a way that ensures that these ties can develop and to establish legal safeguards that enables the child's integration to the family.⁴³ The existence of family ties may also render an obligation upon the State to take measures to ensure a reunification between the parents and the child. This obligation will however depend on the circumstances.⁴⁴ Current case law has neither attributed a right to adopt in relation to Article 12 of the ECHR. Article 12 only implies the existence of a couple and one cannot derive from the article a right for a single person to adopt.⁴⁵

3.1.2 The Role of the Child's Interests

The ECtHR has stressed that when there is competing interests between the child's interests and the adopters' interests the key to the solution will always to identify what is best for the child.⁴⁶ The Contracting State has a duty to ensure that the persons who adopt a child are the ones who can offer the child the most suitable home in every aspect.⁴⁷ The ECtHR has on numerous occasions stressed that the child's interest may even prevail the parents interests.⁴⁸ This is especially true when it comes to adoption.⁴⁹ In *A.H. and other v Russia* a number of American nationals complained to the ECtHR that while in the midst of the adoption processes it had been stopped due to a new legislation that prohibited Americans from adopting Russian children. The ECtHR criticized the Russian authorities for giving no consideration to the children in the process since they

⁴² *Pini and others v. Romania*, § 155.

⁴³ *Harroudj v. France*, § 41.

⁴⁴ *Pini and others v. Romania*, § 150-151.

⁴⁵ See e.g. *X. v. Belgium and the Netherlands*, p. 76.

⁴⁶ White, Ovey & Jacobs (2010), s. 343.

⁴⁷ *Schwizgebel v. Switzerland*, § 95.

⁴⁸ For example in *Schwizgebel v. Switzerland* §95; *E.P. v Italy* §62; *Johansen v Norway* §78.

⁴⁹ *Pini and others v. Romania*, §156.

were obliged to stay in the orphanage for additional periods and some of them were still in the orphanage at the time of the ECtHR ruling.⁵⁰ Another time the ECtHR discussed the importance of considering what is in the child's interest was in *Pini and others v Romania* where they recognized that, although it must be hard upon the prospective adoptive parents when the process was suspended temporarily, these interests were weaker considering that there existed no genuine ties (they had never met) and that the children did not want to leave their current home.⁵¹

One interesting case concerning adoption and the child's interests was *Schwizgebel v Switzerland*. The case involved a woman who had been denied the right to adopt on the grounds of her age (at the time of her last application she was 47 years old). The ECtHR did not doubt that there existed legitimate aims for the differential treatment, at least concerning protection of the well being and rights of the child, and they underscored that the issue at hand were the competing interests of the applicant and the children in question.⁵² Once again the ECtHR stressed that it is up to the Contracting State to ensure that the person chosen to adopt is the most suitable and that particular importance must be placed on the interests of the child.⁵³ The ECtHR thus concluded that there had been no violation of Article 14 taken in conjunction with Article 8.

⁵⁰ *A.H. and others v. Russia* §425.

⁵¹ *Pini and other v. Romania* § 164.

⁵² *Schwizgebel v. Switzerland*, § 86 och 95.

⁵³ *Schwizgebel v. Switzerland*, §95.

4. A Right to Adopt for Homosexual Persons?

4.1 Single Adoption

The ECtHR has examined the right to single adoption for homosexual persons in two instances. The first one was in 2002 when the applicant, named Fretté, complained to the ECtHR that the rejection of his application for authorisation to adopt had been based on his sexual orientation and therefore amounted to a violation of Articles 8 and 14 of the ECHR.⁵⁴ The ECtHR asserted that there were no doubts that the decision to reject to application pursued a legitimate aim – to protect the health and rights of children who could be involved in an adoption procedure.⁵⁵ The ECtHR further stated that even though the decision was based decisively on the applicant’s homosexuality, a wide margin of appreciation should be granted since there is no real common ground on the issue.⁵⁶ By concluding that ”adoption means providing a child with a family, not a family with a child”, that the scientific community is divided on the consequences of adoption by homosexuals, and that the refusal did not infringe on the principle of proportionality since the Contracting States enjoy a wide margin of appreciation and the need to protect the child’s interests, the ECtHR ruled that no violation had taken place.⁵⁷ However the ECtHR was not unanimous by four votes to three and the partly dissenting judges pointed out that the desire to protect the rights and freedoms of the child is a legitimate aim but that the applicant’s personal qualities and aptitude for bringing up children were emphasised on several occasions and they therefore find it contrary that the ECtHR came to the conclusion that it was not discriminatory.⁵⁸

The second case where the ECtHR examined the right to single adoption for a homosexual person was six years later in *E.B. v France*, where E.B. (the applicant) alleged that she had suffered discriminatory treatment based on sexual orientation that had interfered with her rights according to Article 14 taken in conjunction with Article 8. The case concerned a woman who was a nursery school teacher, living in a stable relationship with another woman, who lodged an application for authorisation to adopt (by herself), which was rejected. The ECtHR concluded that the national courts had based their decision on two main grounds: the lack of paternal referent, and the partner’s attitude

⁵⁴ *Fretté v. France*.

⁵⁵ *Fretté v. France*, §32 och § 38.

⁵⁶ *Fretté v. France* §§ 37 och 40-41.

⁵⁷ *Fretté v. France* , §§ 42-43.

⁵⁸ See the dissenting opinion of Judge Sir Nicolas Bratza and Judges Fuhrmann and Tulkens, p. 35.

(who was not committed to the application).⁵⁹ In this case the ECtHR decided that these grounds should be considered concurrently and that the illegitimacy of one of the grounds will have the effect of contaminating the entire decision.⁶⁰ After determining that the national authorities and courts did put the applicant's homosexuality as the determining factor and that they did not present any weighty reasons to justify this, the ECtHR decided that there had been a violation of Article 14 taken in conjunction with Article 8.⁶¹ The ECtHR was not unanimous in this case either holding ten votes to seven.

4.2 Second-Parent Adoption

Second-parent adoption is a process where a person can adopt his or her partner's child without terminating the latter's legal parental right. The ECtHR has dealt with this issue in relation to homosexual orientation in two cases. The first one is *Gas and Dubois v France* and it received its judgement in 2012. Gas and Dubois were a lesbian couple cohabitating. Dubois gave birth to a daughter (via anonymous donor insemination) in 2000, who has lived with the couple since its birth. In 2002 the couple entered into a civil partnership agreement. In 2006 Gas applied for a simple adoption⁶², which was rejected on the grounds that the adoption would transfer the birth mother's (Dubois) parental responsibility to Gas. According to French domestic law, the possibility of obtaining a simple adoption was only afforded to people who were married (which same-sex couples could not do at the time). The ECtHR reiterated that extending marriage to include same-sex couples was within the state's margin of appreciation and that the couple's situation was not comparable with that of a married couple wishing to adopt. In addition the ECtHR stated that a better comparison would be against an unmarried heterosexual couple. However, the ECtHR continues, since an unmarried heterosexual couple's application for simple adoption would also be refused, therefore there did not exist a differential treatment based on sexual orientation.⁶³ Thus the ECtHR did not find a violation of Article 14 taken in conjunction with Article 8.

⁵⁹ E.B v. France, §§ 72-73 och 75-76.

⁶⁰ E.B v. France, § 80.

⁶¹ E.B v. France, §§ 81 och 84-85 och 91.

⁶² A simple adoption would not sever the ties between the child and his or her original family, only adding a legal parent-child relationship, as opposed to a *full adoption* which would replace original ties.

⁶³ Gas and Dubois v. France, §§65-69.

The second case regarding the right to second-parent adoption by a homosexual partner is *X and others v Austria*, a judgement that ECtHR issued only a year later. The first and the third applicant were two women living in a stable relationship. The second applicant was the third applicant's son and was born outside marriage (which meant that the mother was the sole custodian according to Austrian law). The first and second applicants applied for the second applicant to be adopted by the first applicant. The second applicant's father, who had acknowledged paternity, refused to grant his consent and the applicants then tried to obtain an override of his refusal in domestic courts. The application was rejected however on the basis of another Austrian regulation which stated that if the child was adopted by an adoptive mother then the relationship would only cease in respect of the biological mother and her relatives. The first and third applicant complained of having their rights under Article 14 taken in conjunction with Article 8 violated. The ECtHR first examined whether the first and third applicants were in a situation relevantly similar to that of a married couple. Here the ECtHR, reiterating the *Gas and Dubois* case, concluded that there had not been a violation of Article 14 taken in conjunction with Article 8 when comparing against a married couple.⁶⁴ Next the ECtHR examined whether the situation was comparable to that of an unmarried heterosexual couple, since Austrian law allowed second-parent adoption by an unmarried different-sex couple. The ECtHR declared that there had been a differential treatment based on sexual orientation when comparing against an unmarried heterosexual couple.⁶⁵ While acknowledging the aim to be legitimate, the ECtHR however found the means to be disproportionate, e.g. given the existence of a *de facto* family life.⁶⁶

⁶⁴ *X and others v. Austria*, §§ 105-110.

⁶⁵ *X and others v. Austria*, §§ 130-131.

⁶⁶ *X and others v. Austria*, §146.

5. The Child's Interests in Cases Concerning Adoption for Homosexual Persons

Central themes emerge when examining what role the child's interests has in these four cases, themes which ultimately can be divided into two categories: 1) when the ECtHR has a child-centered approach, and 2) when the ECtHR lacks a child-centered approach. Different themes emerge within these categories.

5.1 A Child-Centered Approach

The child's interests as paramount

Already in the first case concerning the right to adopt for homosexual persons the ECtHR quickly established that adoption means "providing a child with a family, not a family with a child". The ECtHR further elaborates that this means that the Contracting State has an obligation to ensure that the persons chosen to adopt are the ones who can offer the child the most suitable home in every respect. The ECtHR also states that this means the best interests of the child may override those of the parent.⁶⁷ In *E.B. v France* the dissenting opinion of Judge Zupancic writes that the child's interests shall prevail and that set against the child's absolute rights, all other rights and privileges pale.⁶⁸ Regarding the same case, in the dissenting opinion of Judge Mularoni, she states that it is incumbent on the state to ensure that the conditions in which a child is provided with a home are the most favourable possible, especially since the child has often experienced great suffering and difficulty in the past.⁶⁹

A divided scientific community

The ECtHR also applies a child-centered approach when establishing that the scientific community is divided in regards to the consequences of a child being adopted by a homosexual person.⁷⁰ In *X and others v Austria* the ECtHR seem to imply that the lack of presented scientific studies proving that a same-sex couple could not adequately provide for a child's needs weakened the Government's argument.⁷¹

Legitimate aim

⁶⁷ *Frette v. France*, § 42.

⁶⁸ See the dissenting opinion of Judge Zupancic in *E.B. v. France*, p. 35.

⁶⁹ See the dissenting opinion of Judge Mularoni in *E.B. v. France*, p. 43.

⁷⁰ *Frette v. France*, § 42.

⁷¹ *X and others v. Austria*, §§ 142 och 144.

One can also discern a child-centered approach from the ECtHR in their reasoning of what constitutes a "legitimate aim". As mentioned in chapter 2.4 the right to respect for family may be infringed under certain circumstances. In *Fretté* the aim of the Contracting State was to protect the "health and rights of children who could be involved in an adoption procedure", which the ECtHR considered to be a legitimate aim.⁷² In *X and others* the aims were to protect the "traditional family" and protect the interests of children, also considered legitimate according to the ECtHR.⁷³

5.2 A Lack of an Child-Centered Approach

Comparisons against different-sex couples

Something that quickly became evident was the back seat that the child is often given by the ECtHR in these circumstances. In both *Gas and Dubois* and *X and others* the ECtHR does not particularly go into a discussion about the child, who is still evidently affected by the decisions. Instead the ECtHR focused more on the same-sex couple and the possibility of a differential treatment when compared against a different-sex couple. However this does not go unnoticed in the following dissenting opinions. In *Gas and Dubois* Judge Villiger writes in his dissenting opinion that the issues should not have been regarded from the adult's points of view but rather on whether the difference of treatment complained of was justified from the vantage point of the child's best interests. According to Judge Villiger the best interest of the child in that case would have been joint parental custody and that pointing out that marriage enjoys a particular status did not justify the discrimination that was placed on the child.⁷⁴ Equally in *X and others* judges Casadevall et al. writes in their joint partly dissenting opinion that the child's interests was overlooked in the case and that efforts should have been made to ascertain the child's position in the case.⁷⁵

Contamination theory

Another case where the ECtHR in practice lacked a child-centered approach was in *E.B. v France*. The ECtHR writes that the decision by national authorities to reject the authorisation to adopt was based on two grounds and that even though the ECtHR

⁷² *Fretté v. France*, § 38.

⁷³ *X and others v. Austria*, §§ 137-138.

⁷⁴ See the dissenting opinion of Judge Villiger in *Gas and Dubois v. France*, p. 24f.

⁷⁵ See the joint partly dissenting opinion of judges Casadevall, Ziemele, Kovler, Jociene, Sikuta, de Gaetano and Sicilianos in *X and others v. Austria*, p. 52f.

states that a partner's attitude is not without interest or relevance in assessing the applicants application, since the applicant was deemed to have been discriminated when it came to the first ground *this contaminated the entire decision*.⁷⁶ For some reason the ECtHR considered that the two grounds would be considered concurrently and not alternatively. Judges Costa et al., Loucaides and Mularoni criticize this "contamination theory" in their dissenting opinions and all of them considered the partner's attitude to be sufficient ground to reject the authorisation to adopt.⁷⁷

⁷⁶ *E.B. v. France*, §§ 72-75, 76, 79 och 80.

⁷⁷ See *E.B. v. France*, p. 31-32 (judges Costa et al.), p. 37 (Judge Loucaides) and p. 43-44 (Judge Mularoni).

6. Analysis

The child's position in the cases concerning a right to adopt for homosexual persons is an interesting one. Even though the ECtHR has stated that the child's interests are paramount and that adoption means "providing a child with a family, not a family with a child", the child is the non-represented party who at times is quite invisible. The ECtHR in some cases has the child's interests' perspective, for example when stating that the protection of the health and rights of children is a legitimate aim. The ECtHR also has a child-centered approach when they discuss that the scientific community is divided on the issue of the consequences for a child of being adopted by a homosexual person or couple. This latter may not be a very clear child-centered approach but it shows that the ECtHR tries to factor in the child in the process. What is evident when examining these cases is that even though the ECtHR has stated that the child's interests is paramount, in practice this interest is often not taken into consideration. The first example of this is the *Gas and Dubois v. France* and the *X and others v. Austria* cases, where the ECtHR does not really discuss the child at all. This does not go unnoticed as I explain in chapter 5.2 by Judge Villiger. This is remarkable since, as Judge Villiger points out, joint parental custody would be in the child's interests. A second example of how the child has an less important role is in the "contamination theory" that the ECtHR presents in *E.B. v. France*. According to the ECtHR, the fact that the French authorities discriminated on the basis of sexual orientation in regard to the rejection ground concerning lack of paternal referent, this meant that the entire French decision was discriminatory, including the rejection ground concerning the partner's attitude. This is especially hazardous from a child's interests' perspective since the partner's attitude will undoubtedly have an impact on the child's everyday life. Instead the ECtHR focus is more on the parent/parents and whether there has been a disproportionate differential treatment. I am not critical of the ECtHR focusing on whether there has been a disproportionate differential treatment when compared against a heterosexual person or couple, this is evidently important in order to advance the rights of homosexual persons in Europe. However it is problematic that the ECtHR does not also apply a more child-centered approach since their starting point seems to be that there does not exist a right to adopt and that the child's interests should prevail. The ECtHR also states in their Convention on the Adoption of Children from 2008, that it is necessary to acquire the child's consent if the child has sufficient understanding. This is not only problematic since the Court states one thing in this convention and then acts differently in their case law, but also of

course since the child's interests should be the deciding factor. As mentioned in the introduction the legal position and rights of the child are being advanced by various international conventions. However there is a risk of this only being window-dressing if the states and courts in practice are not enforcing it. Of course this is not an easy task since promoting the child's interests may at times mean limiting rights for another involved party, e.g. a parent's right. This is visible in the *E.B. v. France* case.

What does it mean to take a child's interests into consideration? Most importantly it means giving a voice to the child. This is something that even though the ECtHR acknowledges it in its Convention on the Adoption of Children, their case law proves the contrary. In none of the two cases concerning second-parent adoption did the ECtHR really discuss the child's opinion. This does not necessarily mean that the ECtHR is doing this in malice. Terms such as "the child's interests", "a child's rights perspective" and when "the child has sufficient understanding" are vague and the consensus is non-existent. This of course renders the task of the ECtHR very difficult since they have to navigate in such an undefined field.

This issue is also made harder since the child is the non-represented party who have to rely on other people speaking on behalf of them. They have to rely on adults making sure their interests are being heard and if the child's interests are being disregarded they have to rely on an adult notifying this. This, in addition to the vague terms related to the child's interests, makes the child's position more fragile since it is always dependant on the attention of the adults. Thus when the ECtHR stated that the child has to consent if the child has sufficient understanding they took an important step towards the advancement of the child's rights in Europe but they also made their task more complex since they added another factor that they have to weigh in.

7. Conclusions

The right to respect for family life entails a right for family members to live together and sustain and develop their mutual relationships without interference from the State. This right may be infringed under certain circumstances and the state has an obligation not to enforce the rights in a discriminatory manner. The right to respect for family life for homosexual persons has been brought before the ECtHR, e.g. in relation to the right to marriage. The ECtHR has stated that there is no right to marry for homosexual persons according to the ECHR.

As I have stated above there neither exist a right for homosexual persons to adopt nor a general right to adopt. However, this does not mean that the Contracting State can not violate Article 8. As the ECtHR explains in both *Harroudj v. France* and *Pini and others v. Romania*, the State may have positive obligations when de facto family ties have been established. A violation may also occur in relation to Article 8 taken in conjunction with Article 14, and the ECtHR has made it clear that when the Contracting State has decided to widen the ambit of Article 8 they can not do this in a discriminatory manner. An example of this is found in the *X and others v. Austria* where the ECtHR found, since second-parent adoption was possible in that case for unmarried different-sex couples that a violation had occurred.

What role does the child's interests play? Even though the Court has stated that the child's interests may prevail the parents' interests and that the Contracting States has an obligation to ensure that the persons chosen to adopt are the most suitable, the child has an inferior position in the case law regarding the right to adopt for homosexual persons. This shows that there are difficulties for the courts to keep a child-centered approach, despite there being a movement of pushing the child's interests, and that this is evident in cases concerning the right to adoption for homosexual persons. This is problematic since it risks this movement of advancing the child's position to merely a facade.

8. Bibliography

Literature:

- Cameron, Iain (2018). *An introduction to the European Convention on Human Rights*. 8th edition Uppsala: Iustus.
- Danelius, Hans (2015). *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*. 5., [uppdaterade] uppl. Stockholm: Norstedts juridik.
- Korling, Fredric & Zamboni, Mauro (red.) (2013). *Juridisk metodlära*. 1 uppl. Lund: Studentlitteratur.
- Schasas, William A. (2015). *The European Convention on Human Rights: a commentary* [Oxford, UK]: Oxford University Press.
- Trolle Önnerfors, Elsa & Wenander, Henrik (2019). *Att skriva rätt: goda råd för att skriva uppsats i juridik*. Andra upplagan Stockholm: Norstedts Juridik.
- White, Robin C. A., Ovey, Clare & Jacobs, Francis Geoffrey (2010). *Jacobs, White and Ovey: the European convention on human rights*. 5. Ed. Oxford: Oxford Univ. Press.

Articles:

- Bracken, L. (2016) 'Strasbourg's Response to Gay and Lesbian Parenting: Progress, then Plateau', *International Journal of Children's Rights*, 24(2), pp. 358–377.
- Johnson, Paul. (2012) 'Adoption, Homosexuality and the European Convention on Human Rights: "Gas and Dubois v France"', *The Modern Law Review*, 75(6), p. 1136.
- Nozawa, Junko. (2013) 'Drawing the Line: Same-sex adoption and the jurisprudence of the ECtHR on the application of the "European consensus" standard under Article 14', *Utrecht Journal of International and European Law*, 29(77), pp. 66–75.

International treaties:

- European Convention on Human Rights (European Convention for the Protection of Human Rights and Fundamental Freedoms), Council of Europe, 4 November 1950, ETS No. 005.
- European Convention on the Adoption of Children, Council of Europe, 24 April 1967, ETS No. 058.
- European Convention on the Adoption of Children (Revised), Council of Europe, 27 November 2008, CETS No. 202.

Hague Adoption Convention (Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption), Hague Conference on Private International Law, 29 May 1993.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

Reports:

Council of Europe, *Explanatory Report to the European Convention on the Adoption of Children (Revised)*, Strasbourg, 27.XI.2008, Council of Europe Treaty Series, No. 202. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3833> (accessed 20200514).

9. Table of Cases

European Court of Human Rights:

A.H. and others v. Russia, no. 6033/13, 8927/13, 10549/13, 12275/13, 23890/13, 26309/13, 27161/13, 29197/13, 32224/13, 32331/13, 32351/13, 32368/13, 37173/13, 38490/13, 42340/13 & 42403/13, 17 January 2017.

Airey v. Ireland, no. 6289/73, 9 October 1979. Series A no. 32.

Beck, Copp and Bazeley v. The United Kingdom, no. 48535/99, 48536/99 & 48537/99, 22 October 2002.

Berrehab v. Netherlands, no. 10730/84, 21 June 1988, Series A no 138.

E.B. v. France [GC], no. 43546/02, 22 January 2008.

E.P. v. Italy, no. 31127/96, 16 November 1999.

Fretté v. France, no. 36515/97, ECHR 2002-I.

Gas and Dubois v. France, no. 25951/07, ECHR 2012.

Gül v. Switzerland, no. 23218/94, 19 Februari 1996, Reports 1996-I.

Handyside v. The United Kingdom, no. 5493/72, 7 December 1976, Series A no. 24.

Harroudj v. France, no. 43631/09, 4 October 2012.

Hämäläinen v. Finland [GC], no. 37359/09, ECHR 2014.

Johansen v. Norway, no. 17383/90, 7 August 1996, Reports 1996-III.

K. and T. v. Finland [GC], no. 25702/94, ECHR 2001-VII.

Keegan v. Ireland, no. 16969/90, 26 May 1994. Series A no. 290.

Lustig-Prean and Beckett v. The United Kingdom, no. 31417/96 & 32377/96, 27 September 1999.

Oliari and others v. Italy, no. 18766/11 & 36030/11, 21 July 2015.

Orlandi and others v. Italy, no. 26431/12, 26742/12, 44057/12 & 60088/12, 14 December 2017.

Perkins and R v. The United Kingdom, no. 43208/98 & 44875/98, 22 October 2002.

Pini and others v. Romania, no. 78028/01 & 78030/01, ECHR 2004-V (extracts)

Schalk and Kopf v. Austria, no. 30141/04, ECHR 2010.

Schwizgebel v. Switzerland, no. 25762/07, ECHR 2010 (extracts).

Smith and Grady v. The United Kingdom, no. 33985/96 & 33986/96, ECHR 1999-VI

X. v. Belgium and the Netherlands, no. 6482/74, Commission decision of 10 July 1975, DR 7.

X and others v. Austria [GC], no. 19010/07, ECHR 2003.